CYCLOPEDIA

OF

LAW AND PROCEDURE

EDITED BY

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VOLUME VI

NEW YORK

THE AMERICAN LAW BOOK COMPANY

LONDON: BUTTERWORTH & CO., 12 BELL YARD

1903

J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

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By Henry Stephen

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I. TERMINOLOGY.

A. Architect or Engineer. An architect or engineer is one whose special business it is to design buildings, fix the thickness of their walls, the supports necessary for the maintenance of them in their proper position, and do all other necessary things in the line of his profession for the guidance of builders in the erection of buildings.[1]

B. Architecture. Architecture is the art of building according to certain determined rules.[2]

C. Builder. A builder is one who builds, or whose occupation is that of building; specifically, one who controls or directs the work of construction in any capacity.[3]

D. Plan. A plan is the delineation of a city, a house, or houses, a garden, etc., traced on paper, or other substance, representing the position and the relative proportion of the different parts.[4]

E. Specification. In the law of contracts, a specification denotes an extended statement annexed to complex building contracts, agreements for construction of public works, and the like, describing the details of the erection or structure intended.[5]

1. Giles *v.* Diamond State Iron Co., (Del. 1887) 8 Atl. 368.

An architect is one whose profession it is to form plans and designs of buildings, and superintend the execution of them. Century Dict.

A civil engineer is a person skilled in the principles and practice of "that branch of engineering which relates to the construction or care of roads, bridges, railroads, canals, aqueducts, harbors, drainage-works, etc." Century Dict.

2. Louisiana Molasses Co. *v.* Le Sassier, 52 La. Ann. 2070, 28 So. 217.

Civil architecture is the art or science of building various structures for the purposes of civil life. Webster Dict. [*quoted* in Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 193, 47 S. W. 196, 42 L. R. A. 334].

3. Century Dict. [*quoted* in Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 193, 47 S. W. 196, 42 L. R. A. 334].

Other definitions are: "A person whose business is to construct buildings, vessels, bridges, canals, or railroads, by contract." Anderson L. Dict. [*quoted* in Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 193, 47 S. W. 196, 42 L. R. A. 334].

"One who builds; especially, one who follows the occupation of building, or who contracts or directs the actual work of building." Standard Dict. [*quoted* in Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 193, 47 S. W. 196, 42 L. R. A. 334].

"One who builds, one whose occupation it is to build, an architect, a shipwright, a mason, etc." Webster Dict. [*quoted* in Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506, 511].

In the practice of civil architecture the builder comes between the architect who designs the work and the artisans who execute it. Century Dict. [*quoting* English Encycl. and *quoted* in Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 193, 47 S. W. 196, 42 L. R. A. 334].

"Builder" synonymous with "contractor." — The word "builder" has been used by lawyers, judges, and courts, as synonymous with "contractor" when used in connection with construction or building contracts. Weeks *v.* Walcott, 15 Gray (Mass.) 54; Parker *v.* Bell, 7 Gray (Mass.) 429; Gray *v.* Walker, 16 S. C. 143; Lloyd Building and Buildings, pp. 45, 54, 55, 82, 83, 84, 85 [*cited* in Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 194, 47 S. W. 196, 42 L. R. A. 334]. So under a statute giving a lien for a debt contracted by the builder of any ship or vessel, it has been held that the man who contracted with the owner for the building of the ship or vessel was the builder thereof (Calkin *v.* U. S., 3 Ct. Cl. 297. And see also Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 195, 47 S. W. 196, 42 L. R. A. 334), and, under statutes providing that every builder shall have a lien for his work or labor done, a builder is practically in effect a contractor (Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 195, 47 S. W. 196, 42 L. R. A. 334; Wortman *v.* Kleinschmidt, 12 Mont. 316, 30 Pac. 280).

4. Bouvier L. Dict.

Another definition is "A map, chart, or design; being a delineation, or projection on a plane surface of the ground lines of a house, farm, street, city, etc., reduced in absolute length, but preserving their relative positions and proportion." Black L. Dict.

Blue prints as plans see *infra*, p. 31, note 22.

Compensation for drawing plans see *infra*, III, A, 2, a.

Construction of plans see *infra*, II, C, 1, b.

Nature and purpose of plans see *infra*, II, A, 2.

Right to plans see *infra*, III, A, 4.

5. Bouvier L. Dict.

Other definitions are: "A particular or detailed statement of the various elements involved." Black L. Dict.

"An accurate description of the materials

II. BUILDING CONTRACTS.

A. Nature and Purpose of — 1. In General. Apart from certain provisions,[6] that are in a great measure applicable to a building contract only, a contract of this class presents no characteristics not common to contracts in general,[7] or contracts of bailment for mutual benefit in particular;[8] the nature and purpose of a building contract being, in general, to govern the respective rights, duties, and liabilities of the builder and his employer, and of an architect so far as he is concerned in the contract between them, and by it those rights must be determined.[9] The contract may be an implied one;[10] and, like other contracts, be

and work to be used and performed in the execution of a building." Gwilt Enc. Architecture 595, § 13 [*quoted* in Gilbert *v.* U. S., 1 Ct. Cl. 28].

"A written instrument containing an exact and minute description, account, or enumeration of particulars." Worcester Dict. [*quoted* in Gilbert *v.* U. S., 1 Ct. Cl. 28].

"A particular and detailed account of a thing." Bouvier L. Dict. [*quoted* in Gilbert *v.* U. S., 1 Ct. Cl. 28].

The term embraces not only the dimensions and mode of construction, but a description of every piece of material — its kind, length, breadth, and thickness — and the manner of joining the separate parts together. Gilbert *v.* U. S., 1 Ct. Cl. 28.

Construction of specifications see *infra*, II, C, 1, b.

Nature and purpose of specifications see *infra*, II, A, 2.

Preparation of specifications see *infra*, III, B, 2, b.

6. Special provisions of building contract see *infra*, II, B, 4, c.

7. As to contracts generally see CONTRACTS.

Specific performance of a building contract will not generally be enforced (Great Southern Hotel Co. *v.* McClain, 4 Ohio S. & C. Pl. Dec. 309, 3 Ohio N. P. 247; Strang *v.* Richmond, etc., R. Co., 101 Fed. 511, 41 C. C. A. 474); nor will a court, at the suit of the builder while the contract is not yet performed by him, undertake to enforce performance indirectly by impounding bonds, alleged to have been appropriated by the contract to pay for the work (Strang *v.* Richmond, etc., R. Co., 101 Fed. 511, 41 C. C. A. 474). See also, generally, SPECIFIC PERFORMANCE.

Bid and acceptance a contract.— Where the builder makes an offer to erect a building for a certain sum and the owner accepts it there is a consummated and binding agreement, notwithstanding the builder, in adding up the items of his estimates, makes a mistake for which the owner is not responsible by which the total is made considerably too small. Brown *v.* Levy, (Tex. Civ. App. 1902) 69 S. W. 255.

Effect of acceptance of bid.— A builder's bid for construction in no way affects or controls an agreement afterward made for performance of the work as the bid is merged in the contract. Taylor *v.* Fox, 16 Mo. App. 527.

Signed instrument may be merely inchoate agreement.— Where the obtaining of a permit to build is essential to render an agreement between the builder and the owner valid and the contract is silent upon the subject the obtaining of such permit must be implied as a condition of the agreement between them and the instrument signed by them as merely an inchoate agreement which will become effective and binding only in case the permit be issued. Smith *v.* Luning Co., 111 Cal. 308, 43 Pac. 967.

8. As to bailments for mutual benefit see BAILMENTS, 5 Cyc. 157.

Building contract said not to be contract of hiring.— A contract to build for a certain sum, owner to furnish all materials, is not a contract of hiring or for personal services but a contract for a "job of work," and is what is called in the books "a building contract." Singleton *v.* Wilson, 85 Tenn. 344, 2 S. W. 801.

9. Hewlett *v.* Alexander, 87 Ala. 193, 6 So. 49; Manuel *v.* Campbell, 3 Ark. 324; Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

Under a statute declaring a building contract void for certain purposes unless a proper contract or memorandum is filed, the rights of the parties, so far as a mechanic's lien is concerned, are entirely statutory. Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

Necessity of recording building contract see *infra*, II, B, 2, c; and, generally, MECHANICS' LIENS.

10. Carney *v.* Cook, 80 Iowa 747, 45 N. W. 919; New England Iron Co. *v.* Gilbert El. R. Co., 91 N. Y. 153.

But there is no implied agreement to employ a builder who offers to do the work at the lowest price. Topping *v.* Swords, 1 E. D. Smith (N. Y.) 609.

An express agreement to pay for extras is not requisite where extras are supplied by the builder upon the order of the owner. Childress *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 1076.

Implied contract with subcontractor.—The existence of a contract covering the whole subject-matter between the owner and the builder will not prevent the existence of an implied promise, by the owner, to pay a subcontractor employed by the builder for work done and materials furnished by him. Blount *v.* Guthrie, 99 N. C. 93, 5 S. E. 890.

Implied contract where express contract void.— Where a written contract to build is void for failure to record under Cal. Code Civ. Proc. § 1183, there is an implied contract

entire[11] or severable;[12] and the character of the building contract in this respect

on the part of the owner to pay the value of the building erected, since § 1197 of the code provides that nothing in the statute shall impair the right of one who has done work on a building to maintain a personal action to recover what is due from the person for whom the work was done. Rebman *v.* San Gabriel Valley Land, etc., Co., 95 Cal. 390, 30 Pac. 564.

Necessity of recording building contract see *infra*, II, B, 2, c; and, generally, MECHANICS' LIENS.

11. *Alabama.*— Partridge *v.* Forsyth, 29 Ala. 200.

California.— Cox *v.* Western Pac. R. Co., 47 Cal. 87; People *v.* Brooks, 16 Cal. 11.

Colorado.— Walling *v.* Warren, 2 Colo. 434.

Connecticut.—Coburn *v.* Hartford, 38 Conn. 290.

Georgia.— Hunnicutt, etc., Co. *v.* Van Hoose, 111 Ga. 518, 36 S. E. 669; Broxton *v.* Nelson, 103 Ga. 327, 30 S. E. 38, 68 Am. St. Rep. 97; Freeman *v.* Campbell, 22 Ga. 184.

Illinois.— Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263.

Kansas.— Madden *v.* Smith, 28 Kan. 798.

Massachusetts.—Weed *v.* Clogston, 98 Mass. 147; Phelps *v.* Sheldon, 13 Pick. (Mass.) 50, 23 Am. Dec. 659.

New Jersey.— Grassman *v.* Bonn, 32 N. J. Eq. 43.

New York.— Cunningham *v.* Jones, 3 E. D. Smith (N. Y.) 650, 4 Abb. Pr. (N. Y.) 433, [*affirmed* in 20 N. Y. 486]; Sharpe *v.* Johnson, 41 How. Pr. (N. Y.) 400.

Ohio.— Newman Lumber Co. *v.* Purdum, 41 Ohio St. 373.

Pennsylvania.— Quigley *v.* De Haas, 82 Pa. St. 267.

West Virginia.— McConnell *v.* Hewes, 50 W. Va. 33, 40 S. E. 436.

Wisconsin.— Grant *v.* Diebold Safe, etc., Co., 77 Wis. 72, 45 N. W. 951.

United States.—Simonds *v.* Pearce, 31 Fed. 137; McGowan *v.* U. S., 35 Ct. Cl. 606.

Illustrations of entire contracts.—The contract is entire where building is to be completed before compensation is demandable (Partridge *v.* Forsyth, 29 Ala. 200; Coburn *v.* Hartford, 38 Conn. 290; Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263; Simonds *v.* Pearce, 31 Fed. 137), although the amount to be paid is made up by stating the estimated cost of each stage of the work separately and then adding the work together (Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263); so where payments are to be made from time to time as the work progresses (Cox *v.* Western Pac. R. Co., 47 Cal. 87; Freeman *v.* Campbell, 22 Ga. 184; Newman Lumber Co. *v.* Purdum, 41 Ohio St. 373); again the contract is entire where the employer is to pay a gross sum (Broxton *v.* Nelson, 103 Ga. 327, 30 S. E. 38, 68 Am. St. Rep. 97; Chicago *v.* Sexton, 115 Ill. 230, 2 N. E. 263; McConnell *v.* Hewes, 50 W. Va. 33, 40 S. E. 436); so where there is no stipulation as to the time of payment (Walling *v.* Warren, 2 Colo. 434; Cunningham *v.* Jones, 20 N. Y. 486 [*affirming* 3 E. D. Smith (N. Y.) 650, 4 Abb. Pr. (N. Y.) 433]), or as to the time in which the building is to be completed (Walling *v.* Warren, 2 Colo. 434); again the contract is entire, where a right is reserved to the owner to suspend further prosecution of work and pay for the building when it has been brought to a certain stage of completion (Hunnicutt, etc., Co. *v.* Van Hoose, 111 Ga. 518, 36 S. E. 669), and where the contract provides for retention of some of the contract price (Grassman *v.* Bonn, 32 N. J. Eq. 43; Quigley *v.* De Haas, 82 Pa. St. 267), notwithstanding payment for the work done is to be made in instalments (Grassman *v.* Bonn, 32 N. J. Eq. 43).

The entire and indivisible nature of a contract is not affected by a provision in a building contract that a certain person shall be paid as the work progresses. Medley *v.* American Radiator Co., (Tex. Civ. App. 1901) 66 S. W. 86.

An inference of an entire contract may be rebutted by proof of the owner's attempt to get an uncompleted building insured against loss by fire. Partridge *v.* Forsyth, 29 Ala. 200.

As to the nature of entire or severable contracts in general see CONTRACTS.

As to performance of an entire contract see *infra*, V, B.

As to recovery where contract is entire or severable see *infra*, V, B.

12. *Illinois.*— Keeler *v.* Clifford, 165 Ill. 544, 46 N. E. 248 [*affirming* 62 Ill. App. 64].

Iowa.— Dibol *v.* Minott, 9 Iowa 403.

Michigan.— Barnard *v.* McLeod, 114 Mich. 73, 72 N. W. 24.

Minnesota.—Spear *v.* Snider, 29 Minn. 463, 13 N. W. 910.

New Hampshire.— Flather *v.* Economy Slugging Mach. Co., (N. H. 1902) 52 Atl. 454.

New York.— Arnson *v.* Wertheim, 21 Misc. (N. Y.) 483, 47 N. Y. Suppl. 657; Gay *v.* Haskins, 11 Misc. (N. Y.) 134, 31 N. Y. Suppl. 1022, 65 N. Y. St. 53.

Pennsylvania.—Crawford *v.* McKinney, 165 Pa. St. 605, 30 Atl. 1045; East Union Tp. *v.* Comrey, (Pa. 1887) 9 Atl. 290.

Rhode Island.—Briggs *v.* Titus, 7 R. I. 441.

Wisconsin.— Arndt *v.* Keller, 96 Wis. 274, 71 N. W. 651.

Illustrations of severable contracts.—A contract to build for an entire sum payable on completion but providing that on failure to complete the owner may do so at the builder's expense is a severable contract (Arndt *v.* Keller, 96 Wis. 274, 71 N. W. 651); so the contract is severable where it provides for payment of definite sums at different periods before the completion of the entire work (Keeler *v.* Clifford, 165 Ill. 544, 46 N. E. 248 [*affirming* 62 Ill. App. 64]; Dibol *v.* Minott, 9 Iowa 403; Crawford *v.* McKinney, 165 Pa. St. 605, 30 Atl. 1045), or where the contract is to do several buildings at so much per building (Dibol *v.* Minott, 9 Iowa 403;

depends upon the intention of the parties to be gathered from the circumstances of the case.[13]

2. Plans and Specifications. The contract moreover may be embodied in several instruments:[14] Thus plans and specifications, if made a part of the contract, are essential factors in determining the rights of the parties.[15]

B. Requisites and Validity— 1. In General — a. Certainty. To constitute a valid building contract, the language used must be such that it is possible to ascertain to a reasonable degree of certainty the meaning and intention of the parties.[16]

Barnard *v.* McLeod, 114 Mich. 73, 72 N. W. 24), or the building consists of separate items, a price being apportioned to each item or left to implication of law (Dibol *v.* Minott, 9 Iowa 403; Spear *v.* Snider, 29 Minn. 463, 13 N. W. 910; McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; East Union Tp. *v.* Comrey, (Pa. 1887) 9 Atl. 290), or when it appears that no work was done or materials furnished under a special contract; that no terms were agreed upon; that no prices were fixed; that no time of payment was appointed; and that directions were given from time to time as to what was wanted (Briggs *v.* Titus, 7 R. I. 441).

Warranty contained in specifications independent of contract.— Where the builder agreed to put in certain apparatus for heating and the specifications guaranteed the apparatus to heat to a certain temperature the warranty was held to be an independent undertaking. Gay *v.* Haskins, 11 Misc. (N. Y.) 134, 31 N. Y. Suppl. 1022, 65 N. Y. St. 53.

13. Hunnicutt, etc., Co. *v.* Van Hoose, 111 Ga. 518, 36 S. E. 669; Allen *v.* Sanders, 7 B. Mon. (Ky.) 593; McGowan *v.* U. S., 35 Ct. Cl. 606.

14. Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356; Francis *v.* Heine Safety Boiler Co., 109 Fed. 838, 48 C. C. A. 687 [*reversing* on other ground 105 Fed. 413].

15. *California.*— Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Worden *v.* Hammond, 37 Cal. 61.

Colorado.— Charles *v.* E. F. Hallack Lumber, etc., Co., 22 Colo. 283, 43 Pac. 548.

Florida.— Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356.

Louisiana.— Suarez *v.* Duralde, 1 La. 260.

Wisconsin.— Learmonth *v.* Veeder, 11 Wis. 138.

United States.— Harvey *v.* U. S., 8 Ct. Cl. 501.

See 11 Cent. Dig. tit. "Contracts," § 884 *et seq.*

Plans and specifications are usually prepared by architects and require great skill and experience. Learmonth *v.* Veeder, 11 Wis. 138.

Writing furnished to builder regarded as specification.— Where a contract did not fix the amount of work to be done, except by reference to accompanying drawing and specifications, but the drawing and specifications actually annexed to the contract did not fix the amount of work, it was held that a writing, prepared by one party and furnished to the other to estimate and bid thereon and upon which he made his proposals which were accepted, which specified within limits the amount of work, was properly admitted in evidence as an accompanying specification. Monmouth Park Assoc. *v.* Warren, 55 N. J. L. 598, 27 Atl. 932.

What matters covered by specifications partially made part of contract.— Plans and specifications expressly made part of a written contract in so far as certain matters are concerned do not cover other matters not embraced in terms in the contract, merely because those matters appear in the plans and specifications and may properly come under the head of an item mentioned in the contract. Harvy *v.* Radkey, 1 Tex. App. Civ. Cas. § 276.

Guaranty contained in specifications binds the contractor.— Lake View *v.* MacRitchie, 134 Ill. 203, 25 N. E. 663.

Duty of builder to comply with plans and specifications see *infra*, V, B.

Liability for defects in plans and specifications see *infra*, III, B, 3; V, B.

As to right of builder to refuse to do work not shown on plans and specifications or to furnish materials other than those appearing therein see *infra*, V, B, 7.

16. Thomas *v.* Thomasville Shooting Club, 123 N. C. 285, 31 S. E. 654.

Contract stating what is intended to be included.—A contract is not void for uncertainty where the builder agrees to construct a feeder for a canal therein described for a sum specified, and the contract itself states what was meant to be included, namely, "every kind of work connected with fetching the water into the canal." Phelps *v.* Sheldon, 13 Pick. (Mass.) 50, 23 Am. Dec. 659.

Quantity and value.—A contract requiring construction in accordance with specifications on file, and there are none on file, is not void for uncertainty where the contract itself specifies the material and there is a common and well-known method of construction. Hitchcock *v.* Galveston, 3 Woods (U. S.) 287, 12 Fed. Cas. No. 6,534.

The ground on which a building is to be erected need not be described.—Austin *v.* Wohler, 5 Ill. App. 300.

Supplying omissions in incomplete contract.— Where the building contract and its consideration are agreed on except that the times and manner of payment of the price are left for future determination, the omission may be supplied by inserting the necessary omissions before the contract is signed; but work commenced before signature must be considered as done under the contract as

It is also essential that the language of the contract be so intelligible as to render the contract capable of performance.[17]

b. Mutuality. Every building contract must contain the elements of mutuality, that is to say, there must be a two-fold obligation — the one on the part of the builder to do work, and the other on the part of his employer to pay therefor.[18]

2. Formal Requisites — a. Necessity of Writing. Unless statutes render a written and signed building contract essential to recovery thereon,[19] a written contract is not requisite, provided that performance be possible within one year from execution thereof.[20]

signed, in so far as the right to a first payment is concerned. Reynolds *v.* Welsh, 8 N. Y. St. 404.

17. Lyle *v.* Jackson County, 23 Ark. 63.

Specifications making building impossible. — A contract to build in every particular similar to specifications and plans annexed is bad, where the specifications make it impossible to erect a structure of any known dimensions. Lyle *v.* Jackson County, 23 Ark. 63. See also Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520.

As to certainty required in specifications see *infra*, III, B, 2, b.

18. Greve *v.* Ganger, 36 Wis. 369.

A mere schedule of prices for work and material signed by the parties, but containing no undertaking by either party, is not an agreement to build. Eyser *v.* Weissgerber, 2 Iowa 463.

There is no mutuality of obligation where there is no definite agreement but merely a bid by the builder in the shape of an unsigned memorandum, without reference to any building and without names of parties or specifications.. Doyle *v.* Desenberg, 74 Mich. 79, 41 N. W. 866.

Where contractors gave plans and estimates, and the owner agreed to accept the bid, provided certain alterations therein were made, saying that he would make a written contract when he came to the place where the building was to be erected, upon which the contractors agreed to make such alterations at such time, and the owner told the contractors that they might consider that they had the contract, but recommended them not to commence work until he came, as he expected to change the plans, it was held that the correspondence did not constitute a contract. Bissinger *v.* Prince, 117 Ala. 480, 23 So. 67.

19. West Coast Lumber Co. *v.* Knapp, 122 Cal. 79, 54 Pac. 533, holding that a writing signed by the parties, but not of itself determining what constitutes the contract, is not sufficient under a statute requiring the whole contract to be in writing, and that if the writing refers to drawings and specifications, in accordance with which the building is to be erected, such drawings and specifications must be in existence.

20. Sarles *v.* Sharlow, 5 Dak. 100, 37 N. W. 748; Plimpton *v.* Curtiss, 15 Wend. (N. Y.) 336; Jones *v.* Pouch, 41 Ohio St. 146. See also Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

Effect of understanding that contract should be in writing.— Where all the substantial terms of a contract have been agreed on and nothing is left for future settlement, the mere fact of an understanding that the contract should be formally drawn up and put in writing does not leave the transaction incomplete and without binding force, unless there is a positive agreement that the contract shall not be binding until reduced to writing and formally executed. Disken *v.* Herter, 73 N. Y. App. Div. 453, 77 N. Y. Suppl. 300. And work may be suspended by a builder, where the owner agreed to have the contract under which the work was commenced reduced to writing and refuses so to do. Smith *v.* O'Donnell, 15 Misc. (N. Y.) 98, 36 N. Y. Suppl. 480, 71 N. Y. St. 432.

Necessity of contract under seal when one party is incorporated.— Where a private corporation contracted under seal for the execution of works according to the terms of a specification annexed, which contained provisions for extra work, and the builder, under the superintendence of the employer's engineer and with his approbation, executed extra works which could not be considered as coming within the provisions of the contract under seal, a claim was made by the builder upon the company to a much larger amount than that specified by the contract, and the directors paid him a sum generally on account. By 8 & 9 Vict. c. 16, s. 97, the directors of such company may make parol contracts without the same being reduced to writing, where such contract would, if entered into between private persons, be valid; but as there was not any evidence that the company had contracted for this extra work under seal, or that the company had entered into a contract for the same under the terms of their special act, or of any general act authorizing the same, the company was not liable to the builder for the extra work so performed by him. Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137, 6 R. & Can. Cas. 790. See also, generally, Corporations.

Necessity of revenue stamp to render contract admissible in evidence see Vincent *v.* Cole, 3 C. & P. 481, 14 E. C. L. 673. See also Black *v.* Woodrow, 39 Md. 194, in which case it was held that an agreement unstamped, as required by act of congress, 13th July, 1866, might be used in evidence, where it did not appear that there was any fraudulent intent to evade the provisions of the Stamp Act.

b. Signature. A written building agreement, showing on its face that it is to be executed by both builder and employer, or at least assented to by both, should be signed by them,[21] but it has been said that actual signing of the contract by the party to be charged therewith is not material, so long as the terms of the contract are agreed upon and the builder is directed to proceed with the work called for by the plans.[22]

c. Recording. Where required by statute the building contract must be recorded or it is void and cannot form the basis of a recovery of damages for prevention of its performance.[23]

3. CONSIDERATION. A consideration is essential to the validity of a building contract.[24]

21. Keating *v.* Nelson, 33 Ill. App. 357, where it was said that an employer was not bound by an agreement where the builder had not signed it. See also Lewis *v.* Crow, 69 Ind. 434.

The fact that specifications referred to in a building contract are not signed by the parties is immaterial if the specifications are otherwise sufficiently identified. White *v.* McLaren, 151 Mass. 553, 24 N. E. 911; Lennon *v.* Smith, 14 Daly (N. Y.) 520, 1 N. Y. Suppl. 97, 16 N. Y. St. 668. *Contra*, Donnelly *v.* Adams, 115 Cal. 129, 46 Pac. 916, holding that a building contract referring to plans and specifications signed by the parties to the contract cannot form the basis of a recovery on a contract if there are no signed plans.

22. Girard L. Ins., etc., Co. *v.* Cooper, 162 U. S. 529, 16 S. Ct. 879, 40 L. ed. 1062.

A builder who refuses to sign a contract under which he has already done work is entitled to be paid the value of the work done. McWilliams *v.* Joseph, 1 L. C. L. J. 92.

23. Palmer *v.* White, 70 Cal. 220, 11 Pac. 647. See also Laidlaw *v.* Marye, 133 Cal. 170, 65 Pac. 391.

As to necessity of recording see MECHANICS' LIENS.

As to whom the duty of recording belongs see *infra*, V, A, 1.

Actual notice by a subcontractor of the existence of a building contract is not equivalent to the filing of the contract in the recorder's office. Butterworth *v.* Levy, 104 Cal. 506, 38 Pac. 897.

Unrecorded contract as evidence.— Where an original contractor sued for the reasonable value of his services and materials in repairing a building, a written contract, though unrecorded, was admissible to show that the work had not been performed in substantial compliance with its terms. Laidlaw *v.* Marye, 133 Cal. 170, 65 Pac. 391.

Plans and specifications made part of a contract for a building must be filed in California. Pierce *v.* Birkholm, 115 Cal. 657, 47 Pac. 681.

It is not sufficient to file a sun-print copy of the plans and drawings bearing a photographic representation of those documents and of the signatures thereto. San Francisco Lumber Co. *v.* O'Neil, 120 Cal. 455, 52 Pac. 728.

24. Performance of legal obligation.— Where a builder agreed with A, who had contracted to build a house for B, to assist him in building the house in consideration of his assisting him in his work, and after A had assisted the builder B agreed to pay the builder for any services performed by him, there was no consideration, as the builder was already bound to render such services (Ford *v.* Crenshaw, 1 Litt. (Ky.) 68; and see Moyer *v.* Kirby, 2 Pearson (Pa.) 64); so the employer's agreement to pay that which he has already contracted to pay does not constitute a consideration for a new promise to perform the same building operation (Widiman *v.* Brown, 83 Mich. 241, 47 N. W. 231).

Completion of work under partly performed contract.— One contracting to build at a fixed price who, after part performance, refuses to proceed but does complete his work on a parol promise by the employer to pay him for his labor and material, can recover on the promise, as it is on a sufficient consideration. Munroe *v.* Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475. So a promise made by an original contractor to the subcontractor of his subcontractor that he would give him extra compensation if he would complete a contract he had refused to proceed further with because of non-payments by his immediate contractor is supported by sufficient consideration. Grant *v.* Duluth, etc., R. Co., 61 Minn. 395, 63 N. W. 1026; Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184 (where the promise was made by the employer); Yeoman *v.* Mueller, 33 Mo. App. 343 (where a subcontractor was informed by the owner that the builder had overdrawn his account and that he (the owner) would have to pay for the work and requested the subcontractor to stop work as he could get it done cheaper; this the subcontractor declined to do and the owner finally instructed him to proceed, send the bills to him but to make a reduction in the price if possible and it was held that the contract was supported by a sufficient consideration in the request to the subcontractor to go on with the work and his compliance with the request). Again, where a building contractor defaulted and permitted liens to accrue and the contract was assigned to sureties on his bond, and the balance on the price paid them on their agreement to finish and discharge all liens to an amount not to exceed the bond plus the amount paid them, it was held that the agreement was supported by a sufficient consideration. McHenry *v.* Brown, 66 Minn. 123, 68 N. W. 847.

4. LEGALITY — a. In General. It has been held that a contract to build a structure that is capable only of use for a purpose prohibited by law cannot form the basis of recovery;[25] on the other hand, it has been held that a builder may recover for building a house intended to be used by the owner for illegal purposes, where it is not shown that the builder's purpose in building was that the house should be used for those purposes, though he may have known of the owner's intention.[26]

b. Building Regulations. It is essential that the contract to build be not in violation of any building regulations.[27]

c. Special Provisions — (I) *AS TO ASSIGNMENT OF MONEY DUE ON THE CONTRACT.* A provision is valid that prohibits the builder from assigning any

Payment of valid matured debt.—An agreement by one who has performed labor for a contractor in the erection of a building to sign a release of the contractor from personal liability, in consideration that the owner will pay the former a past-due note, is *nudum pactum*. McNutt *v.* Loney, 153 Pa. St. 281, 31 Wkly. Notes Cas. (Pa.) 576, 25 Atl. 1088.

Where performance is impossible, as where the contract provides that the builder shall receive no compensation unless his work conforms to a standard having no existence the contract is invalid. Nordyke, etc., Co. *v.* Kehlor, 155 Mo. 643, 56 S. W. 287.

Sufficient consideration for contract between owner and subcontractor.— Where a materialman agreed to furnish building materials to a builder provided the owner would retain sufficient of the money due on the contract to protect the materialman, there was sufficient consideration between the latter and the owner for the owner's promise so to do. Roussel *v.* Mathews, 62 N. Y. App. Div. 1, 70 N. Y. Suppl. 886 [*affirmed* in 171 N. Y. 634, 63 N. E. 1122].

Question of consideration one for the jury. — Where a person agreed to build for the mere convenience of an owner in consideration of the latter releasing him from certain damages, it was held that the contract showed a sufficient consideration to render it valid and that it could not be declared void on *ex parte* affidavits of one of the parties averring that it was not founded on any consideration because the other party had the right to a submission of the question of a consideration to a jury. Missouri, etc., R. Co. *v.* Carter, (Tex. 1902) 68 S. W. 159.

Consideration for builder's agreement to do work abandoned by subcontractor.— Where a subcontractor was unable to complete his contract and it was agreed that the general contractor should finish his work and pay any balance to him, and in pursuance of this agreement the work was completed and the general contractor rendered a statement showing a balance which he was willing to pay, it was held that, if the subcontractor omitted to have the work performed by other means, there was sufficient consideration for the agreement of the general contractor. Pease *v.* McQuillin, 180 Mass. 135, 61 N. E. 819.

25. Spurgeon *v.* McElwain, 6 Ohio 442, 27 Am. Dec. 266.

26. Michael *v.* Bacon, 49 Mo. 474, 8 Am. Rep. 138.

Contract partially void as ousting jurisdiction.—Where an otherwise valid contract contains a provision for the decision of an engineer as to any differences between the parties, and provides that it shall be final, and such provision is separate and individual with regard to other provisions of the contract, the fact that the provision is void as being against public policy in ousting the jurisdiction of the courts does not affect the remainder of the contract. Gay *v.* Lathrop, 6 N. Y. St. 603.

As to provisions void as being against public policy see *infra*, II, B, 4, c, (III).

Right of builder participating in illegal contract to plead illegality.— Where the builder participates in a contract void on the ground of illegality he is not prevented from pleading the illegality. William Wilcox Mfg. Co. *v.* Brazos, 74 Conn. 208, 50 Atl. 722.

27. Burger *v.* Koelsch, 77 Hun (N. Y.) 44, 28 N. Y. Suppl. 460, 59 N. Y. St. 69; Beman *v.* Tugnot, 5 Sandf. (N. Y.) 153; Stevens *v.* Gourley, 7 C. B. N. S. 99, 1 F. & F. 498, 6 Jur. N. S. 147, 29 L. J. C. P. 1, 1 L. T. Rep. N. S. 33, 8 Wkly. Rep. 85, 97 E. C. L. 99.

Contract to build in manner prohibited by statute void.— Under a statute providing that plans and specifications of any structure proposed to be erected in particular localities must be approved by certain officers before construction thereof, an agreement to build from plans and specifications not submitted to such officers is void. William Wilcox Mfg. Co. *v.* Brazos, 74 Conn. 208, 50 Atl. 722.

Illegality of agreement to build without requisite permit.— Where an ordinance requires that a permit for building must be obtained an agreement between the builder and owner to construct without obtaining such permit is unlawful and cannot form the basis of a civil action. Smith *v.* Luning Co., 111 Cal. 308, 43 Pac. 967.

A lawful contract to construct, although carried out in an illegal manner, because no permit is obtained, and the work not done by a person authorized by law, cannot be declared illegal as a whole so as to prevent a recovery under it. Fox *v.* Rogers, 171 Mass. 546, 50 N. E. 1041.

Effect of building regulation upon contract previously made.—A contract to build which, though lawful in its inception, becomes by a change in the law unlawful to fulfil is necessarily at an end and cannot be enforced. Walker *v.* McMillan, 6 Can. Supreme Ct. 241.

money payable under the agreement unless with the assent of the owner, and that authorizes the owner to notify the builder to discontinue work under the contract.[28]

(II) *AS TO BONDS.* A contract may require the builder to tender the owner a satisfactory bond within a certain time of the execution of the contract.[29]

(III) *AS TO CERTIFICATES, ESTIMATES, ETC.* A stipulation is legal, and enforceable by the courts, which provides that the certificate, estimate, determination, or decision of an architect, engineer, or some other person shall be final and conclusive,[30] with respect to disputes concerning the meaning or construction of drawings and specifications;[31] any matters of difference;[32]

Duty of builder to observe building regulations see *infra*, V, A, 3.

As to building regulations in general see MUNICIPAL CORPORATIONS.

28. Burnett *v.* Jersey City, 31 N. J. Eq. 341, holding that subsequent materialmen or persons who have worked in the building have no right to demand a fulfilment of the provision, which is one designed for the protection of the owner against the dereliction or insolvency of the builder.

Rights of subcontractors, materialmen, etc., see *infra*, V, D.

Effect of assignment of balance due builder who subsequently becomes bankrupt see Drew *v.* Josolyne, 18 Q. B. D. 590, 56 L. J. Q. B. 490, 57 L. T. Rep. N. S. 5, 35 Wkly. Rep. 570.

29. Brown *v.* Levy, (Tex. Civ. App. 1902) 69 S. W. 255, holding that a provision of this character does not confer upon the owner a right to reject a good and solvent bond for capricious or whimsical reasons, nor does it contemplate a bond that will impose upon the owner a performance of acts he would not otherwise be required to perform for the protection of a surety on the bond; thus, he need not accept a bond stipulating that he give immediate notice in writing to the surety of default by the builder, and that any suit on the bond be instituted within a specified time after completion of the work.

For whose protection intended.—A clause providing that if it be required a builder shall furnish security is intended for the protection of the owner and not for persons furnishing material to the builder. Hurd *v.* Johnson Park Invest. Co., 13 Misc. (N. Y.) 643, 34 N. Y. Suppl. 915, 69 N. Y. St. 141.

For form of bond see Brown *v.* Levy, (Tex. Civ. App. 1902) 69 S. W. 255.

Duty of builder to furnish security see *infra*, V, A, 2.

As to builders' bonds see *infra*, VI.

30. *Florida.*— Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667.

Georgia.— Green *v.* Jackson, 66 Ga. 250.

Minnesota.— Meyer *v.* Berlandi, 53 Minn. 59, 54 N. W. 937.

Missouri.— Eldridge *v.* Fuhr, 59 Mo. App. 44.

Pennsylvania.— Brown *v.* Decker, 142 Pa. St. 640, 21 Atl. 903.

Texas.— Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270.

Adoption of arbitration clause by subcontractor.— Where a subcontractor accepts work under a contract which adopts, as between himself and the original contractor, all the terms and requirements of the original contract, an arbitration clause is likewise adopted. Brown *v.* Decker, 142 Pa. St. 640, 21 Atl. 903. See also Green *v.* Jackson, 66 Ga. 250.

The enforcement of such a stipulation cannot be objected to by the owner for the reason that the architect was selected by him and charged by him with this very power, and the builder is not entitled to complain because he takes the work on the condition that the stipulation be enforced. Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270.

The stipulation may be waived.— Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667; Meyer *v.* Berlandi, 53 Minn. 59, 54 N. W. 937.

There is a waiver where the clause is not set up in abatement of an action on the contract, but defendant pleads a failure on the part of plaintiff to comply with his contract (Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495; Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667), or presents an issue involving a consideration by the jury of the entire merits of the controversy (Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667); so where the parties proceed without regard to the provision they will be held to have waived it (Meyer *v.* Berlandi, 53 Minn. 59, 54 N. W. 937). Again waiver may be presumed where defendant on a motion for a nonsuit does not specifically urge as a ground thereof that suit was premature, or raise that question at the close of the case, or ask that the question of waiver be submitted to the jury. Preston *v.* Syracuse, 92 Hun (N. Y.) 301, 36 N. Y. Suppl. 716, 71 N. Y. St. 782. Moreover a declaration by an owner to a builder that he will not pay more than a specified sum for extra work excuses the latter from a strict compliance with an agreement to refer to the architects a disagreement as to the value of the work. Munk *v.* Kanzler, 26 Ind. App. 105, 58 N. E. 543.

A contract providing that disputes, or what is extra work, shall be conclusively determined by the employer and the architect is not binding on the builder, as a party making a contract cannot stipulate that he himself shall arbitrate differences arising therefrom. Fulton County *v.* Gibson, (Ind. 1902) 63 N. E. 982.

31. Holmes *v.* Richet, 56 Cal. 307, 38 Am. Rep. 54; Cosby *v.* Adams, Wils. (Ind.) 342; Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

32. Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Hurst *v.* Litchfield, 39 N. Y. 377; Max-

the quantity or quality of the work done under the contract;[33] satisfactory performance;[34] payments;[35] amount and value of work;[36] measurement of

well *v.* Thompson, 15 S. C. 612; Mitchell *v.* Dougherty, 86 Fed. 859.

Effect of provision upon rights of parties. — In general the agreement does not bar the parties of their remedies by action at law or by suit in equity, but the provision will not be specifically enforced. An action at law, however, on such an agreement affords no effectual redress for a refusal to refer, since it is not easy to show that the party has sustained any actual damage by the refusal. Smith *v.* Boston, etc., R. Co., 36 N. H. 458. See also Holmes *v.* Richet, 56 Cal. 307, 38 Am. Rep. 54; Hurst *v.* Litchfield, 39 N. Y. 377. A provision, that any dispute or differerence arising with the contractors in any way relating to the contract or any question arising between any of the several contractors relating to the proposed building shall be settled by the architect whose decision shall be absolute and final, applies only to disputes as to the mode of carrying on the several works, and not to differences between the contractors and their employers as to extras. Pashby *v.* Birmingham, 18 C. B. 2, 86 E. C. L. 2. A provision for decision of disputes between builders does not make the decision a condition precedent to the right of a contractor to sue another contractor for the costs of removing rubbish placed by the latter contractor on land on which the former had to work. Delamater *v.* Folz, 50 Hun (N. Y.) 528, 3 N. Y. Suppl. 711, 20 N. Y. St. 821.

A clause providing that a dispute as to the value of extra work shall be submitted to arbitration does not negative the effect of a provision requiring an architect's certificate of satisfactory completion so as to dispense with the necessity of such certificate as to extras, and require arbitration as to all questions concerning them, but the arbitration is required only as to the value of extra work. Fox *v.* Powers, 65 N. Y. App. Div. 112, 72 N. Y. Suppl. 573.

33. *Arkansas.*— Hot Springs R. Co. *v.* Maher, 48 Ark. 522, 3 S. W. 639.

Florida.— Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667.

Indiana.— Cosby *v.* Adams, Wils. (Ind.) 342.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

United States.— Elliott *v.* Missouri, etc., R. Co., 74 Fed. 707, 40 U. S. App. 61, 21 C. C. A. 3.

34. Wilcox *v.* Stephenson, 30 Fla. 377, 11 So. 659; Finegan *v.* L'Engle, 8 Fla. 413.

Decisions as to quantity or fitness of material or sufficiency of work.—An agreement that an architect or engineer shall determine the quantity or fitness of material or the sufficiency of work is a reference of a matter in dispute to a person fitted by special knowledge to determine the facts, and it is for the benefit of both parties that such facts be settled as the work proceeds, hence an agreement for such arbitrament will be upheld. Barlow *v.* U. S., 35 Ct. Cl. 514.

The stipulation does not apply to the question of damages caused by the owner in wrongfully breaking the contract. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015.

Clause creates condition precedent.—Where the contract provides that an architect is to certify that work is completed to his satisfaction, the obtaining of the certificate is a condition precedent to a right to final payment. Davidson *v.* Francis, 14 Manitoba 141.

Application of clause.—A clause providing that the work was to be executed to the full satisfaction of the architect and to the satisfaction of the owner has no reference to the quality of the workmanship or materials, and is only put in the contract to prevent any change of plan or design without the consent and approval of the owner. Tetz *v.* Butterfield, 54 Wis. 242, 11 N. W. 531, 41 Am. Rep. 29.

A clause requiring a certificate from an architect merely provides a method by which the owner may satisfy himself that the builder has fully performed his contract and is for the benefit of the owner (Blethen *v.* Blake, 44 Cal. 117), and he may waive it (Blethen *v.* Blake, 44 Cal. 117; Clark *v.* Pope, 70 Ill. 128; Gilmore *v.* Courtney, 54 Ill. App. 417).

35. Denver, etc., Constr. Co. *v.* Stout, 8 Colo. 61, 5 Pac. 627; Wilcox *v.* Stephenson, 30 Fla. 377, 11 So. 659; Mitchell *v.* Kavanagh, 38 Iowa 286; Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385.

Contract partly printed and partly written.— The fact that a provision for payments on architect's certificates is contained in the printed part of a contract, and that a provision that payments are to be made at fixed stages in the progression of the work and at definite times on its completion is written does not render the provision for payment on certificates inoperative, since there is no inconsistency between it and the written part of the contract. Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384.

When obtaining of certificate is not a condition precedent.—A clause providing for payment by the owners every two weeks on the architect's certificate for the amount of work done, less a percentage to be held by them, until final completion of the contract, does not make it a condition precedent that a certificate should be obtained on final completion. Childress *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 1076.

36. Summerlin *v.* Thompson, 31 Fla. 369, 12 So. 667.

When clauses create condition precedent. — Where the contract provides that before any right of action shall accrue with respect to extra work any dispute regarding its value must be determined by a tribunal selected by

work;[37] or loss, expense, or damage to owner.[38] The jurisdiction of the courts, however, must not be ousted thereby.[39]

(IV) *As to Completion of Unfinished Work.* The contract may provide that on failure of the builder to complete his work according to contract the owner may employ any other person or persons to finish the work and provide materials therefor.[40]

(V) *As to Compliance With Building Laws.* A stipulation that the provisions of a building law will be complied with in the construction of the building described in the contract, whether the provisions are specified in the contract or not, is a proper one.[41]

(VI) *As to Deviations From Contract.* A stipulation that no deviation from any of the provisions of the contract, specifications, or drawings will be permitted except with the sanction and writing of the architect or engineer is both

the parties, it is a condition precedent that there be a determination (Holmes *v.* Richet, 56 Cal. 307, 38 Am. Rep. 54; Kennedy *v.* U. S., 24 Ct. Cl. 122), or an attempt to obtain one (Ball *v.* Doud, 26 Oreg. 14, 37 Pac. 70; Fulton *v.* Peters, 137 Pa. St. 613, 20 Atl. 936); but an agreement as to valuation of extra work is not a condition precedent to a recovery therefor, where the reasonableness of the charges is not questioned (Essex *v.* Murray, (Tex. Civ. App. 1902) 68 S. W. 736).

The provision does not apply, where the owner refuses to pay for work on the ground that the contract has not been substantially performed. Oberlies *v.* Bullinger, 75 Hun (N. Y.) 248, 27 N. Y. Suppl. 19, 57 N. Y. St. 752.

37. McMahon *v.* New York, etc., R. Co., 20 N. Y. 463.

38. Tally *v.* Parsons, 131 Cal. 516, 63 Pac. 833; Eldridge *v.* Fuhr, 59 Mo. App. 44.

39. Hurst *v.* Litchfield, 39 N. Y. 377; Mitchell *v.* Dougherty, 90 Fed. 639, 62 U. S. App. 443, 33 C. C. A. 205.

Illustrations.—A stipulation that the engineers of a railway company shall make final estimates of the quality, character, and value of the work done by a railway contractor, and that such estimates shall be final and conclusive as against the contractor, without further recourse or appeal, is invalid, and cannot deprive the builders of the right to refer to the courts for a redress of wrongs and for the recovery of whatever may have been due them. Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153. A contract providing that engineers employed on the work shall be "referee in all cases to determine all the questions that may in any way arise . . . and to decide all questions which may arise relative to the fulfilment of this contract" is void as against public policy. National Contracting Co. *v.* Hudson River Water Power Co., 34 Misc. (N. Y.) 652, 70 N. Y. Suppl. 585 [*affirmed* in 67 N. Y. App. Div. 620, 73 N. Y. Suppl. 1142]. The architect, to the exclusion of the court, is not invested with authority to determine the questions as to what delay there was in completing the work, and whether it was caused by acts and orders of the owner, or was attributable to the builder, under a provision that changes may be directed by the owner, and that, in case of any addition, such further time shall be allowed for completion of the work as the architect shall decide to be reasonable, and that any question arising during progress of the work, or in settlement of accounts, shall be referred to the architect, whose decision shall be binding on both parties. Murphy *v.* Orne, 185 Pa. St. 250, 42 Wkly. Notes Cas. (Pa.) 271, 39 Atl. 959.

40. Tally *v.* Parsons, 131 Cal. 516, 63 Pac. 833.

For form of such clause see Parker *v.* McGilway, 7 Rob. (La.) 192.

Provision should receive liberal construction.—A provision that the owner may, in case of default by the builder, proceed to finish the building himself, and to that end use materials brought by the builder on the ground for the purpose of building, and be accountable to the builder for any excess of the unpaid contract price over the cost of completion is not one for a forfeiture which must be strictly construed against the owner, since it does not involve the taking of any property of the builder, by way of penalty or punishment but is in the interest of both parties and is to be fairly construed to effect its purpose. Duplan Silk Co. *v.* Spencer, 115 Fed. 689.

Time to which clause refers.—A clause providing that the owner shall notify the builders of an intention to complete refers to the time when the work is in progress, and not after its completion. Spink *v.* Mueller, 77 Mo. App. 85.

The enforcement of the clause permitting the contract by the owner does not entitle the builder to damages.— Harder *v.* Marion County, 97 Ind. 455.

41. De Kay *v.* Bliss, 4 N. Y. St. 728, holding that the making of such stipulation requires the builder to consult the building laws and ascertain from them what his obligations are, thus where one of the requirements of a building law is with respect to fire-escapes, the builder cannot disregard its provisions, for should he so do he will not have complied with his contract.

Duty to comply with building laws see *infra*, V, A, 3.

equitable and reasonable,[42] is intended to protect the employer against doubtful claims,[43] and is consistent with provisions to the effect that alterations, additions, etc., may be directed by the architect or engineer.[44]

(VII) *AS TO EMPLOYMENT OF SUBCONTRACTORS.* A provision that the builder may not subcontract his work without the written consent of the architect or engineer is entirely proper and is intended for the benefit of the employer, who has a right to waive it.[45]

(VIII) *AS TO EXTRA WORK AND CLAIMS THEREFOR.* A provision that the builder is not to execute any extra work or make any modifications or alterations in the work mentioned in the specifications and plans, unless ordered in writing by the engineer in charge, or claim payment for the same, unless such written order be produced, is valid and should be enforced.[46] Such a provision is one intended for the benefit of the employer.[47]

(IX) *AS TO LIABILITY OF BUILDER.* Ordinarily a builder who agrees to work according to the plan and under the direction of an engineer or architect is not understood to insure the sufficiency of the plan or undertake as to the scientific correctness of the specifications or the verbal or written directions,[48] and he may stipulate against any liability for the correctness of the plan of the work that he is to execute.[49] On the other hand, he may guarantee the perfection of a plan, or the wisdom of directions given under the progress of the work by the architect whose orders he is by the terms of the contract bound to obey;[50] and, since he is bound for his own skill and the skill and fidelity of his workmen as well as the sufficiency of the material which he supplies there is nothing unreasonable in a guaranty that the workmanship and the material furnished by him should

42. White *v.* San Rafael, etc., R. Co., 50 Cal. 417.

43. White *v.* San Rafael, etc., R. Co., 50 Cal. 417.

44. White *v.* San Rafael, etc., R. Co., 50 Cal. 417.

Liability for deviations see *infra*, V, B.

45. Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60, holding that, for the purpose of showing a waiver, the builder may prove by the architect or engineer that he knew subcontractors were at work, and that he estimated their work, and that the employer was aware of the subcontracts and permitted the work to be done by the subcontractors without objection.

Rights of subcontractors see *infra*, V, D.

46. White *v.* San Rafael, etc., R. Co., 50 Cal. 417; Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356.

The object of a clause providing that no extra charge is to be made unless a written agreement be made and attached to the contract is certainty as to the terms on which the work is to be done, in order that the parties may know how much one is to pay and the other to receive for such changes and alterations as may be made. Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

The stipulation does not apply to work done pursuant to alterations made by subsequent mutual agreement. Wilkens *v.* Wilkerson, (Tex. Civ. App. 1897) 41 S. W. 178.

Condition precedent created by clause.—Where a contract provides that no claim for extra work shall be made unless the same be done in pursuance of a written order from the architect, and that all claims must be made to the architect in writing or be considered abandoned by the builder, these are conditions precedent to a right to recover. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

For form of clause see O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325; Bartlett *v.* Stanchfield, 148 Mass. 394, 19 N. E. 549, 2 L. R. A. 625.

Recovery for extra work see *infra*, V, C, 3.

47. Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356.

48. MacRitchie *v.* Lake View, 30 Ill. App. 393.

49. St. Patrick's Hall Assoc. *v.* Gilbert, 1 Montreal Leg. N. 116, 23 L. C. Jur. 1, 9 Rev. Lég. 612.

50. MacRitchie *v.* Lake View, 30 Ill. App. 393 [*reversed* on other ground in 134 Ill. 203, 25 N. E. 663].

Sufficiency of provisions to warrant correctness of plans.—A clause guaranteeing that work should remain in good condition for one year has the effect of insuring the sufficiency of the plan (Lake View *v.* MacRitchie, 134 Ill. 203, 25 N. E. 663 [*reversing* 30 Ill. App. 393]); but a warranty, that ground is free from quicksand or of the character shown by a plan, cannot be implied from a contract to build a dry dock on a place to be provided and designated by the employer, even though a plan showing the soil was shown to the builders and considered by them in making their bid (Simpson *v.* U. S., 172 U. S. 372, 19 S. Ct. 222, 43 L. ed. 482 [*affirming* 31 Ct. Cl. 217]).

Evidence that the builder orally warranted the correctness of the plans is not admissible to vary a written contract. Hills *v.* Farmington, 70 Conn. 450, 39 Atl. 795.

stand the test of a certain period of time after the completion and acceptance of the work.[51]

(x) *As to Liquidated Damages.* A provision for liquidated damages is usual in building contracts.[52]

(xi) *As to Retention of Money Due Builder.* It is competent for the parties to agree that the employer may retain in his hands money due the builder out of which to meet the demands of materialmen,[53] or that money earned by the builder shall be retained until completion of the work to answer any damages suffered by the owner;[54] and a provision of this character is supported by the consideration which supports the remainder of the contract.[55]

51. MacRitchie *v.* Lake View, 30 Ill. App. 393 [*reversed* on other ground in 134 Ill. 203, 25 N. E. 663].

Guaranty of work does not dispense with completion.—A guaranty of the roof of a building for some years against ordinary wear and tear does not dispense with the necessity of the builder completing the roof according to contract, nor does it put the roof in any position different from the rest of the work as to the necessity under another provision of the contract for a certificate that the building is completed according to the satisfaction of the architect. Davidson *v.* Francis, 14 Manitoba 141.

Warranty may exist without the use of any particular words, if such was the intention. Van Buskirk *v.* Murden, 22 Ill. 446, 74 Am. Dec. 163.

Effect of builder's abandonment of contract.—A clause providing that any damage incurred through default of the builder must be audited and certified by architects is not impaired by the builder's abandonment of the contract. Tally *v.* Parsons, 131 Cal. 516, 63 Pac. 833.

52. Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558. See also Downey *v.* O'Donnell, 86 Ill. 49.

For form of clause see Kelly *v.* Fejervary, (Iowa 1899) 78 N. W. 828.

Where the damages that may be suffered by a breach of contract must be of an uncertain nature or amount the parties may designate damages to be paid for the breach provided they are not obviously unconscionable. Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

A provision that stipulated damages should be paid for delay is material. McEntyre *v.* Tucker, 36 N. Y. App. Div. 53, 55 N. Y. Suppl. 153.

Where builder entirely abandons contract the provision is not applicable. Gallagher *v.* Baird, 54 N. Y. App. Div. 398, 66 N. Y. Suppl. 759.

As to construction of clause providing for liquidated damages see *infra*, II, C, 2.

53. Luthy *v.* Woods, 6 Mo. App. 67.

Equity will treat a balance retained for payment of subcontractors as an assignment of the fund and apply it to their payment to the exclusion of any other creditors or the original builder. Luthy *v.* Woods, 6 Mo. App. 67.

The furnishing of a sworn statement as to subcontractors is, in Illinois, a condition precedent to a suit by the builder on his contract. Gilmore *v.* Courtney, 158 Ill. 432, 41 N. E. 1023.

Provision creates condition precedent.—A provision that the builder shall furnish to the owner satisfactory evidence that materials furnished are fully released from all liens before he shall receive the sums due on final payment creates a condition precedent to recovery under the contract (Fogg *v.* Suburban Rapid-Transit Co., 90 Hun (N. Y.) 274, 35 N. Y. Suppl. 954, 70 N. Y. St. 627; Franklin *v.* Schultz, 23 Mont. 165, 57 Pac. 1037); but where a contract contained a clause requiring releases of mechanics' liens to be furnished by the builders before the last payment, and, in an action to recover a balance due on such contract, it appeared that a judgment foreclosing a mechanic's lien had been rendered against plaintiff from which an appeal had been taken, but that at the time of making the contract plaintiff executed a bond against liens to defendant in a sum many times greater than the amount of the lien for which judgment was given, it was proper to refuse an instruction that a tender of releases of mechanics' liens was a condition precedent to plaintiff's right to recover, since the only outstanding lien was the subject of a *bona fide* dispute that had been liquidated by judgment, and the matter was capable of adjustment by the court (Huckestein *v.* Kelly, etc., Co., 152 Pa. St. 631, 25 Atl. 747).

54. Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151, where it was held that such retention was not in the nature of liquidated damages.

Right of retention additional to protection of bond.—A right to withhold payments under a provision therefor, which also provides that no rights under the contractor's bond shall be impaired thereby, is intended as a protection additional to the bond, and not as applying only to the final payment. Dempsey *v.* Schwacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100.

Provision is for benefit of owner.—A provision in a building contract that the owner shall hold a certain percentage of the contract price until the completion of the work is for the benefit of the owner and does not render the owner personally liable to a subcontractor. Steele *v.* McBurney, 96 Iowa 449, 65 N. W. 332.

55. Luthy *v.* Woods, 6 Mo. App. 67.

(XII) *As to Suspension of Building.* A provision giving the employer the right at any time and for any reason satisfactory to him to suspend the progress of building either temporarily or permanently on giving certain notice, and further providing that such suspension shall give the builder no claim for damages therefor is one competent for the parties to make and is valid.[56]

(XIII) *As to Termination of Work.* A provision that work under the contract shall be terminated upon its arriving at a certain stage unless the builder is notified to go on and complete the work is valid, and is for the benefit of the owner who may waive it.[57]

C. Construction and Operation — 1. In General — a. What Law Governs. Like other contracts, a building contract must generally, when to be performed in a state or country other than where made, be governed by the law of the country or state in which it is to be performed.[58]

b. Where Contract Is Contained in Several Instruments. Applying a well-settled rule governing the construction of contracts, effect must be given, if possible, to every part of the contract, whether it is contained in one instrument or in many;[59] thus, plans and specifications, if not contained in the contract itself, but referred to therein or annexed thereto must be construed therewith,[60]

56. Warren-Scharf Asphalt Paving Co. *v.* Laclede Constr. Co., 111 Fed. 695, 49 C. C. A. 552.

Rescission or abandonment see *infra*, II, E.

57. Hinkley *v.* Grafton Hall, 101 Wis. 69, 76 N. W. 1093.

58. Thurman *v.* Kyle, 71 Ga. 628.

59. Mahoney *v.* St. Paul's Church, 47 La. Ann. 1064, 17 So. 484; Fitzgerald *v.* Moran, 19 N. Y. Suppl. 958, 47 N. Y. St. 379; Francis *v.* Heine Safety-Boiler Co., 109 Fed. 838, 48 C. C. A. 687 [*reversing* on other ground 105 Fed. 413].

Conditions inconsistent with contract.— A contract provided that, if work was not carried on with expedition, and in proper manner, the architect might give the contractor ten days' notice in writing to remedy such defects and, upon the latter's failure, dismiss him and employ others. The contract also provided that general conditions were made a part of the contract, except so far as inconsistent with them, in which case the contract should govern. Among the general conditions was one that, in case work was not proceeding with proper dispatch, the architect might give ten days' notice, and, upon failure of the contractor to make the necessary changes, the architect could, with the consent of the owner, take the work out of the hands of the contractor. It was held that such latter clause being inconsistent with the contract the contract would govern, and the architect had power to dismiss without the consent in writing of the owner. Neelon *v.* Toronto, 25 Can. Supreme Ct. 579.

Inconsistent provisions.— Where a clause provided that all walls should be plastered with certain cement, under the direction of a superintendent of its maker and another clause provided that the cement and sand should be mixed in equal parts, it was held that the two clauses were not inconsistent but that effect could be given to each. Fitzgerald *v.* Moran, 19 N. Y. Suppl. 958, 47 N. Y. St. 379.

General provisions do not control a specific provision.— Erickson *v.* U. S., 107 Fed. 204.

Where a subcontractor undertakes to work according to the original contract with the owner, the two contracts are so connected, and the one so dependent on the other, that they form one contract; and the subcontractor is entitled to the same benefits, as well as bound by the same conditions, as affected the first contractor under the original contract. Price *v.* Garland, 3 N. M. 285, 6 Pac. 472.

Where specifications made part of a contract provide for a guaranty the contract is coextensive with the guaranty clause of the specifications. North Bergen Bd. of Education *v.* Jaeger, (N. J. 1901) 50 Atl. 583.

60. *Illinois.*— Lake View *v.* MacRitchie, 134 Ill. 203, 25 N. E. 663.

Indiana.— Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129.

Louisiana.— Suarez *v.* Duralde, 1 La. 260.

Massachusetts.— Bergin *v.* Williams, 138 Mass. 544.

New York.— Gay *v.* Haskins, 11 Misc. (N. Y.) 134, 31 N. Y. Suppl. 1022, 65 N. Y. St. 53.

United States.— Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762.

See 11 Cent. Dig. tit. "Contracts," § 749.

A letter, referred to in a contract, that specifies among other things the quality of material and the mode of doing the work agreed on performs the function of a specification and should be construed as such within the meaning of the contract. McGeragle *v.* Broemel, 53 N. J. L. 59, 20 Atl. 857.

Reference to plans and specifications mean those on which builder estimates.— Where there are differences in plans furnished as a guide for the estimates of work proposed to be let, and a bidder uses the set furnished him for making his estimates and bid, and a difference as to the amount and quality of the work let to him arises between him and his employer on a bid made on the plans submitted which was accepted and made the basis

when identified, and parol evidence is admissible for the purpose of such identification.[61]

c. General and Specific Words and Phrases. General rules must govern the construction of general and specific words,[62] or of particular words and phrases.[63]

d. Terms Implied as Part of Contract. As in other contracts whatever may be fairly implied from the terms and language of a building agreement is generally regarded, by the law, as contained in it,[64] but where the obligations

of the contract, the words "plans," "diagrams," and "drawings" in the contract entered into upon such bid refer to the plans, etc., so furnished to him, and, if the plans, etc., referred to in the contract differ from those furnished, advantage of such difference cannot be taken, to the prejudice of the contractor. Sexton *v.* Chicago, 107 Ill. 323.

Effect of false reference to plans or specifications.—A false reference to signed or attached plans or specifications cannot be aided by parol evidence (Donnelly *v.* Adams, 115 Cal. 129, 46 Pac. 916; Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Worden *v.* Hammond, 37 Cal. 61); and a contract referring to "plans and specifications" as "herein made a part" of the contract, or referring to signed or attached plans or specifications that are not signed or attached, is left inchoate and incomplete and cannot form the basis of a recovery (Donnelly *v.* Adams, 115 Cal. 129, 46 Pac. 916; Willamette Steam Mills Lumbering, etc., Co. *v.* Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Worden *v.* Hammond, 37 Cal. 61; Almini Co. *v.* King, 92 Ill. App. 276), unless such contract contains something to locate or identify them in some way (Almini Co. *v.* King, 92 Ill. App. 276).

The contract as executed merges all previous or contemporaneous agreements as to changes in specifications, if there are specifications attached to the contract at the time of its execution. Coey *v.* Lehman, 79 Ill. 173.

Contract controls specifications.— Meyer *v.* Berlandi, 53 Minn. 59, 54 N. W. 937; Boteler *v.* Roy, 40 Mo. App. 234; Harvey *v.* U. S., 8 Ct. Cl. 501.

Specifications control plan.— Early *v.* O'Brien, 51 N. Y. App. Div. 569, 64 N. Y. Suppl. 848.

Effect of omission in plan.—As between positive requirements of specifications and a plan which, though perfect in other respects, omits a single detail, the mere implication derived from the omission in the plan is controlled by the specifications, thus where a contract provided that the building should be in all respects according to specifications, requiring "all walls to be vaulted," and to the plan on which the walls appeared a certain width, without any apparent vault or space, it was held that the walls were to be, including the vault, of that width only. Smith *v.* Flanders, 129 Mass. 322.

61. Bergin *v.* Williams, 138 Mass. 544.

62. Mellen *v.* Ford, 28 Fed. 639.

63. McPhee *v.* Young, 13 Colo. 80, 21 Pac. 1014; McIntire *v.* Barnes, 4 Colo. 285; Harris *v.* Rutledge, 19 Iowa 388, 87 Am. Dec. 441; U. S. *v.* Mueller, 113 U. S. 153, 5 S. Ct. 380, 28 L. ed. 946; Haydnville Min., etc., Co. *v.* Art Institute, 39 Fed. 484; Tillson *v.* U. S., 20 Ct. Cl. 213.

As to meaning of "omission" see Shaver *v.* Murdock, 36 Cal. 293; Gallagher *v.* Hirsh, 45 N. Y. App. Div. 467, 61 N. Y. Suppl. 609.

As to meaning of "insurance" see Tillson *v.* U. S., 20 Ct. Cl. 213.

As to the expression "available site" see Simpson *v.* U. S., 31 Ct. Cl. 217.

As to "best quality of material" see McIntire *v.* Barnes, 4 Colo. 285; South Cong. Meeting-House *v.* Hilton, 11 Gray (Mass.) 407.

As to "bill of quantities" see Haydnville Min., etc., Co. *v.* Art Institute, 39 Fed. 484.

64. *Delaware.*— Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233.

Indiana.— MacKenzie *v.* Edinburg, 72 Ind. 189.

Kansas.— Thurber *v.* Ryan, 12 Kan. 453.

Maryland.—Black *v.* Woodrow, 39 Md. 194; Denmead *v.* Coburn, 15 Md. 29.

Massachusetts.— White *v.* McLaren, 151 Mass. 553, 24 N. E. 911; Ricker *v.* Cutter, 8 Gray (Mass.) 248.

Michigan.— Perine *v.* Standfield, 107 Mich. 553, 65 N. W. 541.

New Hampshire.—Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

United States.—Crocker *v.* U. S., 21 Ct. Cl. 255.

See 11 Cent. Dig. tit. "Contracts," § 751.

Implied agreement to employ competent engineer.—A provision that work is to be done under the supervision of an employer's engineer and to his satisfaction impliedly binds the employer to employ only a competent engineer. Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

All necessary work included in contract.—A contract to keep up a building and leave it well supported includes all necessary means for the job, whether of labor or materials, although not specially mentioned. Cobb *v.* West, 4 Duer (N. Y.) 38. So where a contract provided that the builder should make excavations and put in foundations according to plans and specifications, including all labor and material incident thereto, and in order to make the excavations of the required depth, it became necessary to underpin a house standing on the line of one of the foundations, and to use a certain quantity of lumber for the purpose of sustaining the sides of the trenches, it was held that the un-

are expressed in clear and unambiguous language further and greater obligations cannot be implied,[65] and when the terms or language are doubtful they should

derpinning of the house, and the lumber used in the trenches, were included in the terms of the contract. Ashley *v.* Henahan, 56 Ohio St. 559, 47 N. E. 573. See also Trenton *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373.

Implied agreement to furnish builder with materials.—An employer bound to furnish materials to the builder impliedly agrees to furnish them in time to enable the builder to finish his work within a time specified. Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

As to making of certificates.—An owner who agrees to pay the builder periodically for work which the employer's engineer certifies to have been done by the builder impliedly agrees that the certificates shall be made by the engineer. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233.

An owner is impliedly bound to give the builder possession of a building upon which the builder is required to make good work condemned by the architect.— Vermont St. M. E. Church *v.* Brose, 104 Ill. 206.

There is an implied contract on the part of the owner to keep work in such a state of forwardness as will enable the builder to perform his contract within a time limited. Nelson *v.* Pickwick Associated Co., 30 Ill. App. 333.

As to deductions from money due builder. — Where it was agreed that if work did not proceed as rapidly and satisfactorily as required by the employer or his agent, they should have power to proceed with the work themselves and deduct from whatever moneys might be due to the builder the cost thereof, it was held that the intention of the parties was that the employer if *bona fide* dissatisfied, whether with or without sufficient reason, with the progress of the work, should be at liberty to deduct from the money due the builder such sums as had been expended in pursuance to the said proviso. Stadhard *v.* Lee, 3 B. & S. 364, 9 Jur. N. S. 908, 32 L. J. Q. B. 75, 7 L. T. Rep. N. S. 815, 11 Wkly. Rep. 361, 113 E. C. L. 364.

As to building foundations.—A contract reciting that a foundation shall rest on "limestone rock," and the filling in "be laid flush with mortar" means that the builder must build the foundations on bed rock, and that the filling be held to its place by grouting. Sullivan County *v.* Ruth, 106 Tenn. 85, 59 S. W. 138.

65. *District of Columbia.*— Carver *v.* Hall, 3 App. Cas. (D. C.) 170.

Illinois.— Owen *v.* Stevens, 78 Ill. 462.

Iowa.— McNulty *v.* Stearns, 85 Iowa 437, 52 N. W. 357.

Kentucky.— Rhodes *v.* Cox, 9 Ky. L. Rep. 895.

Michigan.— Bell *v.* Harvey, 50 Mich. 59, 14 N. W. 699.

Minnesota.— Larson *v.* Schmaus, 31 Minn. 410, 18 N. W. 273.

Missouri.— Ittner *v.* St. Louis Exposition, etc., Assoc., 97 Mo. 561, 11 S. W. 58; Reed *v.* Conway, 26 Mo. 13; Rothwell *v.* Dean, 60 Mo. App. 428.

Nebraska.— O'Rourke *v.* Burke, 44 Nebr. 821, 63 N. W. 17.

New York.— Preston *v.* Syracuse, 92 Hun (N. Y.) 301, 36 N. Y. Suppl. 716, 71 N. Y. St. 782; Millstone Granite Co. *v.* Dolan, 61 N. Y. Super. Ct. 106, 18 N. Y. Suppl. 791, 46 N. Y. St. 531 [*affirmed* in 138 N. Y. 607, 33 N. E. 1082, 51 N. Y. St. 932].

Texas.— Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

United States.— Weld *v.* Goldenberg, 65 Fed. 466, 26 U. S. App. 491, 13 C. C. A. 12; Gibbons *v.* U. S., 15 Ct. Cl. 174.

See 11 Cent. Dig. tit. "Contracts," § 751.

Illustrations.—A contract to deliver a building complete in accordance with plans and specifications, calling for the use of certain materials and the doing of certain work to make a water-proof cellar, with a guaranty of the cellar from the builder for five years, does not amount to a covenant to deliver a water-proof cellar. Weld *v.* Goldenberg, 65 Fed. 466, 26 U. S. App. 491, 13 C. C. A. 12. An owner who promises a materialman to pay for all materials the builder might get for the building is not liable for material furnished to the builder before his promise. Owen *v.* Stevens, 78 Ill. 462. Under a contract between the contractor and a subcontractor a provision that the contractor is not to be liable for any damages accruing to the subcontractor from delay on the part of other contractors does not render the contractor liable for failure to bind one with whom he has contracted for certain materials to furnish the same without delay when needed. McNulty *v.* Stearns, 85 Iowa 437, 52 N. W. 357. A contract to put a mill up and in running order does not compel the painting of the mill as requisite to its completion. Rhodes *v.* Cox, 9 Ky. L. Rep. 895. A contract requiring a builder to take all risks from floods occurring before completion of a levee does not impose on the builder a liability for losses incurred by the other party to the contract during a previous construction of the levee. Rothwell *v.* Dean, 60 Mo. App. 428. By reserving an option to make payments by assuming lumber bills an owner does not assume payment of lumber bills unknown to him at the time of contracting. O'Rourke *v.* Burke, 44 Nebr. 821, 63 N. W. 17. A contract to build a bridge and to keep the bridge in repair for a specified time does not render the builder liable to rebuild if destroyed by fire. Livingston County *v.* Graves, 32 Mo. 479. A contract to build a bridge so as not to interfere with the running of trains over it is not a guaranty of the safe passage of trains over the bridge, and in the absence of negligence or unskilfulness on his part the builder is not liable if the bridge gives way under a passing train.

be construed against the party who in preparing the contract made use of the doubtful terms or language.[66]

2. As to Penalties and Liquidated Damages. Whether a sum agreed between the parties to be paid in the event of a breach of the building contract is termed by them a penalty or liquidated damages is not controlling upon the question of construction, their use of such words not always being conclusive,[67] and there seems to be a leaning against construing the contract so as to compel the builder to pay the sum mentioned as stipulated damages, and a disposition to regard the sum agreed to be paid as a penalty to enforce performance.[68] The intention, however, of the parties and the subject-matter and nature of the agreement are to be considered in determining the meaning of the expression,[69] and the question whether the sum is to be treated as liquidated damages or penalty, must, where there is nothing on the face of the contract which will militate against the sum being liquidated damages, depend on the evidence.[70] It seems, however, a general rule that the sum fixed by the parties is deemed to be liquidated damages and recoverable as such, where the damage and loss which may be presumed to result from non-performance are uncertain and incapable of exact ascertainment,[71] and where the amount named is not, on the face of the contract, out of all proportion to the probable loss;[72] so where the builder stipulates to pay a stated sum for a given period of time during a delay;[73] but where a sum has been stipulated as a payment by the defaulting party which is disproportionate to the presumable

Feike *v.* C. & E. R. Co., 5 Ohio Cir. Ct. 199, 3 Ohio Cir. Dec. 100.

Operation of sureties' agreement to complete on percentage retained by owner.— An agreement made between the sureties of a builder, who has abandoned his contract, and a subcontractor to the effect that the former will complete the work, and the latter proceed under his contract, and that the owner should pay the estimates made on his work and materials directly to him, to which the owner assents, extends to the per cent authorized by the original contract to be retained until final completion of the building, but does not operate on the amount retained thereunder prior to the making of the supplemental agreement. Beatrice School Dist. *v.* Thomas, 51 Nebr. 740, 71 N. W. 731.

Height of dam.— If a contract requires that a dam shall be built "of the same height, thickness, and quality of work" as an old dam there standing, and the old dam was never finished, but only its front part raised to its intended height; a fair construction of the contract requires that the new dam shall be made as high as the front of the old one. Mason *v.* Bridge, 14 Me. 468, 31 Am. Dec. 66.

66. Gibbons *v.* U. S., 15 Ct. Cl. 174, wherein the expression "the foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated on the plan by new work" was held to be a doubtful one.

Statutory provision.— Under Iowa Code, § 3652, providing that where the terms of an agreement have been understood in a different sense by the parties that sense is to prevail against either party in which he had reason to suppose the other party understood it, a builder cannot recover for alterations made without securing an architect's decision, when the contract provides that the architect is to decide whether alterations asked for by the owner are within its terms, if the builder knew that the owner understood the alterations asked for were within the terms of the contract. Evans *v.* McConnell, 99 Iowa 326, 63 N. W. 570, 68 N. W. 790.

67. Moore *v.* Platte County, 8 Mo. 467; Ward *v.* Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, 34 N. Y. St. 934.

68. Moore *v.* Platte County, 8 Mo. 467.

69. Ward *v.* Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, 34 N. Y. St. 934.

70. Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558, holding that it devolves upon the builder to establish by evidence a condition of things which would cause the sum to be regarded as a penalty where the expression used is "liquidated damages"; and that evidence that the owner had made a lease of the building to go into effect on its completion and agreed to abate his rent pending completion of which fact the builder was aware, and that the tenant on completion paid a specified monthly rental, was not sufficient to support a finding that the provision was for a penalty.

71. Ward *v.* Henderson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, 34 N. Y. St. 934; Worrell *v.* McClinaghan, 5 Strobh. (S. C.) 115; Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558; Fort *v.* Cameron, 1 Tex. App. Civ. Cas. § 1112; Reichenbach *v.* Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51.

72. Ward *v.* Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, 34 N. Y. St. 934; Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

73. Nash *v.* Hermosilla, 9 Cal. 584, 70 Am. Dec. 676.

or probable damage or to a really ascertainable loss it will be treated as a penalty;[74] so where a party stipulates to build in a particular manner within a given time, and, upon failure, to pay a named sum.[75]

3. EVIDENCE TO AID CONSTRUCTION. In accordance with general principles of evidence,[76] where the construction of the building contract is in doubt, testimony showing the facts existing at the time of the execution of the contract and the circumstances of the parties is admissible;[77] and it is common and prudent to admit the opinions of experts to explain the contract, and where the evidence otherwise tends to limit or enlarge the apparent meaning of the words used the opinions of witnesses who are in the habit of making and executing such contracts are almost indispensable.[78] So, a custom uniform, general, of long standing, and reasonable, that exists in the place of making the contract and at the time of making the contract, and upon which the builder relied when making the contract, is admissible,[79] and, if proved, should prevail;[80] but it is an equally well-settled rule that the legal effect of a written building contract cannot be varied or contradicted by evidence of a building custom or usage.[81]

74. First Orthodox Cong. Church *v.* Walrath, 27 Mich. 232; Cochran *v.* People's R. Co., 113 Mo. 359, 21 S. W. 6; Ward *v.* Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, 34 N. Y. St. 934.

A stipulation creates a penalty where the owner is at liberty to employ persons to complete the building if the builder is in default and where actual damages by reason of his delay may be readily determined. Brennan *v.* Clark, 29 Nebr. 385, 45 N. W. 472.

Percentages retained until completion of the work though declared by the contract to be forfeited in case of annulment must be treated as penalty and not as liquidated damages. Satterlee *v.* U. S., 30 Ct. Cl. 31.

75. Nash *v.* Hermosilla, 9 Cal. 584, 70 Am. Dec. 676; Moore *v.* Platte County, 8 Mo. 467; Tayloe *v.* Sandiford, 7 Wheat. (U. S.) 13, 5 L. ed. 384.

76. See, generally, EVIDENCE.

77. St. Anthony Falls Water-Power Co. *v.* Eastman, 20 Minn. 277; Doane College *v.* Lanham, 26 Nebr. 421, 42 N. W. 405.

Admissibility of specifications.— Specifications not signed by the parties but agreed upon by them when the building contract was made are admissible for the purpose of explaining a written building contract. Maxted *v.* Seymour, 56 Mich. 129, 22 N. W. 219. See also Myer *v.* Fruin, (Tex. 1891) 16 S. W. 868, in which case a plan not attached to the contract but which was exhibited to plaintiff at the time he made the contract was admitted as explaining how work should be done about which a dispute arose.

78. Reynolds *v.* Jourdan, 6 Cal. 108, holding that a witness may be asked whether if, under the contract and the customs of the locality, he would consider himself bound to put on a tin roof, or any roof, where the contract specified the dimensions of the walls, floors, etc., but did not mention the roof. Since the court was of the opinion that, where the contract contained a specific description of the manner, size, measurement, and material of each part with great particularity with one exception, the exception was the result of design, and did not enter into the contract of the parties.

An architect may be examined as to the usage under particular contracts but not as to his understanding thereof. Suarez *v.* Duralde, 1 La. 260.

79. Patterson *v.* Crowther, 70 Md. 124, 16 Atl. 531; Walker *v.* Syms, 118 Mich. 183, 76 N. W. 320; Bardwell *v.* Ziegler, 3 Wash. 34, 28 Pac. 360.

Under a contract to pay so much "wall measure" for brick work, and those words have acquired a particular meaning by local usage, which is shown to have been so general, uniform, and frequent as to warrant an inference that the owners had knowledge of and contracted with reference to the usage, the sense of the instrument may be explained by parol evidence. Packard *v.* Van Schoick, 58 Ill. 79.

"Mason work."— The evidence of persons skilled in mason work is admissible to show whether the term "mason work" as used in a contract to construct water works includes the laying of inlet, suction, and drain pipes. Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090.

"Old style roofing tin."— Evidence is admissible to show that the words "old style roofing tin" used in a building contract have, by usage of trade, acquired a peculiar meaning. Storck *v.* Mesker, 55 Mo. App. 26.

The meaning of the words "wall count solid measure," as usually understood among bricklayers, may be shown. Long *v.* Davidson, 101 N. C. 170, 7 S. E. 758.

80. Walker *v.* Syms, 118 Mich. 183, 76 N. W. 320, in which case no particular method of measuring work was provided for by the contract of which the language was ambiguous. See also Lowe *v.* Lehman, 15 Ohio St. 179; Bardwell *v.* Ziegler, 3 Wash. 34, 28 Pac. 360; Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327.

81. *Arkansas.*— Cook *v.* Hawkins, 54 Ark. 423, 16 S. W. 8.

Massachusetts.— Daly *v.* Kingston, 177 Mass. 312, 58 N. E. 1019.

So where the language and terms of the contract are plain a custom or usage cannot be implied.[82]

D. Modification and Merger — 1. In General. A building contract is, like other contracts, subject to modification,[83] the parties having a right to alter and modify the original contract[84] by mutual consent,[85] or the contract may be merged in a subsequent one[86] and the new agreement either expressly or impliedly waive any right either would otherwise have had.[87]

2. Manner of Making Modification. The mode of making the modification may be provided for by the contract.[88]

Missouri.— Pavey *v.* Burch, 3 Mo. 447, 26 Am. Dec. 682.

New York.— Fellows *v.* New York, 17 Hun (N. Y.) 249; Dutch *v.* Harrison, 37 N. Y. Super. Ct. 306.

Tennessee.— Wilson *v.* Knott, 3 Humphr. (Tenn.) 473.

Evidence of custom is inadmissible to contravene an implied legal construction that work was to be done in a reasonable time. Morowsky *v.* Rohrig, 4 Misc. (N. Y.) 167, 23 N. Y. Suppl. 880, 53 N. Y. St. 220.

Admissibility of custom as to estimating on walls shown on plan.—Where plans showing sections of the walls are furnished from which to estimate, it is not admissible to show a universal rule, custom, or practice of builders to estimate according to the section as shown and to contract with reference thereto, and to regard an increase in the height of the walls as not included in the contract and demand additional compensation therefor. Stuart *v.* Cambridge, 125 Mass. 102.

82. Chambers *v.* U. S., 24 Ct. Cl. 387.

83. As to modification of contracts generally see Contracts.

A sealed building contract may be changed by a subsequent verbal agreement (Cooke *v.* Murphy, 70 Ill. 96; Munroe *v.* Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475), or by an unsealed agreement (Lawall *v.* Rader, 2 Grant (Pa.) 426).

Effect of subsequent change in character of work.—A contract to raise a building to the grade adopted in a certain ordinance within a specified time is not modified by a subsequent change in the grade so as to extend the time of performance. Clements *v.* Schuylkill River, etc., R. Co., 132 Pa. St. 445, 25 Wkly. Notes Cas. (Pa.) 383, 19 Atl. 274, 276.

84. Cornish *v.* Suydam, 99 Ala. 620, 13 So. 118; Jacksonville, etc., R. Co. *v.* Woodworth, 26 Fla. 368, 8 So. 177.

The legal competency of the parties to modify the contract is not limited, except as to the mode of modification, by provisions that the builder shall not claim for additional work unless done in pursuance of an order from the architects, and that notice of claims therefor shall be made to the architects in writing within a certain time. The legal effect of these stipulations is merely to prevent the builder from recovering for extras, by showing they were not included in the original contract but were necessary for completion of the building and were furnished by him. Michaud *v.* MacGregor, 61 Minn. 198, 63 N. W. 479.

Effect of subsequent agreement to do work contemplated by original contract.—Where, after making a contract to build upon the site of an old building, the builder agreed to remove the ruins of the old building preparatory to the erection of the new one, it was held that the preparatory work of clearing away the old building was necessarily contemplated by the parties when the contract was made, and that the subsequent agreement to do such work did not modify the contract by enlarging the time within which, by its terms, the new building was to be completed. Shute *v.* Hamilton, 3 Daly (N. Y.) 462.

85. Cornish *v.* Suydam, 99 Ala. 620, 13 So. 118. See also Young *v.* Jeffreys, 20 N. C. 294.

Modification must be assented to by both parties.—Where, upon completion of a house, the builder said he would make a deduction from the price if the mortar did not harden, and his employer did not accede to the proposition the builder was not bound by it. Demoss *v.* Noble, 6 Iowa 530.

There was no modification where a builder who contracted to work for a specified sum, without security, shortly after beginning work refused to continue unless security was furnished, and it being arranged that both employer and builder should deposit a certified check as security, and that a contract be executed to that effect, the builder immediately resumed the work, but, the employer subsequently refusing to sign the agreement or give security, the builder abandoned it, and the employer procured another to complete the work, at an advanced price. Klingman *v.* Quincy, 25 Misc. (N. Y.) 526, 54 N. Y. Suppl. 1003.

86. Howard *v.* Wilmington, etc., R. Co., 1 Gill (Md.) 311; Lawall *v.* Rader, 24 Pa. St. 283.

Question of modification or merger is one of fact.— Cook County *v.* Harms, 10 Ill. App. 24; Kugler *v.* Wiseman, 20 Ohio 361; Malone *v.* Philadelphia, etc., R. Co., 157 Pa. St. 430, 33 Wkly. Notes Cas. (Pa.) 373, 27 Atl. 756. See also Lilly *v.* Person, 168 Pa. St. 219, 36 Wkly. Notes Cas. (Pa.) 382, 32 Atl. 23.

87. Cornish *v.* Suydam, 99 Ala. 620, 13 So. 118.

88. A provision by which the builder agrees not to execute any extra work or make

3. NECESSITY AND SUFFICIENCY OF NEW CONSIDERATION. The modification of a building contract should be supported by a new consideration,[89] which must be sufficient.[90]

4. NATURE OF MODIFICATION. The modification may be with respect to the parties,[91] or the terms and conditions of the contract.[92]

5. EFFECT OF MODIFICATION. A partial modification leaves the contract subsisting as to other particulars.[93]

E. Rescission or Abandonment — 1. RIGHT AND GROUNDS OF. The rules allowing rescission or abandonment of contracts apply to building contracts the same as to other contracts.[94] Thus, it is optional with the builder to rescind the

any modifications or alterations in the work described in the specifications and plans unless ordered in writing by a named agent of the employer, or claim pay for extra work, modifications, or alterations unless such written order is produced is valid. Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356. See also Michaud *v.* MacGregor, 61 Minn. 198, 63 N. W. 479.

89. Barnard, etc., Mfg. Co. *v.* Galloway, 5 S. D. 205, 58 N. W. 565. See also Morrison *v.* Heath, 11 Vt. 610. But in Cornish *v.* Suydam, 99 Ala. 620, 13 So. 118, it was said that there was no necessity for any new consideration.

90. Tinker *v.* Geraghty, 1 E. D. Smith (N. Y.) 687.

Change of compensation may be a sufficient consideration, thus, where the builder claimed that he had made a mistake in the price named, and refused to go on and complete the contract, and thereupon his employer agreed to pay a sum in addition to the original contract price, and the builder completed the work, it was held that the new and supplemental agreement to pay an additional sum was not without consideration. Cooke *v.* Murphy, 70 Ill. 96. See also Osborne *v.* O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209. So where a builder, finding himself unable to perform without great loss owing to a rise in prices, informed his employer that he would not comply with the contract, and the employer directed him to go on and finish and he would pay him what was right for it, there was sufficient consideration to support the new agreement. Bishop *v.* Busse, 69 Ill. 403.

Doubtful liability of builder consideration for new contract.—Where a portion of a building fell before the whole building was finished and work was suspended because the builder and owner could not agree as to who was at fault, and subsequently one of the builders made a new contract to complete the structure, it was held that the question of doubtful liability was sufficient consideration for the new contract. Brodek *v.* Farnum, 11 Wash. 565, 40 Pac. 189.

91. Davelaar *v.* Rockwell, 35 Wis. 210, holding that the fact that the employer has contracted with one party for the erection of his building does not invalidate a contract for extra material made with a subcontractor of such party so as to prevent the subcontractor from recovering for such extra work and material.

92. McCormick *v.* Connoly, 2 Bay (S. C.) 401, holding that additions or alterations made in a contract to build a structure of specified size or dimensions form an express or implied new contract that does not affect the original contract, and that such additions and alterations must be paid for under the new contract if a sum is fixed for that purpose, but if not, then according to a just and true valuation. To the same effect are Boody *v.* Rutland, etc., R. Co., 3 Blatchf. (U. S.) 25, 3 Fed. Cas. No. 1,635, 24 Vt. 660; Gallaher *v.* District of Columbia, 19 Ct. Cl. 564.

93. Young *v.* Jeffreys, 20 N. C. 294 (where alterations were made in the building); Haynes *v.* Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413; American Ice Mach. Co. *v.* Paterson Steam Fire Engine, etc., Co., 22 N. J. Eq. 72 (wherein an extension of time was held not to affect other provisions of the contract).

94. See, generally, CONTRACTS. Thus where the contract stipulated that rock taken from a necessary excavation should become the property of the builder except such part as should be necessary for the support of and protection of the work, it was held that the fact that another person, through whose property a portion of the structure ran, would not permit the builder to sell rock removed from such portion did not entitle the builder to rescind the contract, as a right to sell the rock did not occur until the contract was completed. Becker *v.* Philadelphia, (Pa. 1889) 16 Atl. 625.

What constitutes abandonment by owner. — A contract provided that, upon failure of the builder to perform his contract in any particular and the architect should so specify, the employer might give the builder three days' notice to perform, and, on refusal, terminate the contract and, upon the architect giving a certificate that the work was not being done according to the contract, the owner notified the builder to remove the material and provide such material as the specifications call for and that he should terminate the contract; there was an abandonment of the contract by the owner. Charlton *v.* Scoville, 68 Hun (N. Y.) 348, 22 N. Y. Suppl. 883, 52 N. Y. St. 306.

Failure to finish work by the time stipulated is not a rescission by the builder. Aikin *v.* Bloodgood, 12 Ala. 221.

Abandonment of work, leaving it unfin-

contract where the employer prevents the builder from performing it,[95] or where there is a failure of the employer to pay in accordance with his contract,[96] unless the builder himself is in default;[97] so a builder is liable to have his contract terminished when the time for completion has elapsed, amounts to a rescission by the builder. Bertrand *v.* Byrd, 5 Ark. 651.

There is no rescission of the contract by the employer nor cause for rescission by the builder because the owner, on the builder's statement that his failure to prosecute the work was owing to his inability to get men, employs extra men himself. McGonigle *v.* Klein, 6 Colo. App. 306, 40 Pac. 465.

Where the builder agreed to complete within a certain time but the owner reserved the right to add to the building by a payment of a specified sum, it was held that the employer's election to add to the building did not operate as a rescission of the provision requiring the builder to complete within a specified time. Lauer *v.* Brown, 30 Barb. (N. Y.) 416.

A general assignment for the benefit of creditors does not amount to a rescission.— Vandegrift *v.* Cowles Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685.

95. Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640; Connelly *v.* Devoe, 37 Conn. 570; Powers *v.* Hogan, 6 N. Y. St. 239.

Right of builder after rescission by him.— A builder who exercises a right to rescind stipulated for in a contract which prohibits him from removing any building materials after they have been deposited in the place where he is building is not entitled to enter the premises for the purpose of removing the material after the date of rescission. Marsden *v.* Sambell, 43 L. T. Rep. N. S. 120, 28 Wkly. Rep. 952.

96. San Francisco Bridge Co. *v.* Dumbarton Land, etc., Co., 119 Cal. 272, 51 Pac. 335; Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635; Bean *v.* Miller, 69 Mo. 384; South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894. Where a contract provided that before any sum should be due for certain material furnished for a building the builder should furnish a certificate from the architect as to the quality and quantity of the material furnished but the builder without fault or waiver by the other party failed to furnish the certificate and made demand for more than was due which was refused but there was an offer to pay what was due there was no default in payment warranting an abandonment of the contract. Gallagher *v.* Baird, 54 N. Y. App. Div. 398, 66 N. Y. Suppl. 759 [*affirmed* in 170 N. Y. 566, 62 N. E. 1095].

Continuous and repeated defaults in payment justify abandonment by builder. Scheible *v.* Klein, 89 Mich. 376, 50 N. W. 857.

Where a builder has given bond for the faithful performance of his contract and his employer withholds any part of the compensation that is due and payable in order to pay subcontractors or the builder's employees the builder has a right to abandon the work. Dobbins *v.* Higgins, 78 Ill. 440.

Notwithstanding the contract provides that the work shall be steadily prosecuted without intermission until final completion, a failure to pay instalments at stated periods, as agreed, justifies an abandonment of the work by the builder. Bean *v.* Miller, 69 Mo. 384.

A refusal to pay a disputed balance will not justify a builder, who has agreed to accept as part payment a conveyance of two houses built by him under the contract, in refusing to take the houses and entitle him to recover the whole consideration for his work in money. Grunwald *v.* Hahn, 176 Pa. St. 37, 34 Atl. 972.

Where the building is to be paid for in instalments the builder cannot, unless payment is expressly made a condition precedent to a fulfilment of the contract on his part, abandon the contract on the non-payment of an instalment that is due, if he is not absolutely prohibited by some act or omission of the owner from completing the same. Christian County *v.* Overholt, 18 Ill. 223.

Right of rescission where disputed matter referred to arbitration.— Under a contract providing that no compensation shall be made for extra work, unless its price be agreed in advance, a builder performing extra work without an understanding as to price is not justified in abandoning the building, where the parties have referred the claim for extras to arbitration, until the filing of the arbitrator's report. Davis *v.* Ford, 81 Md. 333, 32 Atl. 280.

Where a method of ascertaining the builder's compensation for extra work is specified in the contract the builder cannot rescind it because he will not accept the valuation of such work. Gibbs *v.* Girardville School Dist., 195 Pa. St. 396, 46 Atl. 91.

97. Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635, in which case the builder was in default at the time an instalment was due.

A builder is not justified in an abandonment because the owner requires him to do certain work that he alleges was contracted for, unless the builder offers to perform his contract in accordance with his own understanding. Cochran *v.* Balfe, 12 Colo. App. 75, 54 Pac. 399.

Errors in plans as ground of rescission.— Under a contract providing that errors in plans shall be referred to the architect before the work is proceeded with, the builder's rescission of a contract on the ground that there were errors in the plans which made it impossible to erect the building according to the plans is not justified, unless he calls the architect's attention to the defects and asks for a correction. Gibbs *v.* Girardville School Dist., 195 Pa. St. 396, 46 Atl. 91.

nated where he has violated it in any material part,[98] as where he fails to complete in the time specified or in a reasonable time,[99] or where the material fur-

98. Kirkland *v.* Oates, 25 Ala. 465; George A. Fuller Co. *v.* Doyle, 87 Fed. 687.

Incapacity of the builder to do work properly under a contract, providing that the building is to be erected in the best, most substantial, and workmanlike manner, justifies the owner in terminating the contract, if he is authorized by the contract so to do in the event of the work not being done in accordance with its terms. Rector *v.* McDermott, (Ark. 1890) 13 S. W. 334.

An owner is justified in treating a contract as abandoned, where the builder sublets the work to one who became insolvent and abandons it, and the sureties of the subcontractor undertake to complete and also abandon the work, and the builder himself is insolvent and unable to complete. Watson *v.* De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

An instruction that if the conduct of a builder was such as to evince an intention to abandon the contract the owner would have the right to treat it as abandoned is erroneous, where there is evidence tending to show that the builder had entered upon and was engaged in performance of his contract at the time the owner took possession of the building and completed it. Kilgore *v.* Northwestern Texas Baptist Educational Assoc., 90 Tex. 139, 37 S. W. 598.

Under a provision that the employer may enter and complete the contract if the builder fail in any part of his undertaking a statement from the builder that unless a claim for extra work is allowed he will not proceed does not justify the employer in terminating the contract on disallowance of the claim, when he knows that the contractor is still prosecuting the work, and has told the employer's engineer that he would not quit till he had obtained legal advice and consulted with his bondsmen. Amsterdam *v.* Sullivan, 11 N. Y. App. Div. 472, 42 N. Y. Suppl. 358 [*affirmed* in 162 N. Y. 594, 57 N. E. 1123].

Unqualified refusal of a contractor to perform what he has undertaken justifies the owner in treating the contract as broken.—Thompson *v.* Laing, 8 Bosw. (N. Y.) 482.

Effect of refusal to pay instalment.—Where the contract stipulates that on failure of the builder to pay for labor and material the owner may refuse to pay certain instalments otherwise payable a refusal does not show an abandonment of the contract (Casey *v.* Gunn, 29 Mo. App. 14), nor does it show abandonment because the owner himself does work upon the refusal of the builder to complete. Rodemer *v.* Gonder, 9 Gill (Md.) 288.

Effect of builder's expulsion from work.—Where the employer was entitled to annul the contract upon giving the builder notice in writing, in which case the builder was to forfeit the unpaid value of the work done, and the employer without notice entered upon and expelled the builder from the work it was held that the owner by so doing annulled the contract. Rodemer *v.* Gonder, 9 Gill (Md.) 288.

Employer's power of rescission where work is to be done to his satisfaction.—Where the builder agrees to work to the "full satisfaction" of his employer, the contract is not subject to arbitrary rescission, but the builder's agreement means that the work must be done to the satisfaction of the employer and that the employer must not withhold his satisfaction unreasonably. Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197.

The fact that the architect has the power to accept or reject the work does not prevent the court from passing upon the justification of the owner in terminating the contract. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015.

It is a question of fact whether building work varies materially from the specifications, so as to authorize the owner to terminate the contract. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015.

A builder has no remedy for damages resulting from the owner's exercise of a right to annul the contract when not satisfied with the work. Harder *v.* Marion County, 97 Ind. 455.

99. Wyckoff *v.* Taylor, 13 N. Y. App. Div. 240, 43 N. Y. Suppl. 31, 4 N. Y. Annot. Cas. 102; Miller *v.* Phillips, 31 Pa. St. 218.

As to **time of performance** see *infra*, V, B, 5.

Where builder is for cause ordered to leave premises there is no rescission.—A builder claimed that an instalment was due on a certain day, but the architect pointed out work to be finished, and without demanding the instalment the builder stopped work because it was not paid, and so notified the owner. Five days later the builder, being drunk, went on the premises and threatened the architect; the owner ordered him off the place, and at once gave him notice to proceed with the work, as provided in the contract, in case the builder caused an unreasonable suspension of the work. It was held that the order to leave the premises was not a rescission by the owner. Fox *v.* Clark, 44 N. Y. App. Div. 626, 60 N. Y. Suppl. 237.

When power of determining agreement may be exercised.—Where it was agreed that if the builder was guilty of delay the owner might give notice of his intention to employ another to complete the work, and that at the expiration of the notice the agreement should be void and any amount already paid to the contractor be considered the full value of the work executed by him up to that time, it was held that the power of determination might be exercised before any payment had been made. Davies *v.* Swansea, 8 Exch. 808, 22 L. J. Exch. 297.

Under a contract providing for a forfeiture in event of non-completion by a specified day, and for alterations for which a reasonable valuation should be added to or deducted

nished by the builder is defective, unless the existence of the defect was known to the employer at the time the contract was made ;[1] and in one state, at any rate, the owner has a statutory right to cancel at pleasure the contract he has made for building, even in case the work has already been commenced.[2] The right to annul a contract for non-performance by the builder is lost, where the employer is in default by failure to estimate and pay for work done and material furnished by the builder.[3] Again misrepresentation and fraud practised upon either party may be a ground for rescission by the other, provided the fraudulent representation is respecting a matter material to the contract and one, in the absence of which the contract would not have been made ;[4] so, where the contract is entered into under a mistake as to a material matter, the party affected thereby may be relieved in equity from his obligation.[5] It is not, however, every partial neglect or refusal to comply with some of the terms of the contract by one party which will entitle the other to abandon at once the obligation entered into and by which the parties have made for themselves the law which is to control them.[6] Again the contract may be mutually rescinded or abandoned,[7] or may be implied

from the contract price, the contractors are not justified in abandoning the contract after the date fixed for completing the building, on account of disputes respecting the kind of work being done and materials used, and the alterations required, and because the owner refuses to release them from liability on the forfeiture clause. Hutton *v.* Gordon, 2 Misc. (N. Y.) 267, 23 N. Y. Suppl. 770.

Where an employer does not declare a contract forfeited but tacitly acquiesces in the builder's abandonment there is an abandonment by the act and acquiescence of both parties, and in such case the law will not imply a forfeiture. Satterlee *v.* U. S., 30 Ct. Cl. 31.

Where the employer annuls a building contract, he releases all claims to a forfeiture provided by the contract. Rodemer *v.* Gonder, 9 Gill (Md.) 288.

1. Scales *v.* Wiley, 68 Vt. 39, 33 Atl. 771.

2. Villalobos *v.* Mooney, 2 La. 331, in which case it was also said that, in the event of his so doing, he must pay the builder for the expense and labor already incurred and such damages as the nature of the case may require.

Whether a contract is annulled because the owners have sufficient cause therefor, or because the owners choose to avail themselves of the provisions of La. Rev. Civ. Code (1870), art. 2765, without reference to any cause, the builder should receive compensation for the value of his material and for his labor up to the date his contract is canceled. Monarch *v.* McDonogh School Fund, 49 La. Ann. 991, 22 So. 259.

3. O'Connor *v.* Henderson Bridge Co., 95 Ky. 633, 16 Ky. L. Rep. 244, 27 S. W. 251, 983.

Effect of rescission by owner upon builder's liability to forfeiture see *infra*, V, B.

4. A misrepresentation made by a builder as to his solvency is not ground for rescission of the contract where a bond with security has been exacted of the builder to secure against his failure or inability to perform his contract. Waco Tap R. Co. *v.* Shirley, 45 Tex. 355.

Evidence of fraudulent representation.— Proof of a custom that a builder should be notified in case there were any buildings to be removed by him, and that the builder was not notified as to such buildings is inadmissible in support of a defense in an action on a building contract that there had been a fraudulent representation to the builder (Brown *v.* Strimple, 21 Mo. App. 338) ; again evidence of the insolvency of a builder is irrelevant where suit is brought by an employer to rescind a contract against a builder from whom a bond with security was exacted (Waco Tap R. Co. *v.* Shirley, 45 Tex. 355).

A subcontractor induced to take a subcontract by a promise fraudulently made may abandon his contract on the contractor's failure to keep the promise. St. Louis, etc., Co. *v.* Burgess, 20 Tex. Civ. App. 527, 50 S. W. 486.

5. McCormack *v.* Lynch, 69 Mo. App. 524, in which case the employer sued the builder to recover damages for non-performance and the builder attempted to show that he had been mistaken as to the lot upon which the building was to be erected and that therefore there was no contract. The evidence, however, was not admitted on the ground that the mistake was that of the builder alone.

6. Selby *v.* Hutchinson, 9 Ill. 319, 333, holding that an employer was not entitled to rescind the contract because the builder was somewhat dilatory in doing his work and furnishing material and that "in order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure" of the builder must have been "a total one; the object of the contract must have been defeated, or rendered unattainable by his misconduct or default. For partial derelictions, and non-compliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself." To the same effect is West *v.* Suda, 69 Conn. 60, 36 Atl. 1015.

7. Kirkland *v.* Oates, 25 Ala. 465; Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

from the acts of the parties, as for example if, upon the site on which a building was to be erected under a written contract, the owner should direct the builder to erect a building entirely variant in character, shape, material, and style.[8]

2. MANNER OF EXERCISING RIGHT. The exercise of a right to rescind a building contract must be signified in an unqualified manner,[9] with proper notice to the party to be affected thereby,[10] and within a reasonable time,[11] or, at all events, not after the other party has gone to expense in the belief of the right of election not being exercised.[12]

3. WAIVER OR LOSS OF RIGHT. There is a waiver of the right to rescind a building contract where the contract is treated by either party as still in force.[13]

What constitutes assent.—Where the builder did the work required to earn the first instalment on a contract price for building which was paid to him, and in consequence of a dispute refused to go on with the contract and discontinued working, but afterward the owner gave the builder a statement agreeing to submit their mutual claims to an arbitrator and agreed with the builder that his execution of the statement should relieve him from further performing the contract, and both the employer and the builder signed the statement, it was held that the employer had accepted the abandonment (Scofield *v.* McGregor, 63 N. Y. 638); but where the owner notified the builder that he would, at the expiration of a certain time, himself complete the building if the builder did not, and the builder informed the owner that he would proceed as soon as he could obtain certain material, and afterward notified the owner that he could not secure the material but that he would send some men to finish the building if the owner could get the material elsewhere, it was held that there was no assent to an abandonment and that the builder was liable for the proper construction of the building (Washburn *v.* Dettinger, 76 Hun (N. Y.) 141, 27 N. Y. Suppl. 540, 57 N. Y. St. 320); again, where the builder entered upon the performance of his work, and while so engaged the employer gave him an unconditional direction to leave the work and do nothing more under the contract, whereupon the builder did leave, it was held there was no mutual relinquishment of the contract but that the employer had exercised a legal right to put an end to the contract leaving himself liable of course for all consequences resulting from such a breach of the contract upon his part (Derby *v.* Johnson, 21 Vt. 17). See also Kirkland *v.* Oates, 25 Ala. 465, in which case an entire contract for construction of a house was entered into, but the employer discharged the builder for a violation of the contract and told him to make out a bill for the work done, and that he would pay him, whereupon the builder abandoned the contract and presented the bill.

8. Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373, holding that an inference of abandonment could not be drawn from deviations from the original plan permitted by the contract to be made.

What amounts to mutual abandonment.—A subsequent parol change in a written building contract, with respect to its consideration, does not amount to an abandonment of the written contract (Cooke *v.* Murphy, 70 Ill. 96), nor is there an abandonment where the construction of the building is altered with the consent of the parties (Garver *v.* Daubenspeck, 22 Ind. 238).

9. Marsden *v.* Sambell, 43 L. T. Rep. N. S. 120, 28 Wkly. Rep. 952.

10. Where a contract provides that it may be annulled on notice in writing given by the engineer, a builder accepting an oral notice and abandoning the work cannot avoid the effect of the notice on the ground that it was not in writing. Kennedy *v.* U. S., 24 Ct. Cl. 122.

Service of notice on a builder according to the contract that the owner will complete the work does not of itself terminate the contract so as to relieve the builder from responsibility for proper execution of the work already done. Washburn *v.* Dettinger, 76 Hun (N. Y.) 141, 27 N. Y. Suppl. 540, 57 N. Y. St. 320.

11. Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 Ky. L. Rep. 146, 11 S. W. 18, 957; Linch *v.* Paris Lumber, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208; Marsden *v.* Sambell, 43 L. T. Rep. N. S. 120, 28 Wkly. Rep. 952.

Exercise of right where contract provides for rescission by owner.— Under a provision that on failure of the builder to comply with the contract the owner may, upon serving notice upon the builder of his intention so to do, either complete the contract himself at the expense of the contractor or entirely avoid the contract and bring suit for the damage, in which latter case all work done or material on the ground should become the property of the owner, and under a provision providing that any material condemned must be immediately removed from the building and grounds, and any work that may be condemned must immediately be made good, it would seem that whenever a cause for forfeiture should occur, it should then be promptly declared and proceeded with or the failure so to do considered an acquiescence and waiver of the right to forfeit for that part of the undertaking. Linch *v.* Paris Lumber, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208.

12. Marsden *v.* Sambell, 43 L. T. Rep. N. S. 120, 28 Wkly. Rep. 952.

13. A builder employed to build a certain number of houses waives a right to rescind *in toto*, on account of the employer's refusal to permit him to build some of the houses, if while negotiating with his employer he con-

So also a party to a building contract may waive his right to rescind the contract, when the right is not exercised by him promptly.[14]

III. RIGHTS, DUTIES, AND LIABILITIES OF ARCHITECT.

A. Rights — 1. Authority in General. The mere fact that a person is employed as an architect does not constitute such person a general agent of his employer, his powers as agent being limited by the contract entered into between them.[15] Thus, unless specially authorized, he is not entitled to change, alter, or modify the contract entered into by the builder and his employer;[16] nor has he

tinues to work after the refusal. Meyer *v.* Hallock, 2 Rob. (N. Y.) 284. So an owner waives a right to rescind on the ground of delay in performance, where he permits the builder to continue work after the expiration of the time limit (McIntire *v.* Barnes, 4 Colo. 285; Foster *v.* Worthington, 58 Vt. 65, 4 Atl. 565), and acceptance and payment for work done under the contract subsequent to the time when performance is due waives a contractual right of the owner to annul the contract, if he sees fit so to do, because the work is not progressing with sufficient speed or in a proper manner (Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 Ky. L. Rep. 146, 11 S. W. 18, 957).

14. Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 Ky. L. Rep. 146, 11 S. W. 18, 957; Linch *v.* Paris Lumber, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208; Marsden *v.* Sambell, 43 L. T. Rep. N. S. 120, 28 Wkly. Rep. 952.

Although the power of annulment at will is lost by a failure to exercise it within the time fixed, the right still exists to terminate it whenever the builder, in fact, fails or refuses to progress with sufficient speed or in a proper manner to complete the work within a reasonable time, provided the non-performance or delay is not caused by the owner contributing substantially to it. Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 Ky. L. Rep. 146, 11 S. W. 18, 957.

15. *Connecticut.*— Starkweather *v.* Goodman, 48 Conn. 101, 40 Am. Rep. 152.

Georgia.—Crockett *v.* Chattahoochee Brick Co., 95 Ga. 540, 21 S. E. 42.

Illinois.— Adlard *v.* Muldoon, 45 Ill. 193.

Maine.— Coombs *v.* Beede, 89 Me. 187, 36 Atl. 104, 56 Am. St. Rep. 406.

Massachusetts.— Leverone *v.* Arancio, 179 Mass. 439, 61 N. E. 45.

New York.— Weeks *v.* Trinity Church, 56 N. Y. App. Div. 195, 67 N. Y. Suppl. 670.

Wisconsin.— Dodge *v.* McDonnell, 14 Wis. 553.

As to agent's powers generally see Principal and Agent.

An architect cannot invite people into a building and thereby render his employer liable for any damages occurring to such persons by reason of defects in the building. Seward *v.* Draper, 112 Ga. 673, 37 S. E. 978.

Termination of agency by death.—Where the building is to be finished and completed to the satisfaction of a firm of architects, and one of the firm dies, but both the builder and the owner recognize the surviving member of the firm as architect, the case is taken out of the general rule that the death of one joint agent terminates the agency. Davidson *v.* Provost, 35 Ill. App. 126.

Architect as trustee of owner.—Where a contract is made in the name of the architect, for the benefit of the owner, the former is deemed the trustee of an express trust, and may bring an action on the contract in his own name, or for damages for breach thereof, without joining the owner. Faust *v.* Goodnow, 4 Colo. App. 352, 36 Pac. 71.

16. *California.*— Gray *v.* La Societe, etc., 131 Cal. 566, 63 Pac. 848.

Connecticut.— Starkweather *v.* Goodman, 48 Conn. 101, 40 Am. Rep. 152.

Georgia.— Mallard *v.* Moody, 105 Ga. 400, 31 S. E. 45.

Illinois.— Adlard *v.* Muldoon, 45 Ill. 193.

Kentucky.— Watts *v.* Metcalf, 23 Ky. L. Rep. 2189, 66 S. W. 824.

Missouri.— Lewis *v.* Slack, 27 Mo. App. 119.

New Jersey.—Bond *v.* Newark, 19 N. J. Eq. 376.

New York.—Glacius *v.* Black, 50 N. Y. 145, 10 Am. Rep. 449; Dillon *v.* Syracuse, 5 Silv. Supreme (N. Y.) 575, 9 N. Y. Suppl. 98, 29 N. Y. St. 912.

England.— Sharpe *v.* San Paulo R. Co., L. R. 8 Ch. 605 note, 27 L. T. Rep. N. S. 669 [*affirmed* in L. R. 8 Ch. 597, 29 L. T. Rep. N. S. 9].

Canada.— Mayes *v.* Reg., 23 Can. Supreme Ct. 454 [*affirming* 2 Exch. 403].

Authority must be exercised as provided.— An architect has no authority to extend the time for completion except as provided in the contract, and a verbal extension is of no effect where an extension in writing is provided for. Kelly *v.* Fejervary, (Iowa 1899) 78 N. W. 828.

As to extension of time see *infra*, V, B, 5.

An architect may dispense with requirements contained in specifications where the contract provides that in the event of any dispute arising as to the true construction or meaning of the drawings or specifications it shall be finally and conclusively decided by him. Duell *v.* McCraw, 86 Hun (N. Y.) 331, 33 N. Y. Suppl. 528, 67 N. Y. St. 163.

Provision for decision of disputes not authority to dispense with substantial performance.— An architect is not authorized, by a provision that he is to decide any dis-

any authority to bind the owner by contracts for any work done upon or materials furnished for the structures concerning which he is employed;[17] nor is he entitled to receive notice of an assignment of payments accruing on the contract so as to charge the owner with notice thereof.[18]

2. As to Compensation — a. For Drawing Plans — (i) *In General.* A person employed as an architect to furnish a plan is entitled to remuneration therefor,[19]

pute respecting the construction or meaning of the drawings or specifications, to dispense with the performance of any substantial part of the contract. Mallard *v.* Moody, 105 Ga. 400, 31 S. E. 45.

The architect cannot accept different class of work or inferior materials than those provided for by the plans and specifications. Adlard *v.* Muldoon, 45 Ill. 193; Glacius *v.* Black, 50 N. Y. 145, 10 Am. Rep. 449; U. S. *v.* Walsh, 115 Fed. 697. Thus, a provision that the plastering should be done with a named person's cement, under the direction of a superintendent of such person, followed by one that the cement and sand should be mixed in equal parts does not authorize the superintendent to direct a different mixture. Fitzgerald *v.* Moran, 141 N. Y. 419, 36 N. E. 508, 57 N. Y. St. 579 [*affirming* 19 N. Y. Suppl. 958, 47 N. Y. St. 379].

Cannot waive agreement by owner as to terms of payment.— Leverone *v.* Arancio, 179 Mass. 439, 61 N. E. 45.

Right to pay laborers and supervise contracts made by builder.— Unless authorized an architect cannot receive money from the owner and pay laborers, materialmen, and subcontractors, or supervise the letting of subcontracts and the employment of men. Lewis *v.* Slack, 27 Mo. App. 119.

17. *California.*— Gray *v.* La Societe, etc., 131 Cal. 566, 63 Pac. 848.

Illinois.— Campbell *v.* Day, 90 Ill. 363; Hill *v.* Lowden, 33 Ill. App. 196.

Kentucky.— Watts *v.* Metcalf, 23 Ky. L. Rep. 2189, 66 S. W. 824.

Massachusetts.—McIntosh *v.* Hastings, 156 Mass. 344, 31 N. E. 288.

New York.— Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39, 14 N. E. 832.

South Carolina.— Day *v.* Pickens County, 53 S. C. 46, 30 S. E. 681.

Wisconsin.— Dodge *v.* McDonnell, 14 Wis. 553.

If an inference of authority so to contract were permissible a man who has employed an architect to make plans and specifications for building and then engaged a builder who is to furnish materials might find himself bound by a contract entered into by the architect with another person to do the same work and furnish the same materials. Dodge *v.* McDonnell, 14 Wis. 553.

There is no inference that an architect is authorized to bind an owner for materials because the employer has placed money that will be due the contractor in the hands of the architect to be paid to materialmen upon an order of the contractor. Dodge *v.* McDonnell, 14 Wis. 553.

Implied authority to determine what are extras.—A provision that all extras or additions should be paid for at the price fixed by a surveyor impliedly authorizes him to determine what are extras under the contract. Richards *v.* May, 10 Q. B. D. 400, 52 L. J. Q. B. 272, 31 Wkly. Rep. 708.

Ratification by owner.—Where the architect purchases materials on the credit of the owner with the latter's knowledge and consent, the owner will be deemed to have ratified the transaction and be liable (Crockett *v.* Chattahoochee Brick Co., 95 Ga. 540, 21 S. E. 42), and there is evidence of authority in an architect to order work more expensive than contracted for where the order is given with the knowledge of the employer (Wallis *v.* Robinson, 3 F. & F. 307), and, to show the architect's authority, testimony is admissible that the owner told a person who applied to him for certain work that he must "see the architect," because if the testimony shows recognition of the architect's authority, it is of his authority in the matter in dispute (American Encaustic Tiling Co. *v.* Reich, 12 N. Y. Suppl. 927, 35 N. Y. St. 579); but an acceptance of the work after its completion does not ratify a contract for work entered into by a supervising engineer unless the employer has knowledge of such agreement (Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39, 14 N. E. 832).

18. Renton *v.* Monnier, 77 Cal. 449, 19 Pac. 820, holding that a provision for the signing and issuing of certificates that work has been done to the approval and full satisfaction of an architect, and for the decision of disputes arising as to construction or meaning of drawings or specifications does not authorize the architect so to do.

19. Maas *v.* Hernandez, 48 La. Ann. 264, 19 So. 269; Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974; Smithmeyer *v.* U. S., 25 Ct. Cl. 481 [*affirmed* in 147 U. S. 342, 13 S. Ct. 321, 37 L. ed. 196].

The right to remuneration is not affected because subsequently the architect becomes a contractor for the construction of the building. Maas *v.* Hernandez, 48 La. Ann. 264, 19 So. 269.

Although maps made by an engineer may be incorrect, yet he is entitled to a remuneration for journeys made respecting them. Taylor *v.* Higgins, 1 L. J. K. B. O. S. 19.

Time of payment of compensation.—Where an architect made a written offer to prepare plans and specifications and to supervise building for a percentum on total cost of the work, with "payments to be made on monthly estimates," and there was an acceptance in writing conditioned "upon the agreement terminating in twenty-four months," it was held that the time of payment was fixed by the contract as being every month. Davis *v.*

if made in accordance with the directions of the owner;[20] but he cannot recover, where the owner stipulates that the plan should be for a building not to cost over a specified amount, if the plans made are for a building exceeding that sum.[21]

(II) *Necessity of Delivery and Acceptance.* In order to entitle the architect to compensation for drawing plans there must be a delivery or tender of the plans prepared,[22] but an acceptance of the plan is not necessary,[23] unless

New York Steam Co., 33 N. Y. App. Div. 401, 54 N. Y. Suppl. 78.

Necessity for taking out patent or copyright.— An architect who prepares a design for one about to erect a building is entitled to be paid for it without being obliged to have it patented or copyrighted. Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974.

When plans recoverable for as extras.— Where an architect agreed in writing to make plans and specifications for a building and superintend the construction for a stipulated price, but after accepting the plans and specifications made, defendant abandoned the idea of erecting the building in accordance therewith, and ordered plaintiff to make new plans for an entirely different structure, which plaintiff did, it was held that the latter set were recoverable for as extras. Fitzgerald *v.* Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824.

Right of builder to charge for plan.— Where a contract to build for a fixed amount according to certain specifications is entered into between an owner and a builder and a plan is annexed to the specifications by the builder as explanatory thereof, no charge in the absence of an agreement to that effect can be made for services in preparation of the plan, since the builder appears in the transaction as a contractor and not as an architect. Maas *v.* Hernandez, 48 La. Ann. 264, 19 So. 269.

Necessity of contract.—Where an architect prepared plans for the construction of the congressional library building, and there was no contract entered into with him by any one empowered to adopt plans or employ an architect, or to enter upon the construction of the building, until the act of congress of April 15, 1886, c. 50 (24 Stat. at L. 12), which adopted the architect's plans, it was held that the act did not constitute a contract, but only declared the intention of the legislature, and might have been rescinded at any subsequent time before the architect entered upon the performance of the work without either party becoming liable to the other. Smithmeyer *v.* U. S., 147 U. S. 342, 13 S. Ct. 321, 37 L. ed. 196 [*affirming* 25 Ct. Cl. 481].

20. Smith *v.* Dickey, 74 Tex. 61, 11 S. W. 1049.

Fraudulent representations made by an architect in order to have plans adopted justify rescission of the contract by an employer who adopted the plans on faith of the representations. Hall *v.* Los Angeles County, 74 Cal. 502, 16 Pac. 313.

Abandonment of owner's intention to build does not affect architect's right to compensation.—An architect, employed to prepare plans for a building to cost a specified amount, which are accepted and acted upon by the owner until he finds that the cost will be so much greater than originally contemplated, whereupon he gives up the idea of building, is entitled to recover his commissions. Hutchinson *v.* Conway, 34 Nova Scotia 554.

As to owner's acting upon plans being sufficient delivery see *infra*, III, A, 2, a, (II).

21. *Georgia.*— Feltham *v.* Sharp, 99 Ga. 260, 25 S. E. 619.

Illinois.— Ada St. M. E. Church *v.* Garnsey, 66 Ill. 132.

Maine.— Coombs *v.* Beede, 89 Me. 187, 36 Atl. 104, 56 Am. St. Rep. 406.

Missouri.—Maack *v.* Schneider, 57 Mo. App. 431.

Texas.— Smith *v.* Dickey, 74 Tex. 61, 11 S. W. 1049; Emerson *v.* Kneezell, (Tex. Civ. App. 1900) 62 S. W. 551.

Reasonable approximation to sum stated sufficient.—Where the cost is to be about a specified sum, a reasonable compliance with that sum is sufficient. Smith *v.* Dickey, 74 Tex. 61, 11 S. W. 1049. See also Feltham *v.* Sharp, 99 Ga. 260, 25 S. E. 619.

Reduction of cost to stipulated amount sufficient.—An architect, who, under a contract for plans and specifications for a building to cost ten thousand dollars, furnishes plans for a building that would cost sixteen thousand dollars but proposes certain reductions, making the plans apply to a building that would not cost over ten thousand, has complied with his contract. Marquis *v.* Lauretson, 76 Iowa 23, 40 N. W. 73.

22. Kutts *v.* Pelby, 20 Pick. (Mass.) 65; Wandelt *v.* Cohen, 15 Misc. (N. Y.) 90, 36 N. Y. Suppl. 811, 71 N. Y. St. 834; Resther *v.* Frères des Ecoles Chrétiennes, 34 L. C. Jur. 89.

Sufficiency of delivery.—Where an architect draws plans at the request of an owner who sends for them and has them estimated upon, but concludes not to build by them, there is sufficient delivery. Kutts *v.* Pelby, 20 Pick. (Mass.) 65.

Blue prints furnished by an architect, instead of the original drawings prepared by him, are "plans," within the meaning of a contract requiring him to furnish the plans for a building, and entitle him to compensation therefor. Lincoln School Dist. *v.* Fiske, 61 Nebr. 3, 84 N. W. 401.

23. Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974.

What amounts to acceptance.—Where

there is an express or implied agreement otherwise, as in the case of plans submitted in competition with the plans of other architects.[24]

b. For Superintendence. An architect employed to superintend erection of a building is not entitled to compensation if he does not perform his contract or offer so to do;[25] so an architect is not entitled to compensation in the absence of a contract therefor and is not in fact employed as superintendent;[26] nor can a building contractor who acts as his own superintendent recover for additional compensation as such superintendent under an implied contract.[27]

c. Amount of Remuneration. The allowance of a commission on the cost of building is a usual, fair, and reasonable method of remuneration.[28]

building is actually commenced according to plans made for its construction, the plans are so far accepted as to authorize a recovery therefor. Fitzgerald *v.* Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824; Smithmeyer *v.* U. S., 25 Ct. Cl. 481 [*affirmed* in 147 U. S. 342, 13 S. Ct. 321, 37 L. ed. 196]. So when architects were invited to submit plans for a building not to exceed a certain sum and all plans were rejected except those of plaintiff but his plan was not in accordance with the conditions, it was held that he could recover on a *quantum meruit*. Hopkins *v.* Thompson, 3 L. C. L. J. 36.

Conditional acceptance.—Where plans are accepted on condition that a bid by a reliable person is received on the basis of the plans, the architect may recover in the event of such bids being received. Acceptance of such bids is unnecessary. Hall *v.* Los Angeles County, 74 Cal. 502, 16 Pac. 313.

24. An architect offering plans in competition for a building about to be erected, on condition that all plans sent in will be submitted to disinterested experts before a choice is made and the plans are not submitted to experts, cannot recover since the person to whom the plans were offered is not bound to adopt the plans which might be recommended by the experts. Walbank *v.* Protestant Insane Hospital, 7 Montreal Q. B. 166. So, where an advertisement stated that plans offered would be submitted to a committee of architects who would select the best six plans but before a decision the erection of the building for which the plans were destined was abandoned, it was held that in the absence of evidence that plaintiff's plans were among the best six selected, plaintiff had no cause of action. Audsley *v.* New York, 74 Fed. 274, 38 U. S. App. 689, 20 C. C. A. 426. Again, where an architect, learning that a person was about to build, solicited from such person the superintendence as an architect of the building intended and made a sketch for such a house as the intending builder described and left the sketch with such person, after which it was returned to the architect, never having been used, it was held that the architect could not recover for the sketch. Allen *v.* Bowman, 7 Mo. App. 29.

25. Wehrli *v.* Rehwoldt, 107 Ill. 60, where the architect was present when the work was let out and in a position to have known when building was to be commenced.

26. Where an association invited architects to submit designs for a building, and the designer of the design selected as the best of all was to be engaged as architect and superintendent, and the association selected as best a particular design with the understanding that it should be modified so as not to exceed a certain amount but the designer's plan was for a building to exceed such an amount and another architect was selected who made new plans, it was held that the selection of the design was conditional only, and did not entitle the author to be employed as architect of the building. Walsh *v.* St. Louis Exposition, etc., Assoc., 101 Mo. 534, 14 S. W. 722. But see *contra*, Walsh *v.* St. Louis Exposition, etc., Assoc., 90 Mo. 459, 2 S. W. 842 [*affirming* 16 Mo. App. 502].

Where an architect's contract contemplated the supervision of the construction of an entire building, including certain interior decorations, but before their completion the architect was notified by the owner to cease work on the interior decorations, the architect cannot recover for work done on such decorations after the notice when the work is not done at the owner's request. De Prosse *v.* Royal Eagle Distilleries Co., 135 Cal. 408, 67 Pac. 502.

27. Friedland *v.* McNeil, 33 Mich. 40, holding that the duties of a building superintendent are such that it would be improper that he should be appointed or controlled by the contractor.

As to good faith required of architect see *infra*, III, B, 1.

28. Footner *v.* Joseph, 5 L. C. Jur. 225, 11 L. C. Rep. 94, 7 Quebec Q. B. 478.

Percentage upon actual cost.—Where a contract provided that the architect should draw plans and specifications for a building not exceeding in cost a certain amount, and should make changes and furnish new plans without additional expense in case the bids for building should exceed such amount, or the employers for any reason required new or changed plans, and that as compensation the architect should receive a percentage of the total cost of the completed building, it was held that where changes and additions were ordered to such an extent that the total cost of the building exceeded the specified amount the architect was entitled to the specified percentage of the actual cost. Weatherhogg *v.* Jaspar County, (Ind. 1902) 62 N. E. 477.

Actual cost of construction to termination of employment no limit to amount of recovery. — The actual cost of construction as far as building has proceeded at the time an archi-

3. As to License. In one state, at any rate, architects are required to be licensed after being examined, though examination is not necessary, where it appears that the applicant for a license was practising the profession of architecture on a specified date.[29]

4. As to Plans. An architect has no right to the ownership of a plan furnished to, accepted by, and paid for by another;[30] but as between the architect and builder there is said to be a universal custom that the builder has a right to use and possess plans whilst the building is in course of construction, though the plans remain the property of the architect.[31]

tect's employment is terminated does not limit the amount of his recovery under a contract to furnish all necessary general drawings, specifications, and details for the construction of a building on a specified commission on the total cost of construction. Havens *v.* Donahue, 111 Cal. 297, 43 Pac. 962.

A percentage upon estimated costs means upon reasonable cost of buildings erected in accordance with the plans and specifications referred to, and not necessarily the amount of some actual estimate agreed upon by the parties, or an estimate or bid accepted by the person for whom the plans were made. Lambert *v.* Sanford, 55 Conn. 437, 12 Atl. 519.

Recovery of conditional compensation.—An architect who agrees with a landowner to lay out his land for building purposes and to make all the requisite plans, on condition not to charge for such services, but that, in the event of the land being disposed of for building purposes, he shall be appointed the architect on the landowner's behalf, and that parties building on the land should pay him a percentage on the outlay, provided they did not employ him as their architect, but that the landowner might dispense with his services at any time on remunerating him for his time or trouble in making the preparations, is not entitled to recover where the land is not disposed of for building purposes, as the contract does not compel the landowner to dispose of the land for building purposes only. Moffatt *v.* Laurie, 15 C. B. 583, 24 L. J. C. P. 56, 1 Jur. N. S. 283, 3 Wkly. Rep. 252, 80 E. C. L. 583.

Right to schedule compensation established by institute.—An architect employed to prepare plans and estimates, who does not intimate the price he expects, is not entitled to demand the compensation fixed by the schedule of prices established by an institute of engineers, at any rate in a place other than that where such compensation is recognized as the proper rate (Mason *v.* U. S., 4 Ct. Cl. 495), and knowledge by the employer of a custom of architects to charge a certain percentage on the cost of a building will not be presumed (Packer *v.* Pentecost, 50 Ill. App. 228).

Compensation of supervising architect of the treasury.—A supervising architect of the treasury receiving a salary is precluded, by force of U. S. Rev. Stat. §§ 1763–1765, from recovering extra compensation, not expressly authorized by law, for professional services rendered to the government outside the scope of his official duty. Mullett *v.* U. S., 150 U. S. 566, 13 S. Ct. 190, 37 L. ed. 1184.

29. Illinois State Bd. of Examiners *v.* People, 93 Ill. App. 436, in which case it was held that a mandamus would not lie to compel the board to issue a license to practise architecture in the absence or abuse of discretion.

As to when mandamus lies generally see MANDAMUS.

30. Windrum *v.* Philadelphia, 9 Phila. (Pa.) 550, 29 Leg. Int. (Pa.) 84, holding that where an architect furnishes a plan in pursuance of an advertisement offering a premium for the best plan for a certain building, and receives the premium offered for the accepted plan, the plan as well as the idea becomes the property of the person paying the premium.

Tender of premium sufficient to destroy architect's right to plan.—Where architects are invited to submit designs for a building in competition for an award, an architect to whom the award is tendered loses his right to the plans, and the person making the tender is entitled to use the plans. Walsh *v.* St. Louis Exposition, etc., Assoc., 101 Mo. 534, 14 S. W. 722.

There is no intrinsic property in an architect's design unless patented or copyrighted, and though, if lost or stolen, a court of equity may possibly enjoin a use of such design by one not entitled to it, yet an architect who voluntarily makes an unrestricted surrender of a design loses all right of property in it, and when it is tendered to a party for inspection then, by a usage which cannot be questioned, it is mutually understood to be a tender of the services which produced the plans and which are embodied in them. Smithmeyer *v.* U. S., 25 Ct. Cl. 481 [*affirmed* in 147 U. S. 342, 13 S. Ct. 321, 37 L. ed. 196].

A custom with architects to retain plans accepted by and paid for by one who has offered a premium for the best plan for a building, unless the architect is employed in the erection of the building, binds no one but architects. Windrim *v.* Philadelphia, 9 Phila. (Pa.) 550, 29 Leg. Int. (Pa.) 84. See also Tilley *v.* Chicago, 103 U. S. 155, 26 L. ed. 374.

Presumption that plans a part of contract belong to employer.—Plans forming an essential part of a building contract, unless proved to be the property of the architect, are deemed that of the employer. Moffatt *v.* Scott, 8 L. C. Jur. 310.

31. Lunsford *v.* Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37, wherein it was held that such right of the builder vested in

B. Duties and Liabilities — **1. In General.** The architect must act in good faith toward his employer and the builder,[32] and cannot, at the same time, be employed by the owner and the builder and receive pay from both.[33]

2. Performance of Work — **a. In General.** The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; accordingly he must exercise in any given case his skill and ability, his judgment and his taste reasonably and without neglect,[34] but it is not necessary for him to give more than ordinary care and attention, or so closely to superintend a builder's work as to discover variations from the contract and defects in execution that can only be detected by the exercise of extraordinary diligence,[35] nor does the undertaking imply or guarantee a perfect plan or a satisfactory result,[36] it being con-

him a special property in plans that would enable him, before completion of the building being constructed in accordance with such plans, to maintain trespass against an architect taking the plans from him without his consent, or that would, if the plans were clandestinely taken by the architect with felonious intent to convert them to his own use or to deprive the builder of them, render the architect liable to prosecution for larceny.

As to the constituents of larceny see, generally, LARCENY.

As to when trespass lies see, generally, TRESPASS.

32. Badger *v.* Kerber, 61 Ill. 328.

33. Tahrland *v.* Rodier, 16 L. C. Rep. 473, holding that the owner is discharged where it appears that the architect covenanted with the builder to receive pay from him. See also Poitras *v.* Deslauriers, 4 Rev. Lég. 375.

Validity of architect's contract with builder when made with knowledge of owner. — A special contract of the architect with the building contractors and in his favor, and attached to the original building contract, and recorded in the recorder's office, is presumed to have been made with the knowledge of the owner of the building and, in the absence of actual fraud or deception, neither of such contracts is void. Orlandi *v.* Gray, 125 Cal. 372, 58 Pac. 15.

Employment by the builder is not presumed because the builder went to the architect to see the plans or to borrow them. Poitras *v.* Deslauriers, 4 Rev. Lég. 375.

34. Coombs *v.* Beede, 89 Me. 187, 36 Atl. 104, 56 Am. St. Rep. 406; Hubert *v.* Aitken, 15 Daly (N. Y.) 237, 2 N. Y. Suppl. 711, 5 N. Y. Suppl. 839, 19 N. Y. St. 914; Moneypenny *v.* Hartland, 1 C. & P. 352, 12 E. C. L. 211.

An architect covenants not only that he is possessed of the requisite skill but that the skill shall be exercised in the work which he has undertaken. Johnson *v.* Wanamaker, 17 Pa. Super. Ct. 301.

Responsibility of architect is analogous to that of lawyer or physician.— Coombs *v.* Beede, 89 Me. 187, 36 Atl. 104, 56 Am. St. Rep. 406.

Acceptance of a building, without objection, does not waive defects patent to an architect, though latent to one not an architect. Shipman *v.* State, 43 Wis. 381.

Responsibility for defects where plans are made by another.— An architect is responsible for defects in a building erected by him, though the plans were made by another architect before he assumed charge. Scott *v.* Christ Church Cathedral, 1 L. C. L. J. 63.

35. Stewart *v.* Boehme, 53 Ill. App. 463; Vigeant *v.* Scully, 20 Ill. App. 437; Petersen *v.* Rawson, 34 N. Y. 370 [*reversing* 2 Bosw. (N. Y.) 234].

Failure to fasten joists.— A failure to discover that a contractor, in placing the roof on a porch, omitted to fasten the mortised joints with pegs does not render an architect liable for damages. Stewart *v.* Boehme, 53 Ill. App. 463.

An instruction that the duty of making a special inspection of work, before issuing a certificate that the work was properly done and in accordance with the plans and specifications, devolved upon the architect is erroneous, where the contract does not require the architect to inspect work in any special manner. Vigeant *v.* Scully, 20 Ill. App. 437.

It may be doubted whether an architect is liable for incidental failures in detail of foresight or of oversight that may be consistent with proper architectural skill and reasonable diligence. Shipman *v.* State, 43 Wis. 381.

Skilled architect using best judgment not liable for defects.—Where an architect possesses the knowledge and experience of those ordinarily skilled in the business, and uses his best judgment, he is not liable for faults in construction resulting from defects in the plans. Chapel *v.* Clark, 117 Mich. 638, 76 N. W. 62, 72 Am. St. Rep. 587.

Liability for excess in cost.—An architect who merely gives a price for building figured upon the estimated cost of the building is not liable for excess in the actual cost of building. Bodine *v.* Andrews, 47 N. Y. App. Div. 495, 62 N. Y. Suppl. 385.

36. Coombs *v.* Beede, 89 Me. 187, 36 Atl. 104, 56 Am. St. Rep. 406; Shipman *v.* State, 43 Wis. 381.

No implied warranty that building can be built from plans.—An architect or engineer who prepares plans and specifications does not thereby enter into any implied warranty that the work can be successfully executed according to such plans and specifications; accordingly a builder who has con-

sidered enough that the architect himself is not the cause of any failure, and there is no implied promise that miscalculations may not occur.[37]

b. Preparation of Specifications. It is not usual for architects to prepare specifications of the exact quantities of work to be performed, but, where specifications are prepared, they should be in detail, to enable parties to judge not only of the gross quantities but also of the quantity of labor to be employed.[38]

c. As to Rejection of Work. Where it is the duty of the architect under the contract to inspect the material and construction as operations progress, and he is authorized to reject any material or construction not deemed by him to conform to the contract, the power of rejection for defects discoverable by ordinary care must be exercised promptly or the defects will be considered waived.[39]

d. As to Certificate, Decision, or Estimate — (i) *Necessity and Manner of Giving Certificate, Decision, or Estimate.* Where payment of the builder is dependent upon a certificate, decision, or estimate of the architect or engineer, it is the duty of the latter to give the certificate, upon being satisfied that the builder is entitled thereto,[40] and must exercise his power of withholding a certificate with reasonable discretion and not capriciously,[41] and is only justified in

tracted for the work cannot sustain an action for damages against the owner as upon a warranty, should it turn out that he cannot execute it according to the plans and specifications. Thorn *v.* London, 1 App. Cas. 120, 45 L. J. Exch. 487, 34 L. T. Rep. N. S. 545, 24 Wkly. Rep. 932.

No liability for failure of recommended material.—An architect who recommends the use for a special purpose of a material largely and successfully used in other buildings for similar purposes is not liable if the material fails to be effective. Stewart *v.* Boehme, 53 Ill. App. 463.

37. Coombs *v.* Beede, 89 Me. 187, 36 Atl. 104, 56 Am. St. Rep. 406.

Liability for unfit soil.—An architect who has undertaken to erect a house by the job is answerable in the event of the work falling to ruin, in whole or in part, on account of the badness of his materials or work, but he is not liable for unfitness of soil or for the refusal of the owner to have excavations in the soil properly prepared for the building. Powell *v.* Markham, 18 La. Ann. 581. But it is the duty of an architect to cause a foundation to be sufficiently deep, or otherwise protected in order to prevent settling, which would cause the wall to crack. Schreiner *v.* Miller, 67 Iowa 91, 24 N. W. 738, 56 Am. Rep. 339.

38. Kemp *v.* Rose, 1 Giff. 258, 4 Jur. N. S. 919.

Accuracy of bill of quantities.—Mere employment of an architect to prepare plans and specifications and to procure a builder does not render the employer responsible for the accuracy of the bill of quantities given by the architect to the builder. Scrivener *v.* Pask, 18 C. B. N. S. 785, 114 E. C. L. 785 [*affirmed* in L. R. 1 C. P. 714].

39. Ashland Lime, etc., Co. *v.* Shores, 105 Wis. 122, 81 N. W. 136.

40. *Illinois.*— Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384; Badger *v.* Kerber, 61 Ill. 328; Frost *v.* Rand, 51 Ill. App. 276.

Iowa.— Crawford *v.* Wolf, 29 Iowa 567.

New Jersey.— Bradner *v.* Roffsell, 57 N. J. L. 32, 29 Atl. 317.

New York.— Nolan *v.* Whitney, 88 N. Y. 648; Thomas *v.* Fleury, 26 N. Y. 26; Van Keuren *v.* Miller, 71 Hun (N. Y.) 68, 24 N. Y. Suppl. 580, 54 N. Y. St. 229; Doyle *v.* Halpin, 33 N. Y. Super. Ct. 352; Beinhauer *v.* Gleason, 15 N. Y. St. 227.

South Carolina.— Sullivan *v.* Byrne, 10 S. C. 122.

Texas.— Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

Washington.—Washington Bridge Co. *v.* Land, etc., Imp. Co., 12 Wash. 272, 40 Pac. 982.

Wisconsin.— Wendt *v.* Vogel, 87 Wis. 462, 58 N. W. 764; Bentley *v.* Davidson, 74 Wis. 420, 43 N. W. 139.

See 11 Cent. Dig. tit. "Contracts," § 1290 *et seq.*

There is a covenant on the part of the owner that an engineer shall make a certificate of damage, where it is agreed that, in the event of the builder being prevented by his employer from performing his contract, any pecuniary damage sustained by him by reason thereof shall be certified by the employer's engineer, and, on the certificate, which shall be final and conclusive, the employer shall make to the builder such reasonable compensation as the certificate may fix. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 233.

41. Badger *v.* Kerber, 61 Ill. 328.

The parties have a right to the independent and honest judgment of the umpire with respect to the matters submitted to him, and an arbitrary refusal to determine the fact, or to accept performance, where the work has been in good faith performed, constitutes a fraud in law, availing to dispense with the necessity for his judgment as a condition precedent to the right of recovery by the contractor for the work done. Crane Elevator Co. *v.* Clark, 80 Fed. 705, 53 U. S. App. 257, 26 C. C. A. 100.

To constitute an unreasonable withholding

refusing where there is a real and substantial failure on the part of the builder to fulfil his duty under the contract,[42] the fact that the employer prevented the architect from giving the certificate not being justification.[43] Should the architect unreasonably or fraudulently refuse to issue a certificate or give a decision or estimate, the builder is relieved from the necessity of showing that the certificate, decision, or estimate was procured.[44]

of a certificate there must be not only an absolute compliance with the specifications on the part of the builder but also it must appear that the architect could not, with any fair degree of reason, have any doubt that the payment was "properly due." Fox *v.* Clark, 44 N. Y. App. Div. 626, 60 N. Y. Suppl. 237. Thus where the builder has complied with his contract it is unreasonable to refuse a certificate upon which payment depends (MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. 661 [*reversing* 31 N. Y. App. Div. 232, 52 N. Y. Suppl. 747]; Crouch *v.* Gutmann, 134 N. Y. 45, 31 N. E. 271, 45 N. Y. St. 470, 30 Am. St. Rep. 608; Nolan *v.* Whitney, 88 N. Y. 648; Terra Cotta Co. *v.* Sharp, 7 Pa. Dist. 544), even if the architect has certified that the contract has been performed (Murdock *v.* Jones, 3 N. Y. App. Div. 221, 38 N. Y. Suppl. 461, 73 N. Y. St. 617.

It is a question of fact whether the architect exercised an independent judgment as to the performance of the contract or arbitrarily refused his approval. Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142; Crane Elevator Co. *v.* Clark, 80 Fed. 705, 53 U. S. App. 257, 26 C. C. A. 100. But where it appears that the builder paid the architect for making the inspection on which he gave a final certificate the question of the good faith of the architect in giving the certificate should not be submitted to the jury. Haunroth *v.* Peters, 50 Ill. App. 366.

The burden of proving that an architect or engineer acted unreasonably, arbitrarily, or fraudulently in rejecting work is on the builder. Brownell Imp. Co. *v.* Critchfield, 197 Ill. 61, 64 N. E. 332 [*affirming* 96 Ill. App. 84].

Impropriety of refusal where work nearly completed cannot be immediately finished.— A certificate cannot be withheld where the contract is nearly completed, but it is impossible to finish the work at the time the certificate is asked for, because of circumstances over which the builder has no control. Washington Bridge Co. *v.* Everett Land, etc., Imp. Co., 12 Wash. 272, 40 Pac. 982.

42. Weeks *v.* O'Brien, 59 N. Y. Super. Ct. 28, 12 N. Y. Suppl. 720, 35 N. Y. St. 463; Doyle *v.* Halpin, 33 N. Y. Super. Ct. 352; Highton *v.* Dessau, 19 N. Y. Suppl. 395, 46 N. Y. St. 922; Sullivan *v.* Byrne, 10 S. C. 122; Washington Bridge Co. *v.* Land, etc., Imp. Co., 12 Wash. 272, 40 Pac. 982.

Amount and value of work to be considered.—Where a contract provides that no payment shall be made except on the written certificate of the architect stating that he considers the payment properly due, regard must be had, in making such certificate, to the amount and value of the work remaining to be performed. Kelley *v.* Syracuse, 10 Misc. (N. Y.) 306, 31 N. Y. Suppl. 283, 63 N. Y. St. 534.

The refusal of an architect to give a certificate of performance must be based on and supported by some real and substantial failure on the part of the builder to fulfil his duties under the contract, and such failure should be pointed out and protested against by the architect, and it must appear that the work was not performed as provided in the contract, and that the builder was not really entitled to the certificate. Doyle *v.* Halpin, 33 N. Y. Super. Ct. 352.

Withholding final certificate.—Where certificates from time to time had been given by the architect, and the contractor received payments on account, but the final certificate was withheld because part of the work had not been done in a "sound and workmanlike manner," as agreed, it was held that on proof of the "unsound and unworkmanlike manner of the buildings" the withholding of the final certificate was not a fraud upon the builder. Cooper *v.* Uttoxeter Burial Bd., 11 L. T. Rep. N. S. 565.

43. St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638 [*affirming* 48 Ill. App. 496]; Beinhauer *v.* Gleason, 15 N. Y. St. 227; Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

44. *Illinois.*— Foster *v.* McKeown, 192 Ill. 339, 61 N. E. 514 [*affirming* 85 Ill. App. 449]; St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 38 N. E. 638 [*affirming* 48 Ill. App. 496]; Arnold *v.* Bournique, 144 Ill. 132, 33 N. E. 530, 36 Am. St. Rep. 419, 20 L. R. A. 493 [*reversing* 44 Ill. App. 199]; Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384; Frost *v.* Rand, 51 Ill. App. 276.

New Jersey.— Bradner *v.* Roffsell, 57 N. J. L. 32, 29 Atl. 317.

New York.— Nolan *v.* Whitney, 88 N. Y. 648; Thomas *v.* Fleury, 26 N. Y. 26; Van Keuren *v.* Miller, 71 Hun (N. Y.) 68, 24 N. Y. Suppl. 580, 54 N. Y. St. 229; Doyle *v.* Halpin, 33 N. Y. Super. Ct. 352; Highton *v.* Dessau, 19 N. Y. Suppl. 395, 46 N. Y. St. 922; Beinhauer *v.* Gleason, 15 N. Y. St. 227.

South Carolina.— Sullivan *v.* Byrne, 10 S. C. 122.

Texas.— Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

Wisconsin.— Bentley *v.* Davidson, 74 Wis. 420, 43 N. W. 139.

See 11 Cent. Dig. tit. "Contracts," § 1310.

The question whether a certificate was unreasonably withheld is one of fact.— Gibbons *v.* Russell, 13 N. Y. Suppl. 879, 37 N. Y. St. 402.

(II) *Requisites and Sufficiency of Certificate* — (A) *In General.* Where no specific form of certificate is prescribed, any certificate that is in substance all that the contract requires,[45] or which is so treated by the parties interested is sufficient,[46] and the architect must adopt his own form;[47] but the certificate must be substantially such as the contract calls for.[48] Thus, where the contract requires

A builder is absolved from any further efforts to procure a certificate after having frequently called upon the architect for a certificate, if, after striking out some items and delaying a year after he was first applied to, the architect declines to do anything further in adjusting the differences between the parties. Fowler *v.* Deakman, 84 Ill. 130.

45. Wyckoff *v.* Meyers, 44 N. Y. 143; Gay *v.* Haskins, 11 Misc. (N. Y.) 134, 31 N. Y. Suppl. 1022, 65 N. Y. St. 53; Snaith *v.* Smith, 7 Misc. (N. Y.) 37, 27 N. Y. Suppl. 379, 57 N. Y. St. 86.

Form of certificate of dissatisfaction with work see Sanders *v.* Hutchinson, 26 Ill. App. 633.

A certificate that work will be acceptable when slight additions have been made is sufficient if the additions are made. Mills *v.* Weeks, 21 Ill. 561.

46. Finney *v.* Condon, 86 Ill. 78.

47. Mercer *v.* Harris, 4 Nebr. 77, holding that an order of the architect on the owner in favor of the builder for the amount of the instalment then payable under the terms of the contract, or for a balance in full of the contract price is sufficient, especially in a case where the owner accepts such form.

A certificate headed "Final recommendation," and stating "We recommend, under the terms of the contract," etc., the payment demanded by the contractor, sent by the architect to the owner in a letter inclosing the contractor's bill, is sufficient to inform the owner that in the architect's opinion the builder was entitled to final payment, and, in the absence of fraud or mistake, is the same as if it had stated that the work was finished to their satisfaction. Tilden *v.* Buffalo Office Bldg. Co., 27 N. Y. App. Div. 510, 50 N. Y. Suppl. 511.

There is now due to the builder.—A certificate that "there is now due to" the builder "the final payment on his contract," specifying the amount, sufficiently complies with a contract requiring that all work upon the performance of which payment is to become due has been done to the satisfaction of the architect. Snaith *v.* Smith, 7 Misc. (N. Y.) 37, 27 N. Y. Suppl. 379, 57 N. Y. St. 86.

That builder is entitled to a certain sum.—Where payments are to be made as the work progresses, and the work to be done in a workmanlike manner, to the satisfaction and under the direction of an architect, a certificate that the builder is entitled to a certain sum on account of his contract is sufficient. Bloodgood *v.* Ingoldsby, 1 Hilt. (N. Y.) 388.

Have completed work on building.— Under a provision in a contract that payment is to be made "when all the works are completely finished and certified by the architect to that effect," a certificate that builders "have completed" the work "to your building" is sufficient. Stewart *v.* Keteltas, 9 Bosw. (N. Y.) 261.

Last payment due as per contract.—Where a building contract provides that the last instalment shall be paid "when all the work is completely finished, and certified to that effect by the architects" a certificate that "the last payment is due as per contract" is sufficient. Wyckoff *v.* Meyers, 44 N. Y. 143.

48. Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384.

Entitled to settlement.—Where an architect has certified that a subcontractor is entitled to a settlement, without prejudice to any claim the builder might have for time lost or work done by him in carrying out the terms of the contract, payment cannot be refused on the ground that no certificate of performance was procured. Granniss *v.* Deeves, 72 Hun (N. Y.) 171, 25 N. Y. Suppl. 375, 55 N. Y. St. 674.

Entitled to payment by terms of contract.—A certificate that the contractors "are entitled to a payment" of a named sum "by the terms of contract. . . Work has been measured at building," is not sufficient under a contract requiring a certificate that the "contract has been well and truly performed." Barney *v.* Giles, 120 Ill. 154, 11 N. E. 206. So a certificate in which the amounts of several prior payments are stated, and reciting that the builders "are entitled to a payment, being the last payment on contract price for your residence," to which is appended by the architect a "remark" that the payment due as the last payment "is the same as written in article of agreement, less credits, and credit for defective plastering," is sufficiently explicit as to the sum due on the contract to entitle the contractors to sue for such sum, where there is a finding that the contractors were not liable for the damage caused by the change and defects in the plastering material. Robinson *v.* Baird, 165 Pa. St. 595, 35 Wkly. Notes Cas. (Pa.) 561, 30 Atl. 1010.

Order requesting owner to pay contractor specific sum.—Where a certificate must be to the effect that work is in strict accordance with drawings and specifications, and that the architect considers payment properly due, a mere order signed by the architect addressed to the owner requesting him to pay a given sum to the contractor does not conclude the owner. Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384.

Subject to owner's approval.—Where the building must be performed to the satisfaction of the architect and the owner, a certificate from the architect to the effect that

that work be measured according to the rule of mason's measurement and that such measurement be certified by the architect, the architect in giving his certificate must adhere to the system required by the contract.[49] Moreover, the certificate, estimate, or decision must be given in the exercise of an honest judgment, there being an implied condition in the building contract that this shall be so;[50]

payment is due to the builder "subject to owner's approval" entitles the owner to refuse payment if the work is not satisfactory to him. Pormann *v.* Walsh, 97 Wis. 356, 72 N. W. 881, 65 Am. St. Rep. 125.

The checking of the builder's charges by the architect, who thereupon sends them to the employer, does not amount to a certificate of satisfactory performance. Morgan *v.* Birnie, 9 Bing. 672, 3 Moore & S. 76, 23 E. C. L. 754.

A letter from the architect to the owner, substantially admitting that the building is not finished according to the specification, but saying that were he the owner he would accept them for himself is not a certificate contemplated by the contract. Smith *v.* Briggs, 3 Den. (N. Y.) 73.

Sufficiency of final certificate.— To constitute a certificate a final one, it is not essential that it be therein declared to be such, but, if apparently in balance or satisfaction of all claims, it is sufficient. Rousseau *v.* Poitras, 62 Ill. App. 103. Thus, under a provision that no payments shall be made the builders except on certificates during the progress of the work that a certain amount of work had been done, and that after ninety per cent of the whole work shall be completed and paid for no further payments should be made until after the architect should have certified the completion of the whole work to his satisfaction, a certificate of final completion is sufficient, without mentioning the amount remaining due. Pashby *v.* Birmingham, 18 C. B. 2, 86 E. C. L. 2. But where a contract provided for a payment when part of the work was done, another payment when the work was completed and the balance of the contract price in a specified time from the second payment, and that payments should be made on the architect's certificate that the work had been done to his satisfaction, and that only the final certificate and final payment should be conclusive evidence of performance of the contract, either wholly or in part, a certificate given after the work was completed that the contractor was entitled to the second payment "as per contract" was held not the final certificate contemplated by the contract. Gay *v.* Haskins, 11 Misc. (N. Y.) 134, 31 N. Y. Suppl. 1022, 65 N. Y. St. 53. See also Beharrell *v.* Quimby, 162 Mass. 571, 39 N. E. 407. So where a contract requires a certificate to show the completion of the work, and acceptance by the architect and his final estimate of what was due on the work, and that the same had been done according to his drawinge and specifications to his satisfaction, a certificate showing merely the balance due the builder does not meet the requirements of said contract. Roy *v.* Boteler, 40 Mo. App. 213. Again under a contract requiring a certificate that the work was completed according to specification, a certificate stating that the work was "finished in such a manner" that the architect would accept it "if he were the owner," and that "he was satisfied, as to work and materials," is not a sufficient compliance with the contract. Smith *v.* Briggs, 3 Den. (N. Y.) 73.

Where a contract merely authorizes a certificate that the contract is performed to the satisfaction of the architect, his certificate that it is not so performed because of certain defects in the work has no binding effect. Mackinson *v.* Conlon, 55 N. J. L. 564, 27 Atl. 930.

49. Koch *v.* Kuhns, 41 Wkly. Notes Cas. (Pa.) 429, where it was held that it might be shown that the measurements certified by the architect were not in accordance with the rule required by the contract.

50. Welch *v.* Hubschmitt Bldg., etc., Co., 61 N. J. L. 57, 38 Atl. 824; Chism *v.* Schipper, 51 N. J. L. 1, 16 Atl. 316, 14 Am. St. Rep. 668, 2 L. R. A. 544.

Certificate given to builder on payment of fee.—A certificate from an architect to a builder that a building is completed, given after an inspection of the building, for which inspection the builder paid the architect, is void. Haunroth *v.* Peters, 50 Ill. App. 366.

Competency of architect as arbiter.— The fact that the architect named is interested in the ownership of the building does not of itself render him incompetent to issue a certificate. Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204. Again, an architect is not disqualified, because he has previously been a witness in an action between the owner and the builder, wherein there was involved the matter which is referred to him for decision. Barclay *v.* Deckerhoof, 171 Pa. St. 378, 33 Atl. 71. There must be very conclusive language in the contract to bind a builder to abide by the decision of an architect or engineer appointed by the employer. Lawson *v.* Wallasey, L. R. 11 Q. B. D. 229, 52 L. J. Q. B. 302, 47 L. T. Rep. N. S. 625 [*affirmed* in 47 J. P. 437, 52 L. J. Q. B. 309, 48 L. T. Rep. N. S. 507].

Estimates cannot be expected to be absolutely correct.— Louisiana Molasses Co. *v.* Le Sassier, 52 La. Ann. 2070, 28 So. 217 [*affirmed* in 52 La. Ann. 1768, 28 So. 223].

Where a superintendent when called on for a certificate neither gives nor refuses to give it, but tells the builder to wait the happening of a specified event, when payment will be made, there is a presumption that the work was done to his satisfaction. Vermont St. M. E. Church *v.* Brose, 104 Ill. 206.

and the certificate, decision, or estimate of the architect must be both final,[51] and complete.[52]

(B) *Necessity of Notifying Parties.* It has been said that it is unnecessary, in the absence of any stipulation therefor in the contract, for an architect to give notice to the parties of his intended assessment of damages, caused the owner by the builder's failure to perform his contract, and to which he is required by the contract to certify.[53] On the other hand, there are authorities holding that the architect cannot proceed without giving notice to the builder, in a case where the builder is liable to a forfeiture, as liquidated damages, which are to be determined by the architect,[54] and in a case where it is the duty of the architect or engineer to estimate expenditures for which an allowance is claimed by the builder,[55] and generally, that it is essential to a final and conclusive decision, upon any matter of difference, which the builder and his employer have agreed to submit to the decision of an architect or engineer, that both parties should have notice of the time and place when the architect or engineer is to investigate the matter with a view to such decision, unless there be something in the terms of the agreement declaring or clearly importing that such notice need not be given.[56]

(C) *Necessity of Writing.* It is usual to give the certificate in writing, and in most cases it is required by the contract to be in writing,[57] but there is no rule

51. Hamilton *v.* Hart, 125 Pa. St. 142, 23 Wkly. Notes Cas. (Pa.) 480, 567, 17 Atl. 226, 473.

52. Charlton *v.* Scoville, 144 N. Y. 691; 39 N. E. 394; Hamilton *v.* Hart, 125 Pa. St. 142, 23 Wkly. Notes Cas. (Pa.) 480, 567, 17 Atl. 226, 473; Brown *v.* Farnandis, (Wash. 1902) 67 Pac. 574.

Insufficiency of certificates for final payment.—A certificate that builders are entitled to a specified amount in full, less a specified sum to be held back until certain items are completed, containing a statement showing how the money due is arrived at and reciting that there is a deduction for a "bad floor" of a certain sum, and a second certificate, stating that the items to recover which the deduction was made had been attended to and that the builder is entitled to the amount stated in the first certificate, are insufficient to entitle the builder to the final payment, as the two certificates taken together do not show that the defect named has been corrected. Davidson *v.* Francis, 14 Manitoba 141.

Incomplete certificate.—Where time is of the essence of a building contract which also provides that on all questions of difference arising under the contract the architect's decision shall be final, a certificate that a certain sum was due the builder, and that the work was completed, but not stating whether the completion was within the time fixed does not preclude the owner from insisting on damages for delay. Downey *v.* O'Donnell, 86 Ill. 49.

Where an arbitrator did not pass on the merits of claims for some alterations, because the builder had failed to object to the computations of the architect at the time they were submitted to him with the order for the alterations, the award was not binding, and evidence of the matters submitted was admissible in an action against the builder on his bond. Brown *v.* Farnandis, (Wash. 1902) 67 Pac. 574.

53. Eldridge *v.* Fuhr, 59 Mo. App. 44.

54. Young *v.* Wells Glass Co., 187 Ill. 626, 58 N. E. 605 [*affirming* 87 Ill. App. 537].

55. Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58.

56. Collins *v.* Vanderbilt, 8 Bosw. (N. Y.) 313. See also McMahon *v.* New York, etc., R. Co., 20 N. Y. 463.

An engineer required to measure masonry work need not give previous notice of his intention to make the measurement to the builder. Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58.

57. De Mattos v. Jordan, 20 Wash. 315, 55 Pac. 118; Roberts *v.* Watkins, 14 C. B. N. S. 592, 9 Jur. N. S. 128, 32 L. J. C. P. 291, 8 L. T. Rep. N. S. 460, 11 Wkly. Rep. 783, 108 E. C. L. 592.

Intention that certificate should be written.—A contract providing that if the builder fails to prosecute the work, the owner may take possession and complete it, and that the expense incurred by the owner for materials and work "shall be audited and certified by the architect and that his certificate should be conclusive upon the parties," fairly contemplates a certificate in writing. De Mattos *v.* Jordan, 20 Wash. 315, 55 Pac. 118.

An architect's certificate not signed by the architect which does not confine its estimate to the structure described in the building contract, and does not recite that the work estimated was performed to the architect's satisfaction, does not determine the owner's liability in a case where the building contract specifically prescribes that the architect's certificate is to be in writing and must recite that the work estimated was done to the architect's satisfaction and must also be signed by him. Mockler *v.* St. Vincent's Inst., 87 Mo. App. 473.

of law precluding a certificate by word of mouth, where a written certificate is not specified in the contract.[58]

(D) *Necessity That Certificate Be Made by Party Named.* Where the architect, engineer, or other person is made the sole and only person whose certificate or decision shall be conclusive, a certificate or decision by him is necessary.[59]

(E) *Necessity That Certificate Be Made on Knowledge of Architect.* The certificate should be made only on the knowledge of the architect.[60]

(III) *Effect of Certificate.* Where the building contract expressly provides that a certificate, estimate, determination, or decision of an architect, engineer, or some third person shall be final and conclusive, it is a well-settled rule that such certificate, estimate, determination, or decision is conclusive[61] and

58. Roberts *v.* Watkins, 14 C. B. N. S. 592, 9 Jur. N. S. 128, 32 L. J. C. P. 291, 8 L. T. Rep. N. S. 460, 11 Wkly. Rep. 783, 108 E. C. L. 592.

Final acceptance of the work by the engineer is an announcement of his decision that the terms of the contract have been complied with and is binding under a provision that the work shall be completed under the supervision and to the satisfaction of an engineer and that such work was to be paid for upon a report showing the completion and satisfactory character of the work. Omaha *v.* Hammond, 94 U. S. 98, 24 L. ed. 70.

59. Monahan *v.* Fitzgerald, 164 Ill. 525, 45 N. E. 1013 [*affirming* 62 Ill. App. 192]; McEntyre *v.* Tucker, 5 Misc. (N. Y.) 228, 25 N. Y. Suppl. 95, 54 N. Y. St. 826, 23 N. Y. Civ. Proc. 171, holding that a certificate signed by the assistant of the person named is not sufficient. See also Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58.

It should affirmatively appear that the person making the estimates was the person contemplated by the contract. Moran *v.* Schmitt, 109 Mich. 282, 67 N. W. 323.

Sufficiency of signature by one of a partnership.—Where payments are to be made on the certificates of two architects who are partners, a certificate signed by one of them is sufficient in the absence of any objection to the certificate by the owner. Lull *v.* Korf, 84 Ill. 225.

A certificate signed by another person for the architect named in the contract is not admissible in evidence, unless there has been a modification of a contract which provides that a certain architect shall certify in writing. McEntyre *v.* Tucker, 36 N. Y. App. Div. 53, 55 N. Y. Suppl. 153.

A certificate given by one claiming to be an overseer for the architect is insufficient where there is no evidence that the person giving the certificate occupied that position or was authorized to act for the architect in such a manner. Spencer *v.* Duplan Silk Co., 112 Fed. 638.

Where two persons are named.— Under a contract providing for skilful and workmanlike work, to the "full and complete satisfaction of A, architect, (who drew the plans and specifications,) or his assistant superintendent," the work need not be done to the satisfaction of both. Vermont St. M. E. Church *v.* Brose, 104 Ill. 206.

A failure to designate a person who is to furnish the estimates does not avoid the contract or render nugatory any obligation into which the parties have entered. Johnson *v.* Slaymaker, 18 Ohio Cir. Ct. 104, 9 Ohio Cir. Dec. 500.

Certificate of architect other than one named.—Where an owner, by dismissing an architect from his employment, renders performance of a contract requiring the approval of the architect named impossible, the builder has a right to obtain the certificate of another architect who is in charge of the work. Griffith *v.* Happersberger, 86 Cal. 605, 25 Pac. 137, 487. So, where an architect named dies and another is substituted by the owner who is accepted by the builder, the certificate of the substituted architect is sufficient. Beecher *v.* Schuback, 4 Misc. (N. Y.) 54, 23 N. Y. Suppl. 604, 53 N. Y. St. 74.

60. Spencer *v.* Duplan Silk Co., 112 Fed. 638, holding that a certificate that a failure of the builder is sufficient ground for a termination of the contract by the employer should be made only on the knowledge of the architect, and a certificate reciting that it is based on information received from the employer's agent is insufficient to justify a forfeiture.

Effect of decision not based on personal knowledge.—Where a contract stipulated that, in case of failure or unreasonable delay of the builder to provide the necessary labor and materials to complete the work by a certain time, in the judgment of two architects named, then the employer might, after notice, provide other labor and materials, and complete the work, it was held that the builder could not be stopped from proceeding with the work on the judgment of the architects, where the judgment of one was based solely on what the other had informed him, and not on his own examination. Benson *v.* Miller, 56 Minn. 410, 57 N. W. 943.

61. *Arkansas.*— Hot Springs R. Co. *v.* Maher, 48 Ark. 522, 3 S. W. 639, as to quantity and quality of work done under the contract.

California.—Dingley *v.* Greene, 54 Cal. 333, as to payments.

Illinois.— Finney *v.* Condon, 86 Ill. 78; Downey *v.* O'Donnell, 86 Ill. 49 (as to differences arising under the contract); Lull *v.* Korf, 84 Ill. 225 (as to quality of perform-

binding in its legal operation and effect upon the owner, the builder, and the

ance); Taylor *v.* Renn, 79 Ill. 181 (as to work done and materials furnished); Coey *v.* Lehman, 79 Ill. 173; McAuley *v.* Carter, 22 Ill. 53 (as to work done and payments to be made).

Kentucky.— Covington *v.* Limerick, 19 Ky. L. Rep. 330, 40 S. W. 254 (as to quality and amount of work); McMahon *v.* Casement, 13 Ky. L. Rep. 429 (as to requirements of contract).

Massachusetts.— Chapman *v.* Lowell, 4 Cush. (Mass.) 378, as to time of performance.

Michigan.— Kelly *v.* Muskegon Public Schools, 110 Mich. 529, 68 N. W. 282 (as to meaning of plans, working, drawings, and specifications); Wildey *v.* Fractional School Dist. No. 1, 25 Mich. 419 (as to manner of performance).

Minnesota.— St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1 (as to work performed and materials furnished); Trainor *v.* Worman, 33 Minn. 484, 24 N. W. 297 (as to completion of work).

Missouri.— Eldridge *v.* Fuhr, 59 Mo. App. 44, as to expense and damage to owner from builder's failure to perform.

New York.— Amsterdam *v.* Sullivan, 162 N. Y. 594, 57 N. E. 1123 [*affirming* 11 N. Y. App. Div. 472, 42 N. Y. Suppl. 358]; New York Bldg., etc., Co. *v.* Springfield Elevator, etc., Co., 56 N. Y. App. Div. 294, 67 N. Y. Suppl. 887 (as to substantial completion and reasonable value of work); Lawrence *v.* New York, 29 N. Y. App. Div. 298, 51 N. Y. Suppl. 416 (as to quality of material); Weeks *v.* Little, 47 N. Y. Super. Ct. 1 (as to payment being due); Wiberly *v.* Matthews, 10 Daly (N. Y.) 153; Jones *v.* New York, 32 Misc. (N. Y.) 211, 65 N. Y. Suppl. 747 (as to progress of work and owner's right to take possession of incomplete work); Lantry *v.* New York, 19 Misc. (N. Y.) 558, 44 N. Y. Suppl. 874 (as to performance); Zimmerman *v.* German Evangelical Lutheran Immanuel's Church, 11 Misc. (N. Y.) 49, 31 N. Y. Suppl. 845, 63 N. Y. St. 469 (as to disputes with regard to extra or omitted work); Gay *v.* Haskins, 8 Misc. (N. Y.) 626, 30 N. Y. Suppl. 191, 61 N. Y. St. 837 (as to satisfactory completion).

Pennsylvania.— Messner *v.* Lancaster County, 23 Pa. St. 291 (as to satisfactory completion); Malone *v.* Philadelphia, 12 Phila. (Pa.) 270, 34 Leg. Int. (Pa.) 230 (as to payments).

South Dakota.— Seim *v.* Krause, 13 S. D. 530, 83 N. W. 583, as to value of alterations.

Tennessee.— East Tennessee, etc., R. Co. *v.* Central Lumber, etc., Co., 95 Tenn. 538, 32 S. W. 635, as to allowances and differences not agreed on before commencement of work.

Texas.— Kilgore *v.* North West Texas Baptist Educational Soc., 89 Tex. 465, 35 S. W. 145 (as to payments); Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270; Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122 (as to materials used and character of work).

Washington.— Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142, except in case of concealment of facts.

Wisconsin.— Baasen *v.* Baehr, 7 Wis. 516, as to value of extra work.

United States.— Omaha *v.* Hammond, 94 U. S. 98, 24 L. ed. 70 (as to performance); Breyman *v.* Ann Arbor R. Co., 85 Fed. 579; Newman *v.* U. S., 81 Fed. 122; Elliott *v.* Missouri, etc., R. Co., 74 Fed. 707, 40 U. S. App. 61, 21 C. C. A. 3 (as to quality and amount of work and material); Barlow *v.* U. S., 35 Ct. Cl. 514 (as to quality of material); Henegan *v.* U. S., 17 Ct. Cl. 273 (as to payment).

England.— Richards *v.* May, 10 Q. B. D. 400, 52 L. J. Q. B. 272, 31 Wkly. Rep. 708; Stevenson *v.* Watson, 4 C. P. D. 148, 48 L. J. C. P. 318, 40 L. T. Rep. N. S. 485, 27 Wkly. Rep. 682; Lapthorne *v.* St. Aubyn, Cab. & El. 486; Arnold *v.* Walker, 1 F. & F. 671 (as to balance due builder); Goodyear *v.* Weymouth, 1 H. & R. 67, 35 L. J. C. P. 12; Connor *v.* Belfast Water Com'rs, Ir. R. 5 C. L. 55 (as to payment and value of extra work).

Canada.— Reg. *v.* Cimon, 23 Can. Supreme Ct. 62; Peters *v.* Quebec Harbour Com'rs, 19 Can. Supreme Ct. 685, as to sum due builder.

See 11 Cent. Dig. tit. "Contracts," § 1326 *et seq.*

But *compare* Welch *v.* Hubschmitt Bldg., etc., Co., 61 N. J. L. 57, 38 Atl. 824, to the effect that a provision that a decision shall be final as to the true construction or meaning of the drawings or specifications does not render such decision conclusive as to the character and quality of the workmanship and material.

Account stated has force of estimate.— Where a contract stipulates that an official is to determine the amount of work to be paid for and that his estimate is to be final, and the builder has received payment of the amount audited as due on final settlement and receipted for payment in full, the transaction constitutes an account stated and is, in the absence of fraud, conclusive. McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038.

Decision has the force of finding between the parties.— Kilgore *v.* North West Texas Baptist Educational Soc., 89 Tex. 465, 35 S. W. 145.

Where a building contract is void the conclusiveness or inconclusiveness of an architect's certificate to the effect that the building had been done according to the contract is not material, since the architect's certificate deriving whatever faults it may possess from the contract itself is deprived of all efficacy. Donnelly *v.* Adams, 115 Cal. 129, 46 Pac. 916.

A certificate that an instalment may be paid is not so conclusive as to prevent the owner from showing negligent performance or omission of work. Accordingly, the owner

other parties, if any, to the contract,[62] including those guaranteeing its faithful performance,[63] but not as between either party and the architect,[64] provided the decision concerns matters within the scope of the submission to him,[65]

may show that plans and specifications were disregarded by the builder in material aspects, that certain parts of the work and materials were wholly omitted and alterations made in other particulars. Davidson *v.* Provost, 35 Ill. App. 126.

A certificate that entire work was completed implies that it was done as the contract required, and to the satisfaction of the architect. Galbraith *v.* Chicago Architectural Iron Works, 50 Ill. App. 247.

An architect's estimates are not binding when not provided for in the contract.— Schuler *v.* Eckert, 90 Mich. 165, 51 N. W. 198. See also White *v.* Harrigan, 41 Minn. 414, 43 N. W. 89, in which case the building contract was made with a city but did not provide that the decision of a city building inspector as to whether the builder was complying with a city ordinance should be final and conclusive and the ordinance itself did not assume to give his decision any such effect.

62. *Arkansas.*— Hot Springs R. Co. *v.* Maher, 48 Ark. 522, 3 S. W. 639.

California.— Dingley *v.* Greene, 54 Cal. 333.

Idaho.—Thompson *v.* Bradbury, (Ida. 1898) 51 Pac. 758.

Illinois.— Finney *v.* Condon, 86 Ill. 78; Taylor *v.* Renn, 79 Ill. 181; Coey *v.* Lehman, 79 Ill. 173; Korf *v.* Lull, 70 Ill. 420; Lindeman *v.* Wagner, 67 Ill. App. 134.

Kentucky.— McMahon *v.* Casement, 13 Ky. L. Rep. 429.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New York.— McMahon *v.* New York, etc., R. Co., 20 N. Y. 463.

Ohio.— Kane *v.* Ohio Stone Co., 39 Ohio St. 1.

Pennsylvania.— Kennedy *v.* Poor, 151 Pa. St. 472, 31 Wkly. Notes Cas. (Pa.) 174, 25 Atl. 119; Malone *v.* Philadelphia, 12 Phila. (Pa.) 270, 34 Leg. Int. (Pa.) 230.

South Dakota.— Seim *v.* Krause, 13 S. D. 530, 83 N. W. 583.

Tennessee.— East Tennessee, etc., R. Co. *v.* Central Lumber, etc., Co., 95 Tenn. 538, 32 S. W. 635.

Texas.— Kilgore *v.* North West Texas Baptist Educational Soc., 89 Tex. 465, 35 S. W. 145; Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270; Johnson *v.* White, (Tex. Civ. App. 1894) 27 S. W. 174; Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

Wisconsin.— McAlpine *v.* St. Clara Female Academy, 101 Wis. 468, 78 N. W. 173; Baasen *v.* Baehr, 7 Wis. 516.

United States.— Omaha *v.* Hammond, 94 U. S. 98, 24 L. ed. 70; Breyman *v.* Ann Arbor R. Co., 85 Fed. 579; Newman *v.* U. S., 81 Fed. 122; Barlow *v.* U. S., 35 Ct. Cl. 514; Henegan *v.* U. S., 17 Ct. Cl. 273.

England.— Rogers *v.* James, 56 J. P. 277.

Canada.— Reg. *v.* Cimon, 23 Can. Supreme Ct. 62.

See 11 Cent. Dig. tit. "Contracts," § 1331.

Certificate binds judgment creditors of builder.—A contract between a builder and his subcontractor, providing that the estimate of the engineer shall be final and conclusive as to the amount of work and its value, is binding on judgment creditors of the subcontractors, on garnishment of the builder. St. Joseph Iron Co. *v.* Halverson, 48 Mo. App. 383.

Actual controversy not requisite to make decision binding.— Under a provision that all cases of dispute as to the character of labor or material or the meaning of the contract should be submitted to the architect, whose decision shall be final, with no right to appeal therefrom, it is not necessary that an actual controversy should have existed and have been decided by the architects to make their decision binding between the parties. Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270.

Opinion given as witness not binding.—A provision that the opinion, certificate, report, and decision shall be binding and conclusive does not bind the builder to an estimate or opinion given as a witness. Fitzgerald *v.* Beers, 31 Mo. App. 356.

The fact that a builder does not keep the final certificate, but hands it back to the architects, does not affect the validity of the certificate. Arnold *v.* Bournique, 144 Ill. 132, 33 N. E. 530, 36 Am. St. Rep. 419, 20 L. R. A. 493.

The fact that the question may be decided in some other manner does not affect the binding character of the decision; thus when it is agreed that a report as to the amount and quality of work done or material furnished shall be conclusive, such report is as conclusive upon questions of count, measurement, or distance as upon other matters, although these questions may be capable of accurate measurement. Elliott *v.* Missouri, etc., R. Co., 74 Fed. 707, 40 U. S. App. 61, 21 C. C. A. 3.

Under a provision that suspension of the work shall not entitle the builder to damages, a suspension in good faith will not relieve the contractor from an undertaking to abide by the award of an engineer as to the quantity and quality of the work done. Snell *v.* Brown, 71 Ill. 133.

63. Finney *v.* Condon, 86 Ill. 78.

64. Rogers *v.* James, 56 J. P. 277, holding that the architect's certificate is not final as between the building owner and the architect.

65. *Illinois.*— Taylor *v.* Renn, 79 Ill. 181; Korf *v.* Lull, 70 Ill. 420.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

and also provided the decision, determination, estimate, or certificate is made

New York.— Burns *v.* New York, 69 N. Y. App. Div. 214, 74 N. Y. Suppl. 697 [*affirming* 31 Misc. (N. Y.) 315, 63 N. Y. Suppl. 1078]; Zimmerman *v.* German Evangelical Lutheran Immanuel's Church, 11 Misc. (N. Y.) 49, 31 N. Y. Suppl. 845, 63 N. Y. St. 469.

Pennsylvania.— O'Reilly *v.* Kerns, 52 Pa. St. 214.

United States.— Crane Elevator Co. *v.* Clark, 80 Fed. 705, 53 U. S. App. 257, 26 C. C. A. 100; Elliott *v.* Missouri, etc., R. Co., 74 Fed. 707, 40 U. S. App. 61, 21 C. C. A. 3.

England.—Goodyear *v.* Weymouth, H. & R. 67, 35 L. J. C. P. 12.

Canada.—Peters *v.* Quebec Harbour Com'rs, 19 Can. Supreme Ct. 685.

See 11 Cent. Dig. tit. "Contracts," § 1330 *et seq.*

Decisions or estimates not authorized by contract.—A clause providing that if any difference should arise between the parties in relation to the contract, or the work to be performed under it, the decision of the architect should be final does not render binding a decision on the claim of the owner for a bill for merchandise sold to the builders, as such claim was entirely outside of the contract. Busse *v.* Agnew, 10 Ill. App. 527. So a clause providing that the decision of the architects shall be final and binding in case the parties fail to agree as to the value of extra or deducted work, or the amount of extra time, or in case of any disagreement between the parties relating to the performance of any covenant or agreement contained in the contract, does not cover a claim made by the builder for the recovery of damages resulting from a delay caused by the failure of other contractors to complete the work. Nelson *v.* Pickwick Associated Co., 30 Ill. App. 333. Again a clause providing that the architect's decision be binding on both parties "as to the interpretation of the drawings and specifications, and as to the quality or quantity of work or materials, or any other matter connected with the work, furnishing materials, or in settlement of this contract," does not include a claim for damages for unreasonable delay in performing the contract. Michigan Ave. M. E. Church *v.* Hearson, 41 Ill. App. 89. In like manner the determination of a claim for damages resulting from a builder's delay is not authorized by clauses providing that, if the builder failed to complete the work at the time specified, he should forfeit, as liquidated damages, amounts named in certain detailed specifications for different portions of the work, and, that should any disagreement arise as to the meaning of the drawings or specifications on any point, or as to the character of the work, the decision of the engineer should be conclusive on all parties to the contract. Chandley *v.* Cambridge Springs, 200 Pa. St. 230, 49 Atl. 772. So disputes as to whether certain work was extra work, and as to whether extra work done at agreed prices was properly done are not within a stipulation for arbitration in case of a dispute as to the true value of extra work or of work omitted. Weeks *v.* Little, 47 N. Y. Super. Ct. 1. Again a provision that, in case of dispute concerning certain specified work, or any increase or contingent work, the decision of an engineer shall be conclusive does not apply to extra work not contemplated in making the contract, and a decision thereon is not binding. O'Reilly *v.* Kerns, 52 Pa. St. 214. See also Delaware, etc., Canal Co. *v.* Dubois, 15 Wend. (N. Y.) 87 [*affirming* 12 Wend. (N. Y.) 334]; Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142. So under a contract to do work according to definite plans and specifications, without any responsibility as to result, retention of pay by an engineer till certain work is made perfect, though a defect is not due to a failure of the builder to fully perform his undertaking, is not justified by a provision that the engineer shall determine the amount or quality of the work to be paid for, and shall decide all questions arising relative to execution of the contract by the builder, and that his estimates and decisions shall be conclusive. Harlow *v.* Homestead, 194 Pa. St. 57, 45 Atl. 87. When all payments are to be subject to the architect's approval, but the owner may make "any alteration, deviation, additions, or omissions" from the contract which are not to avoid the contract, but be duly allowed for in payment, work not mentioned in the contract, and for which there are no specifications is not subject to the architect's approval unless it is proved that such work was in contemplation of the parties provided for by the contract. St. John *v.* Potter, 19 N. Y. Suppl. 230, 46 N. Y. St. 883. A contract providing for a determination by the architect of all questions arising as to the true intent and meaning of the plans and specifications does not authorize him to decide a disputed method of measurement of brick used in walls. Walker *v.* Syms, 118 Mich. 183, 76 N. W. 320.

A measurement or estimate based on an erroneous construction of the contract is not binding. Galveston, etc., R. Co. *v.* Henry, 65 Tex. 685.

What provision as to reference of disputes embraces.—A provision in a building contract, referring to the architect "all disputes, . . . and all questions of doubt as to the tenor and intention of the drawings and specifications, or of the contract," embraces the question whether the contractor and his sureties are bound to refund to the owner of the building the amount paid by him on a mechanic's lien, where the contract provides that the contractor shall deliver the building free from all claims, and shall furnish at his own cost all necessary materials. Barclay *v.* Deckerhoof, 171 Pa. St. 378, 33 Atl. 71.

An estimate or decision partly within and partly without the matters submitted by the contract is not void *in toto* but the esti-

by such architect, engineer, or third person in the exercise of an honest judgment.[66]

(IV) *IMPEACHMENT OF CERTIFICATE.* The only grounds, upon which a certificate, estimate, determination, or decision may be impeached[67] are fraud or

mate is rendered void with respect to the matter improperly decided by the architect. Drhew *v.* Altoona City, 121 Pa. St. 401, 15 Atl. 636.

Where the contract fixes the price to be paid, the arbiter has no power to compel the builder, after the work is done according to the terms of his contract, to accept a less price than agreed upon. McMahon *v.* Casement, 13 Ky. L. Rep. 429.

66. *Arkansas.*— Hot Springs R. Co. *v.* Maher, 48 Ark. 522, 3 S. W. 639.

Massachusetts.— Chapman *v.* Lowell, 4 Cush. (Mass.) 378.

Michigan.— Wildey *v.* Fractional School Dist. No. 1, 25 Mich. 419.

Minnesota.— Trainor *v.* Worman, 33 Minn. 484, 24 N. W. 297.

Missouri.— McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

Ohio.— Kane *v.* Ohio Stone Co., 39 Ohio St. 1.

South Dakota.— Seim *v.* Krause, 13 S. D. 530, 83 N. W. 583.

Tennessee.— East Tennessee, etc., R. Co. *v.* Central Lumber, etc., Co., 95 Tenn. 538, 32 S. W. 635.

Texas.— Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270.

United States.— Newman *v.* U. S., 81 Fed. 122.

England.— Ormes *v.* Beadel, 2 Giff. 166 [*affirmed* in 30 L. J. Ch. 1, 3 L. T. Rep. N. S. 344, 9 Wkly. Rep. 25].

Necessity of exercising honest judgment see *supra*, III, B, 2, d, (I).

67. *Arkansas.*— Hot Springs R. Co. *v.* Maher, 48 Ark. 522, 3 S. W. 639.

California.— Moore *v.* Kerr, 65 Cal. 519, 4 Pac. 542; Dingley *v.* Greene, 54 Cal. 333.

Illinois.— Brownell Imp. Co. *v.* Critchfield, 197 Ill. 61, 64 N. E. 332 [*affirming* 96 Ill. App. 84]; Lull *v.* Korf, 84 Ill. 225; Taylor *v.* Renn, 79 Ill. 181; Coey *v.* Lehman, 79 Ill. 173; Snell *v.* Brown, 71 Ill. 133; McAuley *v.* Carter, 22 Ill. 53; Davis *v.* Gibson, 70 Ill. App. 273.

Kentucky.— Covington *v.* Limerick, 19 Ky. L. Rep. 330, 40 S. W. 254.

Minnesota.— St. Paul, etc., R. Co. *v.* Bradbury, 42 Minn. 222, 44 N. W. 1.

Missouri.— Eldridge *v.* Fuhr, 59 Mo. App. 44.

New York.— Tilden *v.* Buffalo Office Bldg. Co., 27 N. Y. App. Div. 510, 50 N. Y. Suppl. 511; Amsterdam *v.* Sullivan, 11 N. Y. App. Div. 472, 42 N. Y. Suppl. 358 [*affirmed* in 162 N. Y. 594, 57 N. E. 1123]; Whiteman *v.* New York, 21 Hun (N. Y.) 117; Weeks *v.* Little, 47 N. Y. Super. Ct. 1; Jones *v.* New York, 32 Misc. (N. Y.) 211, 65 N. Y. Suppl. 747; Gay *v.* Haskins, 8 Misc. (N. Y.) 626, 30 N. Y. Suppl. 191, 61 N. Y. St. 837.

Tennessee.— Chandler *v.* Wheeler, (Tenn. Ch. 1898) 49 S. W. 278.

Texas.— Kilgore *v.* North West Texas Baptist Educational Soc., 89 Tex. 465, 35 S. W. 145; Brin *v.* McGregor, (Tex. Civ. App. 1898) 45 S. W. 923.

Wisconsin.— McAlpine *v.* St. Clara Female Academy, 101 Wis. 468, 78 N. W. 173; Baasen *v.* Baehr, 7 Wis. 516.

United States.— U. S. *v.* Walsh, 108 Fed. 502; Breyman *v.* Ann Arbor R. Co., 85 Fed. 579; Elliott *v.* Missouri, etc., R. Co., 74 Fed. 707, 40 U. S. App. 61, 21 C. C. A. 3.

England.— Scott *v.* Liverpool, 27 L. J. Ch. 641, 4 Jur. N. S. 402, 6 Wkly. Rep. 136, 493.

See 11 Cent. Dig. tit. "Contracts," § 1343.

What constitutes fraud.— To constitute sufficient fraud to avoid a decision, the architect or other person whose decision is impeached must have knowingly and wilfully disregarded his duty (Gilmore *v.* Courtney, 158 Ill. 432, 41 N. E. 1023; Snell *v.* Brown, 71 Ill. 133); thus any failure to consider all matters submitted to him is to that extent a fraud upon the party discriminated against (Anderson *v.* Imhoff, 34 Nebr. 335, 51 N. W. 854). A concealment of defects by builder would be fraud on owner and render decision not binding on him. Kane *v.* Ohio Stone Co., 39 Ohio St. 1. That work specified in a certificate is not entirely completed does not show fraud on the part of the architect. Lincoln *v.* Schwartz, 70 Ill. 134. Fraud is not shown where an engineer allows in his final certificate for all that the contract authorizes, even if he thinks the builder entitled to an allowance for certain work and that he had the right to give the contractor credit therefor on the final certificate. O'Brien *v.* New York, 139 N. Y. 543, 35 N. E. 323, 55 N. Y. St. 596, 142 N. Y. 671, 37 N. E. 465, 60 N. Y. St. 388 [*affirming* 65 Hun (N. Y.) 112, 19 N. Y. Suppl. 793].

Collusion between architect and owner constitutes fraud. Pittsburg Terra-Cotta Lumber Co. *v.* Sharp, 190 Pa. St. 256, 44 Wkly. Notes Cas. (Pa.) 5, 42 Atl. 685; Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

Fraud should not be presumed merely because the architect estimates work done pursuant to the contract as less than the measurement of the work actually done. Snell *v.* Brown, 71 Ill. 133. So the fact that the architects, named to decide disputes as to the meaning of plans, working, drawings, and specifications, drew the plans and specifications and were to receive as their compensation a percentage of the total cost of building does not warrant an inference of fraud in their decision. Kelly *v.* Muskegon Public Schools, 110 Mich. 529, 68 N. W. 282. But

such gross mistake as would imply bad faith or a failure to exercise an honest judgment.

(v) *Withdrawal of Certificate.* An architect may not withdraw an acceptance of work which must be done to his satisfaction without good cause.[68]

3. Liability For Fraud and Negligence. An architect is responsible, not only for actual fraud committed by him,[69] but also for a negligent disregard of his duty.[70] Thus, he is liable to the owner for permitting material to go into the

where the architect had, unknown to the builder, assured the building owner that the cost of building should not exceed a specified amount, it was held that a decision of the architect as to the amount to be paid the builder made under such bias was not binding upon the builder. Kemp *v.* Rose, 1 Giff. 258, 4 Jur. N. S. 919.

Mere refusal to issue a certificate upon grounds known to be fictitious and without foundation may be found by a jury to constitute a fraudulent refusal and be no bar to the contractor's right to payment. Rawle *v.* Gilmore, 76 Ill. App. 372.

The burden of showing fraud (Lindeman *v.* Wagner, 67 Ill. App. 134; Pucci *v.* Barney, 1 Misc. (N. Y.) 84, 20 N. Y. Suppl. 375, 48 N. Y. St. 30), caprice, or malice (Eldridge *v.* Fuhr, 59 Mo. App. 44) is upon the party complaining.

Wilful neglect, refusal, or absolute incapacity of the arbiter to perform his duties are grounds of impeachment. Scott *v.* Liverpool, 27 L. J. Ch. 641, 4 Jur. N. S. 402, 6 Wkly. Rep. 136, 493.

Mere mistake or error of judgment afford no ground of impeachment (Snell *v.* Brown, 71 Ill. 133; Whiteman *v.* New York, 21 Hun (N. Y.) 117; McAlpine *v.* St. Clara Female Academy, 101 Wis. 468, 78 N. W. 173; Mitchell *v.* Dougherty, 86 Fed. 859; Stevenson *v.* Watson, 4 C. P. D. 148, 48 L. J. C. P. 318, 40 L. T. Rep. N. S. 485, 27 Wkly. Rep. 682; Lapthorne *v.* St. Aubyn, Cab. & El. 486), though a mistake may be ground for correction (Peters *v.* Quebec Harbour Com'rs, 19 Can. Supreme Ct. 685).

A palpable mistake appearing on the face of the decision is ground of impeachment. Amsterdam *v.* Sullivan, 11 N. Y. App. Div. 472, 42 N. Y. Suppl. 358.

Severity of award no ground for avoidance. — However severe an award may be in its effects, it will not be relieved against if fairly and impartially made. Ormes *v.* Beadel, 2 Giff. 166 [*affirmed* in 30 L. J. Ch. 1, 3 L. T. Rep. N. S. 344, 9 Wkly. Rep. 25].

It is not permissible to revise a progress certificate, on which a payment is to be made, where the contract limits the certificate to such portions of the building as have been constructed in a manner satisfactory to the supervising architect under the contract, unless the revision is provided for by the contract; and, in this respect, a provision that the certificate shall not be conclusive is not sufficient, as it should be construed to extend to defects only that are not discoverable by the exercise of ordinary care prior to its issuance. Ashland Lime, etc., Co. *v.* Shores, 105 Wis. 122, 81 N. W. 136.

Reopening of decision by subsequent engineer improper.—Where an engineer changes the character of a particular class of work, and classifies it and fixes the value, his decision cannot be reopened and revived by a subsequent engineer. Murray *v.* Reg., 26 Can. Supreme Ct. 203.

Reversal.—An approval of work by an architect who is sole arbiter between the parties as to the character of the materials used cannot be reversed to the injury of the builder. Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

Where an erroneous construction of the contract is given by an engineer and classification of the work is made on an erroneous basis, the error may be corrected in a proceeding to enjoin payment under the contract. State *v.* Cuyahoga County 12 Ohio Cir. Dec. 328.

Where an owner does not exercise a right of reviewing a final decision his approval or disapproval of an estimate is immaterial. Gonder *v.* Berlin Branch R. Co., 171 Pa. St. 492, 33 Atl. 61.

68. Lauman *v.* Clark, 73 Ill. App. 659.

The conclusiveness of a final certificate is not affected by a letter afterward written by the architect, stating that the certificate was not intended to conclude any just rebate or offsets. Weeks *v.* Little, 47 N. Y. Super. Ct. 1.

Where either the architect or his superintendent may approve the work the architect cannot, after it has been done to the approval of the superintendent, say it was not done to his satisfaction, and reject all the building. Vermont St. M. E. Church *v.* Brose, 104 Ill. 206.

Under a contract providing that the building must be subject to the approval of an architect or engineer, the engineer cannot, after approving the materials in advance, withdraw his approval. Jones *v.* Gilchrist, (Tex. Civ. App. 1894) 27 S. W. 890.

69. Lasher *v.* Colton, 80 Ill. App. 75.

70. Lasher *v.* Colton, 80 Ill. App. 75; Schreiner *v.* Miller, 67 Iowa 91, 24 N. W. 738, 56 Am. Rep. 339.

Although an architect may, as between the owner and the builder, be an arbitrator, and his decision be unimpeachable except for fraud or dishonesty, yet as between him and the owner he is answerable for either negligence or unskilfulness in the performance of his duty as architect. Badgley *v.* Dickson, 13 Ont. App. 494 [*approving* Irving *v.* Morrison, 27 U. C. C. P. 242].

Negligence of architect not attributable to owner.— Failure of a competent architect properly to inspect construction of a build-

building that is inferior to that called for by the contract,[71] and is not entitled to recover anything for plans, specifications, or estimates made for the work, where he is so negligent that he fails to inform himself of the nature of the soil of his foundation and such soil turns out to be bad,[72] nor is his negligence excused by the fact that he relied on the statements of others,[73] and the architect is liable to the builder for damages sustained by him by reason of an improper refusal to issue a certificate essential to the builder.[74]

IV. ACTIONS BY OR AGAINST ARCHITECT.

A. By Architect — 1. FORM OF ACTION. Assumpsit will lie where an architect has been prevented by the owner from performing a special agreement.[75]

2. PARTIES. Where the obligation is joint, both contractors must be joined and a discontinuance against either is improper.[76]

ing is not attributable to the owner. Burke *v.* Ireland, 166 N. Y. 305, 59 N. E. 914 [*reversing* 47 N. Y. App. Div. 428, 62 N. Y. Suppl. 453].

Negligence of architect does not bind owner.— The mere fact that the architect does not object to work as it progresses does not amount to waiver of provisions of the contract relating to the character of the work and the manner in which it is to be done, and the owner is not bound by such failure. Monahan *v.* Fitzgerald, 164 Ill. 525, 45 N. E. 1013.

Architect not ordinarily liable for builder's breach of contract.—A supervising architect is not liable for the builder's breaches of contract arising through incapability, misconduct, or intemperance, unless he has wrongfully given the builder a certificate of performance. Gilman *v.* Stevens, 54 How. Pr. (N. Y.) 197.

71. Gilman *v.* Stevens, 54 How. Pr. (N. Y.) 197.

72. Moneypenny *v.* Hartland, 1 C. & P. 352, 12 E. C. L. 211.

73. Hubert *v.* Aitken, 15 Daly (N. Y.) 237, 2 N. Y. Suppl. 711, 5 N. Y. Suppl. 839, 19 N. Y. St. 914; Moneypenny *v.* Hartland, 1 C. & P. 352, 12 E. C. L. 211.

Presence of owner during progress of work no excuse for neglect.— Proof that the owner was about the premises during the progress of the work and must have seen the imperfections does not excuse negligence of architect. Lotholz *v.* Fiedler, 59 Ill. App. 379.

Architect taking construction contract liable for defective plans.—An architect employed to make plans and undertaking to carry out such plan cannot, after executing them, urge that his employment had changed from that of architect to that of a builder and that he is no longer bound for defects in the plans. Louisiana Molasses Co. *v.* Le Sassier, 52 La. Ann. 2070, 28 So. 217.

Where an architect appears to have exercised reasonable care and diligence in supervision the mere fact that inferior material has been used in some instances and that work has been carelessly done does not establish as matter of law that he has not fully performed his contract. Hubert *v.* Aitken, 15 Daly (N. Y.) 237, 2 N. Y. Suppl. 711, 5 N. Y. Suppl. 839, 19 N. Y. St. 914.

74. Ludbrook *v.* Barrett, 46 L. J. C. P. 798, 36 L. T. Rep. N. S. 616, 25 Wkly. Rep. 649.

Duty to third persons.—A surveyor owes no duty to mortgagees who have advanced money to a builder upon the faith of certificates given by him of exercising care in giving the certificates, and is not liable to them for negligence in the absence of contract and fraud. Le Lievre *v.* Gould, [1893] 1 Q. B. 491, 57 J. P. 484, 62 L. J. Q. B. 353, 68 L. T. Rep. N. S. 626, 4 Reports 274, 41 Wkly. Rep. 468.

For form of action see *infra*, IV, B, 2, a.

Responsibility of owner for architect's refusal to issue certificate.—Where there is no collusion between the architect and the owner, the owner is not responsible for the architect's refusal to give a certificate. Clarke *v.* Watson, 18 C. B. N. S. 278, 34 L. J. C. P. 148, 11 L. T. Rep. N. S. 679, 13 Wkly. Rep. 345.

75. Wilson *v.* Bauman, 80 Ill. 493; Marcotte *v.* Beaupre, 15 Minn. 152; Wolf *v.* Altmeyer, 8 Pa. Dist. 408, 30 Pittsb. Leg. J. N. S. (Pa.) 27; Chicago *v.* Tilley, 103 U. S. 146, 26 L. ed. 371. See also, generally, ACTIONS, II, J [1 Cyc. 734].

As to recovery, in general, where performance is impossible see CONTRACTS.

Right to rescind contract where performance prevented.—Where the architect was by the contract to have so much for drawing plans and a per centum for superintendence, but the owner prohibits the superintendence, the architect may treat the contract as rescinded and sue for the value of the services in preparing the plans. Marcotte *v.* Beaupre, 15 Minn. 152.

76. Where plaintiff contracted with the son-in-law of one defendant to make plans and specifications for a building to be erected on land, half of which defendant owned, the other half being controlled by the son-in-law, and plaintiff sued defendant and his daughter, but dismissed as to her, it was held that the obligation sued on was joint, and the father entitled to a verdict. Van Leyen *v.* Wreford, 81 Mich. 606, 45 N. W. 1116.

Necessity of joining joint contractors generally see PARTIES.

3. Conditions Precedent. Plaintiff must have performed or tendered performance of the work for which he seeks to recover.[77]

4. Defenses. The negligence of plaintiff is a defense to an action by an architect to recover remuneration,[78] nor is the defense barred because defendant occupied the building being erected before its completion;[79] but where the contract is divisible and apportionable and has been completely performed but negligently, the defects cannot be urged to defeat all recovery on the contract.[80] It is not a defense, however, to an action to recover for superintending the erection of a building that plaintiff was one of the contractors for the erection of the building.[81]

5. Pleading[82] — a. Complaint, Declaration, or Petition — (I) *In General.* A complaint alleging that plaintiff made plans and specifications and procured bids for building, at the request and by direction of defendant, at an agreed compensation of a percentage upon the estimated cost of building, and that the percentage amounts to a named sum, is sufficient.[83]

(II) *Particular Averments.* Where there was a special contract it may be averred,[84] and should be;[85] but a complaint is sufficient if, after alleging a special agreement, it avers facts showing that plaintiff is entitled to recover for the reasonable value of his services and claims that value.[86]

b. Counter-Claim.[87] A defense by way of counter-claim in an action to

77. Wehrli *v.* Rehwoldt, 107 Ill. 60. See also, generally, Actions, I, N [1 Cyc. 692].

Where an architect declines to proceed with his undertaking upon discovering that a contract for a portion of the work has been awarded to a business rival of a company of which he is president, and takes away his plans, and calls off his superintendent in charge of the building, a promise by the owner, who was in great haste to have the building completed, to pay him a commission of five per cent upon the cost of such work as an inducement to resume work cannot be made the basis of recovery. Lingenfelder *v.* Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844.

78. Havens *v.* Donahue, 111 Cal. 297, 43 Pac. 962; Hettinger *v.* Beiler, 54 Ill. App. 320.

79. Hettinger *v.* Beiler, 54 Ill. App. 320, holding that such occupancy does not constitute, as a matter of law, an acceptance of the architect's work.

80. Hubert *v.* Aitken, 15 Daly (N. Y.) 237, 2 N. Y. Suppl. 711, 5 N. Y. Suppl. 839, 19 N. Y. St. 914, holding that the defects may entitle defendant to a reduction of the damages caused thereby.

It is erroneous to refuse an instruction that payments made by the owner with knowledge that the work paid for was not according to specifications would not preclude the recovery of damages suffered from the architect's failure to use proper diligence and skill in drawing the plans or specifications or to supervise the work done thereunder. Pierson *v.* Tyndall, (Tex. Civ. App. 1894) 28 S. W. 232.

81. Shaw *v.* Andrews, 9 Cal. 73, holding that, though it may be true that the duties of superintendent are in some respects in conflict with the interest of the contractor, if an owner, with a full knowledge of the facts, chooses to employ a contractor for the erection of the building as superintendent and to rely on his good faith and honesty, there is no reason why the contractor should not receive the value of his services, especially where there is no pretense that his duties as superintendent were not faithfully and satisfactorily performed. Accordingly under such circumstances it is not error to refuse an instruction "that plaintiff, being one of the contractors for the erection of the building, it would be against public policy to allow him to act as superintendent of the same building" and that any contract for such superintendence was void.

82. See also, generally, Contracts; Pleading.

83. Lambert *v.* Sanford, 55 Conn. 437, 12 Atl. 519, holding that it is not necessary to aver when, by whom, or how the cost of building was to be estimated, or how much the estimated cost was, or that any estimate had been made, or when payment was to be made, or that a demand for payment had been made on defendant.

84. Maack *v.* Schneider, 51 Mo. App. 92, holding that an architect under contract to plan and superintend the building of seven houses who has completed three, and has been paid for them, but who has agreed to wait a reasonable time for the erection of the other four, for which he has made plans and specifications, may, when suing for services with respect to them, declare on the original contract.

85. Ehlers *v.* Wannack, 118 Cal. 310, 50 Pac. 433.

86. Ehlers *v.* Wannack, 118 Cal. 310, 50 Pac. 433, holding that failure to prove a special contract under such circumstances was not a material variance or one by which defendant could possibly have been injured.

As to declaring on a special contract and recovering on a general count see Assumpsit, 4 Cyc. 356.

87. See, generally, Recoupment, Set-Off, and Counter-Claim.

recover for architect's fees and the superintendence of a building must state facts creating a legal liability against plaintiff, defendant in the counter-claim.[88]

6. Issues and Proof. Under the general issue, where plaintiff sues to recover for plans, defendant may show that plaintiff failed to furnish such plans and specifications as could be used,[89] and, under an answer denying the allegations of the complaint and setting up a contract for the services mentioned in the complaint and payment of the amount therein agreed upon, plaintiff may show that, after the contract but before performance, the plans and character of the work were entirely changed, that no price was fixed upon, and what the services rendered under the new arrangement were worth.[90]

7. Evidence[91] **— a. Admissibility** — (i) *On Behalf of Plaintiff.* Evidence of the customary charges of architects for services similar to those performed by plaintiff is admissible.[92] For the purpose of showing what the reasonable cost of a building was, in a case where the remuneration was to be based upon such cost, evidence of bids for the erection is admissible, even if such bids were not accepted by defendant.[93] Where the action is to recover compensation for drawing plans, plaintiff, if an architect by profession, may testify as to the value of his services,[94] but, for the purpose of proving the value of plaintiff's recent labor in erecting a building, it is incompetent to show that plaintiff was a skilled carpenter and joiner a long time ago, or to show the comparative value of a good architect and an ordinary joiner.[95] Again, where it is sought to recover additional compensation, evidence of the value of plaintiff's services in making an estimate is not admissible, unless it is shown that the services were rendered at the instance of the employer.[96]

(ii) *On Behalf of Defendant.* Where plaintiff has shown by expert witnesses the value of his services in drawing plans and specifications, defendant may show the time reasonably necessary therefor;[97] and, to mitigate damages in an action to recover compensation for drawing two sets of plans, defendant may show that the plans presented in court are more elaborate than the first plan drawn.[98] Testimony that good plans have been obtained for less than the sum proved by plaintiff to be the customary rate of charges of architects is not admissible where plaintiff seeks to recover for drawing plans.[99]

88. Bodine *v.* Andrews, 47 N. Y. App. Div. 495, 62 N. Y. Suppl. 385, holding that an owner, restrained from locating a house upon premises nearer than a specified distance to a street, who has examined the plan therefor prior to construction of the house, and who knew that the plan as prepared located a portion of the building nearer to the street than was permissible, and who with such knowledge approved the plan, cannot enforce an agreement of the architect to pay counsel fees for defending a suit to restrain the maintenance of such portion of the building.

Damages caused by an owner by premature publication of plans are not recoverable by owner in an action brought by the architect to recover for services rendered, since the relationship of the parties is not of that confidential character as will bring the facts within the provisions of Cal. Code Civ. Proc. § 1891. Havens *v.* Donahue, 111 Cal. 297, 43 Pac. 962.

89. Geddis *v.* Greene County, 20 Ind. App. 274, 50 N. E. 581.

90. Marcotte *v.* Beaupre, 15 Minn. 152.

91. See, generally, Evidence.

92. Laver *v.* Hotaling, 115 Cal. 613, 47 Pac. 593, holding that it is immaterial whether defendant is ignorant or not of the customary rate of compensation, since the fact that the customary rates of charges made by architects originated in and conformed to a rule established by an association of architects does not render evidence of the actual custom incompetent.

So in a suit by an architect to recover for work and services plaintiff may show a custom that the employment of an architect to make plans and designs for a building carried with it an employment to superintend its construction. Wilson *v.* Bauman, 80 Ill. 493, also holding that defendant may in rebuttal show by the testimony of builders and contractors as well as architects that no such custom existed among persons entering into building contracts.

93. Lambert *v.* Sanford, 55 Conn. 437, 12 Atl. 519.

94. Nourry *v.* Lord, 3 Abb. Dec. (N. Y.) 392, 2 Keyes (N. Y.) 617.

95. Shepard *v.* Ashley, 10 Allen (Mass.) 542.

96. Tilley *v.* Chicago, 103 U. S. 155, 26 L. ed. 374.

97. Ehlers *v.* Wannack, 118 Cal. 310, 50 Pac. 433.

98. Graves *v.* Hunt, 8 N. Y. St. 308.

99. Cooper *v.* Gordon, (Tex. Civ. App. 1893) 23 S. W. 608.

b. Sufficiency. Where an architect sues for the value of his services and defendant pleads that the work was done under an express contract for a stated consideration, plaintiff must make out his case by a preponderance of evidence;[1] so, the contract or an offer of a contract by defendant either in form or intention must be proved, where plaintiff sues on an express contract for superintendence,[2] or where defendant counter-claims by reason of plaintiff's alleged breach of performance of a supplemental contract.[3]

8. TRIAL[4] — a. Questions of Law and Fact. Whether an architect has used proper skill and diligence is a question of fact;[5] so the value of services rendered by plaintiff is a question of fact, and the time reasonably necessary to perform those services should be considered;[6] again, whether there was a positive employment to draw plans, or whether plans were drawn and submitted by the architect without any agreement or employment, is a question of fact.[7]

b. Instructions. An instruction given by the court must not be misleading,[8] invade the province of the jury by submitting to it a question of law,[9] or be prejudicial to either party.[10]

c. Verdict. In an action instituted by the architect against his employer it has been held that the verdict or finding should dispose of all the issues in the case,[11]

1. Johnson *v.* Wanamaker, 17 Pa. Super. Ct. 301.

2. Benton *v.* Springfield Y. M. C. A., 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320, holding that there is not sufficient evidence of the contract or an intention to make one, where defendants invited plaintiff and other architects to participate in a competition for plans but defendant reserved the right to reject any or all submitted, and where the only evidence is that plaintiff submitted plans and that defendants agreed among themselves that the person who received the greatest number of votes should superintend the construction, and that all the plans were rejected but that defendants selected plaintiff as architect to superintend construction.

In order to charge a third person with liability for preparing plans, the fact of an express promise to pay for them must be established by a fair preponderance of testimony: and the promise should be proved to have been made before the service was rendered; for if the work was not done on the credit of the third person but for some other, any subsequent express parol promise to pay for the same would be void, as being a promise to pay for the debt of a third person. Dunton *v.* Chamberlain, 1 Ill. App. 361.

3. A paper, signed by an architect after he has performed all the services which he has agreed to perform, acknowledging a receipt of part payment and stating that after such payment there remained due a balance which the owner agreed to pay in instalments, at stated times, "which shall be in full for all services for plans of exterior and floor plans" is not an agreement to do detailed drawings or specifications. Pfeiffer *v.* Campbell, 111 N. Y. 631, 19 N. E. 498, 20 N. Y. St. 482.

4. See, generally, TRIAL.

5. Moneypenny *v.* Hartland, 1 C. & P. 352, 12 E. C. L. 211.

6. Ehlers *v.* Wannack, 118 Cal. 310, 50 Pac. 433.

7. Nourry *v.* Lord, 3 Abb. Dec. (N. Y.) 392, 2 Keyes (N. Y.) 617, holding that the jury should consider the fact that plaintiff took away plans instead of leaving them with the owner in determining the question.

8. Coombs *v.* Beede, 89 Me. 187, 36 Atl. 104, 56 Am. St. Rep. 406, holding an instruction, in an action to recover for services rendered in preparing plans and specifications, where the defense was that plaintiff agreed to furnish a plan for a building not exceeding in cost a certain amount but that the plans called for a more expensive house, misleading, when it charged that plaintiff should have either made plans for a building not costing more than a specified sum, or have frankly told defendant that he could not so do, or that if plaintiff undertook to make plans with such a restriction the plan must be so made in order to recover therefor.

9. Link *v.* Westerman, 80 Mo. App. 592, where recovery was sought for making plans and specifications under an implied agreement that they should be accepted, and the jury were erroneously instructed to find for plaintiff if defendant accepted the plans and specifications as work done by plaintiff for him, since the instruction failed to define what amounted to an acceptance.

10. Wees *v.* Warren, 72 Mo. App. 641, where plaintiff was not to have any pay for plans unless he procured a bid at or near his estimate, and an instruction was held to be not prejudicial (although it used objectionable language) when it charged that plaintiff could not recover if the bid procured by him was "largely in excess" of his estimate, and the facts were that plaintiff did procure a person who bid reasonably near the estimated cost.

11. Ehlers *v.* Wannack, 118 Cal. 310, 50 Pac. 433, holding that, where there was a special defense to the effect that plaintiff was told that defendant would not build unless a license was procured for the proposed

and that in such a case the verdict should be sufficiently certain to support a judgment thereon.[12]

9. Judgment.[13] If the cause of action is breach of a contract to pay for plans and specifications defendant, after default, cannot, upon the assessment of damages, show the non-existence of a contract or that a contract if entered into is void.[14]

10. Damages[15] **— a. Generally.** Where the contract price was entire but was to be paid by instalments at times fixed by the progress of the work, the measure of damages is the reasonable value of the services rendered.[16]

b. Prospective Profits. Prospective profits cannot be recovered by an architect employed to prepare plans and obtain estimates for a building and to let the contract for the erection of such building, whose contract is rescinded, unless the amount agreed to be paid to him, or that anything was ever done by him toward performance of the contract, is proved.[17]

c. Reduction of Damages. Defendant is entitled to a reduction from the sum due under the contract, where the architect furnished defective plans whereby defendant suffered damage, of the amount of damage caused by the architect's negligence;[18] so the damages may be reduced, in an action for breach of a contract for superintending the erection of a building, where plaintiff claims that defendant made it impossible for him to complete his part of the contract,

building, but that plaintiff might draw specifications with the understanding that he was not to receive compensation therefor unless the license was procured, and that the building was abandoned because the license was not procurable, a finding that there was no agreement between plaintiff and defendant as to the amount payable to plaintiff related merely to amount and did not dispose of the question whether plaintiff was to be paid anything in the event of defendant not obtaining a license and abandoning the erection of the building.

Finding will not be disturbed where evidence is conflicting.—Where damages for an alleged negligent plan are counter-claimed and there is a finding in favor of plaintiff upon the question of negligence as to which the evidence is conflicting, the findings will not be disturbed. Havens *v.* Donahue, 111 Cal. 297, 43 Pac. 962.

12. A verdict in an action to recover for architectural plans is sufficiently certain to support a judgment for defendant, when it finds that the architect agreed that if his plans were not used in the construction of a particular building he was to receive no pay for it, and that the plans were abandoned on account of imperfections. Geddis *v.* Greene County, 20 Ind. App. 274, 50 N. E. 581.

13. See, generally, Judgments.

14. Lambert *v.* Sanford, 55 Conn. 437, 12 Atl. 519.

15. See, generally, Damages.

16. Marquis *v.* Lauretson, 76 Iowa 23, 40 N. W. 73, holding that where an architect is to be paid one third of the agreed price for drawing plans "when general drawings are made" and the balance at specified stages of the work, but is prevented by the employer from doing more than making the drawings, and it does not appear that the first payment of the price fixed was regarded as fair compensation for the drawings while some of the evidence indicates that it was not, the value of the service constitutes the measure of damages.

Acceptance of salary as superintendent affects method of computing value of service for drawing plan. Where an architect's plan has been accepted and he then departs from the general rule of architects by accepting a salary for superintending the work, with no reservation as to his compensation for the preceding service of preparing the plan, the value of such service should be computed by the salary he has accepted and not according to a schedule of an institute of architects. Smithmeyer *v.* U. S., 147 U. S. 342, 13 S. Ct. 321, 37 L. ed. 196 [*affirming* 25 Ct. Cl. 481].

17. Fuller *v.* Craig, 10 N. Y. St. 108.

Amount of recovery where contract is rescinded — Louisiana.— Where a building contract is rescinded under La. Civ. Code, art. 2736 (La. Rev. Code [1900] art. 2765), providing that an owner may cancel at pleasure his contract, even in case work is commenced thereunder, by paying the architect the expense and labor incurred up to that time and such damages as the nature of the case may require, and there is no evidence on which expenses or loss of profits, if any occurred, can be estimated, the architect can only recover the price of his plans and a commission upon the work done on the building up to the time the contract is annulled. Moore *v.* Howard, 18 La. Ann. 635.

18. Hubert *v.* Aitken, 15 Daly (N. Y.) 237, 2 N. Y. Suppl. 711, 5 N. Y. Suppl. 839, 19 N. Y. St. 914.

In an action by an architect to recover for plans, where it is found that the plans are incomplete and defective, it is erroneous to take as a basis for ascertaining the value of plaintiff's services the amount which the plans would have been worth if skilfully prepared and complete and deduct from such amount what it would cost to complete the plans and remedy the defects therein. Johnson *v.* Wanamaker, 17 Pa. Super. Ct. 301.

by showing that during the time contemplated in the contract plaintiff, though unemployed, rejected offers of employment within the range of his general occupation on reasonable terms, and in the same locality.[19]

B. Against Architect — 1. By Employer — a. Parties.[20] Where improper construction results from joint neglect of architect and builder, a suit based on such neglect will lie against the architect alone.[21]

b. Evidence.[22] Where negligence of the architect consists in the furnishing of defective plans, specifications, and drawings it is essential to prove that the builder substantially complied with such plans and specifications and that in consequence of such compliance damages were sustained by plaintiff.[23]

c. Trial[24] **— Instructions.** Where the scope of an architect's duty is in controversy an instruction that defendant should not have issued a certificate to a builder unless the work appeared, upon a proper inspection, to be properly done, has been held erroneous, since it left the jury to determine what it was proper for an architect to do.[25]

d. Damages.[26] The measure of damages in an action to recover for an architect's negligence in drawing plans is the difference between the value of the building, as designed and constructed, and what it would have been worth had it been properly constructed.[27]

2. By Builder — a. Form of Action. Case will lie at the suit of a builder against an architect who wrongfully withholds a certificate required under the contract to be given by him upon satisfactory performance,[28] and the builder may resort to equity where there is collusive dealing and concert between the owner and the person whom he has appointed architect, overseer, or agent, for the purpose of injuring the builder or defeating his claim.[29]

b. Pleading[30] **— Complaint, Declaration, or Petition.** In an action at law a pleading is sufficient where it shows that defendant had a duty to perform toward plaintiff, a breach of such duty, a fraudulent collusion with the owner to abstain from doing that which defendant was authorized to do, and a damage

19. Pond *v.* Wyman, 15 Mo. 175.

20. See, generally, Parties.

21. Newman *v.* Fowler, 37 N. J. L. 89, holding that a suit by the owner against the architect alone is not barred because the owner has refused to pay the builder a part of the money due him on the ground of improper construction.

Joint liability of architect and builder.— An architect, as well as the builder, is jointly and severally liable for damages incurred by reason of the insufficiency of timber used to support the joists of a floor that has sunk. David *v.* McDonald, 8 L. C. Jur. 44, 14 L. C. Rep. 31.

For form of complaint against architect to recover damages arising from defects in plans and specifications see Lake *v.* McElfatrick, 139 N. Y. 349, 34 N. E. 922, 54 N. Y. St. 610 [*reversing* 19 N. Y. Suppl. 494, 46 N. Y. St. 437].

22. See, generally, Evidence.

23. Lake *v.* McElfatrick, 139 N. Y. 349, 34 N. E. 922, 54 N. Y. St. 610 [*reversing* 19 N. Y. Suppl. 494, 46 N. Y. St. 437], holding that, where there is a variance from plans involving the whole method of constructing the affected part and so material that it may have been the direct cause of the injury, a question as to whether such variance did or did not cause the injury should not be submitted to the jury, though it might be otherwise where the variance was confessedly immaterial or occurred in an independent part of the building having no structural relation to the defective portion. See also Louisiana Molasses Co. *v.* Le Sassier, 52 La. Ann. 2070, 28 So. 217 [*affirmed* in 52 La. Ann. 1768, 28 So. 223], where it was also held that an architect who has taken charge of the execution of his plan, selected his own subcontractor, his own workmen and the materials used in the construction of the building, is responsible to the owner with whom he contracts.

Evidence that the builder has advanced the architect money is admissible as bearing upon the issue of negligence. Gilman *v.* Stevens, 54 How. Pr. (N. Y.) 197.

24. See, generally, Trial.

25. Vigeant *v.* Scully, 20 Ill. App. 437.

26. See, generally, Damages.

27. Larrimore *v.* Comanche County, (Tex. Civ. App. 1895) 32 S. W. 367.

28. Ludbrook *v.* Barrett, 46 L. J. C. P. 798, 36 L. T. Rep. N. S. 616, 25 Wkly. Rep. 649, where it was said by Grove, J., that though it did not appear that such an action had ever been brought against an architect there was "no reason why such an action should not lie." See also Pawley *v.* Turnbull, 3 Giff. 70, 7 Jur. N. S. 792, 4 L. T. Rep. N. S. 672.

29. Bliss *v.* Smith, 34 Beav. 508.

30. See, generally, Pleading.

resulting to plaintiff from defendant's so abstaining from doing such act.[31] Where, however, the builder complains in equity of undue delay on the part of an architect or engineer in awarding the amount earned by the builder, plaintiff's pleading must show facts establishing a case of fraud or collusion against defendant.[32]

V. RIGHTS, DUTIES, AND LIABILITIES OF BUILDER.

A. In General — 1. As to Recording Contract. Where the filing or recording of a building contract is required by a statute, the duty so to do is primarily on the builder.[33]

2. As to Bonds. A builder must execute a bond to secure the due performance of his work, when required so to do by the contract,[34] or by statute.[35] Where, however, the employer accepts a written guaranty in place of the bond and fails to ask anything more the execution of a bond is not necessary.[36]

3. As to Building Regulations. It is the duty of the builder to comply with any building regulation,[37] and should he fail so to do he may be fined.[38] Where the obtaining of a permit is necessary and the contract is silent upon the subject it seems the duty of the builder to obtain it,[39] unless under the statute or regulation it is the duty of the owner so to do.[40] Where the contract requires a builder

31. Ludbrook *v.* Barrett, 46 L. J. C. P. 798, 36 L. T. Rep. N. S. 616, 25 Wkly. Rep. 649.

32. Scott *v.* Liverpool, 3 De G. & J. 334, 5 Jur. N. S. 104, 28 L. J. Ch. 230, 7 Wkly. Rep. 153.

33. Laidlaw *v.* Marye, 133 Cal. 170, 65 Pac. 391. See also Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840.

Necessity of recording contract see *supra*, II, B, 2, c; and, generally, Mechanics' Liens.

34. Flynn *v.* Dougherty, (Cal. 1891) 26 Pac. 831; Howard *v.* Maine Industrial School, 78 Me. 230, 3 Atl. 657.

A builder's bond is not without consideration because executed after the contract and after the commencement of work, in a case where the contract is entered into upon faith of the builder's promise to give bond. Smith *v.* Molleson, 148 N. Y. 241, 42 N. E. 669 [*affirming* 26 N. Y. Suppl. 653, 57 N. Y. St. 250].

The failure of the builder to furnish or tender the required bond precludes his right to recover prospective profits, when he has done nothing under the contract. Flynn *v.* Dougherty, (Cal. 1891) 26 Pac. 831.

Validity of provision requiring bond see *supra*, II, B, 4, c, (II).

As to liability of sureties see *infra*, VI.

35. A builder, entering into a formal building contract with the United States with respect to the construction of a public building, etc., must, under act of congress of August 13, 1894 (28 Stat. at L. 278) before commencing work under the contract execute a penal bond with sureties conditioned for the prompt payment by him of all persons supplying him with labor or materials with respect to the work provided for in the contract. Since the practical effect of the statute is to confer a special lien in favor of these persons and to substitute the bond in the place of the building as the thing upon which a lien is charged, the statute should receive a liberal construction. U. S. *v.* Burgdorf, 13 App. Cas. (D. C.) 506.

36. Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586.

37. Montgomery *v.* Louisville, etc., R. Co., 84 Ala. 127, 4 So. 626; Waterman *v.* Shepard, 21 R. I. 257, 43 Atl. 661; Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504; Walker *v.* McMillan, 6 Can. Supreme Ct. 241.

Builder cannot recover under contract where regulations not complied with.— When work is condemned by the department, a builder contracting to build, according to the regulations of a building department, cannot recover under his contract, unless he shows that the building was erected in accordance with departmental requirements. Mittnacht *v.* Wolf, 6 N. Y. St. 44.

Illegality of contract to build in contravention of building regulation see *supra*, II, B, 4, b.

Health requirements in connection with building see Health.

38. Montgomery *v.* Louisville, etc., R. Co., 84 Ala. 127, 4 So. 626; Sioux Falls *v.* Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 62]; Baxter *v.* Seattle, 3 Wash. 352, 28 Pac. 537.

39. Smith *v.* Luning Co., 111 Cal. 308, 43 Pac. 967.

Validity and constitutionality of ordinances providing for the obtaining of building permits see Municipal Corporations.

40. It is the duty of the owner to obtain a permit to build under N. Y. Consol. Act, § 503, and, where a contract requires the contractor to proceed with the work promptly and diligently, an implied obligation is imposed on the owner to procure the permit to enable the contractor to proceed with the work, and for a breach of such obligation the contractor may recover such damages as have been occasioned. Weeks *v.* Trinity Church, 56 N. Y. App. Div. 195, 67 N. Y. Suppl. 670.

to obtain a permit from the building department of a city he must file plans reasonably free from objections and acceptable to the department, as their filing is a prerequisite to a permit.[41]

4. As to Insurance. The builder is not bound to insure the building until its completion, without an express or implied agreement for that purpose,[42] and the fact that a builder for his own protection might have insured the building on which he was working does not show negligence on his part.[43]

5. As to Possession of Building. A builder who has agreed to erect a building on the land of another has no right to interfere with the latter's possession any more than is necessary to carry out his contract,[44] and cannot, after his work is completed, retain possession as against the owner with a view of enforcing payment of the price,[45] or dispossess the owner.[46] He is, however, entitled to have such possession of the building given to him as is requisite for the purpose of labor thereon.[47]

6. As to Débris on Land and Material Excavated. In the absence of express stipulation, where an owner of land on which buildings are standing contracts for the erection of new buildings thereon, the builder, on taking possession under the contract, has a right to the material of the old building,[48] at any rate where the builder is not paid for taking down the old building;[49] but a contract to excavate land for the erection of a building thereon does not imply that the title to valuable material removed in performing the contract is transferred to the builder.[50]

7. As to Certificates, Estimates, Etc. Unless it is in terms, or by fair implication from the nature or language of the agreement, made the duty of the employer to procure a certificate, decision, or estimate of an architect, engineer, or superintendent, the responsibility rests solely on the builder to obtain it.[51]

Where a builder seeks to recover from the owner damages caused by his failure to obtain a building permit, which resulted in an enforced suspension of the work, the builder may show that the specifications were not filed until after the contract was made, and were so defective that the building superintendent refused a permit, and that the owner's attention was called to the defect too late to obtain a permit. Such evidence is sufficient to entitle the builder to have the question whether the owner did not fail in his obligation to procure a permit submitted to the jury. Weeks *v.* Trinity Church, 56 N. Y. App. Div. 195, 67 N. Y. Suppl. 670.

It is not the builder's duty to obtain a permit that can be issued only upon the owner's personal application, unless the contract goes further than to provide that a permit must be obtained before commencing work. Leverone *v.* Arancio, 179 Mass. 439, 61 N. E. 45.

41. Strom *v.* Dongan, 31 Misc. (N. Y.) 754, 64 N. Y. Suppl. 57, holding that unless this was done a builder was not entitled to payment of a first instalment of the contract price. See also Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1032, in which case it was held that the filing of a plan showing the size and dimensions of contemplated improvements, which was afterward amended and approved by the bureau of buildings, was sufficient.

A mandamus to compel a building inspector to grant a permit will be refused where the inspector considers that the plan submitted fails to comply with statutory requirements as to public health. Rafferty *v.* Haddock, 6 Pa. Dist. 667.

When mandamus lies see, generally, MANDAMUS.

42. Clark *v.* Franklin, 7 Leigh (Va.) 1.

A contract requiring a builder to take all risks before completion of the building does not impose on him a liability for losses previously incurred by the employer. Rothwell *v.* Dean, 60 Mo. App. 428.

As to guaranty of work see *infra*, V, B. 3, a.

43. Weis *v.* Devlin, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38.

44. Keystone Surgical Supply Co. *v.* Bate, 196 Pa. St. 566, 46 Atl. 887.

45. Beller *v.* Stange, 27 Mich. 312.

46. Keystone Surgical Supply Co. *v.* Bate, 196 Pa. St. 566, 46 Atl. 887.

47. Vermont St. M. E. Church *v.* Brose, 104 Ill. 206; Niblo *v.* Binsse, 3 Abb. Dec. (N. Y.) 375, 1 Keyes (N. Y.) 476.

Implied right to possession see *supra*, II, C, 1, d.

48. Villalobos *v.* Mooney, 2 La. 331; Morgan *v.* Stevens, 6 Abb. N. Cas. (N. Y.) 356.

49. Viau *v.* Jubinville, 1 L. C. L. J. 64.

50. Jones *v.* Wick, 10 Misc. (N. Y.) 112, 30 N. Y. Suppl. 924, 62 N. Y. St. 526.

51. Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

A contract providing that the owner's engineer should, on a certain day of each month, estimate the amount of work done in the month previous and return a certificate

B. Performance and Breach of Building Contract — 1. In General. Unless strict performance has been waived,[52] or unless the terms have been changed or modified by the owner, architect, engineer, or superintendent under provisions for that purpose contained in the contract,[53] a builder must perform his contract according to its terms and those of the plans and specifications where there are any;[54] it not being an excuse for non-performance that a literal com-

thereof to the owner, who should then pay the builder a certain portion of the contract price, does not impose on the latter the duty of obtaining a certificate before payment to him, as the estimate of the engineer is solely for the benefit of the owner. Rusling *v.* Union Pipe, etc., Co., 5 N. Y. App. Div. 448, 39 N. Y. Suppl. 216.

Notice of application for certificate.— It is not necessary unless so provided in the contract for the builder to give notice to the owner before applying for a certificate. Taylor *v.* Renn, 79 Ill. 181; Korf *v.* Lull, 70 Ill. 420; McAuley *v.* Carter, 22 Ill. 53. *Contra*, Packard *v.* Van Schoick, 58 Ill. 79.

Duty of architect with respect to certificates, decisions, or estimates see *supra*, III, B, 2, d.

Procurance of certificate as condition precedent see *infra*, VII, A, 3, b.

52. A waiver of performance is not caused by merely paying the whole or part of the contract price (Andrews *v.* Portland, 35 Me. 475; Moulton *v.* McOwen, 103 Mass. 587), unless the employer knew at the time of payment that the work was defective (Andrews *v.* Portland, 35 Me. 475), or unless the circumstances under which the payment was made warranted an inference that a waiver was intended (Moulton *v.* McOwen, 103 Mass. 587). So performance is not waived because the building is used and occupied by the employer (Kirkland *v.* Oates, 25 Ala. 465), although it may be a waiver of defects not substantial in their character (Parke *v.* Franco-American Trading Co., 7 N. Y. St. 498).

Waiver of one defect is not a waiver of others.— Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

Effect of acceptance as a waiver see *infra*, V, B, 6.

53. Validity of provision for providing from deviations from contract see *supra*, II, B, 4, c, (VI).

A builder is justified in departing from the specifications with the assent of the architect where his contract is to do work in a specified manner under the architect's directions. Sinclair *v.* Tallmadge, 35 Barb. (N. Y.) 602.

Even if the contract provides that the building be carried on in accordance with directions to be thereafter given by an architect or engineer the contract must be complied with until the provision is acted upon. Burke *v.* Kansas City, 34 Mo. App. 570.

Time of commencing work.— Where a right to make changes in the plans need not under the contract be exercised before work is commenced, failure to exercise the right does not relieve the builder from a duty promptly to commence work. Savage *v.* Glenn, 10 Oreg. 440.

54. *Arkansas.*—Manuel *v.* Campbell, 3 Ark. 324.

California.— Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635.

Connecticut.—Smith *v.* Scott's Ridge School Dist., 20 Conn. 312.

Illinois.— Monahan *v.* Fitzgerald, 164 Ill. 525, 45 N. E. 1013; Clark *v.* Pope, 70 Ill. 128; Estep *v.* Fenton, 66 Ill. 467; Davidson *v.* Provost, 35 Ill. App. 126.

Iowa.— Fauble *v.* Davis, 48 Iowa 462.

Kansas.— Graham *v.* Trimmer, 6 Kan. 230.

Kentucky.— Kiel *v.* Kline, 15 Ky. L. Rep. 158.

Maine.— White *v.* Oliver, 36 Me. 92; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316; Jewett *v.* Weston, 11 Me. 346.

Maryland.— Hagerstown Presb. Church *v.* Hoopes Artificial Stone, etc., Co., 66 Md. 598, 8 Atl. 752.

Massachusetts.— Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455.

Michigan.— Eaton *v.* Gladwell, 121 Mich. 444, 80 N. W. 292; Scheible *v.* Klein, 89 Mich. 376, 50 N. W. 857.

Minnesota.— Cornish, etc., Co. *v.* Antrim Co-operative Dairy Assoc., 82 Minn. 215, 84 N. W. 724; Stees *v.* Leonard, 20 Minn. 494.

Mississippi.— Wooten *v.* Read, 2 Sm. & M. (Miss.) 585.

Missouri.— Haynes *v.* Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413; Helm *v.* Wilson, 4 Mo. 41, 28 Am. Dec. 336; Burke *v.* Kansas City, 34 Mo. App. 570.

Montana.— Franklin *v.* Schultz, 23 Mont. 165, 57 Pac. 1037.

New Hampshire.— Wheeden *v.* Fiske, 50 N. H. 125.

New York.— Tompkins *v.* Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Lewis *v.* Yagel, 77 Hun (N. Y.) 337, 28 N. Y. Suppl. 833, 60 N. Y. St. 23; Salvinsky *v.* Levin, 27 Misc. (N. Y.) 521, 58 N. Y. Suppl. 284; Kohl *v.* Fleming, 21 Misc. (N. Y.) 690, 47 N. Y. Suppl. 1092; Bryon *v.* New York, 7 N. Y. St. 17.

North Carolina.— Lawing *v.* Rintles, 97 N. C. 350, 2 S. E. 252.

Oregon.—Chamberlain *v.* Hibbard, 26 Oreg. 428, 38 Pac. 437.

Pennsylvania.—Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545.

South Dakota.— Aldrich *v.* Wilmarth, 3 S. D. 523, 54 N. W. 811.

Texas.— Linch *v.* Paris Lumber, etc., Co., (Tex. 1890) 14 S. W. 701.

West Virginia.— McConnell *v.* Hewes, 50 W. Va. 33, 40 S. E. 436.

Wisconsin.— Jackson *v.* Cleveland, 19 Wis. 400.

United States.— Dermott *v.* Jones, 23 How.

pliance with minute specifications was difficult; that difficulty, if it exists, should have been taken into consideration by the builder at the time he entered into his contract;[55] moreover where the plans and specifications are not contained in the same instrument as the agreement but are attached thereto or referred to therein they must be followed just as zealously as if incorporated in the body of the contract.[56] A builder, however, is not bound to follow directions of an architect, engineer, or superintendent that conflict with the plans and specifications;[57] or to do work not shown upon plans and specifications furnished to him and upon which

(U. S.) 220, 16 L. ed. 442; Driscoll *v.* U. S., 34 Ct. Cl. 508.

England.— Ellis *v.* Hamlen, 3 Taunt. 52, 12 Rev. Rep. 595.

Ambiguity in plans and specifications.— A builder who has agreed to erect a building after certain plans, drawings, and specifications impliedly understands them and cannot escape liability for defective performance, on the ground that he exercised ordinary care and skill to understand but failed to comprehend them. If there is obscurity in the drawings and specifications the builder should apply to the architect for directions, for if he relies on his own judgment, and a mistake occurs, he must bear the consequences. Clark *v.* Pope, 70 Ill. 128.

Judgment of builder subordinated to that of architect.— A builder's right to exercise his own judgment with respect to what the specifications, plans, and details require for its fulfilment is subordinated to that of an architect who is authorized to determine their meaning. Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270.

Necessity of general compliance where employer prohibits doing of special work.— A builder is not relieved from general compliance with the contract because not allowed by his employer to do some particular piece of work. Meyer *v.* Martin, (Tex. Civ. App. 1899) 50 S. W. 470.

Duty of builder to correct mistake not observed by architect.— The builder must correct any substantial defect or departure from the contract which escapes the attention of an architect at the time he gives a certificate, in a case where it is stipulated that a certificate shall not relieve the builder from the necessity of completion according to plans and specifications. Snell *v.* Evans, 55 Ill. App. 670.

Effect of architect's failure to object to deviations.— The fact that the architect has charge of the work and makes no objections as the work progresses does not waive strict performance. Monahan *v.* Fitzgerald, 164 Ill. 525, 45 N. E. 1013.

The fact that the builder has employed a competent person under him and the person the owner expected him to employ does not excuse non-performance. Blakeslee *v.* Holt, 42 Conn. 226.

The employer has a right to have the structure he contracted for and not another, and even his caprices, if expressed in the contract, must be complied with, notwithstanding they would not add to the value of the building, or may lessen its value. Perry *v.* Quackenbush, 105 Cal. 299, 38 Pac. 740. See also Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635.

Where the contract contains a guaranty that the builder's work will be sufficient for a particular purpose, there is no substantial performance unless the work conforms thereto. Early *v.* O'Brien, 51 N. Y. App. Div. 569, 64 N. Y. Suppl. 848; MacKnight Flintic Stone Co. *v.* New York, 13 N. Y. App. Div. 231, 43 N. Y. Suppl. 139; Sherwood *v.* Houtman, 73 Hun (N. Y.) 544, 26 N. Y. Suppl. 150, 57 N. Y. St. 271; Weeks *v.* O'Brien, 59 N. Y. Super. Ct. 28, 12 N. Y. Suppl. 720. See also MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. 661 [*reversing* on other ground 31 N. Y. App. Div. 232, 52 N. Y. Suppl. 747].

Where the contract provides that the work must be done under the instructions of an architect, the contract is performed if the work is done as required by the architect and to his approval, whether the work is done according to the plans prepared for building or not. Smith *v.* Farmers' Trust Co., 97 Iowa 117, 66 N. W. 84.

Variations treated at the time as immaterial will not afterward be treated as departures. Wildey *v.* Fractional School Dist. No. 1, 25 Mich. 419.

Damages recoverable from builder by reason of departure from specifications see *infra*, VII, D.

Excuse for departing from plans and specifications see *infra*, V, B, 7.

Nature and purpose of plans and specifications see *supra*, II, A, 2.

Preparation of specifications see *supra*, III, B, 2, b.

Necessity of averring full performance of contract according to plans and specifications see *infra*, VII, A, 5, a.

55. Smith *v.* Scott's Ridge School Dist., 20 Conn. 312.

As to literal performance being a condition precedent to recovery see *infra*, VII, A, 3.

56. Suarez *v.* Duralde, 1 La. 260; Burke *v.* Kansas City, 34 Mo. App. 570.

Construction and operation of plans and specifications see *supra*, II, C, 1, b.

57. Burke *v.* Kansas City, 34 Mo. App. 570, holding that a provision that the builder is to build according to directions that an engineer or architect may from time to time give in superintending the construction of the work should be construed to mean such directions as he may give, looking to a completion of the work according to the plans and specifications, and not to mean that he

his bid was made,[58] unless the contract provides that extra work may be directed by the owner or his representative.[59] Where there is not a compliance, acceptance by the owner cannot be compelled, and the builder is not entitled to recover on the contract.[60]

may give directions for an improvement in manner different from that provided in the plans and specifications.

Legality of provision authorizing deviation see *supra*, II, B, 4, c, (VI).

Right to deviate from contract see *infra*, V, B, 2.

Power of architect to alter or modify contract see *supra*, III, A, 1.

58. *Illinois.*— Sexton *v.* Chicago, 107 Ill. 323.

Maryland.— Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

New Jersey.—Isaacs *v.* Reeve, (N. J. 1899) 44 Atl. 1.

New York.— Lennon *v.* Smith, 23 N. Y. App. Div. 293, 48 N. Y. Suppl. 456 [*affirmed* in 161 N. Y. 661, 57 N. E. 1115]; Millstone Granite Co. *v.* Dolan, 61 N. Y. Super. Ct. 106, 18 N. Y. Suppl. 791, 46 N. Y. St. 531 [*affirmed* in 138 N. Y. 607, 33 N. E. 1082]; Schwoerer *v.* Zimmermann, 63 N. Y. Suppl. 1020; Horgan *v.* McKenzie, 17 N. Y. Suppl. 174, 43 N. Y. St. 131.

Tennessee.— Fisher *v.* Edgefield, etc., Mfg. Co., (Tenn. Ch. 1900) 62 S. W. 27.

Work included in contract but not in specifications.—A builder is not entitled to recover for work as an extra, where it is included in the contract but not mentioned in a specification referred to in the contract. Williams *v.* Fitzmaurice, 3 H. & N. 844. Where signed specifications provided that the finishing of certain work should be made of freshly burnt shell lime and thoroughly washed, coarse, white marble dust, but the plans and specifications submitted to the contractors, and on which they bid, called for a plain cement exterior coat without the white finish, the builders were held bound to the specifications signed. L'Hommedieu *v.* Winthrop, 59 N. Y. App. Div. 192, 69 N. Y. Suppl. 381. But see Schwoerer *v.* Zimmermann, 63 N. Y. Suppl. 1020, in which case the builder was not compelled to do work specified in plans and specifications but not specified in his bid.

Effect of understanding in the trade.— Where a contract called for a combination passenger and freight elevator, without more particular specification, it was held that the builder was not liable for a failure to put gates on the elevator, where there was no proof that the custom of the trade was to supply gates in the absence of specifications, and that the testimony of a witness that, in his opinion, gates were proper and necessary was not sufficient for this purpose. Horgan *v.* McKenzie, 17 N. Y. Suppl. 174, 43 N. Y. St. 131.

A builder may refuse to do the work or assent thereto under a clause providing that no extra charge is to be made unless a written agreement be made and attached to the contract; if, however, the builder does the work without a written agreement so made and attached to the building contract he waives any right to additional compensation for the performance of such extra work. Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

An owner is not entitled to forfeit a contract by reason of the builder's refusal to do work not shown on plans and specifications referred to in the contract or to furnish materials other than those appearing therein. Sexton *v.* Chicago, 107 Ill. 323.

Effect of contract adopting that of original contractor.— Where a contract to build according to certain plans and specifications was abandoned by the contractor after partial completion and another contractor engaged to finish according to the original plans and specifications the latter contractor was bound to correct without extra cost such defects in the work and materials formerly employed as were apparent to a competent and careful observer, but he was not bound to correct defects undiscoverable by the use of reasonable care, since they were not within his contract and the employer was entitled to recover the amount paid therefor from the original contractor. Long Beach City School Dist. *v.* Dodge, 135 Cal. 401, 67 Pac. 499.

59. **Validity of provision as to extra work** see *supra*, II, B, 4, c, (VIII).

Effect of provision authorizing extra work. — A stipulation that the building shall be erected under the supervision of an architect, and that orders for extra work, after being signed by the owner of the building must be countersigned by the architect, does not authorize the architect to order such work done independently of the owner, and of course his ratification, verbal or written, of the performance of extra work done by the contractor does not bind the owner to pay for the same. Baum *v.* Covert, 62 Miss. 113.

60. Fanjoy *v.* Seales, 29 Cal. 243; North *v.* Mallory, 94 Md. 305, 51 Atl. 89; Eaton *v.* Gladwell, 121 Mich. 444, 80 N. W. 292; Cornish, etc., Co. *v.* Antrim Co-operative Dairy Assoc., 82 Minn. 215, 84 N. W. 724. See also Twitty *v.* McGuire, 7 N. C. 501.

At any rate, unless there is substantial compliance.— Cornish, etc., Co. *v.* Antrim Co-operative Dairy Assoc., 82 Minn. 215, 84 N. W. 724.

No obligation to accept where certificate of satisfaction is not produced.— Where the contract provides that an architect must certify to his satisfaction with the work performed by the builder, the owner is not under any obligation to accept the work without the certificate. Clark *v.* Pope, 70 Ill. 128.

Owner not liable at law or in equity.— Where a contract provides that the builder must make all necessary measurements neces-

2. Substantial Performance. To constitute substantial performance a general adherence to the plans prescribed is not sufficient; the builder not being entitled to wilfully or carelessly depart from minute details;[61] to leave his work incomplete in any material respect;[62] to make deviations and omissions that effect a large saving to himself and a consequent damage to the owner,[63] or that in fact substitute a new contract for the original one,[64] or which are so substantial as not to be capable of remedy and that an allowance out of the contract price will not give the owner essentially what he contracted for;[65] or to omit work that cannot be done by the owner except at a great cost,[66] or with great risk to the building.[67] There is a substantial performance, however, where a variation from the specifi-

sary for proper prosecution of the work called for by the drawings or specifications, and also during the progress of the work all necessary remeasurements to prevent misfitting, it is the builder's duty so to do, and if the duty and responsibility are neglected, by reason of which he suffers loss, he cannot, either in law or in equity, hold the owner liable therefor. Driscoll *v.* U. S., 34 Ct. Cl. 508.

As to acceptance see *infra*, V, B, 6, a.

Performance as condition precedent see *infra*, VII, A, 3.

61. Bixby *v.* Wilkinson, 25 Minn. 481; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614.

No substantial performance even if material is substantially the same as specified. — Where a contract stipulates that the builder shall not vary in any manner from the plan and specifications without the written consent of his employer, and the contract calls for a particular kind of material, if it appears that such material could have been procured evidence that the material substituted was substantially like that specified is immaterial and irrelevant, or that material of a different dimension was more in accord with the plan is immaterial. Linch *v.* Paris Lumber, etc., Co., (Tex. 1890) 14 S. W. 701.

Whether an omission or deviation is wilful or not is a fact of great weight in determining if there has been a substantial compliance with the contract. Bradford *v.* Whitcomb, 11 Tex. Civ. App. 221, 32 S. W. 571.

Evidence of substantial performance see *infra*, VII, A, 7.

Right to recover compensation where there is substantial performance see *infra*, VII, A, 3.

62. Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840; Clark *v.* Collier, 100 Cal. 256, 34 Pac. 677; Fox *v.* Clark, 44 N. Y. App. Div. 626, 60 N. Y. Suppl. 237; Anderson *v.* Petereit, 86 Hun (N. Y.) 600, 33 N. Y. Suppl. 741, 67 N. Y. St. 563; McEntyre *v.* Tucker, 5 Misc. (N. Y.) 228, 25 N. Y. Suppl. 95, 54 N. Y. St. 826, 23 N. Y. Civ. Proc. 171; Gillespie Tool Co. *v.* Wilson, 123 Pa. St. 19, 16 Atl. 36.

Ornamentation of a building is matter of substance. — McEntyre *v.* Tucker, 5 Misc. (N. Y.) 228, 25 N. Y. Suppl. 95, 54 N. Y. St. 826, 23 N. Y. Civ. Proc. 171.

Where the contract provides for payment when the building is inclosed and "ready for lathing," and heating pipes and speaking tubes called for in the specifications are not in place, there is no substantial performance. Fox *v.* Clark, 44 N. Y. App. Div. 626, 60 N. Y. Suppl. 237.

A contract for putting down a well of specified dimensions is not performed where those dimensions are not followed and there is nothing to prevent the well being the required size, it not being material that the well as bored is sufficient for the locality and that the boring of it to the required size would only subject the owner to extra expense. Gillespie Tool Co. *v.* Wilson, 123 Pa. St. 19, 16 Atl. 36.

Obedience to the requirement of a building law with which the builder agrees to comply is a matter of substance, and a failure to comply therewith renders a building not completed according to specifications. De Kay *v.* Bliss, 4 N. Y. St. 728. See also Mittnacht *v.* Wolf, 6 N. Y. St. 44.

63. Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635; D'Amato *v.* Gentile, 54 N. Y. App. Div. 625, 66 N. Y. Suppl. 833.

64. Swain *v.* Seamens, 9 Wall. (U. S.) 254, 19 L. ed. 554, holding that it is not sufficient to erect a building costing more and better adapted to the purposes for which it is intended than the one agreed to be built. See also Fauble *v.* Davis, 48 Iowa 462.

65. Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; Van Clief *v.* Van Vechten, 130 N. Y. 571, 29 N. E. 1017, 42 N. Y. St. 736 [*modifying* 55 Hun (N. Y.) 467, 8 N. Y. Suppl. 760, 29 N. Y. St. 378]; Weeks *v.* O'Brien, 59 N. Y. Super. Ct. 28, 12 N. Y. Suppl. 720, 35 N. Y. St. 463.

66. Martus *v.* Houck, 39 Mich. 431, 33 Am. Rep. 409; Cahill *v.* Heuser, 2 N. Y. App. Div. 292, 37 N. Y. Suppl. 736, 73 N. Y. St. 450; Smith *v.* Sheltering Arms, 89 Hun (N. Y.) 70, 35 N. Y. Suppl. 62, 69 N. Y. St. 273; Flannery *v.* Sahagian, 83 Hun (N. Y.) 109, 31 N. Y. Suppl. 360, 63 N. Y. St. 844; Zimmermann *v.* Jourgensen, 70 Hun (N. Y.) 222, 24 N. Y. Suppl. 170, 54 N. Y. St. 13.

The fact that an owner completing a building departs from the plans by introducing additional work is not material, where the contract provides for alterations in the plans and it does not appear that the changes were made in bad faith. Zimmermann *v.* Jourgensen, 70 Hun (N. Y.) 222, 24 N. Y. Suppl. 170, 54 N. Y. St. 13.

67. Flannery *v.* Sahagian, 83 Hun (N. Y.) 109, 31 N. Y. Suppl. 360, 63 N. Y. St. 844.

cations of the contract is unintentional and unimportant,[68] and one by which the building is not injured;[69] where the building is actually used after it is erected for its intended purpose;[70] where the defects can be remedied by the owner without any great expenditure,[71] and it is apparent that the builder intended to fulfil his contract;[72] or where the work is, in fact, done under the direction and to the satisfaction of the architects in compliance with the contract, although not to the entire satisfaction of the owner.[73] The defect, however, must not run through the whole or be such that the object of the owner to have a specified amount of work done in a particular way is not accomplished.[74] Whether there has been a substantial performance, the evidence being contradictory, is one of fact,[75]

68. Smith *v.* Scott's Ridge School Dist., 20 Conn. 312; Oberlies *v.* Bullinger, 132 N. Y. 598, 30 N. E. 999, 44 N. Y. St. 851 [*reversing* 11 N. Y. Suppl. 264, 33 N. Y. St. 443]; Woodward *v.* Fuller, 80 N. Y. 312.

Small and unimportant portions of the work remaining undone are not sufficient to render it not substantially performed so as to preclude the right of a builder to a payment which is not a final payment, if the work can readily be done thereafter and it does not appear that it would not be done if the payment were made. Highton *v.* Dessau, 19 N. Y. Suppl. 395, 46 N. Y. St. 922. Where the only deviation from plans is an error in measurement by which the roof of a rear addition of a building is a few inches too low and the deviation does not affect the appearance or value of the building there is substantial performance. Oberlies *v.* Bullinger, 132 N. Y. 598, 30 N. E. 999, 44 N. Y. St. 851 [*reversing* 11 N. Y. Suppl. 264, 33 N. Y. St. 443].

Bona fide omission may leave contract substantially performed.— Where the builder agreed to make alterations in a building so as to include "the cutting of a door from sitting room to cellar," but the door was not cut because a tenant of the owner objected thereto and the building, though otherwise completed before its acceptance by the owner, a finding by a jury in an action on the agreement that there had been a substantial compliance and that the uncompleted part was omitted in good faith should not be disturbed. Bradford *v.* Whitcomb, 11 Tex. Civ. App. 221, 32 S. W. 571.

Contract to heat building.— A contract to well and sufficiently heat a building being erected is performed where the equipment furnished is sufficient in quality and power to heat the building as exhibited in the plans shown the builder. Phœnix Iron Co. *v.* The Richmond, 6 Mackey (D. C.) 180.

69. Smith *v.* Scott's Ridge School Dist., 20 Conn. 312.

70. Rose *v.* O'Riley, 111 Mass. 57; Liggett *v.* Smith, 3 Watts (Pa.) 331, 27 Am. Dec. 358.

71. Jones, etc., Co. *v.* Davenport, 74 Conn. 418, 50 Atl. 1028; D'Andre *v.* Zimmermann, 17 Misc. (N. Y.) 357, 39 N. Y. Suppl. 1086; Chaplin *v.* Candee, 14 Misc. (N. Y.) 453, 35 N. Y. Suppl. 1018, 70 N. Y. St. 741; Valk *v.* McKiege, 16 N. Y. Suppl. 741, 43 N. Y. St. 26; Crouch *v.* Gutmann, 10 N. Y. Suppl. 275, 32 N. Y. St. 254 [*affirmed* in 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608].

A failure to cover a well when completed is not a failure to substantially perform, if the cost of the cover is a trifling one. Chaplin *v.* Candee, 14 Misc. (N. Y.) 453, 35 N. Y. Suppl. 1018, 70 N. Y. St. 741.

A failure to perform work to the extent of thirteen dollars odd does not show that a contract to build at a price of three hundred and ninety dollars was not substantially performed. D'Andre *v.* Zimmermann, 17 Misc. (N. Y.) 357, 39 N. Y. Suppl. 1086.

Railroad construction contract.— In the construction of a road-bed for a railroad there is no substantial *bona fide* performance if work be omitted, even if such omitted portion may be executed at a trifling expense. Finegan *v.* L'Engle, 8 Fla. 413.

72. Valk *v.* McKiege, 16 N. Y. Suppl. 741, 43 N. Y. St. 26. See also Muckle *v.* Payne, 9 Pa. Dist. 413, 24 Pa. Co. Ct. 305.

Well-digging contract.— In an action to recover in a well-digging contract a jury is warranted in finding a substantial compliance with the contract, where it appears that while finishing the last portion of the work the owner ordered the builder to stop work. Madden *v.* Oestrich, 46 Minn. 538, 49 N. W. 301.

73. Grube *v.* Schultheiss, 57 N. Y. 669.

74. Bradford *v.* Whitcomb, 11 Tex. Civ. App. 221, 32 S. W. 571.

A deviation or omission may be substantial though it does not run through the entire building and can be remedied without disturbing or interfering with the entire building. Oberlies *v.* Bullinger, 75 Hun (N. Y.) 248, 27 N. Y. Suppl. 19, 57 N. Y. St. 752.

75. Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. 661 [*reversing* on other ground 31 N. Y. App. Div. 232, 52 N. Y. Suppl. 747]; Crouch *v.* Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608, 45 N. Y. St. 470; MacKnight Flintic Stone Co. *v.* New York, 13 N. Y. App. Div. 231, 43 N. Y. Suppl. 139; Gibbons *v.* Russell, 13 N. Y. Suppl. 879, 37 N. Y. St. 402.

A motion to dismiss or to direct a verdict should be denied.— Gibbons *v.* Russell, 13 N. Y. Suppl. 879, 37 N. Y. St. 402.

The fact that the owner offers practically no testimony does not alter the rule, since a question of credibility of witnesses cannot be

so it is a question of fact whether the builder was wilfully negligent in failing substantially to perform his contract.[76]

3. Skill and Care Required — a. In General. It is the duty of the builder to perform his work in a workmanlike manner;[77] that is, the work should be done as a skilled workman would do it,[78] the law exacting from a builder ordinary care and skill only.[79] Where the builder fails to perform in a workmanlike manner, he is liable for defects resulting from that failure, notwithstanding the work is done according to the best of his skill, knowledge, and ability in accordance with his contract,[80] and, where he agrees to build according to certain specifications and guarantees the sufficiency of the work for its intended purpose, he is liable, in the event of a failure, notwithstanding the owner furnishes the specifications, and that by them the work could not be performed sufficiently.[81]

b. With Respect to Third Parties — (i) *In General.* It is a builder's duty so to do his work as not to be a source of danger to others lawfully working on the building,[82] and to persons passing along a thoroughfare abutting on the

taken from the jury. Harlow *v.* Homestead, 194 Pa. St. 57, 45 Atl. 87.

76. Hopper *v.* Cutting, 13 N. Y. Suppl. 820, 37 N. Y. St. 504 [*following* Byron *v.* Bell, 16 Daly (N. Y.) 198, 10 N. Y. Suppl. 693, 32 N. Y. St. 323]. See also Johnson *v.* De Peyster, 50 N. Y. 666.

77. Manuel *v.* Campbell, 3 Ark. 324; Feagan *v.* Meredith, 4 Mo. 514; Greene *v.* State, 8 Ohio 310.

An undertaking to construct in a "substantial and workmanlike manner" implies that the work shall be done perfectly for the character of the job contemplated. Smith *v.* Clark, 58 Mo. 145.

Where the builder contracts to do work "in a substantial and workmanlike manner," and "in accordance with the plans, specifications and instructions furnished," the mode of accomplishing the work is left to the skill and judgment of the contractor and the "instructions" must be in reference to the kind of structure, design, materials, combinations, and all matters pertaining to the planning of the building. Hunt *v.* Pennsylvania R. Co., 51 Pa. St. 475.

78. Fitzgerald *v.* La Porte, 64 Ark. 34, 40 S. W. 261, holding that the manner, considered good and workmanlike by the community of the district where the contract was made, is not a criterion, since an employer is not bound by the habits of local workmen.

Implied agreement to use such skill as is customary.— One undertaking to build impliedly agrees that he will do the work skilfully, according to the approved usages of his trade. Somerby *v.* Tappan, Wright (Ohio) 229.

79. Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153; Fletcher *v.* Seekell, 1 R. I. 267.

As to the degree of care required of bailees for hire in general see BAILMENTS, 5 Cyc. 184, 185, 186.

The highest degree of skill and care, such as the most skilful and careful builders use, is not required. On the other hand the law is not satisfied with the lowest degree, or such as the most ignorant and careless exercise, for this would be gross negligence; the medium, therefore, that is, the average of skill and the average of care, is the rule of skill and care required. Fletcher *v.* Seekell, 1 R. I. 267.

Perpetual presence of the builder is not required nor is he precluded from employing assistants where he contracts to perform work "under his own personal and immediate superintendence, and not by sub-contract," but he must give the work his personal attention. Reed *v.* Conway, 26 Mo. 13.

A builder is not responsible for the success of something adopted at his recommendation by his employer, when his employer exercises his own judgment in adopting it. Fletcher *v.* Seekell, 1 R. I. 267.

80. Manuel *v.* Campbell, 3 Ark. 324.

81. Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637.

Legality of provision guaranteeing work see *supra*, II, B, 4, c, (IX).

82. Bill *v.* New York Expanded Metal Co., 60 N. Y. App. Div. 470, 69 N. Y. Suppl. 989; Pasquini *v.* Lowry, 18 N. Y. Suppl. 284, 44 N. Y. St. 339; Weiler *v.* Isley, 6 N. Y. St. 595. *Compare* Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077.

Where a builder has taken all the usual precautions against danger and there is no evidence as to what caused an object to fall from above a builder is not liable to a person rightfully in the building who is injured by the falling of the object. Van Orden *v.* Acken, 28 N. Y. App. Div. 160, 50 N. Y. Suppl. 843.

In an action for injuries caused by the falling of a pile of brick from the upper floor of a building, in the course of construction, into the cellar, where plaintiff was working, it appeared that the accident occurred while workmen were moving a derrick past the pile of brick, and that when the derrick reached the point nearest the bricks they began to fall, and that the men then stopped moving the derrick. This evidence was held sufficient to present a question for the jury as to whether the brick were knocked down by the derrick, though there was no direct evidence of that fact. Reilly *v.* Atlas Iron Constr. Co., 83 Hun (N. Y.) 196, 31 N. Y. Suppl. 618, 64 N. Y. St. 332.

place where building is in operation.[83] Thus, where work is being done by a staging suspended above a thoroughfare the builder should have a sufficient covering or other proper provision to render its use reasonably safe to people that may be expected to pass below,[84] but there is no implied legal obligation to adopt a special precaution to prevent injury from material dropping from a building, where the work is being done on an interior wall, unless there be reason to apprehend that persons may be employed under the staging.[85]

(II) *WHILE BUILDING IS PROGRESSING.* A builder, carrying on an independent employment and acting in pursuance of a contract with his employer, by which he has agreed to work at specified times in a particular manner and for a stipulated price, is alone liable for injuries to third parties that occur while the work is progressing and which are caused by his negligence;[86] and, for negligence, of the builder not done under the contract but in violation of it the employer is

83. Mayer *v.* Thompson-Hutchinson Bldg. Co., 116 Ala. 634, 22 So. 859; Angus *v.* Lee, 40 Ill. App. 304.

Non-compliance with ordinance as to staging legal negligence.—The failure of a builder to comply with the requirements of a reasonable ordinance as to the method of protecting passers-by from injuries resulting from the falling of materials or implements constitutes negligence as a matter of law. Smith *v.* Milwaukee Builders' etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

Non-application of statute as to protective fencing.— A statute requiring a builder to maintain a fence round a building so long as there is danger from materials falling therefrom does not render the builder liable to a person injured when the danger has ceased, even if the fencing be removed. Waterman *v.* Shepard, 21 R. I. 257, 43 Atl. 661.

84. Angus *v.* Lee, 40 Ill. App. 304.

85. Angus *v.* Lee, 40 Ill. App. 304.

86. *California.*— Frassi *v.* McDonald, 122 Cal. 400, 55 Pac. 139; Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345.

Connecticut.— Geer *v.* Darrow, 61 Conn. 220, 23 Atl. 1087; Lawrence *v.* Shipman, 39 Conn. 586.

Illinois.— Alexander *v.* Mandeville, 33 Ill. App. 589.

Iowa.— Hughbanks *v.* Boston Invest. Co., 92 Iowa 267, 60 N. W. 640.

Massachusetts.—Conners *v.* Hennessey, 112 Mass. 96; Brackett *v.* Lubke, 4 Allen (Mass.) 138, 81 Am. Dec. 694; Hilliard *v.* Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743.

New York.— Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369.

Pennsylvania.— Walton *v.* Bryn Mawr Hotel Co., 160 Pa. St. 3, 28 Atl. 438.

United States.— Crane Elevator Co. *v.* Lippert, 63 Fed. 942, 24 U. S. App. 176, 11 C. C. A. 521; Doran *v.* Flood, 47 Fed. 543.

Canada.— Walker *v.* McMillan, 6 Can. Supreme Ct. 241.

Doctrine of independent contractors see, generally, MASTER AND SERVANT.

Authority to do certain acts to facilitate building does not exempt the builder from liability. Thus an ordinance allowing the placing of a post for the purpose of attaching thereto a guy line stretched across the street will not relieve the builder from an injury caused by the manner of stretching the rope. Larson *v.* Ring, 43 Minn. 88, 44 N. W. 1078.

Building laws which prescribe the manner in which structures are to be built do not make the owner an absolute guarantor that the building erected should be in compliance with the statute, and accordingly the owner has no obligation to preserve the servants of the contractor or a subcontractor from the negligence of their masters or of fellow servants. Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369.

So far as injury to adjoining property from the erection of a building is due to the negligence and carelessness of the builder, and not necessarily incident to the plan of the work or the building contract, the builder, and not the owner, is liable. Laycock *v.* Parker, 103 Wis. 61, 79 N. W. 327.

A contractor is liable to owner's tenants for damages to their goods. Butts *v.* J. C. Mackey Co., 72 Hun (N. Y.) 562, 25 N. Y. Suppl. 531, 55 N. Y. St. 137.

Liability of builder for negligence of his subcontractor.— In an action against a builder for injuries caused by the falling of a wall, if it appears that he accepted the wall from a subcontractor with knowledge of its condition and that, at the time of the acceptance, the condition was so defective as to cause the injuries complained of, but that the builder's own servants did certain work which caused the defect the question whether the builder's liability was shifted to the subcontractor is one of fact. Berberich *v.* Ebach, 131 Pa. St. 165, 25 Wkly. Notes Cas. (Pa.) 272, 18 Atl. 1008.

Liability for injuries caused by act of intruder.— A builder is not liable for injuries caused by articles falling from a properly constructed building, which is temporarily completed, through the act of an intruder or an employee neither in the discharge of any duty nor acting within the scope of his employment, even if he fails to erect a suitable scaffold and maintain it until the permanent completion of the building. Mayer *v.* Thompson-Hutchinson Bldg. Co., 116 Ala. 634, 22 So. 859.

As to liability of builder to his employees see, generally, MASTER AND SERVANT.

in general not liable,[87] the relationship of master and servant not subsisting between the parties, but only that of contractor and contractee, and the power of directing and controlling the work being parted with by the employer and given to the builder.[88] But on the other hand if the builder is employed generally and the work is to be performed for a reasonable compensation or for a stipulated price,[89] the employer remains liable,[90] because he retains the right and power of directing and controlling the manner and time of executing the work, or of refraining from doing it, if in his opinion necessary or expedient.[91] The builder is not liable for injuries to trespassers on the building,[92] or for injuries occurring to the employees of other contractors where they without request or invitation go upon a scaffold erected by him and such scaffold gives way thereby injuring such employees.[93] The builder and owner are jointly liable, where their negligence directly concurs to produce the injury, although one may have undertaken one part and the other another part of the work, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury,[94] and where the building is unlawful.[95] The employer is liable where the builder faithfully performs his contract and a third person is injured by him in the course of its due performance or by its result,[96] for the employer causes the precise act to

87. Lawrence *v.* Shipman, 39 Conn. 586.

88. Conners *v.* Hennessey, 112 Mass. 96; Brackett *v.* Lubke, 4 Allen (Mass.) 138, 81 Am. Dec. 694.

The employment of an architect or engineer by the employer does not so interfere with the conduct of the work by the builder as to render the employer liable for the negligence of the builder. Murphy *v.* Ottawa, 13 Ont. 334.

Whether builder or employer has control of building operations is a question of fact.— Peard *v.* Karst, 10 N. Y. Suppl. 463, 32 N. Y. St. 159.

General liability of master for acts of servant see, generally, MASTER AND SERVANT.

89. Brackett *v.* Lubke, 4 Allen (Mass.) 138, 81 Am. Dec. 694.

Right of employee of builder to recover from the owner for injuries received without fault on his part from the dangerous conditions of premises in the control of the owner see, generally, NEGLIGENCE.

90. Hughbanks *v.* Boston Invest. Co., 92 Iowa 267, 60 N. W. 640; Hoffnagle *v.* New York Cent., etc., R. Co., 1 Thomps. & C. (N. Y.) 346.

91. Brackett *v.* Lubke, 4 Allen (Mass.) 138, 81 Am. Dec. 694.

92. McNeven *v.* Arnott, 4 N. Y. App. Div. 133, 38 N. Y. Suppl. 759, 74 N. Y. St. 94; Mauer *v.* Ferguson, 17 N. Y. Suppl. 349, 44 N. Y. St. 372.

93. Maguire *v.* Magee, (Pa. 1888) 13 Atl. 551.

94. Lawrence *v.* Shipman, 39 Conn. 586; Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

The test seems to be whether or not the negligence of each directly contributed in producing the injurious result. Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

95. Lawrence *v.* Shipman, 39 Conn. 586; Walker *v.* McMillan, 6 Can. Supreme Ct. 241.

Where a building is a direct violation of a building law the employer is responsible for the wrong done by the builder or his servants, and is liable to third persons who sustained damage from the doing of that wrong. Walker *v.* McMillan, 6 Can. Supreme Ct. 241.

Violation of building law legal negligence. — One who, in erecting a building, violates a building law by causing a greater weight to be placed on portions of the foundation than the limit prescribed is negligent as matter of law, and liable for an injury to an innocent person, resulting from a violation of the statute. Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156. See also Diamond State Iron Co. *v.* Giles, (Del. 1887) 11 Atl. 189 [*affirming* 8 Atl. 368]; Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

Approval of plans by the building department of a city does not absolve the owner from liability growing out of its construction in violation of a statute. Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156.

96. Lawrence *v.* Shipman, 39 Conn. 586; Pye *v.* Faxon, 156 Mass. 471, 31 N. E. 640.

Material dropping from building.— An instruction in an action to recover for injuries caused by material dropping from a building, charging that so far as material dropped "from the carelessness of the workmen the [employer] is not liable for that; but if it was something necessarily involved in the building of the wall" then the employer is liable to the person injured thereby so far as it is actionable is correct. Pye *v.* Faxon, 156 Mass. 471, 31 N. E. 640.

Inherent defects in construction.— Where a building is inherently defective and dangerous *prima facie* the owner is responsible (Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369; Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 [*affirmed* in 163 N. Y. 559, 57 N. E. 1109]; Walton *v.* Bryn Mawr Hotel Co., 160 Pa. St. 3, 28 Atl.

be done which occasions the injury;[97] and upon the same principle the owner is responsible to persons injured by a builder while employed in doing work which, in the progress of its execution, obviously exposes others to unusual peril.[98] Again, it is generally understood that the owner is liable for the negligence of the builder, where such negligence creates a nuisance,[99] and where an incompetent and untrustworthy builder is employed.[1]

(III) *After Completion and Acceptance.* After completion and acceptance of a building the liability of the builder for accidents caused by defective construction ceases and the liability attaches to the owner, whether the damage is attributable to his own negligence or to that of the builder.[2]

4. Defects — a. In General. A builder is responsible to his employer for defective performance, and is liable either to an action or to a deduction from the price agreed upon.[3]

438) though he has no actual knowledge of the defect, and employed a contractor for the construction, and a competent architect to oversee it (Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 [*affirmed* in 163 N. Y. 559, 57 N. E. 1109]), but he must affirmatively show that he did employ a competent architect and acted upon his advice (Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369. And see also Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156).

As to effect of consulting an architect upon liability of owner of a building in course of erection see Olsen *v.* Mayer, 46 Nebr. 240, 64 N. W. 954.

Reasonable care in obtaining plans and employing a builder to do work does not relieve the owner of a building falling without apparent reason from liability from resulting damage. A building so defectively constructed as to be dangerous is a nuisance and the doctrine of independent contractors does not apply. Wilkinson *v.* Detroit Steel, etc., Works, 73 Mich. 405, 41 N. W. 490.

97. Lawrence *v.* Shipman, 39 Conn. 586.

98. Lawrence *v.* Shipman, 39 Conn. 586, holding that where an owner employed a mason to remove earth from under the owner's tenement and underpin it with stone and the builder did his work negligently, thereby causing the building to fall and injure tenants of the owner inhabiting the building, such work could not be treated as one at all exposing the tenants to unusual peril.

99. Lawrence *v.* Shipman, 39 Conn. 586; Conners *v.* Hennessey, 112 Mass. 96.

This principle seems somewhat doubted by Maule, J., in Overton *v.* Freeman, 3 C. & K. 52, 11 C. B. 867, 16 Jur. 65, 21 L. J. C. P. 52, 73 E. C. L. 867.

1. Lawrence *v.* Shipman, 39 Conn. 586; Conners *v.* Hennessey, 112 Mass. 96.

Employment of builder pecuniarily irresponsible.— The principle that an owner employing an incompetent and untrustworthy builder is liable for injuries done to third persons by the builder's carelessness in the execution of his contract does not apply as a general rule to the employment of a person pecuniarily irresponsible, though this fact may be of some weight where the work to be done is hazardous to others. "If a person having an interest in a job which naturally exposes others to peril, should attempt to shield himself from responsibility by contracting with a bankrupt" builder, that person may be subjected for damages done by the builder. Lawrence *v.* Shipman, 39 Conn. 586.

2. Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345; Gorham *v.* Gross, 125 Mass. 232, 28 Am. Rep. 224.

Should the owner accept a house to his knowledge insufficiently built and allow it to remain in that condition he assumes to third persons who may be concerned its sufficiency for the uses and purposes for which it was constructed. Fanjoy *v.* Seales, 29 Cal. 243.

Builder's duty only to owner.— A contractor who has completed his work and turned it over to the owner is not liable for accidents caused by the defective construction of the building, since the builder's duty is only to the owner. Curtin *v.* Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220.

3. *District of Columbia.*— Beha *v.* Ottenberg, 6 Mackey (D. C.) 348.

Florida.— Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

Indiana.— McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470.

Maine.—Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

Massachusetts.—Taft *v.* Montague, 14 Mass. 282, 7 Am. Dec. 215.

Michigan.— Phelps *v.* Beebe, 71 Mich. 554, 39 N. W. 761.

Missouri.— Globe Light, etc., Co. *v.* Doud, 47 Mo. App. 439; Austin *v.* Keating, 21 Mo. App. 30.

New York.— Walker *v.* Millard, 29 N. Y. 375.

Ohio.— Marshall *v.* Ames, 11 Ohio Cir. Ct. 363. See also Somerby *v.* Tappan, Wright (Ohio) 570.

Canada.— Pepin *v.* Martin, 5 Rev. Lég. 183.

Amount of recovery where performance is defective see *infra*, VII, D.

An owner who seeks to recover damages for defects in construction should protect himself as far as possible from the damage which would naturally result from the defects, and can only charge the builder with such expenses and efforts, and to the damage which he could not have prevented by the ex-

b. Due to Plans. Where the builder performs his work strictly in conformity with plans and specifications, he is not liable for defects in the work that are due to faulty structural requirements contained in such plans and specifications,[4] and may recover under the contract,[5] unless he has warranted that the plans and specifications are correct;[6] nor is he under any responsibility, in the event of the subsequent destruction of completed work, whether that destruction is caused by its own inherent weakness or from extraneous causes, but if he departs from his

ercise of due diligence. Mather *v.* Butler County, 28 Iowa 253.

An offer made in good faith to correct defects entitles the builder to recover for what he has done under his contract, and an instruction so stating the law is not incorrect because the tender might have been made on condition that sums claimed to be due should first be paid and no reference was made thereto, for in determining whether the tender was made in good faith the jury would have to consider whether the tender was conditional or not. Cass County *v.* Gibson, 107 Fed. 363, 46 C. C. A. 341.

4. *Connecticut.*— Hills *v.* Farmington, 70 Conn. 450, 39 Atl. 795.

Georgia.— Porter *v.* Wilder, 62 Ga. 520.

Illinois.— Vermont St. M. E. Church *v.* Brose, 104 Ill. 206; Sperry *v.* Fanning, 80 Ill. 371.

Indian Territory.— South McAlester Electric Light, etc., Co. *v.* Eddy, 2 Indian Terr. 645, 53 S. W. 448.

Iowa.— Holland *v.* Union County, 68 Iowa 56, 25 N. W. 927.

Massachusetts.— Burke *v.* Dunbar, 128 Mass. 499; Gray *v.* James, 128 Mass. 110.

Mississippi.— Collins *v.* Money, 4 How. (Miss.) 11.

New York.— Byron *v.* New York, 54 N. Y. Super. Ct. 411, 7 N. Y. St. 17; *In re* Freel, 38 N. Y. Suppl. 143, 73 N. Y. St. 331.

Pennsylvania.— Murphy *v.* Liberty Nat. Bank, 184 Pa. St. 208, 42 Wkly. Notes Cas. (Pa.) 151, 39 Atl. 143; Beswick *v.* Platt, 140 Pa. St. 28, 21 Atl. 306; O'Loughlin *v.* Jefferson County, 56 Pa. St. 62; Bryant *v.* Stilwell, 24 Pa. St. 314.

Vermont.— Fairman *v.* Ford, 70 Vt. 111, 39 Atl. 748.

Wisconsin.— Bentley *v.* State, 73 Wis. 416, 41 N. W. 338.

United States.—Gubbins *v.* Lautenschlager, 74 Fed. 160.

Illustrations.— Where iron work put in according to the specifications is not sufficient to support that part of the building which it is intended to support the builder is not required to complete the work (Murphy *v.* Liberty Nat. Bank, 184 Pa. St. 208, 42 Wkly. Notes Cas. (Pa.) 151, 39 Atl. 143); so where the owner directed the builder to use inferior sand in the mortar, the builder was held not liable for a defective wall in the building for which such mortar was used (McLane *v.* De Leyer, 56 N. Y. 619).

A builder is not liable for defective work caused by a subcontractor's use of a different material from that specified in the contract, by agreement between them and the architect without the knowledge of the contractors. Robinson *v.* Baird, 165 Pa. St. 505, 35 Wkly. Notes Cas. (Pa.) 561, 30 Atl. 1010.

Building reservoir.—A builder who has constructed a reservoir in accordance with the plans and specifications is not liable for defects therein. Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545.

It is a question of fact whether an imperfection in construction is attributable to the builder or to a defect in the original plan for which he is not responsible. Gray *v.* James, 126 Mass. 110.

A builder knowing or having reason to believe that plans are defective, who follows such plans without pointing out the defect to the owner or architect, is not entitled to recover if the building proves insufficient because of such defect. Burke *v.* Dunbar, 128 Mass. 499.

The fact that plans furnished to builder are defective does not relieve him from liability on a guaranty of his work, where he has previously examined the plans, since before making the contract he should have known that they were defective. Giles *v.* San Antonio Foundry Co., (Tex. Civ. App. 1893) 24 S. W. 546.

Liability of architect for defect in plans see *supra*, III, B, 3.

Liability of owner for defective construction see *supra*, V, B, 3, b.

5. *Indian Territory.*— South McAlester Electric Light, etc., Co. *v.* Eddy, 2 Indian Terr. 645, 53 S. W. 448.

Iowa.— Holland *v.* Union County, 68 Iowa 56, 25 N. W. 927.

Massachusetts.— Burke *v.* Dunbar, 128 Mass. 499; Gray *v.* James, 128 Mass. 110.

New York.— Bryon *v.* New York, 7 N. Y. St. 17.

Wisconsin.— Bentley *v.* State, 73 Wis. 416, 41 N. W. 338.

United States.— Sickels *v.* U. S., 1 Ct. Cl. 214.

6. Hills *v.* Farmington, 70 Conn. 450, 39 Atl. 795.

Guaranty that work is sufficient for specified purpose not guaranty of plan.—An agreement to build in a particular way and to use specified materials, in accordance with a design furnished the builder, which is to be his sole guide, with a guaranty that the work when done in that way will be sufficient for a particular purpose, warrants the construction and material used by the builder but does not guarantee defects in the plan furnished. MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. 661 [*reversing* 31 N. Y. App. Div. 232, 52 N. Y. Suppl. 747].

Validity of provision guaranteeing architect's plan see *supra*, II, B, 4, c, (IX).

working contract without consent he becomes a guarantor of the strength and safety of the building.[7]

c. Due to Soil or Weather Conditions. As a general rule the builder is responsible for defects caused by defects in the soil or by weather conditions,[8] notwithstanding that he was bound by contract to follow plans and specifications prepared by an architect.[9]

d. Due to Changes Made With Owner's Consent. A builder is not chargeable for defects arising from changes made during the building with the owner's consent,[10] but it must clearly appear that the consent was fairly obtained and given with knowledge of all material circumstances.[11]

e. Due to Other Contractors. A builder who undertakes work independently of other contractors and not having general direction of the work is not liable for defects caused by them.[12]

7. Clark *v.* Pope, 70 Ill. 128.

8. *Michigan.*— Schliess *v.* Grand Rapids, (Mich. 1902) 90 N. W. 700, 9 Detroit Leg. N. 192.

Minnesota.— Stees *v.* Leonard, 20 Minn. 494.

New Jersey.—Trenton *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373.

Pennsylvania.— Sinnott *v.* Mullin, 82 Pa. St. 333.

United States.— Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762; Bitting *v.* U. S., 25 Ct. Cl. 502.

Canada.— Wardle *v.* Bethune, 16 L. C. Jur. 85 [*confirming* 12 L. C. Jur. 321]; Brown *v.* Laurie, 1 L. C. Rep. 343, 5 L. C. Rep. 65, 3 Quebec Q. B. 27.

Liability of builder for defects in soil under French and Louisiana code.— Under Code Napoleon a builder is liable when a building crumbles in consequence of a defect in the soil on which he has erected it; but in Louisiana the legislature, in adopting the provisions of the French code on the subject, thought proper to leave out that part of it which thus extended the builder's liability and restricted it entirely to cases where loss results from defective workmanship (Fremont *v.* Harris, 9 Rob. (La.) 23 [*citing* La. Rev. Civ. Code (1870) art. 2733 (Merrick's Rev. Civ. Code La. (1900), art. 2762)]), and under this provision in an action to recover damages for the falling to ruin of a building the owner must prove that badness of workmanship is the cause of defects (Fremont *v.* Harris, 9 Rob. (La.) 23).

A builder is not liable for the cracking of walls occasioned by the unfitness of the soil to sustain such walls, when the employer refuses to have the foundation of the wall made sufficiently deep and broad. Powell *v.* Markham, 18 La. Ann. 581.

Damage by frost.— A builder who undertakes to build a wall in winter time is liable for damage done to the wall by frost existing at the time of building, although before commencing work he notifies the owner that he will not be responsible for damages caused by frost. St. Louis *v.* Shaw, 2 Dorion (Quebec) 374 [*confirmed* in 8 Can. Supreme Ct. 385].

Where a builder agrees to complete a partially existing building, his responsibility for the fitness of old walls not contributed by him must depend upon his contract. Gibbons *v.* U. S., 15 Ct. Cl. 174. A builder is responsible for a defect in the timber of a building on which he undertakes to put a new roof in the same manner as he would be for the unfavorable nature of the ground. Martel *v.* Syndics, etc., 11 Montreal Leg. N. 82.

9. Brown *v.* Laurie, 1 L. C. Rep. 343, 5 L. C. Rep. 65, 3 Quebec Q. B. 27.

Construction in accordance with plans and specifications does not relieve a contractor from liability if the building falls before completion, in a case where he has agreed to do everything necessary to erect and complete the building. Stees *v.* Leonard, 20 Minn. 494.

Under an agreement to build in a good, substantial, and workmanlike manner and to excavate as far as is necessary for a solid foundation, the builder is liable if the foundation be laid at less than the proper depth in wet, swampy ground of such character as to suggest to a man of ordinary prudence that the building would not stand, and cannot escape liability because of the approval of the architect. Chandler *v.* Wheeler, (Tenn. Ch. 1898) 49 S. W. 278.

As to skill and care required of builder see *supra*, V, B, 3.

Responsibility for conditions caused by weather.— Where a builder erects a building at the time when he is directed by his employer, in accordance with plans and specifications furnished by the latter, and his contract does not contain a guarantee that the building will stand the weather, he is not responsible for its condition caused by the freezing of the mortar, as such risk was assumed by the employer. Schliess *v.* Grand Rapids, (Mich. 1902) 90 N. W. 700, 9 Detroit Leg. N. 192.

10. Bryant *v.* Stilwell, 24 Pa. St. 314.

11. Bryant *v.* Stilwell, 24 Pa. St. 314.

Where specifications provide for alterations if required, a change made by mutual agreement does not relieve the builder from liability for defects. Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455.

12. Cowen *v.* Evans, 16 Rev. Lég. 43.

A builder is liable for a defect in another contractor's work which is known to him before he does his own, as he should notify his employer of the other contractor's defective

5. Time of Performance — a. In General. Where the builder stipulated to perform his work by a specified time, the time is generally regarded at law as of the essence of the contract,[13] and it is his duty to observe the stipulation,[14] unless it has been waived;[15] and, with this object in view, he should commence his work

work with a view to its immediate remedy. Fletcher *v.* Seekell, 1 R. I. 267.

13. Allen *v.* Cooper, 22 Me. 133; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316; Wood *v.* Joliet Gaslight Co., 111 Fed. 463, 49 C. C. A. 427.

There are cases in which time is not regarded as of the essence of the contract and equity will relieve against a provision for performance within a limited time. Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

Time is not of the essence of the contract as applied to extra work, where the contract provides for completion within a specified time and also for extra work to be paid for at its reasonable value. Ramsburg *v.* McCahan, 3 Gill (Md.) 341.

14. Allen *v.* Cooper, 22 Me. 133; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316; Curtis *v.* Brewer, 17 Pick. (Mass.) 513.

Where not less than a named time is allowed.— Where a contract provides that the time within which its full performance is requisite shall not be less than a certain time the builder has all of such time in which to complete. Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. (Del.) 151.

Allowance of reasonable time where builder allows for delay beyond specified time.— Where a contract stipulated that a building should be finished agreeably to the contract in a specified time, and also provided that, if completed before that time, the builder should be paid or allowed for the time anticipated at a certain rate and that, if not finished within the time, the builder should pay or allow for the time extended at the same rate, it was held that the latter clause controlled the former and impliedly allowed a reasonable time beyond that specified for finishing the building upon paying or allowing damages for the delay. Folsom *v.* McDonough, 6 Cush. (Mass.) 208.

Inconsistency as to time between contract and specifications.— Where a contract provided that the work was to be done "without unnecessary delay" as soon as ordered, and the specifications provided that the building will be completed within three months from the date of the contract, the builder was not compelled to finish his work within three months, since the contract controls the specifications. Boteler *v.* Roy, 40 Mo. App. 234.

15. Allen *v.* Cooper, 22 Me. 133; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Bigler *v.* New York, etc., Ferry Co., 1 Silv. Supreme (N. Y.) 351, 5 N. Y. Suppl. 347, 24 N. Y. St. 603; Close *v.* Clark, 16 Daly (N. Y.) 91, 9 N. Y. Suppl. 538, 30 N. Y. St. 671; Mechan *v.* Williams, 2 Daly (N. Y.) 367; Kugler *v.* Wiseman, 20 Ohio 361; Hawman *v.* Yellow House, etc., Turnpike Road Co., 2 Woodw. (Pa.) 332; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961.

Waiver need not be in writing or established by positive testimony but may be inferred from circumstances. Smith *v.* Gugerty, 4 Barb. (N. Y.) 614. See also Hawman *v.* Yellow House, etc., Turnpike Road Co., 2 Woodw. (Pa.) 332.

What constitutes waiver.— There is a waiver where the builder is permitted to continue his work after the expiration of the time limited for completion (Gallagher *v.* Nichols, 16 Abb. Pr. N. S. (N. Y.) 337; Kugler *v.* Wiseman, 20 Ohio 361; Hawman *v.* Yellow House, etc., Turnpike Road Co., 2 Woodw. (Pa.) 332), without any expression of disapproval from the employer (Fowlds *v.* Evans, 52 Minn. 551, 54 N. W. 743), and after completion the employer takes possession of the work and uses it (Hawman *v.* Yellow House, etc., Turnpike Road Co., 2 Woodw. (Pa.) 332. And see Gallagher *v.* Nichols, 16 Abb. Pr. N. S. (N. Y.) 337; Kugler *v.* Wiseman, 20 Ohio 361), though it has been held that the mere fact that the employer takes possession of his own land on which the work has been done does not afford an inference of waiver (Monro *v.* Butt, 9 E. & B. 738, 4 Jur. N. S. 1231, 93 E. C. L. 737); the fact, however, that a builder failing to perform within a specified time has been allowed to complete the work afterward only operates as a waiver of performance on the date fixed (Snell *v.* Cottingham, 72 Ill. 161), so there is a waiver where the original plan has been departed from by mutual consent (Close *v.* Clark, 16 Daly (N. Y.) 91, 9 N. Y. Suppl. 538, 30 N. Y. St. 671), if the departures are necessarily the cause of delay (Kenny *v.* Monahan, 169 N. Y. 591, 62 N. E. 1096 [*affirming* 53 N. Y. App. Div. 421, 66 N. Y. Suppl. 10]; Bigler *v.* New York, etc., Ferry Co., 1 Silv. Supreme (N. Y.) 351, 5 N. Y. Suppl. 347, 24 N. Y. St. 603); and where the work is accepted after the time specified and payment made in accordance with the contract (Paddock *v.* Stout, 121 Ill. 571, 13 N. E. 182), though a payment made under such circumstances has been held not to be a waiver (Shute *v.* Hamilton, 3 Daly (N. Y.) 462). Again there is a waiver where the builder has completed except as to certain matters not satisfactory to the employer, who writes to the builder stating that he will be ready to pay for the entire work when unsatisfactory work is remedied (Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961), or where a subsequent contract is made after the time has expired to do additional work for extra pay (Cornish *v.* Suydam, 99 Ala. 620, 13 So. 118); and where a contract provides for completion by a named date, and before such date the contract is modified by reducing the amount

within such reasonable time after execution of the contract as will enable him to finish within the time limit.[16]

b. Where No Time Is Specified. Where the contract fails to specify a time for completion, the builder is entitled to reasonable time within which to perform,[17] and it will be implied that a reasonable time for performance was intended;[18] so where a time provision has been waived and the builder was permitted to continue;[19] but the builder is bound to finish within such time.[20]

c. Right to Additional Time. Where the builder is delayed by his employer such additional time as may have been lost by delay should be allowed;[21] so he should be allowed extra time when required to do extra work,[22] where changes

of building to be done by that date, and afterward the employer acquiesces in continuance of the work and there is evidence that, at the time of the modification, the employer contemplated that the building might not be completed for some time afterward, the right to insist that time was of the essence of the contract is waived (Barnard *v.* McLeod, 114 Mich. 73, 72 N. W. 24).

The question of a waiver of a time limitation is one for the jury.— Hawman *v.* Yellow House, etc., Turnpike Road Co., 2 Woodw. (Pa.) 332.

16. Cannon *v.* Hunt, 113 Ga. 501, 38 S. E. 983.

Even providential causes that may be an excuse for delay will not be a legal excuse, when it appears that there was sufficient time between the making of the contract and the happening of the cause to perform the work. Cannon *v.* Hunt, 113 Ga. 501, 38 S. E. 983.

17. Dannat *v.* Fuller, 120 N. Y. 554, 24 N. E. 815, 31 N. Y. St. 825.

18. Walling *v.* Warren, 2 Colo. 434; Fowler *v.* Deakman, 84 Ill. 130; George Lehman, etc., Co. *v.* Clark, 33 Ill. App. 33; North *v.* Mallory, 94 Md. 305, 51 Atl. 89; Brodek *v.* Farnum, 11 Wash. 565, 40 Pac. 189.

What constitutes waiver of time see *supra*, note 15.

19. Lawson *v.* Hogan, 93 N. Y. 39; Rode *v.* Auerbach, 31 Misc. (N. Y.) 765, 64 N. Y. Suppl. 774; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961.

Failure of owner to furnish lines for foundation.— Where a contract provided that the building should be completed on a certain date or for a forfeiture on failure so to do, and the employer was to furnish plaintiff the lines and levels for the foundation before a date prior to the date of the contract, and he failed to do so for some days after such date, the builder, by entering on the work after a breach of the condition precedent, only obligated himself to finish within a reasonable time. Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142.

20. Wilderman *v.* Pitts, 29 Ill. App. 528; Rode *v.* Auerbach, 31 Misc. (N. Y.) 765, 64 N. Y. Suppl. 774.

21. Starr *v.* Gregory Consol. Min. Co., 6 Mont. 485, 491, 13 Pac. 195, 198; McGowan *v.* American Pressed Tan Bark Co., 121 U. S. 575, 7 S. Ct. 1315, 30 L. ed. 1027. But when a contract provides that the building shall be completed at a special time, and that the builder shall be allowed additional time when delayed by the fault or neglect of other contractors, provided he gives notice in writing to the owner of such neglect of other contractors, the builder cannot be allowed additional time in the absence of a written notice. Feeney *v.* Bardsley, 66 N. J. L. 239, 49 Atl. 443.

Builder should use reasonable diligence where allowed additional time. Starr *v.* Gregory Consol. Min. Co., 6 Mont. 485, 491, 13 Pac. 195, 198.

Where the contract so provides, delay in completing the building caused by the delays of other contractors, or by the unusual action of the elements, or otherwise, affords proper grounds for action claiming an extension of time. Kelly *v.* Fejervary, (Iowa 1899) 78 N. W. 828.

A stipulation, that if delays in the completion of the work be occasioned by epidemics, strikes, or providential causes, a reasonable extension of time for the completion of the contract shall be made, if qualified by a condition that timely notice of all such delays shall be given by the builder to the owner, does not relieve the builder from liability for damages resulting to the owner because of delays thus brought about, unless he gives actual notice to the owner of such delays within a reasonable time after their recurrence, and makes thereon proper claims for extensions of time. Florida Northern R. Co. *v.* Southern Supply Co., 112 Ga. 1, 37 S. E. 130.

22. Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

Under a stipulation that, in case the owner shall direct any more work to be done than is mentioned in the agreement, he shall pay therefor a reasonable valuation, the extent and kind of work other than that mentioned in the agreement is discretionary with the owner, and the completion of the building may be, in consequence, postponed beyond the day designated in the contract. Ramsburg *v.* McCahan, 3 Gill (Md.) 341.

Where the builder contracts to finish building by a certain date but subject to extras, alterations, or additions which may be made, and that the time mentioned for completion shows the essence of the contract the builder must execute not only the work specified but also all alterations within the time prescribed in the contract, there being

are made in the original plans.[23] Where a cause for delay ceases the obligation to finish is at once imposed on the builder, and failure then to perform within a reasonable time warrants damages for unreasonable delay thereafter.[24]

d. Liability For Delay. A builder who has not performed his contract in due time is liable in damages for the delay,[25] unless the damages be waived.[26]

6. Acceptance and Waiver — a. What Constitutes. Acceptance may be expressed or implied from the conduct of the employer.[27] Mere naked occupancy or use of a building erected on the land of the owner does not, however, warrant an inference of acceptance of the work as done in compliance with the contract,[28] unless the possession or use be coupled with some act or

no implied condition that the alterations should be such as could reasonably be completed within that time. Jones *v.* St. John's College, L. R. 6 Q. B. 115, 40 L. J. Q. B. 80, 23 L. T. Rep. 803, 19 Wkly. Rep. 276. But see Dodd *v.* Churton, [1897] 1 Q. B. 562, 66 L. J. Q. B. 477, 76 L. T. Rep. 438, 45 Wkly. Rep. 490 [*following* Westwood *v.* Secretary of State, 1 N. R. 262, 7 L. T. Rep. 736, 11 Wkly. Rep. 261, and *distinguishing* Jones *v.* St. John's College, L. R. 6 Q. B. 115, 40 L. J. Q. B. 80, 23 L. T. Rep. 803, 19 Wkly. Rep. 276].

23. Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

24. Graveson *v.* Tobey, 75 Ill. 540; Pittsburg Iron, etc., Co. *v.* National Tube Works Co., 184 Pa. St. 251, 39 Atl. 76.

25. Graveson *v.* Tobey, 75 Ill. 540; Snell *v.* Cottingham, 72 Ill. 161; Percy *v.* Peyroux, 5 Rob. (La.) 179; Sinclair *v.* Tallmadge, 35 Barb. (N. Y.) 602; Weeks *v.* Little, 47 N. Y. Super. Ct. 1; Hexter *v.* Knox, 39 N. Y. Super. Ct. 109; Reichenbach *v.* Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51.

Subcontractor liable to builder for delay.— Granniss, etc., Lumber Co. *v.* Deeves, 72 Hun (N. Y.) 171, 25 N. Y. Suppl. 375, 55 N. Y. St. 674.

As to damages recoverable see *infra*, VII, D.

In the absence of anything to show that time is of the essence of the contract the employer cannot recover for expenses and losses arising from the builder's failure to complete the contract at a date at which he said he would try to complete it. Gubbins *v.* Lautenschlager, 74 Fed. 160.

An employer may show that he rented a building for an amount shown to be less than its reasonable rental value, and that, owing to the delay, the tenant was unable to take possession until after the day specified for completion. Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104.

Damages after completion by owner.— A builder who, after having agreed to complete within a certain time, fails so to do and abandons his work without any valid excuse is liable to an owner who, after notice, proceeds to have the building completed for the value of the work and material necessary to complete the building according to the contract, less any unpaid balance of the contract price. Davis *v.* Ford, 81 Md. 333, 32 Atl. 280. An owner should when it is apparent that a builder will not complete according to contract either take it or abandon it to the builder and, on a failure to decide which he will do in a reasonable time, he cannot recover for reasonable value or for any deterioration in the building during that time. Eaton *v.* Gladwell, 121 Mich. 444, 80 N. W. 292.

26. Under a contract providing that work should be completed by a certain day if it appears that the employer told the builder there were to be "no damages if it is not done according to the time specified," and it does not appear that the building was wanted for occupancy before it was completed no damages can be claimed for delay. Erskine *v.* Johnson, 23 Nebr. 261, 36 N. W. 510.

Waiver of delay see *supra*, V, B, 5, a.

27. Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

Whether an owner has shown an acceptance is a question of fact. Gray *v.* James, 128 Mass. 110; Fuller *v.* Brown, 67 N. H. 188, 34 Atl. 463; Colby *v.* Franklin, 15 Wis. 311.

Admissibility of evidence not tending to show acceptance see *infra*, VII, A, 7.

28. *Alabama.*— Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

Arkansas.—Fitzgerald *v.* La Porte, 64 Ark. 34, 40 S. W. 261; Bertrand *v.* Byrd, 5 Ark. 651; Manuel *v.* Campbell, 3 Ark. 324.

Connecticut.— Smith *v.* Scott's Bridge School Dist., 20 Conn. 312.

Iowa.— Kilbourne *v.* Jennings, 40 Iowa 473; Corwin *v.* Wallace, 17 Iowa 374.

Kentucky.— Escott *v.* White, 10 Bush (Ky.) 169; Morford *v.* Mastin, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168.

Louisiana.— Gordy *v.* Veazey, 25 La. Ann. 518.

Maryland.— Hagerstown Presb. Church *v.* Hoopes Artificial Stone, etc., Co., 66 Md. 598, 8 Atl. 752.

Massachusetts.— Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455; Gray *v.* James, 128 Mass. 110.

Michigan.— Wildey *v.* Fractional School Dist. No. 1, 25 Mich. 419.

Missouri.— Haynes *v.* Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413.

Montana.— Franklin *v.* Schultz, 23 Mont. 165, 57 Pac. 1037.

New Jersey.— Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

New York.— Walker *v.* Millard, 29 N. Y. 375; Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442; Reed *v.* Brooklyn, 4 Abb. Dec.

some language from which acceptance or acquiescence may be reasonably

(N. Y.) 24, 3 Keyes (N. Y.) 105, 33 How. Pr. (N. Y.) 237; Spence *v.* Ham, 27 N. Y. App. Div. 379, 50 N. Y. Suppl. 960; Tucker *v.* Williams, 2 Hilt. (N. Y.) 562; Smith *v.* Coe, 2 Hilt. (N. Y.) 365; Vanderzee *v.* Herman, 13 N. Y. Suppl. 164, 35 N. Y. St. 778; Parke *v.* Franco-American Trading Co., 7 N. Y. St. 498; Crane *v.* Knubel, 43 How. Pr. (N. Y.) 389.

Ohio.— Bender *v.* Buehrer, 8 Ohio Cir. Ct. 244.

Pennsylvania.— Bryant *v.* Stilwell, 24 Pa. St. 314.

Vermont.— Austin *v.* Wheeler, 16 Vt. 95.

See 11 Cent. Dig. tit. "Contracts," § 1459.

Use and occupation may show that the employer has derived some benefit from the work, thereby rendering him liable to the builder to the extent of that benefit; this, however, is only in a case where deviations from the contract are small and there was an honest intention to substantially perform the contract. A case of a flagrant or radical departure from the contract would be fraudulent and furnish an ample defense to the employer in an action to recover the contract price. Bertrand *v.* Byrd, 4 Ark. 187.

Acceptance of public bridge not inferred from use by individuals nor from repairs made by public officials. Taft *v.* Montague, 14 Mass. 282, 7 Am. Dec. 215.

Evidence of acceptance see *infra*, VII, A, 7.

User is evidence of acceptance.— Hamilton *v.* Myles, 24 U. C. C. P. 309.

Evidence not admissible to vary terms of acceptance.—Where it appears that the building had been accepted as completed, evidence was not admissible to show that the building had not been substantially completed. Levally *v.* Harmon, 24 Iowa 592.

Amount of recovery where contract is substantially but not strictly performed see *infra*, VII, D.

Defenses to action to recover contract price see *infra*, VII, A, 4.

Any inference of acceptance from occupancy is negatived by the fact that a house is not completed when its owner moves in. Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

Illustrations of no inferred acceptance.— The fact, that an owner is at or about the house during the progress of building, giving instructions in relation to the building, and not objecting at the time to the manner of construction, is not an acceptance. Mitchell *v.* Wiscotta Land Co., 3 Iowa 209. Use and occupation under protest and complaint that there is no full performance do not constitute an acceptance. Corwin *v.* Wallace, 17 Iowa 374. Where an employer points out defects and notifies the builder that, unless remedied, there will be no acceptance, and the builder replies that he wishes for no interference from the employer until the work is done the silence of the owner does not show a waiver. Hill *v.* Millburn School Dist. No. 2, 17 Me. 316. Use of a building when the builder stops working on it is not an acceptance, where the contract expressly provides that only an order for final payment shall be considered an acceptance. Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455. The use of a building for purposes connected with its construction, such use being contemplated by the contract, does not constitute an acceptance of any part of the work. Haynes *v.* Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413.

Mere occupation does not waive strict performance, but must be considered with other circumstances in determining whether there was a waiver. Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442.

Possession taken without prejudice to claims against builder.— Where possession of the building is taken by necessity a defect is not waived when an architect or engineer expressly states that possession is taken without prejudice to any claims against the builder and refuses to give a certificate that the work is satisfactory. MacKnight Flintic Stone Co. *v.* New York, 13 N. Y. App. Div. 231, 43 N. Y. Suppl. 139.

Well-digging contract.— Where an owner uses a well, built under a contract that it should furnish water sufficient for the owner's use, only to test its capacity to furnish sufficient water for the purposes intended, there is no acceptance, and it is erroneous to instruct a jury that if the owner use the well to any extent they should find for the builder. Genni *v.* Hahn, 82 Wis. 90, 51 N. W. 1096.

When right to withhold payment not waived by possession.— Under a contract providing for payment only on completion of the work an owner does not, by taking possession of the building before completion, waive a right to withhold payment until completion. Bradley Currier Co. *v.* Bernz, 55 N. J. Eq. 10, 35 Atl. 832.

Effect of occupancy by agreement as waiver. — Where an employer contends that a building is not finished in accordance with the plans, but it is agreed that the employer may occupy the building without waiving claims for non-performance, the right of the employer to insist that the builder cannot recover for extra work without showing that he had made an agreement in writing therefor with the architect as required by the contract is not waived. Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142.

Mere use of a building does not waive a latent defect (Morrison *v.* Cummings, 26 Vt. 486), nor is a latent defect waived because the owner visits his building and points out some defects but is silent when asked if there are others (Eaton *v.* Gladwell, 108 Mich. 678, 66 N. W. 598).

Taking possession does not waive defects in work. Eberly *v.* Curtis, 5 Mo. App. 595.

Occupation only waives unintentional omissions unsubstantial in their character, for which a due allowance can be made to the owner. Parke *v.* Franco-American Trading Co., 7 N. Y. St. 498.

Where defective performance is not the fault of the builder acceptance may be im-

inferred,[29] since the owner cannot divest himself of the possession without surrendering a portion of his freehold.[30] So part payment does not, standing by itself, amount to an acceptance or waiver of defects,[31] known to the owner at the time of payment,[32] or defects not known.[33]

plied from possession and occupation, notwithstanding a protest by the owner. Gray *v.* James, 128 Mass. 110.

Notice to complete an election to accept subject to cost of completion.— A notice from the owner to the builder that he will complete the work and deduct the cost from the contract price is an election to accept it subject to the necessary cost of completion. Wilkinson *v.* Becker, 13 Montg. Co. Rep. (Pa.) 106.

Under statute occupation or use may constitute acceptance.— In California, under Code Civ. Proc. § 1187, occupation or use of a structure by its owner or one representing him constitutes an acceptance of the building as completed, but such occupation or use must be open, entire, and exclusive, and not of such character as would be consistent with the builder's continuance in his work, and whether in any particular case there has been such occupation or use must be determined from the facts in each case. Orlandi *v.* Gray, 125 Cal. 372, 58 Pac. 15.

29. Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

Illustrations of inferred acceptance.—Where the owner of a building in the course of erection takes possession of and occupies a portion of it during the progress of work and afterward takes possession of and occupies the whole building there is an acceptance. Cosby *v.* Adams, Wils. (Ind.) 342. So where the owner uses the house while being built, inspects it with ordinary care, makes partial payments during progress of the work, takes possession, and expresses satisfaction with the work after its completion. Demoss *v.* Noble, 6 Iowa 530.

Railroad construction contract.— Where a railroad company leases such portion of a line of railroad as is completed and the lessee operates the railroad, there is an acceptance of such portion for which the company must pay the contract price subject to deduction for defects in the work. Barker *v.* Troy, etc., R. Co., 27 Vt. 766.

As tending to show an acceptance the fact of taking possession may be considered in connection with all facts and circumstances of the case. Boteler *v.* Roy, 40 Mo. App. 234.

Possession as waiver of delay in completion. — Delay in completion is not waived by taking possession of and accepting work (Felt *v.* Smith, 62 Ill. App. 637), but after full completion acceptance waives both delay in completion and the manner of building (Emerson *v.* Coggswell, 16 Me. 77). See also Nibbe *v.* Brauhn, 24 Ill. 268, in which case the owner allowed the contractor to proceed after the day fixed for completion, and it was held that by afterward accepting the work he waived performance at the time specified but not other stipulations of the contract.

As to waiver of delay see *supra*, p. 65, note 15.

30. Manuel *v.* Campbell, 3 Ark. 324; Morford *v.* Mastin, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168; Hayward *v.* Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373. See also Yeats *v.* Ballentine, 56 Mo. 530.

The owner is not bound to remove the building or to abstain from using it since, being attached to his land, it becomes his property. Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455.

31. Katz *v.* Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; Hattin *v.* Chase, 88 Me. 237, 33 Atl. 989; Moulton *v.* McOwen, 103 Mass. 587; Wilkinson *v.* Becker, 13 Montg. Co. Rep. (Pa.) 106. See also U. S. *v.* Walsh, 115 Fed. 697.

Part payment is not an acceptance but only an acquiescence in the work to the extent of the payment. Morrison *v.* Cummings, 26 Vt. 486.

Part payment and a promise to pay the residue is not an acceptance. Feagan *v.* Meredith, 4 Mo. 514.

Payment may tend to show waiver and acceptance. Hattin *v.* Chase, 88 Me. 237, 33 Atl. 989.

A certificate of satisfactory performance is not necessarily waived by a payment. Beharrell *v.* Quimby, 162 Mass. 571, 39 N. E. 407.

Waiver of certificate see *infra*, VII, A, 3, b.

32. Flannery *v.* Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36; Hattin *v.* Chase, 88 Me. 237, 33 Atl. 989; Stewart *v.* Fulton, 31 Mo. 59; Halleck *v.* Bresnahen, 3 Wyo. 73, 2 Pac. 537.

But see *contra*, Hayden *v.* Madison, 7 Me. 76, in which case the builder was to be paid half of an agreed sum on completion of the work and half some time later, and the employer, without objection, made the first payment knowing that a portion of the work was defective. To the same effect is Meehan *v.* Williams, 2 Daly (N. Y.) 367.

Part payment may warrant an inference of an intention to waive defects. Flannery *v.* Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36.

Part payment and promise of balance with knowledge of defects.— An owner who sees during progress of work that all specifications are not being complied with, but pays nearly all the contract price, and after completion promises to pay the balance as soon as he is able waives defects. Diehl *v.* Schmalacker, 62 N. Y. Suppl. 1080 [*affirming* 26 Misc. (N. Y.) 835, 57 N. Y. Suppl. 244].

33. Andrews *v.* Portland, 35 Me. 475; Johnson County *v.* Lowe, 72 Mo. 637; Stewart *v.* Fulton, 31 Mo. 59; Cahill *v.* Heuser, 2 N. Y. App. Div. 292, 37 N. Y. Suppl. 736, 73 N. Y. St. 450; Hartupee *v.* Pittsburgh, 97 Pa. St. 107.

b. Effect of. Except as to defects that are not apparent,[34] an acceptance by the owner precludes him from refusing to pay a reasonable value for the work performed and materials furnished,[35] or from refusing to pay the contract price;[36] but he is not precluded from showing that the work was done in an unworkmanlike manner and from claiming damages caused by the defects.[37] Nor is he so precluded by the fact that the architect or superintendent has, without authority, accepted the work,[38] or has improperly done so.[39]

7. Excuses For Defective Performance, Non-Performance, and Delay — a. For Defective Performance and Non-Performance — (1) *In General.* A builder who has improvidently assumed an absolute liability when he might have undertaken a qualified one only[40] is not excused from performing his engagement,

To constitute a waiver there must be both knowledge and acquiescence. Johnson County *v.* Lowe, 72 Mo. 637.

Payment after approval of architect.— Where an architect might easily have discovered a defect unknown to the builder but approves the work, payment by the owner relieves the builder from liability. Standard Stamping Co. *v.* Hemminghaus, 157 Mo. 23, 57 S. W. 746.

34. *Colorado.*— Barker *v.* Nichols, 3 Colo. App. 25, 31 Pac. 1024.

Georgia.— Monroe Female University *v.* Broadfield, 30 Ga. 1.

Illinois.— Korf *v.* Lull, 70 Ill. 420.

Iowa.— Mitchell *v.* Wiscotta Land Co., 3 Iowa 209.

United States.— U. S. *v.* Walsh, 115 Fed. 697.

See 11 Cent. Dig. tit. "Contracts," § 1469.

Latent defects not waived by acceptance in ignorance of their existence. Monahan *v.* Fitzgerald, 164 Ill. 525, 45 N. E. 1013.

35. Cosby *v.* Adams, Wils. (Ind.) 342.

Right of builder to recover in quantum meruit see *infra*, VII, A.

36. *Illinois.*— Vermont St. M. E. Church *v.* Brose, 104 Ill. 206.

Indiana.— Becker *v.* Hecker, 9 Ind. 497; Cummings *v.* Pence, 1 Ind. App. 317, 27 N. E. 631.

Louisiana.—Clark *v.* Kemper, 3 Rob. (La.) 10.

Maine.— White *v.* Oliver, 36 Me. 92; Emerson *v.* Coggswell, 16 Me. 77; Hayden *v.* Madison, 7 Me. 76.

Missouri.— Dutro *v.* Walter, 31 Mo. 516.

See 11 Cent. Dig. tit. "Contracts," § 1469.

Well-digging contract.— A person who accepts a well as completed according to contract is estopped from claiming that the contract was not performed. Elwood Natural Gas, etc., Co. *v.* Baker, 13 Ind. App. 576, 41 N. E. 1063.

37. Kilbourne *v.* Jennings, 40 Iowa 473; Mitchell *v.* Wiscotta Land Co., 3 Iowa 209; Stewart *v.* Fulton, 31 Mo. 59.

Where a house is built upon the property of him who has it built, acceptance and use of the work, knowing it was not done in accordance with the contract, will not constitute a waiver of defects; "the owner is powerless to do anything else, unless he should pull the house down." Mohney *v.* Reed, 40 Mo. App. 99.

The fact that the owner has expressed his satisfaction with the work and accepted it does not estop him from showing that the employee had failed properly or sufficiently to perform the work. Meyer *v.* Martin, (Tex. Civ. App. 1899) 50 S. W. 470.

Acceptance upon completion without objection waives slight variations. Mitchell *v.* Curell, 11 La. 252.

38. Eberly *v.* Curtis, 5 Mo. App. 595.

As to power of architect to accept work see *supra*, III, A, 1.

39. Schmidt *v.* North Yakima, 12 Wash. 121, 40 Pac. 790.

Acceptance by architect not binding on owner.— Acceptance by the architect of a different class of work or of different materials than that called for by the plans and specifications will not bind the owner, even if the contract provides that the work should be subject "to the acceptance or rejection of the architect," such a provision being merely inserted in the contract as an additional safeguard for the benefit of the owner. Lewis *v.* Yagel, 77 Hun (N. Y.) 337, 28 N. Y. Suppl. 833, 60 N. Y. St. 23.

40. School Dist. No. 1 *v.* Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Serber *v.* McLaughlin, 97 Ill. App. 104; Stees *v.* Leonard, 20 Minn. 494; Ward *v.* Hudson River Bldg. Co., 1 Silv. Supreme (N. Y.) 341, 5 N. Y. Suppl. 319, 24 N. Y. St. 347.

Where the sole limitation on the absolute character of a building contract was that if completion was delayed by damage caused by fire, lightning, earthquake, cyclone, etc., the time fixed for completion should be extended, it was held that where an unprecedented storm destroyed the building before completion the loss would fall on the builders, notwithstanding the payments were to be made as the work progressed. Bartlett *v.* Bisbey, (Tex. Civ. App. 1901) 66 S. W. 70.

Conflicts arising from the co-employment of union and non-union labor are matters of such general knowledge that a builder must know of them; accordingly, where he contracts to work without guarding against such conflicts, he assumes the risk of the happening of any contingency that may occur through his men refusing to work. Serber *v.* McLaughlin, 97 Ill. App. 104.

Strikes as excuses for delay in performance of building contracts see *infra*, p. 73, notes 61, 62.

unless prevented by the act of God, the law, or his employer;[41] no hardship, no unforeseen hindrance, no difficulty short of absolute impossibility will excuse him from doing what he has expressly agreed to do.[42] Thus, he is not excused from performance because of a latent defect in the soil;[43] or because the building before completion is destroyed by accidental fire,[44] lightning,[45] windstorm,[46] or flood,[47] unless performance has been unreasonably delayed by the employer.[48]

(II) *INSOLVENCY OF BUILDER.* Personal insolvency of the builder is held not to relieve him from an obligation to perform his contract.[49]

(III) *ACTS OF EMPLOYER.* Non-performance or defective performance is generally excused where it is owing to the acts of the employer.[50]

b. For Delay. A delay in performance is excused, where it is caused by

41. *Illinois.*— Schwartz *v.* Daegling, 55 Ill. 342.

Kentucky.— Shanks *v.* Griffin, 14 B. Mon. (Ky.) 124.

Massachusetts.— Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. 667, 25 Am. St. Rep. 654, 12 L. R. A. 571.

Minnesota.— Stees *v.* Leonard, 20 Minn. 494.

Missouri.—Haynes *v.* Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413.

New York.— Tompkins *v.* Dudley, 25 N. Y. 272, 82 Am. Dec. 349.

Ohio.— Bailey *v.* Brown, 9 Ohio Cir. Ct. 455, 6 Ohio Cir. Dec. 440.

Texas.— Weis *v.* Devlin, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38.

United States.— Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762.

See 11 Cent. Dig. tit. "Contracts," § 1409 *et seq.*

Where performance becomes impossible.— A builder who has agreed to repair or build in a structure destroyed when nearly completed is excused from performance, because performance becomes impossible, and with the principal perishes the incident. Siegel *v.* Eaton, etc., Co., 165 Ill. 550, 46 N. E. 449 [*reversing* 60 Ill. App. 639]; Schwartz *v.* Saunders, 46 Ill. 18; Chicago Edison Co. *v.* Huyett, etc., Mfg. Co., 66 Ill. App. 222; Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. 667, 25 Am. St. Rep. 654, 12 L. R. A. 571; Lord *v.* Wheeler, 1 Gray (Mass.) 282; Bailey *v.* Brown, 9 Ohio Cir. Ct. 455, 6 Ohio Cir. Dec. 440, 3 Ohio Dec. 120. See also Garretty *v.* Brazell, 34 Iowa 100.

A builder is not entitled to relief from a provision for liquidated damages because prevented from carrying out his contract by an act of God. Ward *v.* Hudson River Bldg. Co., 1 Silv. Supreme (N. Y.) 341, 5 N. Y. Suppl. 319, 24 N. Y. St. 347.

42. Lord *v.* Wheeler, 1 Gray (Mass.) 282; Stees *v.* Leonard, 20 Minn. 494; Satterlee *v.* U. S., 30 Ct. Cl. 31.

43. Stees *v.* Leonard, 20 Minn. 494; Trenton *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373; Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762.

44. Cutcliff *v.* McAnnally, 88 Ala. 507, 7 So. 331; Brumby *v.* Smith, 3 Ala. 123; Lord *v.* Wheeler, 1 Gray (Mass.) 282; Adams *v.* Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Eaton *v.* Joint School Dist. No. 3, 33 Wis. 374.

The rule has its foundation in the fact that unless prevented by the act of God, the law, or his employer it always remains possible for a builder to perform his contract, even if the building be partially or wholly destroyed while in an unfinished state and, even though the structure may have been so attached to the land as to become a part of it and therefore the property of the owner of the land, the maxim *res perit domino* does not apply and the loss is that of the builder and not the owner. Weis *v.* Devlin, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38.

45. School Dist. No. 1 *v.* Dauchy, 25 Conn. 530, 68 Am. Dec. 371.

46. Meyer *v.* Haven, 37 N. Y. App. Div. 194, 55 N. Y. Suppl. 864; Bath Tp. *v.* Townsend, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868; Bailey *v.* Brown, 9 Ohio Cir. Ct. 455, 6 Ohio Cir. Dec. 440; Bartlett *v.* Bisbey, (Tex. Civ. App. 1901) 66 S. W. 70. See also Dale *v.* U. S., 14 Ct. Cl. 514. *Contra*, Board of Education *v.* Townsend, 15 Ohio Cir. Ct. 674.

A builder agreeing to build under direction of an architect who neglects to brace walls, afterward blown down, more securely, in accordance with the instructions of the architect, is liable for the loss if the direction was feasible and would, if complied with, have saved the building. Schwartz *v.* Daegling, 55 Ill. 342.

47. Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153; Shanks *v.* Griffin, 14 B. Mon. (Ky.) 124; Brecknock, etc., Canal Nav. Co. *v.* Pritchard, 6 T. R. 750, 3 Rev. Rep. 335.

48. Partridge *v.* Forsyth, 29 Ala. 200.

49. McConnell *v.* Hewes, 50 W. Va. 33, 40 S. E. 436.

50. Carroll County *v.* O'Conner, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Manville *v.* McCoy, 3 Ind. 148; Bean *v.* Miller, 69 Mo. 384; McLane *v.* De Leyer, 56 N. Y. 619; Gibbs *v.* Girardville School Dist., 195 Pa. St. 396, 46 Atl. 91; Robinson *v.* Baird, 165 Pa. St. 505, 35 Wkly. Notes Cas. (Pa.) 561, 30 Atl. 1010; Rohrman *v.* Steese, 9 Phila. (Pa.) 185, 31 Leg. Int. (Pa.) 98.

The fact that work was performed under the orders and directions of his employer has been held not to relieve the builder from liability. Roberge *v.* Talbot, 4 Quebec 451.

default of the employer to perform the contract on his part,[51] as where the employer has failed to do, or to have done, work that is necessary to be done before the builder can proceed with his own work,[52] or has failed to furnish necessary material agreed to be furnished by him,[53] or has ordered the work to be stopped;[54] so delay is excused by mistakes in the drawings and specifications,[55] or by the acts of the architect,[56] or by alterations in the plans made at the sug-

Right of builder to abandon contract see *supra*, II, E, 1.

51. *California.*— White *v.* Fresno Nat. Bank, 98 Cal. 166, 32 Pac. 979.

Missouri.— Eldridge *v.* Fuhr, 59 Mo. App. 44.

New York.— Stewart *v.* Keteltas, 36 N. Y. 388, 2 Transcr. App. (N. Y.) 288; Willis *v.* Webster, 1 N. Y. App. Div. 301, 37 N. Y. Suppl. 354, 72 N. Y. St. 743; Lauer *v.* Brown, 30 Barb. (N. Y.) 416; Deeves *v.* New York, 60 N. Y. Super. Ct. 339, 17 N. Y. Suppl. 460, 44 N. Y. St. 218; Beinhauer *v.* Gleason, 15 N. Y. St. 227.

Texas.— Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

United States.— Hart *v.* Rose, Hempst. (U. S.) 238, 11 Fed. Cas. No. 6,154*a*.

See 11 Cent. Dig. tit. "Contracts," § 1376.

Failure of employer to obtain permit or fix time for commencement.— Where the builder contracted to erect a building and to commence work on such day as should be fixed, and complete within three months thereafter, and the day was not fixed, and the builder was delayed for a long time by the neglect of a board of health to give a necessary permit and also by inclement weather, it was held that as the employer did not have the time fixed or the permit procured the builder could not be held to a strict performance. Deeves *v.* New York, 60 N. Y. Super. Ct. 339, 17 N. Y. Suppl. 460, 44 N. Y. St. 218.

52. *Illinois.*— Taylor *v.* Renn, 79 Ill. 181; Graveson *v.* Tobey, 75 Ill. 540.

Louisiana.— Haughery *v.* Thiberge, 24 La. Ann. 442.

New York.— Dannat *v.* Fuller, 120 N. Y. 554, 24 N. E. 815, 31 N. Y. St. 825; Weeks *v.* Little, 89 N. Y. 566, 11 Abb. N. Cas. (N. Y.) 415 [*reversing* 47 N. Y. Super. Ct. 1]; Granniss, etc., Lumber Co. *v.* Deeves, 72 Hun (N. Y.) 171, 25 N. Y. Suppl. 375, 55 N. Y. St. 674; Highton *v.* Dessau, 19 N. Y. Suppl. 395, 46 N. Y. St. 922.

Pennsylvania.— Pittsburg, etc., Iron Co. *v.* National Tube Works Co., 184 Pa. St. 251, 39 Atl. 76; Huckestein *v.* Kelly, etc., Co., 139 Pa. St. 201, 27 Wkly. Notes Cas. (Pa.) 387, 21 Atl. 78.

United States.— Standard Gaslight Co. *v.* Wood, 61 Fed. 74, 9 C. C. A. 362, 26 U. S. App. 15; King Iron Bridge, etc., Co. *v.* St. Louis, 43 Fed. 768, 10 L. R. A. 826.

See 11 Cent. Dig. tit. "Contracts," § 1376.

Failure to prepare piers to receive bridge to be built an excuse for delay. King Iron Bridge, etc., Co. *v.* St. Louis, 43 Fed. 768, 10 L. R. A. 826.

Failure to build sewer excused by failure of city to open street.— French *v.* Syracuse, 18 Misc. (N. Y.) 278, 41 N. Y. Suppl. 1036.

Implied duty of employer to have building ready for builder's use.— A person employing another person to do certain work impliedly agrees to keep such work far enough in advance to enable such person to perform his work within the time agreed upon, and the builder is not liable where the owner does not so do. Taylor *v.* Renn, 79 Ill. 181. See also Granniss, etc., Lumber Co. *v.* Deeves, 72 Hun (N. Y.) 171, 25 N. Y. Suppl. 375, 55 N. Y. St. 674.

Implied contract of employer to give builder possession see *supra*, II, C, 1, d.

Right of builder to possession see *supra*, V, A, 5.

53. Bulkley *v.* Brainard, 2 Root (Conn.) 5; Vermont St. M. E. Church *v.* Brose, 104 Ill. 206; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Mason *v.* Rempe, (Tex. Civ. App. 1897) 41 S. W. 694.

Where failure to furnish not an excuse.— Failure to furnish material is not an excuse where the builder does not call for it until the day on which the contract is to be fully performed (Goldnick *v.* Toelberg, 55 N. Y. Suppl. 954), or fails to do work that can be finished without the material (Mason *v.* Rempe, (Tex. Civ. App. 1897) 41 S. W. 694).

54. Marsh *v.* Kauff, 74 Ill. 189; Farnham *v.* Ross, 2 Hall (N. Y.) 167.

An owner preventing completion cannot claim liquidated damages agreed on in case of failure to finish within a specified time. Farnham *v.* Ross, 2 Hall (N. Y.) 167.

As to liquidated damages see *supra*, II, B, 4, c, (x).

55. Sperry *v.* Fanning, 80 Ill. 371.

Liability of architect for mistakes in plans see *supra*, III, B, 3.

Builder not responsible for mistakes in plans see *supra*, V, B, 4, b.

56. Willis *v.* Webster, 1 N. Y. App. Div. 301, 37 N. Y. Suppl. 354, 72 N. Y. St. 743; White *v.* Braddock School Dist., 159 Pa. St. 201, 28 Atl. 136; Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

Delays caused by the wrongful withholding of a monthly estimate for payments are excusable.— Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

Architect's refusal in bad faith of additional time excuses delay.— Under a contract, providing that the builder should pay for delay, but that, where delay was occasioned by certain causes, additional time should be allowed on an application in writing presented to the architects, the builder is not liable where the architect *mala fide* re-

gestion of the owner,[57] or by the performance of additional work not contemplated when the original contract was made.[58] Delay in performance, however, is not excused because the builder's work is retarded by the happening of a contingency possible at the time the contract was made,[59] such as the difficulty of performance,[60] or the occurrence of a strike,[61] unless there is a provision exempting the builder from the consequences thereof;[62] nor is the delay excused where it resulted from the condemnation of materials furnished by the builder,[63] or from the faultiness of his workmanship,[64] or from the act or omission of a contractor

fuses additional time. McDonald *v.* Patterson, 186 Ill. 381, 57 N. E. 1027 [*affirming* 84 Ill. App. 326].

Where there is a general custom to apply to the architect for the specifications, delay is not excused on the ground that specifications were not furnished in time by the architect, when the architect does not delay to furnish them when applied for. Murdock *v.* Jones, 3 N. Y. App. Div. 221, 38 N. Y. Suppl. 461, 73 N. Y. St. 617.

57. McGinley *v.* Hardy, 18 Cal. 115; Palmer *v.* Stockwell, 9 Gray (Mass.) 237; Farnham *v.* Ross, 2 Hall (N. Y.) 167; Anderson *v.* Meislahn, 12 Daly (N. Y.) 149; Focht *v.* Rosenbaum, 176 Pa. St. 14, 34 Atl. 1001; White *v.* Braddock School Dist., 159 Pa. St. 201, 28 Atl. 136.

The fact that the contract requires a written order for any change affecting the time of completion does not render the builder responsible for delay caused by a change in the plans made at the owner's oral request. Focht *v.* Rosenbaum, 176 Pa. St. 14, 34 Atl. 1001.

Provision that builder should make changes does not make builder liable for delays occasioned by change.— A provision that any change in plans, "either in quantity or quality of the work," should be executed by the contractor, "without holding this contract as violated or void in any other respect," does not render a provision for forfeit for each day that building remains unfinished after a day fixed applicable to delay necessitated by changes ordered by the owners. Lilly *v.* Person, 168 Pa. St. 219, 32 Atl. 23.

58. Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Wilkens *v.* Wilkerson, (Tex. Civ. App. 1897) 41 S. W. 178; Thornhill *v.* Neats, 8 C. B. N. S. 831, 2 L. T. Rep. 539.

The mere ordering of extra work does not relieve from consequences of delay.— Harrison *v.* Trickett, 57 Ill. App. 515.

59. Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762; Texas, etc., R. Co. *v.* Rust, 19 Fed. 239. Where the builder contracts absolutely to complete on or before a certain date, unforeseen contingencies, no matter of what nature, are not available as an excuse. Ward *v.* Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, 34 N. Y. St. 934 [*affirming* 1 Silv. Supreme (N. Y.) 341, 5 N. Y. Suppl. 319, 24 N. Y. St. 347].

An instruction that a builder hindered by unusual, heavy, and constant rains has a sufficient excuse provided he commenced his work at such time as would enable him to perform within a time limit, under ordinary conditions, is erroneous. Cannon *v.* Hunt, 113 Ga. 501, 38 S. E. 983.

60. Cannon *v.* Hunt, 113 Ga. 501, 38 S. E. 983; Reichenbach *v.* Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51; Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

Impossibility of procuring certain material as excuse.— Where a person contracts to build a building of a certain kind of stone, and to complete the same within a specified time, the impossibility of procuring the stone, to be an excuse for delay, must have existed when the contract was made. Wright *v.* Meyer, (Tex. Civ. App. 1894) 25 S. W. 1122.

Severity of the weather insufficient as excuse, if the work could have been carried on by exercise of extra means or effort. Reichenbach *v.* Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51.

61. Hexter *v.* Knox, 39 N. Y. Super. Ct. 109.

62. McDonald *v.* Patterson, 186 Ill. 381, 57 N. E. 1027 [*affirming* 84 Ill. App. 326]; Texas, etc., R. Co. *v.* Rust, 19 Fed. 239.

How far builder protected by provision against strikes and boycotts.— A provision for completion by a specified time, "contingent upon strikes and boycotts," protects the contractor against liability for unavoidable delay so far as it is due to strikes, and the strikes referred to are not limited to such as occur in the shops of the contractor. Milliken *v.* Keppler, 4 N. Y. App. Div. 42, 38 N. Y. Suppl. 738, 74 N. Y. St. 257.

Strike caused by builder not within provision for exemption.— Where contract provides for completion by a special date, "providing there be no interference from labor strikes," the fact that mechanics quit work upon a building on account of the builder's failure to pay as agreed does not release the builder. McLeod *v.* Genius, 31 Nebr. 1, 47 N. W. 473.

Provision exempting builder satisfied where work is impracticable.— A provision that the builder shall not be liable for delay caused by the unusual action of the elements, or otherwise, does not require great and unexpected disturbances of the weather, but is satisfied where events rendering the work impracticable are the cause of delay. McDonald *v.* Patterson, 84 Ill. App. 326 [*affirmed* in 186 Ill. 381, 57 N. E. 1027].

63. Mahoney *v.* St. Paul's Church, 47 La. Ann. 1064, 17 So. 484; White *v.* Braddock School Dist., 159 Pa. St. 201, 28 Atl. 136.

64. Mahoney *v.* St. Paul's Church, 47 La. Ann. 1064, 17 So. 484.

employed by him,[65] or from changes in the plan, not of such a nature as to render further time necessary, where it is not agreed that the time for completion should be extended,[66] unless strict performance within such time is waived.[67]

8. COMPLETION OF WORK BY OWNER. An owner who has paid for all the work that has been done on the contract may immediately, upon a default of the builder to complete, take possession of the unfinished building, and if he pleases employ another person to do what the builder had been engaged to do and had refused to do. This right is not affected because the contract provides that the owner may complete the building,[68] but where the owner fails to avail himself of a provision to that effect, work done thereafter is done under the contract.[69] Where the contract provides that, in the event of the builder's refusal or neglect to supply sufficient materials and workmen, the owner may provide what is necessary after notifying the builder in writing to complete his work, the builder not only has a right to the notice but must be given an opportunity to proceed in conformity therewith.[70] When the contract provides that if the contractor fail to complete the building as agreed the owner may do so, and deduct the expense from the contract price, the contractor cannot abandon the work and compel the owner to complete it, and account to him for the balance of the contract price;[71] and, even if the contract also provides that if any balance

65. Reichenbach *v.* Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51. The builder may recover from the subcontractor the amount he is required to pay the owner of the building for the delay, notwithstanding that the subcontractor was unaware of the time within which the builder was required to complete the building. Murdock *v.* Jones, 3 N. Y. App. Div. 221, 38 N. Y. Suppl. 461, 73 N. Y. St. 617. Whether the failure of a subcontractor or materialman justifies a delay in performance is a question of fact for a jury. McLaren *v.* Fischer, 45 N. Y. App. Div. 13, 61 N. Y. Suppl. 808.

66. Harrison *v.* Trickett, 57 Ill. App. 515; Weeks *v.* Little, 47 N. Y. Super. Ct. 1; Goldnick *v.* Toelberg, 55 N. Y. Suppl. 954; Tew *v.* Newbold-on-Avon United Dist. School Board, Cab. & El. 260.

Reservation of right to have additional work done.— Where the builder agreed to have certain work finished by a named date and the owner reserved a right to have additional work done on payment therefor, it was held that if within the specified time the owner elected to have such additional work done, the builder was bound to finish by the named date. Lauer *v.* Brown, 30 Barb. (N. Y.) 416.

The fact that an architect has power to extend the time for completion in proportion to extra work ordered, but does not do it, does not release the builder from his liability to perform within the specified time. Tew *v.* Newbold-on-Avon United Dist. School Board, Cab. & El. 260.

67. Weeks *v.* Little, 47 N. Y. Super. Ct. 1.

Waiver of time specified see *supra*, V, B, 5.

68. Hammond *v.* Miller, 2 Mackey (D. C.) 145.

69. Hinkley *v.* Grafton Hall, 101 Wis. 69, 76 N. W. 1093.

70. Hall *v.* Bennett, 48 N. Y. Super. Ct. 302.

Necessity of notice.— Although a building contract requires the contractor to remedy any defect in his work after the building has been accepted, the owner may not proceed and remedy defects himself at the contractor's expense, and in his absence, without giving him any notice. Mansfield *v.* Beard, 82 N. Y. 60.

Sufficiency of notice.— Notice that certain parts are worthless and dangerous, not fit for use, liable to cause damage, their construction in direct violation of the contract, without other specification of the nature of the alleged defects, is insufficient to require the contractor to replace such parts or to defeat his right to recover therefor. Gubbins *v.* Lautenschlager, 74 Fed. 160.

Effect of notice.— The giving of notice and an attempt to complete the unfinished work at the contractor's expense waives a certificate of the architect as a condition of payment (Holl *v.* Long, 34 Misc. (N. Y.) 1, 68 N. Y. Suppl. 522. And see Gillen *v.* Hubbard, 2 Hilt. (N. Y.) 303), and a right to liquidated damages stipulated for in case of delay; thus where the contract provided that should the builder during progress of the work refuse or neglect to supply sufficient materials or workmen, the owner might provide materials and workmen after specified notice given in writing to finish the work, and that the amount paid therefor should be deducted from the amount named in the contract, it was held that the owner, by electing to go on under such clause of the contract, waived his right to insist upon forfeiture for the failure of the contractor (Murphy *v.* Buckman, 66 N. Y. 297). See also Crawford *v.* Becker, 13 Hun (N. Y.) 375.

71. Bernz *v.* Marcus Sayre Co., 52 N. J. Eq. 275. 30 Atl. 21.

Liability of builder for architect's services. — The builder is liable to an owner who completes a building after its abandonment by the builder for the services of an architect employed by him in building it, even though

on the contract price remains after completion it shall belong to the builder, or those representing him, the builder has no right thereto if the expense exceed the contract price.[72] Where the contract provides that the employer, in case of the builder's default, may proceed to finish the building himself, and for that purpose make use of materials brought on the ground by the builder, such materials, when appropriated for that purpose by the employer, are so far delivered into his possession as to make them a security for advances made by him to the builder on the contract and to vest in him a qualified right of property in the same.[73]

C. Compensation of Builder — 1. In General. Where there is a special contract to build for a specific price and there has been full performance the compensation of the builder is regulated by the agreement;[74] where, however, there is no special agreement his compensation is the reasonable value of the services rendered by him,[75] as it is where the building plan is abandoned to such an extent that it is impossible to trace the contract in the work done,[76] or where there has been partial performance only and the owner has accepted the work and been benefited by it;[77] where, however, the work is not accepted and the owner derives no benefit from it the builder has no right to any compensation;[78] so where he voluntarily and without justification abandons his work before it is finished.[79]

the builder was an architect and agreed to give his services free of charge. Watson *v.* De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

72. Hewlett *v.* Alexander, 87 Ala. 193, 6 So. 49.

73. Duplan Silk Co. *v.* Spencer, 115 Fed. 689 [*reversing* 112 Fed. 638].

74. McDaniel *v.* Webster, 2 Houst. (Del.) 305. See also Edwards *v.* Louisa County, 89 Iowa 499, 56 N. W. 656; Hawkins *v.* Burrell, 69 N. Y. App. Div. 462, 74 N. Y. Suppl. 1003; Hollinsead *v.* Mactier, 13 Wend. (N. Y.) 276.

75. Baum *v.* Covert, 62 Miss. 113.

As to compensation for services rendered see, generally, Work and Labor.

76. Hollinsead *v.* Mactier, 13 Wend. (N. Y.) 276.

77. *Alabama.*— Bell *v.* Teague, 85 Ala. 211, 3 So. 861; Kirkland *v.* Oates, 25 Ala. 465.

Arkansas.— Manuel *v.* Campbell, 3 Ark. 324; Simpson *v.* McDonald, 2 Ark. 370.

California.— San Francisco Bridge Co. *v.* Dunbarton Land, etc., Co., 119 Cal. 272, 51 Pac. 335.

Colorado.— Schaefer *v.* Gildea, 3 Colo. 15.

District of Columbia.— Hammond *v.* Miller, 2 Mackey (D. C.) 145.

Indiana.— Becker *v.* Hecker, 9 Ind. 497; McClure *v.* Secrist, 5 Ind. 31; Cosby *v.* Adams, Wils. (Ind.) 342.

Iowa.— Shulte *v.* Hennessy, 40 Iowa 352.

Kansas.— School Dist. No. 2 *v.* Boyer, 46 Kan. 54, 26 Pac. 484.

Louisiana.— Joublanc *v.* Daunoy, 6 La. 656.

Missouri.— Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225; Austin *v.* Keating, 21 Mo. App. 30.

New Hampshire.— Bailey *v.* Woods, 17 N. H. 365.

North Carolina.— Moffitt *v.* Glass, 117 N. C. 142, 23 S. E. 104; Dixon *v.* Gravely, 117 N. C. 84, 23 S. E. 39; Simpson *v.* Carolina Cent. R. Co., 112 N. C. 703, 16 S. E. 853.

Texas.— Harris County *v.* Campbell, 68 Tex. 32, 3 S. W. 243, 2 Am. St. Rep. 467; Jennings *v.* Willer, (Tex. Civ. App. 1895) 32 S. W. 24.

Utah.— Rhodes *v.* Clute, 17 Utah 137, 53 Pac. 990.

Wisconsin.— Taylor *v.* Williams, 6 Wis. 363.

Wyoming.— Hood *v.* Smiley, 5 Wyo. 70, 36 Pac. 856.

Extent of recovery see *infra*, VII, D.

Essentiality of acceptance by, and benefit to, owner see *supra*, V, B, 6.

78. *Kentucky.*—Morford *v.* Mastin, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168.

Maine.— Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

Massachusetts.— Taft *v.* Montague, 14 Mass. 282, 7 Am. Dec. 215.

Michigan.— Eaton *v.* Gladwell, 121 Mich. 444, 80 N. W. 292; Martus *v.* Houck, 39 Mich. 431, 33 Am. Rep. 409.

Minnesota.— Cornish, etc., Co. *v.* Antrim Co-operative Dairy Assoc., 82 Minn. 215, 84 N. W. 724.

New York.— Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442; D'Amato *v.* Gentile, 54 N. Y. App. Div. 625, 66 N. Y. Suppl. 833; Zimmermann *v.* Jourgensen, 70 Hun (N. Y.) 222, 24 N. Y. Suppl. 170, 54 N. Y. St. 13; Pullman *v.* Corning, 14 Barb. (N. Y.) 174; Tucker *v.* Williams, 2 Hilt. (N. Y.) 562; Smith *v.* Coe, 2 Hilt. (N. Y.) 365.

North Carolina.— Byerly *v.* Kepley, 46 N. C. 35.

Pennsylvania.— Miller *v.* Phillips, 31 Pa. St. 218.

South Dakota.— Hulst *v.* Benevolent Hall Assoc., 9 S. D. 144, 68 N. W. 200.

Wisconsin.— Houlahan *v.* Clark, 110 Wis. 43, 85 N. W. 676.

79. *California.*— Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840.

2. Time of Payment. In the absence from the contract of any provision on the point the time of making payment is presumed to be on completion of the work only,[80] but the time for making payments may be established and made binding on the parties by mutual conditions.[81]

3. For Additional, Changed, or Extra Work — a. In General. It is well settled that a builder ordered to do extra work, whether caused by changes from the original plans, or by work that is in some way connected with the original contract though substantially independent of it, is entitled to compensation therefor,[82] if the circumstances are such that the proprietor must know the work will cause extra labor and expense to the builder not contemplated by either party in the original contract,[83] unless the original contract expressly provides other-

Connecticut.— Smith *v.* Scott's Ridge School Dist., 20 Conn. 312.

Indiana.— Forkner *v.* Purl, 1 Ind. 489.

Massachusetts.— Faxon *v.* Mansfield, 2 Mass. 147.

Rhode Island.— Carpenter *v.* Gay, 12 R. I. 306.

Vermont.— Kettle *v.* Harvey, 21 Vt. 301.

United States.— Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762; Henegan *v.* U. S., 17 Ct. Cl. 273.

80. Shanks *v.* Griffin, 14 B. Mon. (Ky.) 124; Smith *v.* Sheltering Arms, 89 Hun (N. Y.) 70, 35 N. Y. Suppl. 62, 69 N. Y. St. 273; Boody *v.* Rutland, etc., Co., 3 Blatchf. (U. S.) 25, 3 Fed. Cas. No. 1,635, 34 Vt. 660.

Statutory time of payment.— Twenty-five per cent of the contract price for the protection of lienors must, under Cal. Code Civ. Proc. § 1184, be payable at least thirty-five days after final completion of the contract. West Coast Lumber Co. *v.* Knapp, 122 Cal. 79, 54 Pac. 533. See also Dunlop *v.* Kennedy, (Cal. 1893) 34 Pac. 92. As to validity of payment prior to the statutory time as against lienors see, generally, Mechanics' Liens.

81. Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356.

82. Dull *v.* Bramhall, 49 Ill. 364; Childress *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 1076; Fitzgerald *v.* Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824.

What amounts to extra work.— Extra excavations for foundations, caused by peculiarities in the soil, unknown to either builder or owner at the time the contract was signed, constitute extra work. Anderson *v.* Meislahn, 12 Daly (N. Y.) 149. Under a contract providing that, if the owner at any time requests any alterations, deviations, additions, or omissions from the contract, he shall be at liberty to make them, and the same shall in no way affect or avoid the contract, but will be added to, or deducted from, the amount of the contract by a fair and reasonable valuation, work done and material furnished upon and for the building agreed to be built by the contract will not be regarded as extra work, although not called for by the contract or the specifications. Alger *v.* Vanderpoel, 34 N. Y. Super. Ct. 161.

Necessity and requisites of contract.— There must be either an express or implied contract of the employer for extra work in order to entitle the builder to compensation (Niemeyer *v.* Woods, 72 N. Y. App. Div. 630, 76 N. Y. Suppl. 563. And see Miller *v.* McCaffrey, 9 Pa. St. 245); but an express agreement is not necessary when the work is ordered by the owner (Childress *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 1076); thus, an employer must pay for extra work even if he did not order it, when he was daily at the building and must have seen it, and did not forbid it (Percy *v.* Peyroux, 5 Rob. (La.) 179), and, if there be no promise to pay, there is a presumption that alterations were agreed to be made and were made without extra charge (Badders *v.* Davis, 88 Ala. 367, 6 So. 834). A promise of extra pay must, however, be based upon a sufficient consideration. Nelson *v.* Pickwick Associated Co., 30 Ill. App. 333.

Where a building contract provides for extra compensation failure to make claim at the time the work was ordered is immaterial. Essex *v.* Murray, (Tex. Civ. App. 1902) 68 S. W. 736.

A builder is entitled to compensation even if the contract was rescinded by the owner because not performed in accordance therewith and the owner has afterward completed the work, provided that the cost of completion be less than the contract price and the value of the extra work, but if the cost of completion be greater than the sum of the contract price and the value of the extra work the builder is not entitled to compensation but is indebted to his employer. Rector *v.* McDermott, (Ark. 1890) 13 S. W. 334.

83. Fitzgerald *v.* Walsh, 107 Wis. 92, 84 N. W. 717, 81 Am. St. Rep. 824; Gibbons *v.* U. S., 15 Ct. Cl. 174.

Duty of builder to notify owner where extra cost will not necessarily result.— A builder should, where the owner orders a change under circumstances warranting an inference of his belief that no extra cost will result therefrom, notify the owner that the change cannot be made without extra cost. Where, however, the change will necessarily cause increased expense no notice to the owner is requisite. Gibbons *v.* U. S., 15 Ct. Cl. 174.

Inference of no claim for extra compensation.— Where a builder does not exact a promise of payment and does not notify his employer that a change will entail extra expense the latter may well infer that no extra

wise.[84] It must, however, clearly appear that the work for which extra compensation is demanded was not embraced in the original contract of employment or in the duties thereby imposed.[85] Where the contract contains conditions in reference to compensation for extras the builder must comply with them or he has no right to compensation,[86] unless the provision be waived by the owner.[87] Thus, where the specifications provide that no extra work shall be allowed except on a written order from the architect, such order must be obtained,[88] a verbal order not being

charge will be made. Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

It is a question of fact whether a change involving extra expense was ordered. Essex *v.* Murray, (Tex. Civ. App. 1902) 68 S. W. 736.

84. Fitzgerald *v.* Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824.

85. *Illinois.*— Dull *v.* Bramhall, 49 Ill. 364.

Missouri.— Ruecking *v.* McMahon, 81 Mo. App. 422.

New York.— Brewster *v.* Hornellsville, 35 N. Y. App. Div. 161, 54 N. Y. Suppl. 904.

Tennessee.— Perkins Oil Co. *v.* Eberhart, 107 Tenn. 409, 64 S. W. 760.

Wisconsin.—Riesen *v.* Milwaukee, 112 Wis. 651, 88 N. W. 594.

A builder is not entitled to an allowance for extra work when, at the solicitation of the owner, he gave more time and attention to effect an earlier completion than he would have done without such solicitation, though the building contract required him to "superintend the building and see that the contractors for each and every portion therein shall complete their work in a workmanlike and satisfactory manner, with due diligence," and it does not appear that the work was done any better than the contract required. Kinsley *v.* Charnley, 33 Ill. App. 553.

Where material is substituted at builder's desire.— A builder who, being unable to obtain the material specified, is given permission by the architect to substitute other material, at his option, is not entitled to compensation for that material as an extra. Bond *v.* Stewart, 58 N. Y. App. Div. 615, 68 N. Y. Suppl. 586.

86. Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Eldridge *v.* Fuhr, 59 Mo. App. 44; Gilbert Blasting, etc., Co. *v.* Rex, 7 Can. Exch. 221.

87. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325; Illinois Deaf, etc., Inst. *v.* Platt, 5 Ill. App. 567.

88. *California.*— Gray *v.* La Societe Francaise, etc., 131 Cal. 566, 63 Pac. 848; White *v.* San Rafael, etc., R. Co., 50 Cal. 417.

Connecticut.— O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

Georgia.— Heard *v.* Dooly County, 101 Ga. 619, 28 S. E. 986.

Illinois.— Illinois Deaf, etc., Inst. *v.* Platt, 5 Ill. App. 567.

Louisiana.— Monarch *v.* New Orleans, 49 La. Ann. 991, 22 So. 259.

New York.— L'Hommedieu *v.* Winthrop, 59 N. Y. App. Div. 192, 69 N. Y. Suppl. 381.

North Dakota.— Northern Light Lodge No. 1, I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524.

Texas.— Ferrier *v.* Knox County, (Tex. Civ. App. 1896) 33 S. W. 896.

Notwithstanding there is a clause providing that alterations and additions may be made by an architect or engineer in charge of the work see White *v.* San Rafael, etc., R. Co., 50 Cal. 417.

Non-application of provision for orders in writing to other clauses.— A clause, providing that no alterations or extra work may be done without a written order from the architect and an express agreement in writing as to the cost, applies only to orders of the architect and has no relation to clauses providing that the owner may, during progress of the building, request alterations which shall not affect or avoid the contract, but be added or deducted from the contract price, as the case may be, by a fair and reasonable valuation, and that any dispute arising respecting the value of extra work or of work omitted shall be settled by a competent person employed by the owner and a competent person employed by the builder. Cooper *v.* Hawley, 60 N. J. L. 560, 38 Atl. 964.

In some cases the filing of a claim with an architect before the next ensuing payment is necessary in addition to a written order of the architect. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

An order in writing is not necessary with respect to work not called for in the specifications but required by detailed plans subsequently furnished by the architect. Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142.

Whether a written order was waived is a question of fact (Foster *v.* McKeown, 192 Ill. 339, 61 N. E. 514 [*affirming* 85 Ill. App. 449]), but the fact that the owner has previously paid for extra work done upon a mere verbal order does not waive the provision (White *v.* San Rafael, etc., R. Co., 50 Cal. 417).

Provision not effective where order given by owner.— A stipulation that no extra work of any kind will be allowed or paid for, unless authorized by an agreement in writing previously made, is of no effect, where the owner orders the builder to do extra work, outside of and additional to that covered by the written contract. Foley *v.* Tipton Hotel Assoc., 102 Iowa 272, 71 N. W. 236; Escott *v.* White, 10 Bush (Ky.) 169; Baum *v.* Covert, 62 Miss. 113.

Sufficiency of written order.— A certificate for payment is not a written order (Tharsis Sulphur, etc., Co. *v.* McElroy, 3 A. C. 1040; Brunsdon *v.* Staines, Cab. & El.

sufficient,[89] unless known to the owner,[90] or the charge for extra work is agreed to by the owner.[91] So the builder is not entitled to compensation for extras ordered by an architect not authorized by the contract to order extra work.[92]

b. Amount, Time, and Manner of Payment. Where the contract provides for the valuation of extra work by an architect whose decision thereon is to be final the builder need not accept his valuation, if the changes ordered be materially different from the plans and specifications.[93] In the absence of any agreement with regard to the time and mode of payment for partial alterations or additions, the time and mode of payment prescribed for the original work, if in their nature applicable to payments for such alterations or changes, control the mode of pay-

272); so an unsigned sketch made by the architect is not sufficient (Myers *v.* Sarl, 7 Jur. N. S. 97, 30 L. J. Q. B. 9, 9 Wkly. Rep. 96); and so too where no written directions were given by architects for additional works, except that letters were signed, some by one of the architects, and others by both, in which allusion was incidentally made to some of the additional works in progress, containing suggestions as to the mode of execution, and save also that long after the works were complete the architects, on the application of the builder, made a valuation of the additional works, it was held that the certificate of satisfaction, the letters, and final valuation of the architects did not amount to a written order (Lamprell *v.* Billericay Union, 3 Exch. 282, 18 L. J. Exch. 282).

The owner and builder only are affected by Quebec Civ. Code, art. 1690, which requires an authorization in writing to establish a claim for extra labor or material, and not the contractor and his subcontractor. Robert *v.* Chartrand, 3 Quebec 339.

89. Gray *v.* La Societe Francaise, etc., 131 Cal. 566, 63 Pac. 848; Monarch *v.* New Orleans, 49 La. Ann. 991, 22 So. 259; Stuart *v.* Cambridge, 125 Mass. 102.

It is erroneous to charge that architects may give a verbal order when the contract provides for one that is written. L'Hommedieu *v.* Winthrop, 59 N. Y. App. Div. 192, 69 N. Y. Suppl. 381.

There must be something beyond an order to entitle the builder to obtain payment for extras not ordered in writing. Franklin *v.* Darke, 3 F. & F. 65, 6 L. T. Rep. N. S. 291.

In Alabama it seems settled law that, a building contract not being one which the law requires to be evidenced by writing signed, it is not requisite that there should be a written order, even if one be required by the contract, since the parties thereto may mutually alter, modify, or rescind it. Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

90. Gray *v.* La Societe Francaise, etc., 131 Cal. 566, 63 Pac. 848.

Knowledge of owner.— Where the architect tells the builder in the presence of the owner to do certain extra work and that he would "see that he got his pay," the builder has a right to compensation. Nelson *v.* Halfen, 51 Ill. App. 198.

91. Monarch *v.* New Orleans, 49 La. Ann. 991, 22 So. 259.

Work accepted by owner.— A builder has a right to compensation where the owner has accepted work ordered by an architect to whom superintendence of the work was intrusted, though the price of such work was not agreed on and the contract therefor was not written (Gibson County *v.* Motherwell Iron, etc., Co., 123 Ind. 364, 24 N. E. 115), but it has been said that if extra work be done without authority the employer's acceptance, with knowledge that extra compensation was demanded, does not raise an implied contract that the extra work will be paid for (Driscoll *v.* U. S., 34 Ct. Cl. 508).

Part payment may amount to ratification. — Where a contractor did extra work on a verbal order, and monthly estimates were made, and the correctness thereof was certified in writing, and part of the price was paid, there was a ratification in writing sufficient to satisfy the requirement of the contract that all extra work should be done on a written order. Abells *v.* Syracuse, 7 N. Y. App. Div. 501, 40 N. Y. Suppl. 233 (two judges dissenting).

92. Starkweather *v.* Goodman, 48 Conn. 101, 40 Am. Rep. 152, holding that the builder cannot extend the architect's power by inference, and that where he furnishes materials for, or performs labor in excess of, the specifications, upon the order of the architect, he assumes the risk of ratification by the owner. See also Carson *v.* Mitchell, 41 Ill. App. 243, in which case it was held that the fact that the owner told the builder that some person would be on the premises to see that work was done properly and that the builder must look to that person for his orders did not expressly or impliedly authorize such person to allow or direct extra work.

An employer is not estopped by the fact that when a building is nearly completed the owner without objection receives a statement of work and materials not specified in the written contract and which he has not ordered, from denying the architect's authority to order the extra work. Starkweather *v.* Goodman, 48 Conn. 101, 40 Am. Rep. 152.

93. Cook County *v.* Harms, 108 Ill. 151.

Where a contract provided that the value of any alteration should be decided by the architect, and that, if either party dissented from his decision, the matter should be referred to arbitrators, but did not specify any time at which the dissent should be made, the builder does not waive a right to dissent, because he does not so do at the time the

ment for alterations or additions subsequently made,[94] and deductions must be made if there be also changes lessening the cost of the extra work.[95] Where, however, the changes are such that it is impossible to trace the contract and say to what part of the work it is to be applied,[96] the original contract is no longer a guide for estimating the price,[97] and where no price is agreed upon for extra work the amount of compensation therefor will be what it is reasonably worth.[98]

4. Where There Is Excusable Delay in Performance. The builder is entitled to compensation for his services where his delay in performance is excusable,[99] or the delay has been waived;[1] and for the delay,[2] even if caused by other contract-

architect's computation was submitted to him with the order for the alterations, but a submission to arbitration without raising the objection that the builder lost his right to dissent is a waiver of the objection. Brown *v.* Farnandis, (Wash. 1902) 67 Pac. 574.

Legality of provisions as to extra work see *supra*, II, B, 4, c, (VIII).

94. Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356; Jones *v.* Woodbury, 11 B. Mon. (Ky.) 167; Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225; Wheeden *v.* Fiske, 50 N. H. 125. See also Mueller *v.* Rosen, 179 Ill. 130, 53 N. E. 625 [*affirming* 79 Ill. App. 420]; Boody *v.* Rutland, etc., R. Co., 3 Blatchf. (U. S.) 25, 3 Fed. Cas. No. 1,635, 24 Vt. 660.

Agreement not to charge more than specified sum.— The builder has agreed that work shall not cost over a certain amount, but after work has commenced proposes to do extra work which would make the whole building not cost over another sum, there is an agreement that if the owner would permit the extra work to be put on the house the builder would not charge more than the latter amount for the entire work. Britney *v.* Bolding, 28 Miss. 53.

A builder who has completed his work, and claimed payment under the contract, cannot claim for work in excess of the quantities on which it was based, nor for any additions or alterations beyond the amount allowed by the employer's surveyor. Coker *v.* Young, 2 F. & F. 98.

95. Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225.

96. Wheeden *v.* Fiske, 50 N. H. 125.

97. Tebbetts *v.* Haskins, 16 Me. 283.

98. Tebbetts *v.* Haskins, 16 Me. 283; Baum *v.* Covert, 62 Miss. 113; Wheeden *v.* Fiske, 50 N. H. 125.

A provision that the architect may make alterations in the plans, and that any difference in the cost shall be figured by the architects, whose figuring shall be final, does not, where alterations have been made in the plans and extra work done at the request of the architects who did not fix the difference in the cost occasioned thereby, prevent the builder from recovering for the reasonable value of the work. Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225.

There is a waiver of provision that the amount of extra pay is to be agreed upon mutually or referred to arbitrators before the work be done, if the owner orders them but refuses to have the price fixed. Truckee Lodge No. 14, I. O. O. F. *v.* Wood, 14 Nev. 293.

99. *Illinois.*— Vermont St. M. E. Church *v.* Brose, 104 Ill. 206; Taylor *v.* Renn, 79 Ill. 181.

Kentucky.— Vaughn *v.* Digman, 19 Ky. L. Rep. 1340, 43 S. W. 251.

Mississippi.— Collins *v.* Money, 4 How. (Miss.) 11.

New York.— Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Stewart *v.* Keteltas, 9 Bosw. (N. Y.) 261; Anderson *v.* Meislahn, 12 Daly (N. Y.) 149.

United States.— Erickson *v.* U. S., 107 Fed. 204; Bitting *v.* U. S., 25 Ct. Cl. 502.

Loss caused by owner's delay.— It is the duty of the owner to keep another contractor's work in such a state of forwardness as to enable a builder to perform his contract within the time specified, though the contract contains no stipulation to that effect. Haynes *v.* St. Louis Second Baptist Church, 12 Mo. App. 536; See *v.* Partridge, 2 Duer (N. Y.) 463.

Terms implied in contract see *supra*, II, C, 1, d.

Loss caused by rise in price of labor.— A builder may recover for losses sustained on his contract from a rise in the price of labor during a delay caused by the neglect of his employer to furnish building materials as agreed. Bitting *v.* U. S., 25 Ct. Cl. 502.

When delay in performance is excusable see *supra*, V, B, 7.

1. Fowlds *v.* Evans, 52 Minn. 551, 54 N. W. 743; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Meehan *v.* Williams, 2 Daly (N. Y.) 367; Gallagher *v.* Nichols, 16 Abb. Pr. N. S. (N. Y.) 337; Kugler *v.* Wiseman, 20 Ohio 361; Lucas *v.* Godwin, 3 Bing. N. Cas. 737, 3 Hodges 114, 6 L. J. C. P. 205, 32 E. C. L. 340.

As to form of action see *infra*, VII, A, 2.

2. Granniss, etc., Lumber Co. *v.* Deeves, 72 Hun (N. Y.) 171, 25 N. Y. Suppl. 375, 55 N. Y. St. 674.

A clause providing that the builder shall have no claim upon his employer for any delay in delivering material does not apply to delay and expense resulting to the builder from the necessity of altering defective material furnished by the employer, the defects of which cannot be detected until they are being put in place. Wood *v.* Ft. Wayne, 119 U. S. 312, 7 S. Ct. 219, 30 L. ed. 416.

A builder agreeing to complete within a

ors,[3] unless the contract provides that if the builder be delayed by reason of tardiness or want of dispatch on the part of contractors doing other kinds of work upon the building, he is to be entitled to such further time for the completion of the work as the architects shall allow him.[4]

5. Where Full Performance Is Prevented. Where full performance is prevented for a cause not attributable to the builder he is entitled to the compensation provided in the contract as far as his work has been done,[5] so where he is prevented from completing his work because his employer is enjoined from having the work done,[6] or where disabled by sickness.[7] Again, where some portion of the contract price is due under the contract at the time a building is destroyed by inevitable accident not attributable to the builder, he generally has a right to the sum due or at any rate to the reasonable value of his work,[8] though there are decisions to the contrary.[9]

D. Compensation of Subcontractors and Materialmen. As a general rule the builder, and not the owner, is the person liable for services performed by a person or persons under a contract with the builder,[10] and for materials

certain time, under a contract authorizing an engineer if at any time he believes the work will not be completed to declare a forfeiture, can recover damages where a forfeiture has been declared, only if he can show corrupt motives on the part of the engineer and that he himself would have completed if the work had proceeded under him. Culbertson *v.* Ellis, 6 McLean (U. S.) 248, 6 Fed. Cas. No. 3,461.

When right to compensation not waived.— A contractor damaged by delay in the prosecution of his work caused by the owner does not, by receiving the stipulated contract price for performance of his contract, waive a right to proceed against the owner for the damages sustained. Weeks *v.* Trinity Church, 56 N. Y. App. Div. 195, 67 N. Y. Suppl. 670.

No waiver of damage.—By continuing work until the completion of his contract, a builder does not waive damages occasioned by delay of his employer in furnishing material. Tobey *v.* Price, 75 Ill. 645.

What amount recoverable see *infra*, VII, D.

3. State *v.* Farish, 23 Miss. 483; See *v.* Partridge, 2 Duer (N. Y.) 463.

A stipulation for further time should delay be caused by other contractors implies that the builder is to have no pecuniary compensation for delay caused by the other contractors. Haydnville Min., etc., Co. *v.* Art Institute, 39 Fed. 484.

A builder is not entitled to counter-claim against a subcontractor suing for compensation damages caused by delay in performance, where the claim for damages is put in by the employer at the request of the builder for the purpose of reducing the subcontractor's compensation, nor, where he has not paid the owner the penalty imposed in his own contract for such delay or there is not a fixed liability against him for such damages. Fisher *v.* Edgefield, etc., Mfg. Co., (Tenn. Ch. 1900) 62 S. W. 27.

4. Haydnville Min., etc., Co. *v.* Art Institute, 39 Fed. 484.

5. Heine *v.* Meyer, 61 N. Y. 171, in which case the further prosecution of work was forbidden by an authorized building superintendent for a defect not occasioned by the contractor.

6. Doolittle *v.* Nash, 48 Vt. 441.

7. Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475.

8. *Alabama.*— Hunt *v.* Toulmin, 1 Stew. & P. (Ala.) 178.

Illinois.— Rawson *v.* Clark, 70 Ill. 656; Siegel *v.* Eaton, etc., Co., 60 Ill. App. 639.

Massachusetts.— Cleary *v.* Sohier, 120 Mass. 210; Lord *v.* Wheeler, 1 Gray (Mass.) 282.

New York.— Nihlo *v.* Binsse, 3 Abb. Dec. (N. Y.) 375, 1 Keyes (N. Y.) 476.

Texas.— Weir *v.* Devlin, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38; Hollis *v.* Chapman, 36 Tex. 1.

Wisconsin.— Cook *v.* McCabe, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765.

9. Cutcliff *v.* McAnally, 88 Ala. 507, 7 So. 331; Brumby *v.* Smith, 3 Ala. 123; Fildew *v.* Besley, 54 Mich. 100, 3 N. W. 278, 36 Am. Rep. 433; Lawing *v.* Rintles, 97 N. C. 350, 2 S. E. 252; Burke *v.* Purifoy, 21 Tex. Civ. App. 202, 50 S. W. 1089.

10. *California.*— Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640.

Illinois.— Fender *v.* Kelly, 58 Ill. App. 283.

Indiana.— Mackenzie *v.* Edinburg, 72 Ind. 189; Floyd *v.* Indianapolis, etc., R. Co., 8 Ind. 469.

Louisiana.— Pelanne *v.* Coudreau, 16 La. Ann. 127.

New York.— O'Neil *v.* Hudson Valley Ice Co., 74 Hun (N. Y.) 163, 26 N. Y. Suppl. 598, 56 N. Y. St. 289 [*distinguishing* Lawrence *v.* Fox, 20 N. Y. 268]; Smith *v.* Ferris, 1 Daly (N. Y.) 18.

United States.— U. S. *v.* Driscoll, 96 U. S. 421, 24 L. ed. 847.

The doctrine that a party seeing work progress for him, and making no objection thereto to the person doing the same, is liable to the person so working has no application where the entire work is contracted to and placed under the control of another, who has the power to employ him when he pleases. Campbell *v.* Day, 90 Ill. 363.

Where a building is destroyed by fire while

furnished,[11] and subcontractors and materialmen must resort for payment to the former.[12]

in course of erection, a settlement between the owner and the contractor, by which the latter is paid for the work as far as done, entitles a subcontractor to be paid by the contractor for work actually done by him, notwithstanding some things of minor importance may not have been performed in accordance with the subcontract, since such failure was waived in the adjustment between the original contractor and the owner. Clark *v.* Busse, 82 Ill. 515.

A provision made by a contractor in a contract between him and a subcontractor that he shall be entitled to retain in his hands a part of the earnings as a protection against his liability to the persons employed by the subcontractors will not give to the latter or his assignee any right of action against the contractor personally, nor any lien on the fund itself. Wells *v.* Williams, 39 Barb. (N. Y.) 567.

Where a building contract is modified at the request of the owner and a workman employed separate from the contract with the builder, the owner is liable for his services. McIntosh *v.* Clannon, 18 La. 469. See also Nial *v.* Flandrian, 1 N. Y. St. 73.

Where an architect certifies a completion of a certain stage of the work in conformity with the powers conferred on him by the contract, substantial performance is sufficient, and an honest mistake on the part of the builder as to a small matter will not invalidate payment made on the certificate so as to make the employer liable for a second payment to creditors of the builder, on the ground that the first payment was made before due. Sisters of Charity *v.* Smith, (N. J. 1899) 46 Atl. 598.

An owner is not liable to a subcontractor after the contract price has been paid merely because he does not take advantage of an agreement under which he undertakes to pay him on an indorsement of the account by the builder, although he has paid previous accounts without an indorsement. The payment does not waive the contract requirement. Yahr *v.* Joint School Dist. No. 2, 99 Wis. 281, 74 N. W. 779.

Workmen or subcontractors employed by the builder have in some jurisdictions a right to have enough reserved out of the money given to the builder to pay them. Hogge *v.* Taliaferro, 10 La. Ann. 561; Allen *v.* Wills, 4 La. Ann. 97.

Right of subcontractors and materialmen to recover from sureties on builder's bond see *infra*, VI, B.

11. Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640; Peers *v.* Board of Education, 72 Ill. 508; Murphy *v.* Winchester, 35 Barb. (N. Y.) 616; Brown *v.* Morgan, 2 Bosw. (N. Y.) 485; Hutton *v.* Gordon, 2 Misc. (N. Y.) 267, 23 N. Y. Suppl. 770.

A provision that the builder, under the direction of the architect, acting as "agents" of the owner, shall provide all materials and perform all work for which the contract provides does not make the owner liable, as the builder's principal, for material ordered by the builder, the use of the plural of agent appearing to be a clerical error. Steele *v.* McBurney, 96 Iowa 449, 65 N. W. 332.

An owner who says to a materialman, who has already furnished materials to the contractor, that he will pay for all the materials that the contractor might get for the building, is liable, on his promise, for all materials furnished thereafter for the building and charged to him, but not liable for such as had, before the promise, been furnished to the contractor. Owen *v.* Stevens, 78 Ill. 462. See also Lumaghi *v.* Neuber, 67 Ill. 250.

Where a builder abandons his work before completion and an owner employs another to finish the building, according to the plans and specifications, which call for material furnished by a third party and stored in the building the owner is liable for the price of such material if used in the building after having been notified by the third party that the material must not be used until paid for. Clore *v.* Johnson, 21 Ky. L. Rep. 1685, 56 S. W. 5.

Where a materialman stated that he would furnish materials to a building contractor if assured of payment, whereon the owner agreed with the consent of the contractor to retain in its control sufficient of the money due the contractor to protect the materialman the latter was not obliged to await the completion of the contract before he could recover on the agreement. Roussel *v.* Mathews, 62 N. Y. App. Div. 1, 70 N. Y. Suppl. 886.

Where material is furnished to a building contractor under an agreement that the owner will retain sufficient of the money due the contractor to protect him, and the owner has agreed to accept a certain sum for the contractor's failure to complete minor details, and agreed on the balance due, the materialman may hold the owner responsible for payment. Roussel *v.* Mathews, 62 N. Y. App. Div. 1, 70 N. Y. Suppl. 886.

12. Cleaves *v.* Stockwell, 33 Me. 341; International, etc., R. Co. *v.* Hutchins, 1 Tex. App. Civ. Cas. § 303.

The rule is the same even if the contract provides that the owner may retain from money due the contractor an amount sufficient to meet the claims of those who should have done work or furnished materials, until the contractor should have furnished proof of having paid such claims, unless it is also provided that the owner may pay a claim out of the money retained. Quinlan *v.* Russell, 47 N. Y. Super. Ct. 212.

Effect of orders for payment given by builder.— A subcontractor may resort to an owner to the extent of any money paid away to his damage after the owner has accepted an order from the builder in favor of the subcontractor agreeing to deduct the amount of the subcontractor's claim out of payments

VI. RIGHTS, DUTIES, AND LIABILITIES OF SURETIES ON BUILDERS' BONDS.[13]

A. In General. Sureties are bound only in the manner and to the extent provided in the obligation;[14] and its terms cannot be changed without their consent, even with a view to avoid ultimate liability.[15] Thus, if payments are made to the builder in excess of the amounts due on the estimates, they will not be liable for the excess,[16] and payment to the builder, without the surety's consent, of a percentage that should under the building contract be reserved until completion of the work for which a bond was given discharges the surety.[17]

due the contractor on completion of the building. Hammond *v.* Miller, 2 Mackey (D. C.) 145. See also Hafner *v.* Kirby, 24 Misc. (N. Y.) 390, 53 N. Y. Suppl. 552. An order or draft, if accepted by the owner, amounts to an assignment *pro tanto* of the fund due under the building contract; and a subsequent assignment from the contractor to a third person of his rights under the contract does not affect the rights thus acquired under said order. Hafner *v.* Kirby, 24 Misc. (N. Y.) 390, 53 N. Y. Suppl. 552. See also Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640. Where the contract provides for payments to the builder as the work progresses, and also that a specific sum is to be reserved for the payment of materialmen, such sums must be reserved from the balance due after completion and the builder is entitled to have the payments made, notwithstanding that the owner has accepted orders drawn in favor of the materialmen, and incurred liabilities therefor in excess of the payments then due. Ford *v.* Burchard, 130 Mass. 424. Where the owner of a house in process of building accepted an order drawn upon him by the builder in favor of a third person to be paid when the house was finished, and neither the builder nor the owner finished the house, but it was sold by the latter in an unfinished state and afterward completed by the purchaser, the third party doing some work upon it, it was held that he was entitled to recover from the owner. Robbins *v.* Blodgett, 124 Mass. 279. Orders drawn by the builder on the owners payable when the building has been completed to a certain point, and accepted by the owner, cannot be collected, when the builder has abandoned his contract before completing it to the specified point and it has been completed by the owner at a cost greater than the sum which would be due the contractor if he had completed it, unless the owner has practised force, fraud, or collusion against or with the contractor. Newhall *v.* Clark, 3 Cush. (Mass.) 376, 50 Am. Dec. 741. The payee of an order accepted by the owner conditionally on the work being done according to the contract has no privity with the owner that will, if payment is refused on the ground of failure to perform, entitle him to maintain an action against the owner on an account annexed for labor and materials. Farquhar *v.* Brown, 132 Mass. 340.

Right to money retained.— The fact that a contract provided that the owner should retain fifteen per cent of each partial estimate, made as the work progressed, to insure him that all claims for labor and materials were paid by the contractor, and that the building should be completed in accordance with the contract, gives a subcontractor no right of action or claim against the owner for money so retained, though from estimates based on labor and materials furnished by him (Beatrice School Dist. *v.* Thomas, 51 Nebr. 740, 71 N. W. 731), and persons who have advanced money to the builder with the expectation that it will be used in carrying out the building contract cannot, where some of it has been paid to laborers and materialmen, demand that an owner's right to withhold the funds only in case of non-payment of laborers or materialmen be exercised in their favor. Lawrence *v.* U. S., 71 Fed. 228.

13. See, generally, BONDS, 5 Cyc. 721.

14. Finney *v.* Condon, 86 Ill. 78; Gray *v.* Norfolk School Dist., 35 Nebr. 438, 53 N. W. 377.

Consideration for surety's promise to pay subcontractor.— A promise by a surety to whom the builder has assigned the money to become due under the contract, to pay the claim of a subcontractor, if the subcontractor would do certain work on the premises, is without consideration, unless the work specified was something which the subcontractor was not required by his contract to do. Alley *v.* Turck, 8 N. Y. App. Div. 50, 40 N. Y. Suppl. 433, 70 N. Y. St. 865.

15. Finney *v.* Condon, 86 Ill. 78.

Completion by owner on absolute abandonment of work by builder.— A provision that in the event of the builder's failure to supply sufficient skilled workmen or materials of proper quality or to prosecute the work with diligence the employer may, upon securing a certificate of the architect, to these facts upon proper notice, finish the work, contemplates a case where the builder claims to be complying with his obligation, and not one where, before doing any substantial part of the work, he absolutely abandons it and voluntarily surrenders the premises to the owner for its completion; therefore, neither a failure to secure the architect's certificate and give proper notice to the builder, or a waiver of them by the builder releases the surety. George A. Fuller Co. *v.* Doyle, 87 Fed. 687.

As to suretyship see, generally, PRINCIPAL AND AGENT.

16. Gray *v.* Norfolk School Dist., 35 Nebr. 438, 53 N. W. 377.

17. Finney *v.* Condon, 86 Ill. 78, holding that a provision for reservation of payment

B. Compensation of Subcontractors and Materialmen. On default of the builder, in cases where the contract requires him to pay for all labor and material furnished, a right of action directly against the sureties accrues to unpaid laborers, materialmen,[18] and subcontractors;[19] in the absence, however, of this provision the sureties are not liable,[20] unless they have completed the building on his default, and under an agreement with him collected the price from the owner.[21]

C. Changes and Alterations. Sureties on a bond, conditioned for building in accordance with plans, are released by a substantial change in the plans,[22] if the changes are made without their consent;[23] but changes and alterations made by the owner will not release the sureties where the contract permits him, at any time during progress of building operations, to make alterations, changes, or additions without invalidating the contract,[24] or where the bond itself contains a similar provision.[25]

is as much for the indemnity of the surety as of the owner.

Where the retention moneys have been paid over and thereby the position of the sureties has been altered, but such change in position has been effected by fraudulent execution of the work, the honest execution of which sureties have guaranteed, the sureties are not discharged, it being a principle of the law of suretyship that a surety cannot claim to be discharged, upon the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by a fraudulent act or omission, against which the surety, by the contract of suretyship, has guaranteed the person with whom he has contracted. Kingston-Upon-Hull *v.* Harding, [1892] 2 Q. B. 494, 57 J. P. 85, 62 L. J. Q. B. 55, 67 L. T. Rep. N. S. 539, 4 Reports 7, 41 Wkly. Rep. 19.

18. Fitzgerald *v.* McClay, 47 Nebr. 816, 66 N. W. 828; Kaufmann *v.* Cooper, 46 Nebr. 644, 65 N. W. 796.

19. Fitzgerald *v.* McClay, 47 Nebr. 816, 66 N. W. 828.

20. Stull *v.* Hance, 62 Ill. 52; Buffalo Cement Co. *v.* McNaughton, 90 Hun (N. Y.) 74, 35 N. Y. Suppl. 453, 69 N. Y. St. 846; Greenless *v.* Shinnick, 7 Ohio Dec. (Reprint) 385, 2 Cinc. L. Bul. 282.

Unless there is an intent on the part of the owner to take the bond for his benefit, and an obligation to him which would create a privity of interest. Lyth *v.* Hingston, 14 N. Y. App. Div. 11, 43 N. Y. Suppl. 653.

A clause providing that if it be required the contractor shall furnish security, and a certificate that no liens have been filed, before he shall be entitled to payment under the contract, is intended for the protection of the owner of the building, and not for a person furnishing materials to the contractor. Hurd *v.* Johnson Park Invest. Co., 13 Misc. (N. Y.) 643, 34 N. Y. Suppl. 915, 69 N. Y. St. 141.

21. Greenless *v.* Shinnick, 7 Ohio Dec. (Reprint) 385, 2 Cinc. L. Bul. 282.

But they are liable only to the extent of the amount received by them from the owner. Greenless *v.* Shinnick, 7 Ohio Dec. (Reprint) 385, 2 Cinc. L. Bul. 282.

22. Morgan County *v.* McRae, 53 Kan. 358, 36 Pac. 717.

Materiality of alteration.— Where a contract to erect a building "with such stone and brick, timber and other materials of the size, kind and quality as particularly mentioned and set forth in the accompanying specifications" had attached thereto detailed specifications, it was held that an interlineation in the specifications of the words, "sliding doors between hall and parlor," and "bath room," constituted a material alteration and released the surety (Lancaster *v.* Barrett, 1 Pa. Super. Ct. 9, 37 Wkly. Notes Cas. (Pa.) 251); but a consent to changes, in minor details of the work, given by a builder who does not bind himself to conform to such changes and agree to the modification of the original contract does not discharge the surety (Henricus *v.* Englert, 17 N. Y. Suppl. 235, 43 N. Y. St. 595), nor was the obligation of the sureties affected, where a contract provided for alterations in the specifications, and that such alterations should not make the contract void, by the fact that the employer under agreement with the contractor changed the window lintels from stone to railroad iron (Howard County *v.* Baker, 119 Mo. 397, 24 S. W. 200).

Effect of destruction of original specifications.— Where original specifications, exhibited to the sureties with numerous alterations noted therein, were taken by the architect to be copied, and additions upon the copy were not material, the sureties were not released by the inadvertent destruction of the original specifications. McLennan *v.* Wellington, 48 Kan. 756, 30 Pac. 183.

23. Eldridge *v.* Fuhr, 59 Mo. App. 44.

24. Morgan County *v.* McRae, 53 Kan. 358, 36 Pac. 717; McLennan *v.* Wellington, 48 Kan. 756, 30 Pac. 183; Hayden *v.* Cook, 34 Nebr. 670, 52 N. W. 165. But see Ashenbroedel Club *v.* Finlay, 53 Mo. App. 256, holding that the knowledge or consent of the surety to a change in plan or detail was requisite to continue his liability, even if the contract provided that the architect might make such changes without avoiding the contract.

25. Morgan County *v.* McRae, 53 Kan. 358, 36 Pac. 717.

As to the necessity of filing a building contract or specifications see *supra*, II, B, 2, c.; and, generally, MECHANICS' LIENS.

D. Effect of Failure to Record Contract. A surety is not discharged from his obligation because a building contract,[26] plans and specifications,[27] or the bond itself[28] have not been filed or recorded as required by statute.

VII. ACTIONS BY OR AGAINST BUILDER.

A. To Recover Compensation Due Builder — 1. ACCRUAL OF RIGHT. The right to sue for recovery of compensation accrues from the time that it is due;[29] but where the contract provides for payment of the balance due within a specified time after completion, inspection, and acceptance by an architect, an action is prematurely brought, if brought within such specified time.[30]

2. FORM OF ACTION. Where there is a special building contract the builder should sue on it,[31] but assumpsit under the common counts will lie, where the builder has not strictly complied with a special building contract, if the owner has had the benefit of his work and accepted it,[32] the doctrine practically resting upon the acceptance of the work by the owner, not as finished according to the con-

26. Summerton *v.* Hanson, 117 Cal. 252, 49 Pac. 135.

27. Blyth *v.* Robinson, 104 Cal. 239, 37 Pac. 904.

28. Where a bond covers requirements of a statute designed to protect the owner, and also requirements of a statute designed to protect workmen and materialmen, the mere fact that the bond is not filed does not release the sureties. Evans *v.* Watson, 8 Kan. App. 144, 55 Pac. 17.

29. West Coast Lumber Co. *v.* Knapp, 122 Cal. 79, 54 Pac. 533, holding that a statute of limitation begins to run from that date.

30. O'Connor *v.* Adams, (Ariz. 1889) 59 Pac. 105, holding that whether the architect has accepted or refused to accept is not material.

31. Western *v.* Sharp, 14 B. Mon. (Ky.) 144. See also McDaniel *v.* Webster, 2 Houst. (Del.) 305; Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455.

32. *Alabama.*— Davis *v.* Badders, 95 Ala. 348, 10 So. 422; Bell *v.* Teague, 85 Ala. 211, 3 So. 861; Kirkland *v.* Oates, 25 Ala. 465.

Arkansas.— Simpson *v.* McDonald, 2 Ark. 370.

California.— Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840; Castagnino *v.* Balletta, 82 Cal. 250, 23 Pac. 127; Katz *v.* Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826.

Connecticut.— Blakeslee *v.* Holt, 42 Conn. 226.

District of Columbia.— Hammond *v.* Miller, 2 Mackey (D. C.) 145.

Georgia.— Ford *v.* Smith, 25 Ga. 675.

Illinois.— Taylor *v.* Renn, 79 Ill. 181.

Indiana.— Becker *v.* Hecker, 9 Ind. 497; McClure *v.* Secrist, 5 Ind. 31; Cummings *v.* Pence, 1 Ind. App. 317, 27 N. E. 631.

Kansas.— School Dist. No. 2 *v.* Boyer, 46 Kan. 54, 26 Pac. 484.

Kentucky.—Escott *v.* White, 10 Bush (Ky.) 169; Kiel *v.* Kline, 15 Ky. L. Rep. 158; Lexington Ice Mfg., etc., Co. *v.* Farnan, 13 Ky. L. Rep. 270.

Louisiana.— Joublanc *v.* Daunoy, 6 La. 656.

Maine.— Hattin *v.* Chase, 88 Me. 237, 33 Atl. 989; White *v.* Oliver, 36 Me. 92; Jewett *v.* Weston, 11 Me. 346.

Massachusetts.—Blood *v.* Wilson, 141 Mass. 25, 2 N. E. 362; Smith *v.* First Cong. Meeting House, 8 Pick. (Mass.) 178; Hayward *v.* Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268.

Missouri.— Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225; Dutro *v.* Walter, 31 Mo. 516; Mash *v.* Richards, 29 Mo. 99; Heman *v.* Compton Hill Imp. Co., 58 Mo. App. 480; Globe Light, etc., Co. *v.* Doud, 47 Mo. App. 439; Gregg *v.* Dunn, 38 Mo. App. 283; Fleischmann *v.* Miller, 38 Mo. App. 177; Austin *v.* Keating, 21 Mo. App. 30.

New Jersey.—Feeney *v.* Bardsley, 66 N. J. L. 239, 49 Atl. 443; Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

North Carolina.—Moffitt *v.* Glass, 117 N. C. 142, 23 S. E. 104; Dixon *v.* Gravely, 117 N. C. 84, 23 S. E. 39; Simpson *v.* Carolina Cent. R. Co., 112 N. C. 703, 16 S. E. 853.

Ohio.— Goldsmith *v.* Hand, 26 Ohio 101.

Pennsylvania.— White *v.* Braddock School Dist., 159 Pa. St. 201, 28 Atl. 136.

Tennessee.— Elliott *v.* Wilkinson, 8 Yerg. (Tenn.) 411.

Texas.— Harris County *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Carroll *v.* Welch, 26 Tex. 147; Jennings *v.* Willer, (Tex. Civ. App. 1895) 32 S. W. 24.

Utah.— Rhodes *v.* Clute, 17 Utah 137, 53 Pac. 990.

Vermont.— Gilman *v.* Hall, 11 Vt. 510, 34 Am. Dec. 700.

Wisconsin.— Taylor *v.* Williams, 6 Wis. 363.

Wyoming.— Hood *v.* Smiley, 5 Wyo. 70, 36 Pac. 856.

United States.— Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762; Lee *v.* New Haven, etc., R. Co., 15 Fed. Cas. No. 8,197.

See 11 Cent. Dig. tit. "Contracts," § 1551; also, generally, ASSUMPSIT, ACTION OF, 4 Cyc. 317.

The builder's right is not affected by a provision that compensation shall be payable on completion of the work, and acceptance by the architect. Linnenkohl *v.* Winkelmeyer, 54 Mo. App. 570.

tract, but in its incomplete condition, and that in such condition it is a benefit to him,[33] and there being an implied contract on his part to pay the builder what his work is reasonably worth.[34] So assumpsit will lie where the contract has been rescinded by the owner,[35] or where the builder is justified in not proceeding further under a contract of which the owner has committed a substantial breach,[36] or there has been a mutual rescission;[37] where, before completion, the builder's work is, without his fault, destroyed by inevitable accident,[38] or by fire,[39] and while under the control of the owner;[40] where the terms of a special contract have been afterward varied by the agreement of both parties;[41] where the work

33. Davis *v.* Badders, 95 Ala. 348, 10 So. 422, holding that the acceptance need not be express when there is no gross or fraudulent violation or abandonment of the contract, but may be inferred from the use and enjoyment of the property by the owner upon whose land value has been conferred by the erection of the building. So the owner's acquiescence in continuance of work by a builder who has, to the knowledge of the owner, deviated from his contract may amount to an acceptance. Hayward *v.* Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Bailey *v.* Woods, 17 N. H. 365.

Inference of acceptance see *supra*, V, B, 6.

Acceptance as a waiver is not a ground upon which courts have allowed recovery.— "It is because the work is of value to the proprietor, and if it is of no value, there can be no recovery." Yeats *v.* Ballentine, 56 Mo. 530.

There is an admission that the builder's work is of some benefit when the owner takes possession of a building not completed according to contract and finishes the work. Taylor *v.* Williams, 6 Wis. 363.

34. Simpson *v.* McDonald, 2 Ark. 370; Hammond *v.* Miller, 2 Mackey (D. C.) 145.

35. *Colorado.*— Cochran *v.* Balfe, 12 Colo. App. 75, 54 Pac. 399.

Connecticut.— Connelly *v.* Devoe, 37 Conn. 570.

Illinois.— Sexton *v.* Chicago, 107 Ill. 323.

Maryland.— Rodemer *v.* Gonder, 9 Gill (Md.) 288.

Massachusetts.— Bassett *v.* Sanborn, 9 Cush. (Mass.) 58.

New York.— Powers *v.* Hogan, 6 N. Y. St. 239.

See 11 Cent. Dig. tit. "Contracts," § 1554.

36. San Francisco Bridge Co. *v.* Dunbarton Land, etc., Co., 119 Cal. 272, 51 Pac. 335; Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635; Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640; Dobbins *v.* Higgins, 78 Ill. 440; Lincoln *v.* Schwartz, 70 Ill. 134; Forkner *v.* Purl, 1 Ind. 489.

A builder cannot recover an instalment under the common counts if he has not performed his contract at the time an instalment is due, as no breach is committed by the employer. Golden Gate Lumber Co. *v.* Sahrbacher, 105 Cal. 114, 38 Pac. 635.

Grounds of justifiable abandonment see *supra*, II, E, 1.

37. Kirkland *v.* Oates, 25 Ala. 465.

38. Richardson *v.* Shaw, 1 Mo. App. 234, holding in a case where the contract provides for payment in instalments as the work progresses that the builder is entitled to be paid instalments that have been earned but not any part of an instalment not fully earned. See also Bailey *v.* Brown, 9 Ohio Cir. Ct. 455, 6 Ohio Cir. Dec. 440.

39. Cleary *v.* Sohier, 120 Mass. 210, Galyon *v.* Ketchen, 85 Tenn. 55, 1 S. W. 508; Wilson *v.* Knott, 3 Humphr. (Tenn.) 473. But see Fildew *v.* Besley, 42 Mich. 100, 3 N. W. 278, 36 Am. Rep. 433.

40. Haynes *v.* Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413, in which case it was held that Mo. Rev. Stat. § 667, providing that no suit should be maintained against any tenant or other person in whose house or apartment fire should accidentally take place, or should any recompense be made by any such person for any damages occasioned thereby, did not prevent a person who had made improvements for another on a building, accidentally destroyed by fire, from recovering value of his work and the materials furnished in the improvements. To the same effect is Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. 667, 25 Am. St. Rep. 654, 12 L. R. A. 571; Cook *v.* McCabe, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765.

Destruction of building as excuse for nonperformance see *supra*, V, B, 7.

41. *Alabama.*— Hutchison *v.* Cullum, 23 Ala. 622.

Arkansas.— Manuel *v.* Campbell, 3 Ark. 324.

California.— Reynolds *v.* Jourdan, 6 Cal. 108; De Boom *v.* Priestly, 1 Cal. 206.

Louisiana.— Joublanc *v.* Daunoy, 6 La. 656.

Virginia.— Clark *v.* Franklin, 7 Leigh (Va.) 1.

See 11 Cent. Dig. tit. "Contracts," § 1551.

Partial change in contract.— Where plaintiff contracted to build according to plans and specifications, but during the progress of the work many deviations were mutually assented to but all conditions in the original contract as to times and amounts of payments as the work progressed were strictly complied with and no new express contract was entered into, it was held that the deviations were not such as justified the builder in setting up a claim of *quantum meruit* except as to extra work done and extra materials furnished. Goodwin *v.* McCormick, 6 N. Y. Suppl. 662, 25 N. Y. St. 1017.

Effect of partial modification see *supra*, II, D, 5.

was not performed and materials were not supplied under a special agreement,[42] as where such material departures from plans and specifications are made at the instance of the owner as will result in a different undertaking from that contracted for and partly performed and no agreement is made as to the price for such departures;[43] where by some default of his own the builder is precluded from recovering on a special agreement;[44] or where performance is rendered impossible by the conduct of the owner.[45] Moreover, assumpsit for the value of the work performed and the materials furnished is the only remedy available to a builder who has not complied with his contract.[46] Assumpsit, however, will not lie where the builder has entirely failed to perform his contract,[47] or where the building contract is an entire one, and the builder has performed part of it, and then wilfully refuses without legal excuse, and against the owner's consent, to perform the rest.[48]

3. CONDITIONS PRECEDENT — a. Performance of Work — (I) *WHERE ACTION IS FOR CONTRACT PRICE.* In accordance with general principles, performance of the work which the builder agreed to do is a condition precedent to his recovery of the contract price, even if performance by him is not expressly provided for in the contract.[49]

42. McDaniel *v.* Webster, 2 Houst. (Del.) 305; Kline *v.* Foster, 1 Walk. (Pa.) 250.

43. Manuel *v.* Campbell, 3 Ark. 324; Wheeden *v.* Fiske, 50 N. H. 125; Rhodes *v.* Clute, 17 Utah 137, 53 Pac. 990; Hood *v.* Smiley, 5 Wyo. 70, 36 Pac. 856.

44. Western *v.* Sharp, 14 B. Mon. (Ky.) 144; Dermott *v.* Jones, 23 How. (U. S.) 220, 16 L. ed. 442.

45. *Alabama.*—Danforth *v.* Tennessee, etc., Co., 93 Ala. 614, 11 So. 60.

California.— Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640; Reynolds *v.* Jourdan, 6 Cal. 108.

Colorado.— Walling *v.* Warren, 2 Colo. 434; Cochran *v.* Balfe, 12 Colo. App. 75, 54 Pac. 399.

Delaware.— McDaniel *v.* Webster, 2 Houst. (Del.) 305.

Illinois.— Waggeman *v.* Janssen, 74 Ill. App. 38.

Indiana.— Forkner *v.* Purl, 1 Ind. 489.

Kentucky.—Escott *v.* White, 10 Bush (Ky.) 169.

Maryland.— North *v.* Mallory, 94 Md. 305, 51 Atl. 89.

New York.— Powers *v.* Hogan, 12 Daly (N. Y.) 444.

Vermont.— Hill *v.* Hovey, 26 Vt. 109.

See 11 Cent. Dig. tit. "Contracts," § 1554.

Insufficiency of evidence to show prevention by owner.— Evidence that a builder before completion on receipt of a notice from the owner of his election to complete the work thereafter ceases to build does not show that he was prevented by the owner from proceeding with the work so as to entitle him to a *quantum meruit*. Beecher *v.* Schuback, 1 N. Y. App. Div. 359, 37 N. Y. Suppl. 325, 72 N. Y. St. 511 [*affirmed* in 158 N. Y. 687, 53 N. E. 1123].

Conduct of owner affecting performance by builder see *supra*, V, B, 7, a, (III).

46. Dermott *v.* Jones, 23 How. (U. S.) 220, 16 L. ed. 442.

What constitutes compliance with contract see *supra*, V, B.

The contract so far as it can be traced furnishes the rule for damages.— De Boom *v.* Priestly, 1 Cal. 206; Wheeden *v.* Fiske, 50 N. H. 125.

Measure of damages see *infra*, VII, D.

Admissibility of contract in evidence see *infra*, VII, A, 7.

47. *Arkansas.*— Fitzgerald *v.* La Porte, 64 Ark. 34, 40 S. W. 261; Manuel *v.* Campbell, 3 Ark. 324; Simpson *v.* McDonald, 2 Ark. 370.

California.— De Boom *v.* Priestly, 1 Cal. 206.

Connecticut.— Blakeslee *v.* Holt, 42 Conn. 226.

Illinois.— Springdale Cemetery Assoc. *v.* Smith, 32 Ill. 252.

Ohio.— Allen *v.* Curles, 6 Ohio St. 505.

Wisconsin.— Malbon *v.* Birney, 11 Wis. 107.

England.— Ellis *v.* Hamlen, 3 Taunt. 52, 12 Rev. Rep. 595.

48. Hammond *v.* Miller, 2 Mackey (D. C.) 145. See also Cutter *v.* Powell, 2 Smith Lead. Cas. 1212.

49. Escott *v.* White, 10 Bush (Ky.) 169; Allen *v.* Sanders, 7 B. Mon. (Ky.) 593; Morford *v.* Mastin, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168; Kettle *v.* Harvey, 21 Vt. 301; Pormann *v.* Walsh, 97 Wis. 356, 72 N. W. 881, 65 Am. St. Rep. 125.

Performance of conditions precedent in general see ACTIONS, I, N [1 Cyc. 692].

Performance of an express condition precedent imposed by contract see, generally, CONTRACTS.

New agreement by builder condition precedent to recovery on original contract.— Where, on payment to him, on the superintendent's certificate of a part of the contract price, the contractor indorses thereon that he receives such payment with the understanding that certain defective work will be made satisfactory before further payment is made, he thereby makes a new agreement, which must be complied with before he can recover anything more on the original con-

(II) *Where Action Is For Value of Work or Materials.* It has frequently been held by courts of eminent authority that, where there is a special building contract, the builder cannot recover compensation for work and labor done or materials furnished by him, unless he has performed his contract according to the terms thereof, or unless there has been a waiver of strict performance;[50] the hardship, however, of this rule upon a builder, who has undesignedly violated his contract, and the inequitable advantage it gives to an owner who receives and retains the benefit of the builder's labor and materials has led to its qualification,[51] and the weight of authority shows that strict literal performance of a building contract is not a condition precedent to a recovery thereon,[52] a substantial performance being all that is requisite.[53] The doctrine, however, of

tract. Pormann *v.* Walsh, 97 Wis. 356, 72 N. W. 881, 65 Am. St. Rep. 125.

Where a contract provides for payment of part of the price previous to performance, and also provides for completion by a certain day, and for payment of the balance when the work is completed, performance is a condition precedent to recovery of any part of the contract price except the amount agreed to be paid without reference to performance (Allen *v.* Sanders, 7 B. Mon. (Ky.) 593; Kettle *v.* Harvey, 21 Vt. 301), but where the builder was to receive so much when a portion was completed and the balance to be paid another person when the remainder was completed, it was held that completion of the latter work was not a condition precedent to the builder's right of action (Ford *v.* Bronaugh, 11 B. Mon. (Ky.) 14); so completion was held not a condition precedent, where the builder agreed to finish building before a specified date in consideration of a certain sum, part of which was to be paid on another date and the balance when the house was finished (Seers *v.* Fowler, 2 Johns. (N. Y.) 272). See also Beinhauer *v.* Gleason, 15 N. Y. St. 227.

Necessity of demand for performance.— Where the time specified for performance has been abrogated and the builder has continued his work but was prevented from completing by the fault of the owner, the builder is not entitled to abandon his contract and recover for what he has done in assumpsit without making a demand for performance upon the owner, since the latter had a reasonable time in which to perform. Lawson *v.* Hogan, 93 N. Y. 39.

50. *Connecticut.*— Smith *v.* Scott's Ridge School Dist., 20 Conn. 312.

Maine.— White *v.* Oliver, 36 Me. 92; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

Mississippi.— Wooten *v.* Read, 2 Sm. & M. (Miss.) 585.

Missouri.— Helm *v.* Wilson, 4 Mo. 41, 28 Am. Dec. 336.

North Carolina.— Lawing *v.* Rintles, 97 N. C. 350, 2 S. E. 252.

England.— Ellis *v.* Hamlen, 3 Taunt. 52, 12 Rev. Rep. 595.

See 11 Cent. Dig. tit. "Contracts," § 1563.

51. Pinches *v.* Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Carroll *v.* Welch, 26 Tex. 147; Hilliard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Bradford *v.* Whitcomb, 11 Tex. Civ. App. 221, 32 S. W. 571.

52. Pinches *v.* Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264; Gleason *v.* Smith, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; Heckmann *v.* Pinkney, 81 N. Y. 211; Vogel *v.* Friedman, 68 N. Y. Suppl. 820; Bradford *v.* Whitcomb, 11 Tex. Civ. App. 221, 32 S. W. 571; Jennings *v.* Willer, (Tex. Civ. App. 1895) 32 S. W. 24.

53. *California.*— Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840; Perry *v.* Quackenbush, 105 Cal. 299, 38 Pac. 740.

Connecticut.— Pinches *v.* Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264; Smith *v.* Scott's Ridge School Dist., 20 Conn. 312.

Illinois.— Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247 [*affirming* 88 Ill. App. 485].

Massachusetts.— Cullen *v.* Sears, 112 Mass. 299; Gleason *v.* Smith, 9 Cush. (Mass.) 484, 57 Am. Dec. 62.

Minnesota.— Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52.

New York.— Lennon *v.* Smith, 161 N. Y. 661, 57 N. E. 1115 [*affirming* 23 N. Y. App. Div. 293, 48 N. Y. Suppl. 456]; Crouch *v.* Gutmann, 134 N. Y. 45, 31 N. E. 271, 45 N. Y. St. 470, 30 Am. St. Rep. 608; Nolan *v.* Whitney, 88 N. Y. 648; Woodward *v.* Fuller, 80 N. Y. 312; Sinclair *v.* Tallmadge, 35 Barb. (N. Y.) 602; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Anderson *v.* Meislahn, 12 Daly (N. Y.) 149; Ryan *v.* Voelkl, 26 Misc. (N. Y.) 840, 56 N. Y. Suppl. 1065; Vogel *v.* Friedman, 68 N. Y. Suppl. 820; Rush *v.* Wagner, 12 N. Y. Suppl. 2, 34 N. Y. St. 798.

North Dakota.— Anderson *v.* Todd, 8 N. D. 158, 77 N. W. 599.

Texas.— Linch *v.* Paris Lumber, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208; Bradford *v.* Whitcomb, 11 Tex. Civ. App. 221, 32 S. W. 571; Jennings *v.* Willer, (Tex. Civ. App. 1895) 32 S. W. 24.

United States.— Woodruff *v.* Hough, 91 U. S. 596, 23 L. ed. 332.

Canada.—Hamilton *v.* Myles, 24 U. C. C. P. 309.

See 11 Cent. Dig. tit. "Contracts," § 1353.

What constitutes substantial performance see *supra*, V, B, 2.

"substantial compliance" does not apply when the omissions or departures from the contract are intentional,[54] or so substantial as not to be capable of remedy, so that an allowance out of the contract price would not give the owner substantially what he contracted for,[55] or where the contract must be performed to the satisfaction of the owner or architect.[56]

b. References, Certificates, Decisions, or Estimates. In accordance with general principles,[57] where the contract either expressly or impliedly[58] makes a reference to arbitration, or a certificate, decision, or estimate of an architect a condition precedent to the right of the builder to sue on his contract, the builder must comply with the condition before suing for compensation on the contract,

54. Perry *v.* Quackenbush, 105 Cal. 299, 38 Pac. 740; Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; Anderson *v.* Todd, 8 N. D. 158, 77 N. W. 599; Ashley *v.* Henahan, 56 Ohio St. 559, 47 N. E. 573.

55. Anderson *v.* Pringle, 79 Minn. 433, 82 N. W. 682; Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; Crouch *v.* Gutmann, 134 N. Y. 45, 31 N. E. 271, 45 N. Y. St. 470, 30 Am. St. Rep. 608; Anderson *v.* Todd, 8 N. D. 158, 77 N. W. 599.

56. Ryan *v.* Voelkl, 26 Misc. (N. Y.) 840, 56 N. Y. Suppl. 1065; Marshall *v.* Ames, 11 Ohio Cir. Ct. 363. See also Kane *v.* Ohio Stone Co., 39 Ohio St. 1.

57. For matters relating to arbitration and award see, generally, ARBITRATION AND AWARD, 3 Cyc. 568.

It is not requisite to submit to arbitration a claim that extra work was not properly done, where the contract provides that a dispute as to the meaning or scope of the specifications, or as to what is extra work outside of the contract, or as to the value of work omitted by the builder, shall be referred to the architect. Gallagher *v.* Sharpless, 134 Pa. St. 134, 19 Atl. 491.

58. *California.*— Gray *v.* La Societe Francaise, etc., 131 Cal. 566, 63 Pac. 848; Scammon *v.* Denio, 72 Cal. 393, 14 Pac. 98; Holmes *v.* Richet, 56 Cal. 307, 38 Am. Rep. 54.

Colorado.— Denver, etc., Constr. Co. *v.* Stout, 8 Colo. 61, 5 Pac. 627.

Illinois.— International Cement Co. *v.* Beifeld, 173 Ill. 179, 50 N. E. 716 [*reversing* 67 Ill. App. 110]; Arnold *v.* Bournique, 144 Ill. 132, 33 N. E. 530, 36 Am. St. Rep. 419, 20 L. R. A. 493; Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384; Barney *v.* Giles, 120 Ill. 154, 11 N. E. 206; Fowler *v.* Deakman, 84 Ill. 130; Coey *v.* Lehman, 79 Ill. 173; Packard *v.* Van Schoick, 58 Ill. 79; Mills *v.* Weeks, 21 Ill. 561; Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204; Vincent *v.* Stiles, 77 Ill. App. 200.

Indiana.— Cosby *v.* Adams, Wils. (Ind.) 342.

Kansas.— Thurber *v.* Ryan, 12 Kan. 453.

Maryland.— Gill *v.* Vogler, 52 Md. 663.

Massachusetts.— Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455; Beharrell *v.* Quimby, 162 Mass. 571, 39 N. E. 407.

Michigan.— Hanley *v.* Walker, 79 Mich. 607, 45 N. W. 57, 8 L. R. A. 207.

Minnesota.— Shaw *v.* Winona First Baptist Church, 44 Minn. 22, 46 N. W. 146.

Missouri.—Dinsmore *v.* Livingston County, 60 Mo. 241.

New Jersey.— Bradner *v.* Roffsell, 57 N. J. L. 32, 29 Atl. 317; Byrne *v.* Sisters of Charity, 45 N. J. L. 213.

New York.— Smith *v.* Wetmore, 167 N. Y. 234, 60 N. E. 419 [*affirming* 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402]; Dwyer *v.* Board of Education, 165 N. Y. 613, 59 N. E. 1122 [*affirming* 27 N. Y. App. Div. 87, 50 N. Y. Suppl. 123]; Wangler *v.* Swift, 90 N. Y. 38; Sherman *v.* New York, 1 N. Y. 316; Oberlies *v.* Bullinger, 75 Hun (N. Y.) 248, 27 N. Y. Suppl. 19, 57 N. Y. St. 752; Gillies *v.* Manhattan Beach Imp. Co., 73 Hun (N. Y.) 507, 26 N. Y. Suppl. 381, 56 N. Y. St. 206; Weeks *v.* O'Brien, 59 N. Y. Super. Ct. 28, 12 N. Y. Suppl. 720, 35 N. Y. St. 463; Haden *v.* Coleman, 42 N. Y. Super. Ct. 256; Martin *v.* Leggett, 4 E. D Smith (N. Y.) 255; Diehl *v.* Schmalacker, 26 Misc. (N. Y.) 835, 57 N. Y. Suppl. 244; Beecher *v.* Schuback, 4 Misc. (N. Y.) 54, 23 N. Y. Suppl. 604, 53 N. Y. St. 74; Smith *v.* Briggs, 3 Den. (N. Y.) 73.

Ohio.— Ashley *v.* Henahan, 56 Ohio St. 559, 47 N. E. 573.

Oregon.— Ball *v.* Doud, 26 Oreg. 14, 37 Pac. 70.

Washington.— Schmidt *v.* North Yakima, 12 Wash. 121, 40 Pac. 790.

Wisconsin.— Boden *v.* Maher, 95 Wis. 65, 69 N. W. 980; Hudson *v.* McCartney, 33 Wis. 331; Baasen *v.* Baehr, 7 Wis. 516.

United States.— Sweeny *v.* U. S., 15 Ct. Cl. 400.

England.— Morgan *v.* Birnie, 9 Bing. 672, 23 E. C. L. 754; Clarke *v.* Watson, 18 C. B. N. S. 278, 34 L. J. C. P. 148, 11 L. T. Rep. N. S. 679, 13 Wkly. Rep. 345; Milner *v.* Field, 5 Exch. 829, 20 L. J. Exch. 68; Richardson *v.* Mahon, 4 L. R. Ir. 486.

Canada.— Guilbault *v.* McGreevy, 18 Can. Supreme Ct. 609.

See 11 Cent. Dig. tit. "Contracts," § 1308.

The rule is the same as well in equity as at law.— Barney *v.* Giles, 120 Ill. 154, 11 N. E. 206.

Objection that condition precedent was not performed not available for first time on appeal.— An owner, relying on a provision requiring a disagreement between the builder and owner as to the price of extras to be referred to arbitration, cannot object to the omission of a reference for the first time on appeal. Mueller *v.* Rosen, 179 Ill. 130, 53 N. E. 625 [*affirming* 79 Ill. App. 420].

his employer being under no liability to pay unless this is done,[59] if there is not sufficient excuse for the builder's failure to refer or obtain such certificate, decision, or estimate,[60] such as a fraudulent,[61] malicious,[62] capricious,[63] or unreasonable[64] refusal to determine the facts or issue the certificate;[65] or a waiver of the condition;[66] or the builder is prevented from obtaining such certificate,

59. Scott *v.* Liverpool Corp., 3 De G. & J. 334, 5 Jur. N. S. 105, 28 L. J. Ch. 230, 7 Wkly. Rep. 153.

60. Holmes *v.* Richet, 56 Cal. 307, 38 Am. Rep. 54; International Cement Co. *v.* Beifeld, 173 Ill. 179, 50 N. E. 716 [*reversing* 67 Ill. App. 110]; Barney *v.* Giles, 120 Ill. 154, 11 N. E. 206; Mills *v.* Weeks, 21 Ill. 561; Martin *v.* Leggett, 4 E. D. Smith (N. Y.) 255.

Former membership of the architect on the board of directors of an employing corporation is not conclusive on the question whether his conduct was such as to excuse the builder from obtaining his certificate, as required. Chicago Athletic Assoc. *v.* Eddy Electric Mfg. Co., 77 Ill. App. 204.

61. *Illinois.*— Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384; Fowler *v.* Deakman, 84 Ill. 130.

Michigan.— Hanley *v.* Walker, 79 Mich. 607, 45 N. W. 57, 8 L. R. A. 207.

Minnesota.— Shaw *v.* Winona First Baptist Church, 44 Minn. 22, 46 N. W. 146.

Missouri.— Dinsmore *v.* Livingston County, 60 Mo. 241.

New Jersey.— Bradner *v.* Roffsell, 57 N. J. L. 32, 29 Atl. 317.

New York.— Beecher *v.* Schuback, 4 Misc. (N. Y.) 54, 23 N. Y. Suppl. 604, 53 N. Y. St. 74; Fay *v.* Muhlker, 1 Misc. (N. Y.) 321, 20 N. Y. Suppl. 671, 48 N. Y. St. 699.

Ohio.— Ashley *v.* Henahan, 56 Ohio St. 559, 47 N. E. 573.

Pennsylvania.—Pittsburg Terra-Cotta Lumber Co. *v.* Sharp, 190 Pa. St. 256, 44 Wkly. Notes Cas. (Pa.) 5, 42 Atl. 685.

Texas.— Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 558.

Washington.— Schmidt *v.* North Yakima, 12 Wash. 121, 40 Pac. 790.

Wisconsin.— Hudson *v.* McCartney, 33 Wis. 331.

See 11 Cent. Dig. tit. "Contracts," § 1310.

There is a fraudulent refusal where the architect recommends a particular kind of material which the builder uses and then the architect refuses to give a certificate of completion. Badger *v.* Kerber, 61 Ill. 328.

Character of mistake that will authorize recovery without certificate.— The mistake must be an intentional misapprehension or ignorance of some material fact which must be clearly shown, and so palpable as to amount to dishonest or arbitrary action. Wendt *v.* Vogel, 87 Wis. 462, 58 N. W. 764.

That a builder feared to apply for a certificate because he believed the architect to be fraudulently prejudiced against him is not a sufficient excuse for the absence of the certificate. Gilmore *v.* Courtney, 158 Ill. 432, 41 N. E. 1023 [*reversing* 54 Ill. App. 417].

62. Dinsmore *v.* Livingston County, 60 Mo. 241.

63. Shaw *v.* Winona First Baptist Church, 44 Minn. 22, 46 N. W. 146; Terra Cotta Co. *v.* Sharp, 7 Pa. Dist. 544; Sullivan *v.* Byrne, 10 S. C. 122; Bentley *v.* Davidson, 74 Wis. 420, 43 N. W. 139.

64. MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. 661 [*reversing* 31 N. Y. App. Div. 232, 52 N. Y. Suppl. 747]; Nolan *v.* Whitney, 88 N. Y. 648; Thomas *v.* Fleury, 26 N. Y. 26; Fox *v.* Clark, 44 N. Y. App. Div. 626, 60 N. Y. Suppl. 237; Murdock *v.* Jones, 3 N. Y. App. Div. 221, 38 N. Y. Suppl. 461, 73 N. Y. St. 617; Van Keuren *v.* Miller, 71 Hun (N. Y.) 68, 24 N. Y. Suppl. 580, 54 N. Y. St. 229; McConologue *v.* Larkins, 32 Misc. (N. Y.) 166, 66 N. Y. Suppl. 188; Beecher *v.* Schuback, 4 Misc. (N. Y.) 54, 23 N. Y. Suppl. 604, 53 N. Y. St. 74; Highton *v.* Dessau, 19 N. Y. Suppl. 395, 46 N. Y. St. 922; Mitchell *v.* Dougherty, 90 Fed. 639, 62 U. S. App. 443, 33 C. C. A. 205.

Where there is not a substantial performance of the contract it is not unreasonable to refuse to give an architect's certificate. Weeks *v.* O'Brien, 59 N. Y. Super. Ct. 28, 12 N. Y. Suppl. 720, 35 N. Y. St. 463.

The unreasonable withholding of a certificate has been said not to justify its nonproduction.— "The best judgment of the architect upon the matter so committed to his determination, has been agreed upon as the test of performance," and the builder cannot reject or repudiate the architect's refusal to give a certificate to the other upon "allegation or testimony tending to show that his action has been 'unreasonable.'" Schenke *v.* Rowell, 7 Daly (N. Y.) 286.

There is no unreasonable delay in furnishing a certificate, where the building operation consists of an aqueduct many miles in length and involves an outlay of several millions of dollars, and there is a demand at about the same time for a final estimate under several contracts, all of which involve a great amount of figuring, and the certificate is given three months after the work is done. O'Brien *v.* New York, 139 N. Y. 543, 35 N. E. 323, 55 N. Y. St. 596 [*affirmed* in 142 N. Y. 671, 37 N. E. 465, 60 N. Y. St. 388].

65. Fowler *v.* Deakman, 84 Ill. 130.

A demand for a certificate is a prerequisite to suit.—Wangler *v.* Swift, 90 N. Y. 38.

66. *Connecticut.*— Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495.

Illinois.— Frost *v.* Rand, 51 Ill. App. 276.

Indiana.— Cosby *v.* Adams, Wils. (Ind.) 342.

New Jersey.— Byrne *v.* Sisters of Charity, 45 N. J. L. 213.

New York.— Haden *v.* Coleman, 42 N. Y. Super. Ct. 256; Diehl *v.* Schmalacker, 26 Misc. (N. Y.) 835, 57 N. Y. Suppl. 244; Fay

decision, or estimate by some cause over which the builder himself has no control whatever.[67]

c. Special Conditions. There must be compliance with conditions requiring

v. Muhlker, 1 Misc. (N. Y.) 321, 20 N. Y. Suppl. 671, 48 N. Y. St. 699.

Ohio.— Ashley *v.* Henahan, 56 Ohio St. 559, 47 N. E. 573.

Pennsylvania.— Wilkinson *v.* Becker, 185 Pa. St. 225, 39 Atl. 885.

Wisconsin.— Ashland Lime, etc., Co. *v.* Shores, 105 Wis. 122, 81 N. W. 136.

See 11 Cent. Dig. tit. "Contracts," § 1317.

Waiver may be express or implied.— Cosby *v.* Adams, Wils. (Ind.) 342.

What constitutes waiver.—A provision providing for payments to be made on progress certificates that is ignored by both builder and owner from the commencement to the end of operations will be deemed waived (Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495; Ashland Lime, etc., Co. *v.* Shores, 105 Wis. 122, 81 N. W. 136), or where the owner accepts a certificate issued by the architect's assistant but asks for delay in making payment (McEntyre *v.* Tucker, 10 Misc. (N. Y.) 669, 31 N. Y. Suppl. 672, 64 N. Y. St. 298 [*overruling* 5 Misc. (N. Y.) 228, 25 N. Y. Suppl. 95, 54 N. Y. St. 826, 23 N. Y. Civ. Proc. 171]); so, where the builder delivers possession of an uncompleted building to the owner who promises to pay therefor (Duell *v.* McCraw, 86 Hun (N. Y.) 331, 33 N. Y. Suppl. 528, 67 N. Y. St. 163), or the owner's acceptance of a building as under a completed contract (Smith *v.* Alker, 102 N. Y. 87, 5 N. E. 791; McPherson *v.* Rockwell, 37 Wis. 159), although mere use does not amount to a waiver (Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455), or taking possession of the premises by the owner after the builder quit work (Hanley *v.* Walker, 79 Mich. 607, 45 N. W. 57, 8 L. R. A. 207). So the provision is waived where the owner commences an interpleader action to determine his liability under the contract, and alleges the amount which he claims is due because of the cost of completing a building abandoned by the contractor (Edison Electric Illuminating Co. *v.* Gustavino Fire Proof Constr. Co., 16 N. Y. App. Div. 350, 44 N. Y. Suppl. 1026), or the owner fails to employ an architect to supervise the construction of his building (Diehl *v.* Schmalacker, 62 N. Y. Suppl. 1080 [*affirming* 26 Misc. (N. Y.) 835, 57 N. Y. Suppl. 244]), or has paid more than is due of the contract price, without requiring a certificate, and does not afterward demand certificates for the residue of the work (Bannister *v.* Patty, 35 Wis. 215. And see Vermont St. M. E. Church *v.* Brose, 104 Ill. 206), but the payment of one instalment without a certificate does not waive a right to exact it before making others (Bradley Currier Co. *v.* Bernz, 55 N. J. Eq. 10, 35 Atl. 832; Haden *v.* Coleman, 42 N. Y. Super. Ct. 256; Hartley *v.* Murtha, 5 N. Y. App. Div. 408, 39 N. Y. Suppl. 212; Barton *v.* Hermann, 11 Abb. Pr. N. S. (N. Y.) 378; Brown *v.* Winehill, 3 Wash. 524, 29 Pac. 1037), though a part payment of a sum due without objection or protest may tend to show a waiver of the production of a certificate upon which final payment is dependent (Cosby *v.* Adams, Wils. (Ind.) 342). Again an assumption of unauthorized power by architect is a waiver (Frost *v.* Rand, 51 Ill. App. 276), as is the completion of the work by the owner (Early *v.* O'Brien, 51 N. Y. App. Div. 569, 64 N. Y. Suppl. 848). A failure, however, of the architect to abandon construction is not a waiver. Bradley Currier Co. *v.* Bernz, 55 N. J. Eq. 10, 35 Atl. 832. But see Haden *v.* Coleman, 73 N. Y. 567 [*reversing* 42 N. Y. Super. Ct. 256].

67. Fowler *v.* Deakman, 84 Ill. 130; Beinhauer *v.* Gleason, 15 N. Y. St. 227; Whelden *v.* Boyd, 114 Pa. St. 228, 6 Atl. 384; Brunsden *v.* Beresford, Cab. & El. 125.

Where the owner has by positive acts prevented full performance on the part of the builder, the latter is relieved from a contractual necessity of procuring a certificate, showing a satisfactory completion according to contract (Justice *v.* Elwert, 28 Oreg. 460, 43 Pac. 649); thus a discharge of the architect by the owner excuses the builder furnishing a certificate (Fitts *v.* Reinhart, 102 Iowa 311, 71 N. W. 227).

Where materials furnished by a subcontractor are seized through no fault on his part by attachment against the original contractor, the subcontractor can recover without acceptance of such materials by the architect, since the original contractor has put it beyond the subcontractor's power to furnish evidence of approval by the architect. U. S. *v.* Jack, 124 Mich. 210, 82 N. W. 1049.

Where the builder frequently requested the owner to have the architect come and make an examination of the building but he did not direct him to come, and the architect would not come without his direction, it was held that a compliance with a condition that the builder furnish a certificate was not essential. McDonald *v.* Patterson, 186 Ill. 381, 57 N. E. 1027 [*affirming* 84 Ill. App. 326].

The builder is relieved from an obligation to obtain a certificate by the owner's repudiation of the contract and his refusal to permit the builder to proceed. Smith *v.* Wetmore, 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402 [*affirmed* in 167 N. Y. 234, 60 N. E. 419]. See also Velsor *v.* Eaton, 14 N. Y. Suppl. 467, 39 N. Y. St. 21.

Where a builder fails to proceed on account of the insolvency of the owner and his inability to further perform the contract, it is not necessary for the builder to get estimates or certificates from the architect in order to sue. Childress *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 1076.

Where it is the owner's duty to procure a certificate a failure of the architect to give a certificate is a sufficient excuse. McKone *v.* Williams, 37 Ill. App. 591.

that the work must arrive at a certain stage before any payment thereon is due,[68] or that work must be done with all possible speed,[69] or that some contingency must occur before payment is due,[70] or that all subcontractors and materialmen must be paid by the builder before payment to him,[71] or that the builder must agree that the final instalment of the contract price will be accepted by him in final settlement of all claims.[72]

4. DEFENSES. Delay in completion is a defense by reason of which the employer may set off damages sustained by reason of plaintiff's failure to complete within the time specified,[73] but is not a defense where extra work requiring additional time was ordered,[74] or where defendant, without objection, permitted the builder to finish after the time stipulated.[75] Non-acceptance by an architect is not a defense, where plaintiff sues on *quantum meruit* and defendant has been benefited and is in possession.[76] A defense of non-performance is not permissible where defendant has, as authorized by the contract, removed improper material and replaced it at the cost of plaintiff,[77] or, where the work done and materials furnished were approved by an architect, who is sole arbitrator under the contract as to the character of the work done and materials furnished, and whose decision is to be binding and conclusive.[78] A failure of the builder to obtain a certificate is a defense,[79] but a refusal to submit a dispute as to value of work or materials to arbitration is not a defense, where the agreement neither expressly nor by necessary implication made such submission a condition precedent to the institution of an action.[80] Defendant, however, is not precluded from showing

68. Sullivan *v.* Eusner, 27 N. Y. App. Div. 103, 50 N. Y. Suppl. 93.

69. St. Louis Steam-Heating, etc., Co. *v.* Bissell, 41 Mo. App. 426.

70. Peery *v.* Cooper, 8 Mo. 205.

71. Downey *v.* O'Donnell, 86 Ill. 49; Leverone *v.* Arancio, 179 Mass. 439, 61 N. E. 45. But see Beinhauer *v.* Gleason, 15 N. Y. St. 227, in which case a provision of this character was regarded, not as requiring the performance of a condition precedent, but as a covenant for a breach of which the owner might, should he suffer damage, sue.

72. Leverone *v.* Arancio, 179 Mass. 439, 61 N. E. 45.

73. Cornish *v.* Snydam, 99 Ala. 620, 13 So. 118.

The owner may set off any amount expended by him in completing, after the builder has refused to complete, upon being notified so to do, the contract authorizing him to finish the building under such circumstances. Scammon *v.* Denio, 72 Cal. 393, 14 Pac. 98.

Where time is of the essence of a contract an architect's certificate of completion, and the sum due to the contractor, which fails to state completion within the time fixed, will not preclude the owner from insisting upon the damages agreed upon for delay. Downey *v.* O'Donnell, 86 Ill. 49.

Excuses for delay in completion see *supra*, V, B, 7.

Amount of deduction see *infra*, VII, D.

74. Kenny *v.* Monahan, 53 N. Y. App. Div. 421, 66 N. Y. Suppl. 10.

Right of builder to additional time see *supra*, V, B, 5, c.

75. Gallagher *v.* Nichols, 16 Abb. Pr. N. S. (N. Y.) 337.

76. Everroad *v.* Schwartzkopf, 123 Ind. 35, 23 N. E. 969.

77. Charles *v.* E. F. Hallack Lumber, etc., Co., 22 Colo. 283, 43 Pac. 548.

Excuses for non-performance see *supra*, V, B, 7.

78. Vulcanite Paving Co. *v.* Philadelphia Traction Co., 115 Pa. St. 280, 8 Atl. 777.

79. Hanley *v.* Walker, 79 Mich. 607, 45 N. W. 57, 8 L. R. A. 207.

Absence of final certificate.— Under a contract for construction providing that payment is to be made in five instalments, four as the work progresses and the fifth a certain number of days after the building is complete, delivered, and accepted, and that the payments are to be made on the certificate of an architect whose certificate is to be final and conclusive that the work done warrants the payments, and also providing that the work should be in strict accordance with plans and specifications, and that the building be delivered clean, in good condition, and complete, upon the understanding that the work will be at the builder's risk until accepted by the employer or his assigns as a whole, the owner is entitled to have the building delivered in good condition according to the specifications, and is not precluded by certificates for partial payment from pleading and proving in reconvention, in an action to recover the final payment, the damages sustained by the failure to deliver it in such condition, whether defects complained of were in fact done before the last of such certificates was given or not, when it does not appear that a certificate for final payment has been given. Blanchard *v.* Sonnefield, 116 Fed. 257.

Necessity of certificate see *supra*, VII, A, 3, b.

Legality of provision requiring certificate see *supra*, II, B, 4, c, (III).

80. Cole Mfg. Co. *v.* Collier, 91 Tenn. 525, 19 S. W. 672, 30 Am. St. Rep. 898. See also

that the contract was not complied with because of a provision rendering a certificate that work has been completed a condition precedent to the builder's right to recover,[81] unless the certificate is made binding on the parties;[82] and where plaintiff claims for extras it is no defense that the contract provided for arbitration of any dispute respecting its value, unless defendant has taken steps to select arbitrators, or demanded or offered arbitration.[83] The fact that an architect's certificate does not comply with the requirements of the contract is not a defense, where defendant did not base his refusal to pay on that ground.[84] A breach of the warranty of the work, given by the builder, is a defense, notwithstanding the architect has certified that the work was done to his satisfaction.[85]

5. Pleading[86] **— a. Complaint, Declaration, or Petition** — (i) *In General.* Plaintiff must state facts sufficient to disclose a cause of action,[87] but it is sufficient to allege generally, the execution of a contract, performance of work thereunder by plaintiff, acceptance of the work by defendant, and the amount due thereon with a general prayer for judgment.[88]

(ii) *Setting Out Contract, Plans, or Specifications* — (a) *Contract.* Plaintiff need not set out a contract in full.[89]

Waterford *v.* Richfield Springs First Nat. Bank, 70 Hun (N. Y.) 520, 24 N. Y. Suppl. 392, 54 N. Y. St. 46.

81. Gallagher *v.* Minturn, 27 N. Y. App. Div. 274, 50 N. Y. Suppl. 491; McAlpine *v.* St. Clara Female Academy, 101 Wis. 468, 78 N. W. 173.

82. Gallagher *v.* Minturn, 27 N. Y. App. Div. 274, 50 N. Y. Suppl. 491.

83. Van Note *v.* Cook, 55 N. Y. App. Div. 55, 66 N. Y. Suppl. 1003.

84. Tilden *v.* Buffalo Office Bldg. Co., 27 N. Y. App. Div. 510, 50 N. Y. Suppl. 511.

Requisites and sufficiency of certificate see *supra*, III, B, 2, d, (II).

85. Gay *v.* Haskins, 11 Misc. (N. Y.) 134, 31 N. Y. Suppl. 1022, 65 N. Y. St. 53.

Warranty by builder see *supra*, II, B, 4, c, (IX); V, B, 3.

86. See, generally, Pleading.

87. A complaint alleging that plaintiff entered into a contract with defendant to build according to plans and specifications; that all material furnished and work done were subject to the approval of defendant's engineer; that thereafter a bed of quicksand was discovered where the structure was to be built; that a supplemental contract was made by which plaintiff agreed to furnish all material, etc., necessary to make a foundation for the structure; and that the work when completed was accepted by defendant and payment made, except for a balance, to recover for which action was brought, is sufficient. Smith *v.* Miami County, 6 Ind. App. 153, 33 N. E. 243. So a declaration is sufficient on general demurrer that sets forth a contract whereby plaintiff undertook to do certain work at certain prices in a workmanlike manner and defendant contracted to furnish material as it should be wanted, and alleging that plaintiff entered upon and executed a great part of the work, and as a breach that material was not furnished in consequence of which, after plaintiff had done the work, it was destroyed by the act of God, and that defendant refused to pay plaintiff for work he had done. Clark *v.* Franklin, 7 Leigh (Va.) 1.

A complaint in quantum meruit sufficiently stated the origin of plaintiff's cause of action, when it is alleged that plaintiff agreed to build at a specific price according to plans and specifications; that no plans or specifications were furnished, and that performance according thereto was practically abandoned; that plaintiff did the work as directed by defendant, frequently protesting that it was insecure, and that when nearly completed the building, without plaintiff's fault, fell to the ground. Siebert *v.* Leonard, 17 Minn. 433.

An averment that the owner verbally promised to pay the builder for work done in one building, according to the terms of a written contract for another building, sufficiently states a cause of action under the verbal contract, notwithstanding it does not state the terms of the written contract. O'Connor *v.* Adams, (Ariz. 1899) 59 Pac. 105.

Sufficiency of complaint or statement in justice's court.— In a proceeding in a justice's court it is sufficient if the account sued on or statement filed by plaintiff advises defendant of the nature of the cause of action and is definite enough to bar another action for the same claim. Gregg *v.* Dunn, 38 Mo. App. 283; Fleischmann *v.* Miller, 38 Mo. App. 177. See also, generally, Justices of the Peace.

Plaintiff must declare on the contract that was entered into.— Cox *v.* McLaughlin, 63 Cal. 196.

88. Davenport *v.* Jennings, 25 Nebr. 87, 40 N. W. 952.

Amendment of pleading.—Where the pleading alleges construction under a written contract and asks a recovery of the contract price it may be amended so as to claim the actual values of material furnished and work performed. Wabaunsee County School Dist. No. 2 *v.* Boyer, 46 Kan. 54, 26 Pac. 484.

89. Logan *v.* Berkshire Apartment Assoc., 18 N. Y. Suppl. 164, 46 N. Y. St. 14.

In order to avoid a variance it is usual, where plaintiff declares on a special contract,

(B) *Plans or Specifications.* Plans or specifications referred to in the contract are not parts of the contract in such sense as to require that they should be filed as exhibits, with a complaint on the contract, in order to authorize their admission in evidence,[90] and it is sufficient to refer to them as parties refer to them in a contract, leaving their identity in case of dispute to be established by parol evidence.[91]

(III) *Particular Averments* — (A) *Conditions Precedent* — (1) In General — (a) Necessity of Averment. Where the right of action depends upon a condition precedent its performance must be averred or else a legal reason dispensing with it.[92] Thus, where payments are to be made only upon the certificate or estimate of an architect or engineer, the obtaining of such certificate or estimate,[93] or else a good and sufficient excuse for the not obtaining it must be averred,[94]

to add the common counts. Fowler *v.* Deakman, 84 Ill. 130.

90. Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129.

91. Learmonth *v.* Veeder, 11 Wis. 138, wherein it was said that the reason of the rule was, that in many cases it would be utterly impracticable since "they consist sometimes of extensive and complicated plates or drawings, which it would often be exceedingly inconvenient, if not utterly impracticable to attach to and make a part of the pleadings in the case." These considerations lead to the conclusion that "plans and specifications, although referred to in the contract, and being so much a part of it that they are material to be known in order to determine what it requires, are yet, from their very nature so far incapable of being inserted in the pleadings."

For forms of declaring by reference to plans and specifications see Learmouth *v.* Veeder, 11 Wis. 138 [*citing* 2 Chitty Pl. 331, 332].

92. Schenke *v.* Rowell, 7 Daly (N. Y.) 286, 3 Abb. N. Cas. (N. Y.) 42.

The performance of a provision as to arbitration need not be alleged where defendant refused to pay, not on the ground that an arbitration was not carried out but for other reasons. Porter *v.* Swan, 14 Misc. (N. Y.) 406, 35 N. Y. Suppl. 1037, 70 N. Y. St. 758.

93. *California.*—Tally *v.* Parsons, 131 Cal. 516, 63 Pac. 833; Cox *v.* McLaughlin, 63 Cal. 196.

Illinois.— Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384; Vincent *v.* Stiles, 77 Ill. App. 200.

Kentucky.— Louisville Trust Co. *v.* Louisville Fire Proof Constr. Co., 22 Ky. L. Rep. 433, 57 S. W. 506.

Missouri.— Dinsmore *v.* Livingston County, 60 Mo. 241.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New York.— Weeks *v.* O'Brien, 141 N. Y. 199, 36 N. E. 185, 56 N. Y. St. 813; Schenke *v.* Rowell, 7 Daly (N. Y.) 286, 3 Abb. N. Cas. (N. Y.) 42; Fay *v.* Muhlker, 1 Misc. (N. Y.) 321, 20 N. Y. Suppl. 671, 48 N. Y. St. 699; Smith *v.* Briggs, 3 Den. (N. Y.) 73.

Oregon.— Meyers *v.* Pacific Constr. Co., 20 Oreg. 603, 27 Pac. 584.

Wisconsin.— Boden *v.* Maher, 95 Wis. 65, 69 N. W. 980.

See 11 Cent. Dig. tit. "Contracts," § 1636.

Reason why allegation is necessary.— It should be alleged that the person designated accepted, or was satisfied with, the materials or workmanship, that he measured or ascertained the quantity, or fixed the price, or did any other thing required by the contract, since, until these things are done, or their performance refused, plaintiff has no right of action. Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

Certificate set out must comply with contract.—A declaration setting out a certificate which does not comply with the contract is insufficient. Smith *v.* Briggs, 3 Den. (N. Y.) 73.

Necessity of the averment when suing on the common counts on an implied contract to pay for labor and material see, generally, Assumpsit, Action of, 4 Cyc. 317; Work and Labor.

94. Cox *v.* McLaughlin, 63 Cal. 196; Vincent *v.* Stiles, 77 Ill. App. 200; Louisville Trust Co. *v.* Louisville Fire Proof Constr. Co., 22 Ky. L. Rep. 433, 57 S. W. 506; Weeks *v.* O'Brien, 141 N. Y. 199, 36 N. E. 185, 56 N. Y. St. 813; Schenke *v.* Rowell, 7 Daly (N. Y.) 286, 3 Abb. N. Cas. (N. Y.) 42; Smith *v.* Wetmore, 24 Misc. (N. Y.) 225, 52 N. Y. Suppl. 513 [*affirmed* in 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402].

Sufficient facts are stated to constitute a sufficient excuse where it is alleged that plaintiff fully performed the contract on his part, except the condition thereof requiring him to obtain the certificate of an architect, and that after the work was finished plaintiff demanded the certificate and notified the owner of such demand, requesting him to cause the certificate to be delivered, but that the same was refused. Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129. See also Louisville Trust Co. *v.* Louisville Fire Proof Constr. Co., 22 Ky. L. Rep. 433, 57 S. W. 506.

Sufficient allegation of fraud as excuse.— An allegation that the builder demanded a certificate of the architect, and that he, acting in furtherance of a conspiracy with defendant to cheat and defraud plaintiff, fraudulently withheld the same, full compliance with the contract in all other respects being alleged, sufficiently charges fraud. Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384.

or that such condition requiring such a certificate or estimate was waived or modified.[95]

(b) Sufficiency of Averment. As a rule, a general averment that plaintiff has complied with all the provisions of the contract on his part is sufficient,[96] but it is not sufficient to allege merely the fact of an acceptance by the owner,[97] or that the work was performed substantially,[98] or completely,[99] or that the architect neglected and refused to make an estimate.[1]

It is not proper to aver that the architect's certificate was unreasonably withheld, where defendant undertook the completion of the work himself under a provision of the contract, thereby rendering the architect's certificate unnecessary to enable plaintiff to recover. Weeks *v.* O'Brien, 141 N. Y. 199, 36 N. E. 185, 56 N. Y. St. 813.

Amendment of complaint omitting allegation.—A complaint that is faulty because a necessary allegation in this regard is omitted may be amended on the trial so as to conform to proof or even on appeal. Smith *v.* Wetmore, 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402 [*affirming* 24 Misc. (N. Y.) 225, 52 N. Y. Suppl. 513].

Provision requiring payments to be made on written certificates.— In an action to recover an unpaid balance due on a building contract, specifying that all payments shall be made upon written certificate of the architects to the effect that such payments have become due, an averment that the architects, at the express direction and request of the owners, have failed, neglected, and refused to furnish plaintiff with further certificates is an equivalent to an averment that the architects, at the express direction and request of defendant and wholly on that account, refused the certificates, and that there was no reason or justification in the facts for such refusal, and is sufficient to entitle plaintiff to recover, especially where there is no motion to make more definite and certain. Wicker *v.* Messinger, 22 Ohio Cir. Ct. 712, 12 Ohio Cir. Dec. 425.

Though a contract provide that, in case of dispute as to value of extra work, it shall be submitted to arbitration, one suing thereon for extras need allege nothing as to arbitration, where defendant refused to pay, not on the ground that the arbitration clause was not carried out, but for other reasons. Porter *v.* Swan, 14 Misc. (N. Y.) 406, 35 N. Y. Suppl. 1037, 70 N. Y. St. 758 [*affirmed* in 51 N. E. 1093].

95. McEntyre *v.* Tucker, 36 N. Y. App. Div. 53, 55 N. Y. Suppl. 153.

Bill of particulars.— Where the complaint alleges a waiver of a certificate defendant is entitled to a bill of particulars of the acts or statements from which such waiver could, as alleged in the complaint, be implied. Fox *v.* Davidson, 44 N. Y. App. Div. 283, 60 N. Y. Suppl. 678.

96. Fox *v.* Cowperthwait, 60 N. Y. App. Div. 528, 69 N. Y. Suppl. 912; Smith *v.* Wetmore, 24 Misc. (N. Y.) 225, 52 N. Y. Suppl. 513 [*affirmed* in 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402].

Sufficiency of general averment under statute.— Under McClelland's Dig. p. 826, § 59 (Fla. Rev. Stat. § 1045), providing that there may be a general averment of performance of a condition precedent, a declaration, setting out a contract providing that no money shall be due, unless certified to by the architect, and alleging a performance of each and every requirement set forth in the contract, is sufficient without alleging a certificate from the architect. Wilcox *v.* Stephenson, 30 Fla. 377, 11 So. 659. So in Alabama under Ala. Civ. Code (1886) § 3352, Form 9 (Davis *v.* Badders, 95 Ala. 348, 10 So. 422), and in Missouri under Mo. Rev. Stat. § 3551 (Roy *v.* Boteler, 40 Mo. App. 213).

97. A mere allegation that the owner has duly accepted the work performed by plaintiff does not extenuate or avoid the necessity of an architect's certificate, without a further allegation that the work was so accepted not only in compliance with the contract but was also received as a full performance. "The acceptance by the architect of any substitute for that which the contract called for, if substantially variant from its terms, could not be justified, (except through authority of the employer), nor can the acceptance by the employer of inferior or different work than such as was contracted for, be deemed or accredited as part or entire performance, except upon some new consideration operating between the parties." Schenke *v.* Rowell, 7 Daly (N. Y.) 286, 3 Abb. N. Cas. (N. Y.) 42.

98. Since the contractor really makes his compensation dependent, not only upon the substantial performance of the work but upon a subsequent procurement of the certificate, he is not entitled to recover unless he does procure the certificate or give some adequate reason for not obtaining it, and it is not sufficient to allege substantial performance of all work called for by the contract. Smith *v.* Wetmore, 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402 [*affirming* 24 Misc. (N. Y.) 225, 52 N. Y. Suppl. 513].

99. A mere allegation of complete performance of the work does not confer any right of action where a certificate is wanting and the omission is not supplied by an averment that the architect has "unreasonably" refused a certificate. Schenke *v.* Rowell, 7 Daly (N. Y.) 286, 3 Abb. N. Cas. (N. Y.) 42.

1. Where a contract provides that work to be performed may in certain respects be varied in the discretion of a chief engineer, and that when such changes shall in his opinion materially alter the character of the work he shall estimate the difference in value and make due allowance therefor, the opinion of the engineer that there was such material

(2) PERFORMANCE OF WORK — (a) NECESSITY OF AVERMENT. Where plaintiff has alleged that a proper certificate was obtained, an averment that his work has been performed is not requisite,[2] but where the builder has not fully completed his work his pleading must allege his excuse for non-completion, and a proper offer to perform with a refusal by the owner to accept it,[3] and in all cases, where the contract is an entire one, there must be an averment that the work was performed,[4] or that performance was waived.[5]

(b) SUFFICIENCY OF AVERMENT. Where an averment of performance is necessary, a general allegation that plaintiff performed all conditions on his part to be performed is sufficient,[6] it not being necessary to aver that the work was done according to plans and specifications furnished by the architect under his personal supervision and to his satisfaction as required by the contract.[7]

(B) *As to Extras.* Where the builder claims for extra work he should allege an independent claim in order to avoid the stipulations of a covenant against any claim for extra work,[8] and should allege a claim for extras where he desires to recover therefor.[9]

(C) *Damages.* A general allegation that plaintiff has suffered actual damage is sufficient.[10]

change and his estimate of the difference in value are conditions precedent, and a pleading failing to allege that he had such opinion and made such estimate is bad, although it contains an allegation that the engineer had "wholly neglected and refused so to do." Low *v.* Fisher, 27 Fed. 542.

An averment that an estimate is erroneous and too low is not sufficient to show fraud or bad faith on the part of an architect in making the estimate. Baasen *v.* Baehr, 7 Wis. 516.

That the owner by his own act or neglect prevented performance of the condition has, if alleged and proved, the same effect as the averment of an award or decision according to the agreement. Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

Proof of averment see *infra*, VII, A, 6.

2. Towsley *v.* Olds, 6 Iowa 526.

3. Chamberlin *v.* McCalister, 6 Dana (Ky.) 352.

4. Kirkland *v.* Oates, 25 Ala. 465; Allen *v.* Sanders, 7 B. Mon. (Ky.) 593.

5. Rode *v.* Auerbach, 31 Misc. (N. Y.) 765, 64 N. Y. Suppl. 774, holding that otherwise no evidence of waiver was permissible.

Where defendant admits that plaintiff's complete performance was rendered impossible by him, the absence of an averment of waiver is not sufficient reason for reversing a judgment for plaintiff. Wilman *v.* Wagner, 4 Luz. Leg. Reg. (Pa.) 252, 23 Pittsb. Leg. J. (Pa.) 40.

A narration, defective in not setting out a waiver of performance, is amendable at any time, on motion. Wilman *v.* Wagner, 4 Luz. Leg. Reg. (Pa.) 252, 23 Pittsb. Leg. J. (Pa.) 40.

6. Bangs *v.* Berg, 82 Iowa 350, 48 N. W. 90.

Where the contract was to be performed according to certain specifications to the satisfaction of the employer plaintiff need only allege a performance in accordance with the specifications. Kinsley *v.* Monongalia County Ct., 31 W. Va. 464, 7 S. E. 445.

Necessity of stating facts showing performance.— Under Mo. Rev. Stat. (1879), § 3551, providing "that the language of a pleading should be taken in its plain and ordinary meaning, and such an interpretation given as fairly appears to have been intended by the author," an allegation that plaintiff "has duly kept and performed all the promises, covenants and agreements in said contract, on his part, to the satisfaction and under the direction of said architects," is a sufficient allegation of performance, and it is not necessary to make a special statement of facts showing such performance. Roy *v.* Boteler, 40 Mo. App. 213.

Performance of modified contract.—A complaint setting forth an agreement, all the conditions of which plaintiff averred he had fulfilled in every respect "except wherein the same were afterwards waived and altered from said written agreements, by the direction, consent or negligence and fault" of defendant is bad. Smith *v.* Brown, 17 Barb. (N. Y.) 431.

7. Davis *v.* Badders, 95 Ala. 348, 10 So. 422. But see Learmonth *v.* Veeder, 11 Wis. 138.

8. Escott *v.* White, 10 Bush (Ky.) 169, holding that an omission so to do is aided by verdict, especially where the facts established sustain the cause of action.

The amount that is due for extras is properly alleged as due upon an original contract which contemplates a charge for extras and makes provision for settlement of costs arising from changes in the plans. Mueller *v.* Rosen, 179 Ill. 130, 53 N. E. 625 [*affirming* 79 Ill. App. 420].

9. Mills *v.* Hall, (Tex. Civ. App. 1895) 30 S. W. 558.

Sufficiency of averment.—An averment that an estimate is erroneous and too low is not sufficient to sustain an action to recover for extra work above the amount estimated. Baasen *v.* Baehr, 7 Wis. 516.

10. Case *v.* Phœnix Bridge Co., 55 N. Y. Super. Ct. 25, 10 N. Y. St. 474.

b. Answer or Plea — (i) *In General.* The answer or plea must, of course, state a defense,[11] and be responsive to plaintiff's pleading,[12] and the whole thereof, where it purports so to do.[13] Moreover, defendant's pleading must not be double,[14] or waive any defense on which he may afterward desire to insist;[15] thus a defense that the contract between the parties provided that payment should be made on certificate of an engineer, and that his decision and estimate should be final and conclusive, and that plaintiff had not obtained the certificate is not available unless pleaded.[16]

(ii) *Special Pleas in Bar.* A plea alleging non-performance or defective performance by plaintiff must set out specifically the character and nature of the imperfections,[17] and where unavoidable accidents might excuse plaintiff's non-performance it should be alleged that plaintiff was not prevented from performance by accidents of that character.[18]

(iii) *Recoupment, Set-Off, and Counter-Claim.* Where defendant pleads a counter-claim for, or seeks to recoup or set off liquidated damages, in case of delay in construction, facts consistent with any condition qualifying the builder's promise to pay liquidated damages must be averred;[19] and where the builder has shown a substantial performance with the building contract, and defendant desires an allowance or deduction on account of slight defects and

Amount of damages recoverable see *infra*, VII, D.

11. Everroad *v.* Schwartzkopf, 123 Ind. 35, 23 N. E. 969.

Available defenses see *supra*, VII, A, 4.

12. Krog *v.* Rice, 1 Speers (S. C.) 333, in which case plaintiff covenanted to build in a workmanlike manner and defendant agreed to pay a certain sum for the whole work, some of which was to be paid at a particular stage of the work and the balance when the whole work was completed, and plaintiff averred performance of the covenant on his part but that defendant had broken his covenant in not paying the money due under the agreement, and defendant pleaded specially that plaintiff did not and would not build according to minute and particular descriptions contained in his covenant.

13. Everroad *v.* Schwartzkopf, 123 Ind. 35, 23 N. E. 969, holding that it is not sufficient, where a complaint counts upon a special contract and also for materials furnished and work and labor done, to plead a special contract and allege its breach as an entire defense, since such an answer would not constitute a defense to the common counts.

A sufficient answer.— Where plaintiff alleges a substantial performance, except in respect to certain particulars that are waived by defendant and none of which relate to the quantity of work to be done, an answer denying that plaintiff had performed all conditions of his contract except provisions thereof admitted to have been waived necessarily puts in issue the question whether there was performance of the contract, and not merely whether there had been strict and literal performance thereof. Fox *v.* Davidson, 36 N. Y. App. Div. 159, 55 N. Y. Suppl. 524.

14. Scott *v.* Whipple, 6 Me. 425, holding that, where plaintiff covenanted to build within a specified time (unavoidable accidents excepted) in a workmanlike manner, a plea in bar that plaintiff did not within such specified time build in a workmanlike manner was bad.

15. Gubbins *v.* Lautenschlager, 74 Fed. 160, holding that a defendant, by failing to plead a failure of plaintiff to show that there were no possible liens on the structure and to furnish defendant with a bond as required by the contract, waives provisions of the contract requiring proof that there were no possible liens, and security as a condition of making a final payment, and cannot insist on these defenses upon argument.

Where a duplicate building contract is required by statute defendant cannot raise the question of the validity or a failure to comply with such provision, unless his answer does more than present the theory of an original valid contract, with an attempt to rescind it, even if the defense be supported by evidence to that effect. Kemp *v.* Sedalia School Dist., 84 Mo. App. 680.

16. Weed *v.* Draper, 104 Mass. 28; Everard *v.* New York, 89 Hun (N. Y.) 425, 35 N. Y. Suppl. 315, 69 N. Y. St. 760.

17. Parks *v.* Holmes, 22 Ill. 522.

That the quality of the work was not that required by the contract, and that by reason of its inferiority and unskilled workmanship the work was worthless and of no benefit to defendant whatever, is sufficient in an action to recover on a contract, providing that the work should be of a certain quality. Nollman *v.* Evenson, 5 N. D. 344, 65 N. W. 636.

Plaintiff is sufficiently informed as to how work was defective when defendant alleges that rain came in through a window by reason of negligent and unskilful manner of doing the work. Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 So. 659, 54 Am. St. Rep. 188.

18. Scott *v.* Whipple, 6 Me. 425.

19. Connelly *v.* Priest, 72 Mo. App. 673, in which case it was also held that proof that such conditions were complied with was requisite to entitle defendant to even nominal damages.

omissions in the performance of the contract the damages sustained must be alleged.[20]

c. Affidavit of Defense. An affidavit of defense, where requisite, must be definite in its allegations,[21] and sufficiently specific to prevent judgment being taken under the statement of claim,[22] but an affidavit is sufficient to prevent judgment under a statement of claim, making it apparent that there are active elements of serious dispute between the parties, and that work was not prosecuted and not finished by plaintiff to the satisfaction of an owner and architect as required by the contract, when it avers that plaintiff failed to finish building according to contract, and especially failed to finish it to the satisfaction of the architect and owner, as required by the contract.[23]

d. Replication or Reply. A replication or reply is good that does not set up a new cause of action but merely matter which, if true, would explain or avoid the facts stated in the answer;[24] it must, however, afford a good answer to defendant's pleading.[25]

6. Issues, Proof, and Variance. In the absence of an allegation to that effect it is not permissible for plaintiff to show that a certificate was fraudulently withheld,[26]

20. Leeds *v.* Little, 42 Minn. 414, 40 N. W. 309.

21. Server *v.* Heppe, 11 Montg. Co. Rep. (Pa.) 171, holding that an affidavit of defense alleging that the contract price is not due because a building is defective, in that its roof leaks, is too indefinite to prevent judgment.

22. An affidavit of defense which alleges that work has not been done in a workmanlike manner to the satisfaction of defendant and his agent, but on the contrary has been so improperly done and in such an unworkmanlike manner as to necessitate expenditure of large sums of money in altering and finishing the work in accordance with the contract, without stating in what particulars the work was defective, is not sufficient; nor is an allegation that checks given by defendant to plaintiff had not been paid for the reason that plaintiff had agreed that one of the checks should be used to pay a materialman to whom plaintiff was indebted and had failed so to apply it sufficient, without a further allegation that the materialman was entitled to a lien against defendant's property, or that defendant was liable to him. Kellett *v.* Freeman, 8 Del. Cas. (Pa.) 98.

23. Murphy *v.* Liberty Nat. Bank, 179 Pa. St. 295, 39 Wkly. Notes Cas. (Pa.) 526, 36 Atl. 283, so holding, though it was said that the affidavit might have been more specific as to certain matters.

An affidavit of defense is not sufficient which sets up that the work specified had not been completed according to the plans and specifications of the architect, and had not been accepted by the employer, if it does not aver that the work was not done according to the contract between plaintiff and defendant. U. S. *v.* Dixey, 71 Fed. 846.

24. Anderson *v.* Inhoff, 34 Nebr. 335, 51 N. W. 854, holding that, where plaintiff sought to recover for extra material and labor furnished and performed and defendant set up in his answer that extra material and labor had been estimated for by the architect in accordance with the contract and the amount of such estimate tendered plaintiff, a reply was sufficient that the architect's estimate was collusively and fraudulently made, in that it did not make the proper allowance for the material actually furnished and the work actually done by plaintiff, did not set up a new cause of action but merely matter to avoid the provision in the contract in regard to adjustment and certificate of the architect.

25. To a plea, setting out an agreement, under which defendant claims a deduction on the ground that a penalty had attached for non-completion of work by a stipulated day, a replication, to the effect that plaintiff's failure to complete the work, upon which the alleged penalty attached, was occasioned by a subsequent agreement which prevented, and which defendant knew would prevent, performance of the original contract by the day named, is a good legal answer on the ground of waiver; or a good equitable answer on the ground that the original agreement, though not completely rescinded by the subsequent agreement, was rescinded and altered so far as related to the penalty, because it required further work to be done which could not be done within the time limited by the original agreement. Thornhill *v.* Neats, 8 C. B. N. S. 831, 2 L. T. Rep. N. S. 539, 98 E. C. L. 830.

Necessity of reply in confession and avoidance.— Where a plea avers a failure of plaintiff to perform in the manner required by the contract, and claims liquidated damages provided for in the contract, and another plea avers that the contract provided for a determination by the architect of a question as to the builder's liability for delay, it is not sufficient to join issue on the pleas, but plaintiff should reply in confession and avoidance; unless he so does he cannot show that his failure to complete in time was excusable. Gerald *v.* Tunstall, 109 Ala. 567, 20 So. 43.

26. Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Milner *v.* Field, 5 Exch. 829, 20 L. J. Exch. 68.

Amendment of complaint to conform with

or that the contract had been modified,[27] or that, where plaintiff claims for extra work, the owner had waived a provision requiring a written order of the architect for alterations,[28] or that defendant had waived a stipulation as to time of completion, in a case where time is of the essence of the contract;[29] so proof of extra work is incompetent, unless a claim therefor is alleged.[30] Where plaintiff avers performance of a condition precedent, as to the procurance of a decision upon a reference or a certificate, decision, or estimate of an architect, or an excuse for failure to perform such condition, the proof must conform therewith.[31]

7. Evidence[32] **— a. Presumptions and Burden of Proof** — (I) *Presumptions.* Where there is a finding that a contract was entered into and that it was performed, it is not presumed that the contract was void because not filed in accordance with a statute providing therefor or for any other reason.[33] So there is no presumption that defendant intended to waive defects in performance, because he did not object thereto when making payments to plaintiff,[34] unless payment was made with knowledge of the defects.[35] There is a presumption, however, that an architect's certificate was executed by him in the honest discharge of his duty, unless defendant has alleged that plaintiff obtained such certificate through the fraud or mistake of the architect.[36] So the falling of a building upon a calm day raises a presumption that it was negligently constructed.[37]

(II) *Burden of Proof.* Upon plaintiff is thrown the burden of proving what the terms of the contract were;[38] what the plans and specifications were, when building was to be performed according to plans and specifications,[39] and a compliance with them;[40] the cost of remedying unsubstantial defects, where he has shown substantial performance;[41] an excuse for non-performance;[42] that labor and material was used for particular work, where he claims for extra labor and material as having been furnished for such work;[43] and that his work benefited defendant, where that is the sole ground upon which recovery can be had.[44] Again, where, by the specifications, the builder was to allow for the value of old

proof.— Where plaintiff was permitted to amend a complaint to conform to the proof by alleging substantial instead of full performance, and defendant's evidence showed the necessary expense of completing the work, plaintiff's omission to prove the expense was supplied by defendant's evidence. Niemeyer *v.* Woods, 76 N. Y. Suppl. 563.

27. Elting *v.* Dayton, 17 N. Y. Suppl. 849, 43 N. Y. St. 363.

There is a fatal variance where plaintiff proves another contract essentially different from that declared on. Cox *v.* McLaughlin, 63 Cal. 196.

28. Essex *v.* Murray, (Tex. Civ. App. 1902) 68 S. W. 736.

29. Elting *v.* Dayton, 17 N. Y. Suppl. 849, 43 N. Y. St. 363.

30. Mills *v.* Hall, (Tex. Civ. App. 1895) 30 S. W. 558.

31. Cox *v.* McLaughlin, 63 Cal. 196; Michaelis *v.* Wolf, 136 Ill. 68, 26 N. E. 384; Fowler *v.* Deakman, 84 Ill. 130; Boden *v.* Maher, 95 Wis. 65, 69 N. W. 980.

32. See, generally, Evidence.

33. Bridgeport First Nat. Bank *v.* Perris Irrig. Dist., 107 Cal. 55, 40 Pac. 45.

Necessity of filing building contract see *supra*, II, B, 2, c; and, generally, Mechanics' Liens.

34. Flannery *v.* Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36; Hattin *v.* Chase, 88 Me. 237, 33 Atl. 989; Franklin *v.* Schultz, 23 Mont. 165, 57 Pac. 1037.

35. Franklin *v.* Schultz, 23 Mont. 165, 57 Pac. 1037.

36. Mercer *v.* Harris, 4 Nebr. 77.

37. Martin *v.* Dufalla, 50 Ill. App. 371.

38. Pattinson *v.* Luckley, L. R. 10 Exch. 330, 44 L. J. Exch. 180, 33 L. T. Rep. N. S. 360, 24 Wkly. Rep. 224.

39. Lehan *v.* Kiley, 21 Ky. L. Rep. 1186, 54 S. W. 727.

40. Lehan *v.* Kiley, 21 Ky. L. Rep. 1186, 54 S. W. 727; Woolreich *v.* Fettretch, 4 N. Y. Suppl. 326, 21 N. Y. St. 56.

41. Spence *v.* Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 239 [*affirming* 27 N. Y. App. Div. 379, 50 N. Y. Suppl. 960].

42. Walling *v.* Warren, 2 Colo. 434.

Insufficiency of another contractor's work. — A builder, under a contractual obligation to erect a wall on a substructure of stone built by another contractor, seeking to be relieved from his obligation on the ground that the stone foundation is defective and insufficient, has the burden of proving the insufficiency of the foundation wall. Evans *v.* Cowen, 3 Quebec Q. B. 59.

43. Maas *v.* Hernandez, 48 La. Ann. 264, 19 So. 269.

44. Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455, wherein it was held that proof of the value of material furnished and work performed did not shift the burden to defendant of showing that defects in the building were caused by the failure of plaintiff to perform his agreement.

material, and there is an allegation that such allowance was made by him, plaintiff must show that he had informed defendant or his agent of the fact that such old material had been allowed for.[45] Where there was substantial performance a defendant, claiming a deduction from the agreed price on the ground that performance was only partial, is charged with the burden of proving damages occasioned by slight defects and omissions,[46] or based on the failure of plaintiff to complete within the time agreed;[47] and where plaintiff was prevented from complying with his contract through default of defendant, the burden of proving payments made by him under the contract is upon defendant.[48]

b. Admissibility — (1) *In General* — (A) *On Behalf of Plaintiff.* The general rule that evidence is inadmissible to change or modify the express terms of a written contract,[49] but that all proof must correspond to the terms thereof,[50] is applicable to actions on building contracts, but it is admissible for plaintiff to show substantial compliance with his contract,[51] or that the cause of his delay or the failure to so comply was not through his own fault,[52] unless his pleading alleges

45. Harvey *v.* Lawrence, 15 L. T. Rep. N. S. 571, holding that unless there is proof thereof, the value of the old material must be deducted from the amount of his charge.

46. Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309; Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545.

47. Chicago Bridge, etc., Co. *v.* Olson, 80 Minn. 533, 83 N. W. 461; Edison Electric Illuminating Co. *v.* Guastavino Fire Proof Constr. Co., 16 N. Y. App. Div. 358, 44 N. Y. Suppl. 1022. See also Bridges *v.* Hyatt, 2 Abb. Pr. (N. Y.) 449, in which case defendant claimed damages stipulated in the contract for the builder's delay in completing a small part of the work and, it having been shown that the contract was changed by introducing extra work, it was held that defendant was charged with the burden of proving either that the delay was but slightly produced by the change in the contract, or that it was caused by defendant's negligence or fault.

48. Childress *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 1076.

49. Hawk *v.* Walworth, 4 Ark. 577; Graham *v.* Trimmer, 6 Kan. 230; Devlin *v.* New York, 4 Duer (N. Y.) 337; Love *v.* Rempe, (Tex. Civ. App. 1898) 44 S. W. 681; Linch *v.* Paris Lumber, etc., Co., (Tex. 1890) 14 S. W. 701, the latter case holding that where the contract called for a particular kind of material, which could have been procured, evidence that the substitution therefor was substantially like it would be inadmissible.

Illustrations.— Where the action is on a special contract, evidence of the peculiar adaptation of the building contracted for, both in its design and situation, to the defendant's personal and professional pursuits, would be inadmissible (Van Buren *v.* Digges, 11 How. (U. S.) 461, 13 L. ed. 771); so it would not be admissible to show that the building did not answer the purposes for which it was intended (Kendall *v.* Vallejo, 1 Cal. 371); or that defendant had expended certain sums in preparation of plans for building (Hills *v.* Farmington, 70 Conn. 450, 39 Atl. 795).

50. L'Hommedieu *v.* Winthrop, 59 N. Y. App. Div. 192, 69 N. Y. Suppl. 381; Williams *v.* Keech, 4 Hill (N. Y.) 168; Nehurin *v.* Stone, 37 Ohio St. 49; Gibbs *v.* Girardville School Dist., 195 Pa. St. 396, 46 Atl. 91; Aldrich *v.* Wilmarth, 3 S. D. 523, 54 N. W. 811.

Where the defense was that work was improperly done plaintiff cannot show that the work could not have been done in a workmanlike manner for the agreed price. Williams *v.* Keech, 4 Hill (N. Y.) 168.

51. Porter *v.* Wilder, 62 Ga. 520, holding that for this purpose the builder may show that the employer recognized the contract as complied with by not making, until some time after its completion, any suggestion to the contrary. See also Worden *v.* Connell, 196 Pa. St. 281, 46 Atl. 298; Long *v.* Pierce County, 22 Wash. 330, 61 Pac. 142.

Where only the certificate of satisfactory completion is required to render the contract fully executed, which certificate is refused because the employer has directed the architect not to issue it, evidence explaining the absence of the same is admissible in assumpsit, and the special contract need not be pleaded. Foster *v.* McKeown, 192 Ill. 339, 61 N. E. 514 [*affirming* 85 Ill. App. 449].

Evidence that work which the contract called for had been omitted by the express direction of the owner, or that by such directions one kind of work had been substituted for another, or that the parties had changed the plan of construction by mutual consent, is admissible. Smith *v.* Wetmore, 41 N. Y. App. Div. 290, 58 N. Y. Suppl. 402 [*affirming* 24 Misc. (N. Y.) 225, 52 N. Y. Suppl. 513].

What constitutes substantial compliance see *supra*, V, B, 1, b.

52. Campbell *v.* Russell, 139 Mass. 278, 1 N. E. 345; Willis *v.* Webster, 1 N. Y. App. Div. 301, 37 N. Y. Suppl. 354, 72 N. Y. St. 743; Beinhauer *v.* Gleason, 15 N. Y. St. 227; Huckestein *v.* Kelly, etc., Co., 152 Pa. St. 631, 25 Atl. 747; Van Buren *v.* Digges, 11 How. (U. S.) 461, 13 L. ed. 771.

Where a defect is discovered after the builder has made considerable progress in his work of alteration he will be permitted to offer in evidence a certificate of the superintendent of buildings showing that the reason that the work was stopped was because of the

full performance, in which case such evidence would be inadmissible.[53] So plaintiff cannot show, unless provision was made therefor in his contract, that a delay was caused by bad weather.[54]

(B) *On Behalf of Defendant.* Where the builder's delay or abandonment is justifiable defendant cannot show that he sustained loss because of the delay,[55] or the amount he expended in the supervision and completion of the work,[56] or the insolvency of the builder.[57] Defendant, however, may generally show a non-compliance with the contract by plaintiff,[58] even if he has taken possession of the property,[59] unless he directed that the work be done under direction of an architect who under the contract is the sole judge of the quality of material and work furnished, in which case evidence of non-compliance is admissible, unless there is an averment of a fraudulent collusion between the builder and the architect.[60]

(II) *Acts and Statements of Defendant.* For the purpose of showing ownership or interest in the subject-matter of the suit, plaintiff may show that defendant gave orders to others than himself for work or materials for the building;[61] so, that at the time of his discharge the owner promised to pay his demand,[62] or that he refused to admit a party who had been sent by the builder to examine the work.[63] So declarations of defendant tending to show that the fact of his moving into a building was not an admission by him that it had been completed according to contract are admissible on his behalf, if made at the time of his taking possession.[64]

(III) *Certificate of Architect or Superintendent.* The certificate of an architect or superintendent that work has been done to his satisfaction, or as to the settlement of a dispute by him concerning the quality or value of the material employed by the builder, is, when properly obtained,[65] admissible in so far as

defect and not because of the manner in which the builder was doing his work. Heine *v.* Meyer, 61 N. Y. 171.

Where the cause for the delay in completion was on account of extra work and alterations, the builder may testify as to what he considers extra work, and the time that it would take to do the same. Campbell *v.* Russell, 139 Mass. 278, 1 N. E. 345.

For this purpose evidence of a subsequent parol agreement for extra work is properly admitted. Huckestein *v.* Kelly, etc., Co., 152 Pa. St. 631, 25 Atl. 747.

Evidence that alleged defects were supplied after the commencement of the action is competent as bearing on the question of damages. Rancher *v.* Cronk, 3 N. Y. Suppl. 470, 21 N. Y. St. 529.

Excuses for delay see *supra*, V, B, 7.

53. Schnaier *v.* Nathan, 31 N. Y. App. Div. 225, 52 N. Y. Suppl. 812.

54. Cochran *v.* Peoples' R. Co., 131 Mo. 607, 32 S. W. 177.

Right of builder to protect himself against delays caused by bad weather see *supra*, II, B, 4, c, (IX).

Bad weather as excuse for delay see *supra*, V, B, 4, c.

55. San Francisco Bridge Co. *v.* Dumbarton Land, etc., Co., 119 Cal. 272, 51 Pac. 335.

What justifies abandonment by builder see *supra*, II, E, 1.

What justifies delay see *supra*, V, B, 7.

56. Stone *v.* Assip, 18 N. Y. Suppl. 441, 45 N. Y. St. 271.

57. Howell *v.* Gould, 2 Abb. Dec. (N. Y.) 418, 3 Keyes (N. Y.) 422, 2 Transcr. App. (N. Y.) 360.

58. Davidson *v.* Provost, 35 Ill. App. 126; Haist *v.* Bell, 24 N. Y. App. Div. 252, 48 N. Y. Suppl. 405. See also Brown *v.* Kriser, (Mich. 1902) 89 N. W. 51, 8 Detroit Leg. N. 999 (holding that under the terms of plaintiff's allegations, such evidence was admissible to show a non-compliance of the contract, if plaintiff relied on the contract, and that if plaintiff relied on an alleged settlement, such evidence would also be admissible to show what the settlement was, and that he had not complied with it); Schuler *v.* Eckert, 90 Mich. 165, 51 N. W. 198 (holding that it was competent for the owner to show in what particulars the contractors had been inefficient in their work, and how much it had cost him to reconstruct and complete the structure).

59. Gordy *v.* Veazey, 25 La. Ann. 518.

Taking possession not always an acceptance see *supra*, V, B, 6.

60. Mercer *v.* Harris, 4 Nebr. 77.

61. Woodward *v.* Buchanan, L. R. 5 Q. B. 285, 39 L. J. Q. B. 71, 22 L. T. Rep. N. S. 123.

62. Worden *v.* Connell, 196 Pa. St. 281, 46 Atl. 298.

63. Bryant *v.* Stilwell, 24 Pa. St. 314.

64. Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

65. Young *v.* Wells Glass Co., 187 Ill. 626, 58 N. E. 605 [*affirming* 87 Ill. App. 537].

Illustrations.— A certificate as to damages obtained on an *ex parte* statement of the

such certificate of such architect or superintendent concerns matter properly referable to him.[66]

(iv) *Comparison With Other Buildings.* Evidence of cost of similar structures erected by plaintiff for other parties is inadmissible upon the question of value;[67] but if the question is the quality of material furnished, or grade of workmanship employed, such comparison may be invoked,[68] provided it is shown that the subject-matter is in each case subjected to the same or similar conditions.[69]

(v) *Contracts, Writings, and Agreements.* Where there is a special contract, but the builder seeks to recover on a general assumpsit, the contract is

owner and without notice to the builder is admissible. Young *v.* Wells Glass Co., 187 Ill. 627, 58 N. E. 605 [*affirming* 87 Ill. App. 537]. See also Mercer *v.* Harris, 4 Nebr. 77, holding that an owner who, on completion, received from the architect a writing in effect a certificate of satisfactory performance cannot, in an action brought to recover a balance due, adduce in evidence a writing, made by the architect long afterward, to the effect that it would be detrimental to his reputation to sign a certificate that the work had been done in accordance with the plans and specifications, as such an admission would carry with it strong suspicions of collusion between the owner and the architect.

Necessity and manner of giving certificate, decision, or estimate see *supra,* III, B, 2, d, (I).

Necessity of notifying parties see *supra,* III, B, 2, d, (II), (B).

66. *Florida.*— Wilcox *v.* Stephenson, 30 Fla. 377, 11 So. 659.

Illinois.— Mills *v.* Weeks, 21 Ill. 561; Stewart *v.* Carbray, 59 Ill. App. 397; Matthews *v.* Rice, 4 Ill. App. 90.

Indiana.— Hamilton County *v.* Newlin, 132 Ind. 27, 31 N. E. 465.

Kentucky.— Whitehead *v.* Brothers Lodge I. O. O. F. No. 132, 23 Ky. L. Rep. 29, 62 S. W. 873.

Minnesota.— Swank *v.* Barnum, 63 Minn. 447, 65 N. W. 722.

Nebraska.— Smith *v.* White, 5 Nebr. 405.

New York.— New York Bldg., etc., Co. *v.* Springfield Elevator, etc., Co., 56 N. Y. App. Div. 294, 67 N. Y. Suppl. 887.

Pennsylvania.— Bailey *v.* Presbyterian Bd., 200 Pa. St. 406, 50 Atl. 160.

United States.—North American R. Constr. Co. *v.* R. E. McMath Surveying Co., 116 Fed. 169.

See 11 Cent. Dig. tit. "Contracts," § 1809.

The fact that the architect had exceeded his powers with respect to one or more items of non-importance does not render his certificate inadmissible; it being to the effect that the building did not substantially comply with the plans and specifications. Sanders *v.* Hutchinson, 26 Ill. App. 633.

As to matters referable to architect see *supra,* III, B, 2, d, (II), (A).

A certificate of satisfaction has been regarded as prima facie evidence of approval only. Bailey *v.* Presbyterian Bd., 200 Pa. St. 406, 50 Atl. 160.

The architect's decision upon the matter of giving or withholding a certificate is usually conclusive between the parties (Matthews *v.* Rice, 4 Ill. App. 90), unless shown to have been given or withheld through fraud or collusion or such gross misapprehension or mistake as to amount to fraud (Wilcox *v.* Stephenson, 30 Fla. 377, 11 So. 659; Smith *v.* White, 5 Nebr. 405; North American R. Constr. Co. *v.* R. E. McMath Surveying Co., 116 Fed. 169; Sweeny *v.* U. S., 15 Ct. Cl. 400). In the absence of an agreement that an architect's certificate should be conclusive the efficiency or inefficiency of work performed or materials furnished may be proven by other evidence. Hamilton *v.* Myles, 24 U. C. C. P. 309.

Effect of certificate see *supra,* III, B, 2, d, (III).

Fraudulent withholding of a certificate by the architect may be shown by proving that a building was completed at the time of its inspection (Bradner *v.* Roffsell, 57 N. J. L. 32, 29 Atl. 317); so conversations of the architect with the builder and his workmen at the time he was acting on the subject-matter tending to show improper reasons for a refusal to grant the certificate are admissible (Tibbits *v.* Phipps, 30 N. Y. App. Div. 274, 51 N. Y. Suppl. 954).

Fraudulent issuance of a certificate.— In order to show that a certificate was fraudulently given defendant may show that material used by the builder was rotten, a fact of which the architect was well aware before he granted his certificate. Tetz *v.* Butterfield, 54 Wis. 242, 11 N. W. 531, 41 Am. Rep. 29. See also Brin *v.* McGregor, (Tex. Civ. App. 1901) 64 S. W. 78.

Fraudulent withholding or fraudulent issuance of certificate as excuse for non-production, or as ground for going behind certificate see *supra,* VII, A, 3, b.

Sufficiency of evidence to prove fraudulent withholding or fraudulent issuance of certificate see *infra,* VII, A, 7.

Incompetency of the architect or engineer chosen by the owner may be shown by the builder when the contract is silent as to who the inspecting party shall be. Sweeny *v.* U. S., 15 Ct. Cl. 400.

67. Gouge *v.* Roberts, 53 N. Y. 619.

68. Kilbourne *v.* Jennings, 40 Iowa 473, where it was held error to exclude testimony as to the difference between the buildings in question and others built in a workmanlike manner. See also Van Orden *v.* Andrews, 9 N. Y. St. 18.

69. Campbell *v.* Russell, 139 Mass. 278, 1 N. E. 345.

admissible,[70] not only as a guide to the jury in assessing damages,[71] or to show what the parties had agreed on as a reasonable price for that portion of the work embraced in it,[72] but also to show that since its terms had not been complied with no action could be maintained thereon.[73] If, however, the action be to recover for extra work, such contract would be admissible only for the purpose of showing that the work in question was or was not embraced in, or covered by, such contract.[74] For the purpose of showing a parol contract to build, a written instrument, purporting to set out the terms of the contract, signed by the builder and in the handwriting of the owner but not signed by him, is admissible; so too a proposal to build, given by the owner to the builder and accepted by him, is admissible for that purpose.[75]

(VI) *Cost or Value of Work.* If recovery is sought on the theory of substantial performance, evidence of cost or value of the work is inadmissible;[76] so after an abandonment of the contract through fault of the employer, the builder is, in an action to recover for work and labor, confined to the contract price, unless he can show that, because of the default, the work performed was more expensive or was performed under less favorable circumstances than it otherwise would have been,[77] and where, by the contract, extra work is to be estimated in proportion to the price of the entire work, evidence of the reasonable value of the same would be inadmissible.[78] Where, however, an arbitrator, whose duty it is under the contract to estimate the value of work done, fails or refuses so to do, evidence *aliunde* of its value is admissible.[79]

(VII) *Opinion of Skilled or Experienced Architects or Builders.* The testimony of an experienced architect, builder, or contractor is generally admissible[80] as to the probable cost of a building or structure, though he has seen

70. Adams *v.* Burbank, 103 Cal. 646, 37 Pac. 640; Fowler *v.* Deakman, 84 Ill. 130.

71. Jewett *v.* Weston, 11 Me. 346; Ibers *v.* O'Donnell, 25 Mo. App. 120.

Where the contract fixes the price to be paid for work which may be found necessary, but which is not specified therein, evidence of its cost not showing the amount or its value as measured by the contract is inadmissible as primary evidence. North American R. Constr. Co. *v.* R. E. McMath Surveying Co., 116 Fed. 169.

72. Terrell Coal Co. *v.* Lacey, (Ala. 1901) 31 So. 109; Hutchison *v.* Cullum, 23 Ala. 622; Castagnino *v.* Balletta, 82 Cal. 250, 23 Pac. 127; Fulton County *v.* Gibson, (Ind. 1902) 63 N. E. 982.

73. Jewett *v.* Weston, 11 Me. 346.

74. Baum *v.* Covert, 62 Miss. 113.

But a paper, prepared by the architect, and containing a list of the extras and their value, would be admissible in such action, in connection with the testimony of the builder and the architect. Foster *v.* McKeown, 192 Ill. 339, 61 N. E. 514 [*affirming* 85 Ill. App. 449].

Books of original entry belonging to the builder are admissible to prove the amount in value of work and materials furnished under a special contract rescinded by the builder on account of the owner's conduct. McDaniel *v.* Webster, 2 Houst. (Del.) 305.

75. Murphy *v.* Murphy, 22 Mo. App. 18.

Specifications not signed by the parties, but agreed upon by them at the time of making the contract, are admissible to show the manner in which the building was to be constructed. Maxted *v.* Seymour, 56 Mich. 129, 22 N. W. 219; Myer *v.* Fruin, (Tex. 1891) 16 S. W. 868.

76. Eaton *v.* Gladwell, 108 Mich. 678, 66 N. W. 598; Campau *v.* Moran, 31 Mich. 280.

77. Koon *v.* Greenman, 7 Wend. (N. Y.) 121. *Compare* Villalobos *v.* Mooney, 2 La. 331.

To show increased cost, evidence of the state of the weather, and the lateness of the season, in connection with defendant's explicit directions to continue the work, may be shown. Turner *v.* Grand Rapids, 20 Mich. 390.

78. Eigemann *v.* Posey County, 82 Ind. 413.

79. Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Boyd *v.* Whelen, 17 Phila. (Pa.) 270, 41 Leg. Int. (Pa.) 154; Baker *v.* Herty, 1 Cranch C. C. (U. S.) 249, 2 Fed. Cas. No. 771.

80. The testimony of an architect, while not being accorded the same effect as a certificate, will be accorded the same weight as that of any other witness having the same means of information. Boteler *v.* Roy, 40 Mo. App. 234.

A plumber who has for many years been out of business, during which time the nature of such work has changed materially, could not be considered an experienced or expert witness with regard to the business at the time his testimony was offered. McEwen *v.* Bigelow, 40 Mich. 215.

Whether work was done in a manner considered skilful by the workmen in the community in which the building was erected is not a question at issue as a rule, but whether

only the plans and specifications,[81] or their exterior;[82] so his testimony that, but for delays caused by the owner or architect, the work could have been completed within the contract time is admissible.[83]

c. Weight and Sufficiency — (I) *In General.* Evidence impeaching an architect's certificate,[84] or showing a waiver of a provision of the contract requiring that extra work be authorized by the architect must be clear and convincing.[85] Where an architect is employed to supervise the construction in all its details, evidence that deviations from the contract were made with his consent is sufficient to show the consent of the owner.[86] The falling of the building,[87] or the violation of a city ordinance regulating the thickness of the walls thereof is *prima facie* evidence of negligent construction;[88] but the fact that the kind of building usually constructed to withstand ordinary storms is incapable of withstanding an extraordinary one does not show negligence.[89]

(II) *To Authorize Recovery* — (A) *On Express Contract.* If the action is on a special contract, proof of a substantial compliance with the terms of the entire instrument must be offered to entitle the builder to recover;[90] but this does not mean that a compliance with regard to the minutest details is required of him.[91]

it was done in a manner generally considered skilful by those competent to judge of the same, regardless of where the work was performed. Fitzgerald *v.* La Porte, 64 Ark. 34, 40 S. W. 261.

81. Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586.

82. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

83. Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153.

As to evidence of expert witnesses see, generally, EVIDENCE; WITNESSES.

84. State *v.* McGinley, 4 Ind. 7; J. G. Wagner Co. *v.* Cawker, 112 Wis. 532, 88 N. W. 599.

85. Ashley *v.* Henahan, 56 Ohio St. 559, 47 N. E. 573.

Illustration of sufficiency of such evidence. — Bartlett *v.* Stanchfield, 148 Mass. 394, 19 N. E. 549, 2 L. R. A. 625.

Express evidence of approval by the architect need not be offered where the owner does not deny such approval, but relies on the absence of a direct evidence of the same, and evidence showing by implication such approval is sufficient. Union Stove Works *v.* Arnoux, 7 Misc. (N. Y.) 700, 28 N. Y. Suppl. 23, 58 N. Y. St. 367 [*affirming* 6 Misc. (N. Y.) 64, 26 N. Y. Suppl. 83, 56 N. Y. St. 604].

86. Schnaier *v.* Nathan, 49 N. Y. App. Div. 298, 63 N. Y. Suppl. 38.

87. Giles *v.* Diamond State Iron Co., (Del. 1887) 8 Atl. 368.

88. Giles *v.* Diamond State Iron Co., (Del. 1887) 8 Atl. 368.

89. Giles *v.* Diamond State Iron Co., (Del. 1887) 8 Atl. 368.

Evidence that cracks in the earth were found in vicinity of a building, and that a number of houses, apparently built in a substantial manner, had seemingly been injured by such openings in the earth, and that the cracks in a particular house resulted from such fissures is sufficient to show that in all probability the defects did not result from bad workmanship or material. Fremont *v.* Harris, 9 Rob. (La.) 23.

That the builders were not responsible for weak points in a wall which had been blown down by a fierce storm is sufficient evidence to sustain a verdict for them in an action to recover a balance due, the defense being that the wall was blown down because of defective or negligent workmanship. The builder need not show that other walls in the vicinity were blown down by the same storm. South McAlester, etc., Electric Light Co. *v.* Eddy, 2 Indian Terr. 645, 53 S. W. 448.

90. *Alabama.* — Kirkland *v.* Oates, 25 Ala. 465.

California. — Blythe *v.* Poultney, 31 Cal. 233.

Connecticut. — Coburn *v.* Hartford, 38 Conn. 290.

Kansas. — Graham *v.* Trimmer, 6 Kan. 230.

New York. — Cunningham *v.* Jones, 20 N. Y. 486; Curtice *v.* West, 50 Hun (N. Y.) 47, 2 N. Y. Suppl. 507, 19 N. Y. St. 511; Levin *v.* Spero, 33 Misc. (N. Y.) 781, 67 N. Y. Suppl. 931.

Wisconsin. — Jackson *v.* Cleveland, 19 Wis. 400.

United States. — McNeil *v.* Armstrong, 81 Fed. 943, 27 C. C. A. 16.

Where time is the essence of the contract it is incumbent upon the builder to show that the building was completed within the time specified. Clayton *v.* Blake, 26 N. C. 497.

Proof of the value of the work is not, of course, essential, where the builder has substantially performed his contract and brings his action thereon. Lennon *v.* Smith, 23 N. Y. App. Div. 293, 48 N. Y. Suppl. 456 [*affirmed* in 161 N. Y. 661, 57 N. E. 1145].

What constitutes substantial compliance see *supra*, V, B, 2.

91. Killian *v.* Herndon, 4 Rich. (S. C.) 609.

Performance of work as condition precedent to recovery see *supra*, VII, A, 3, a.

(B) *On Quantum Meruit.* Where plaintiff sues on a *quantum meruit*, he must show, by a fair preponderance of the proof, that the work or material furnished was of the value claimed,[92] over and above the damages resulting from non-compliance with the contract.[93] If the cause of non-compliance is the fault of the employer, the builder need not prove his readiness and ability to perform.[94]

8. TRIAL — a. Questions of Law and Fact. It is for the jury to determine, under proper instructions, when the evidence on that point is conflicting, whether the contract was verbal or written;[95] whether the contract has been modified or not;[96] whether plans or specifications are a part of the building contract;[97] whether the builder was justified in abandoning his contract before completion;[98] whether the contract has been substantially performed by the builder,[99] according

92. Jones, etc., Co. *v.* Davenport, 74 Conn. 418, 50 Atl. 1028; Barnwell *v.* Keating, 72 Conn. 732, 43 Atl. 984.

Sufficiency to show abandonment or breach or fault of owner.— Evidence that the contract was abandoned should be of the most satisfactory character, and show that both parties intended to set the contract aside. The mere showing of deviations from the contract is not alone sufficient. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325. Mere evidence that the contractor, upon receiving notice from the owner that he himself desired to complete the work thereafter, ceased to work upon the building is insufficient to show that he was in fact prevented by the owner from proceeding with the work so as to entitle him to recover upon a *quantum meruit*. Beecher *v.* Schuback, 1 N. Y. App. Div. 359, 37 N. Y. Suppl. 325, 72 N. Y. St. 511. And see Yarborough *v.* Davis, (Tex. App. 1891) 15 S. W. 713, where it was held that the evidence was insufficient to show that the breach was occasioned through the fault of defendant.

The contract price is only prima facie evidence of reasonable value, where the contractor has abandoned the contract and sues on a *quantum valebat*. Ibers *v.* O'Donnell, 25 Mo. App. 120.

93. Globe Light, etc., Co. *v.* Doud, 47 Mo. App. 439.

94. Howell *v.* Gould, 2 Abb. Dec. (N. Y.) 418; 3 Keyes (N. Y.) 422, 2 Transcr. App. (N. Y.) 360.

95. Jones *v.* Sherman, 34 Nebr. 452, 51 N. W. 1036.

The court must determine and inform the jury whether a paper or writing introduced is or is not a contract — is or is not that which fixes the liabilities of the parties in the premises. Eyser *v.* Weissgerber, 2 Iowa 463.

96. Power *v.* Walker, 18 Ky. L. Rep. 889, 35 S. W. 256, 907.

97. Mallard *v.* Moody, 105 Ga. 400, 31 S. E. 45.

Whether a certain plan was in existence at the time the contract was executed should be submitted to the jury. Carberry *v.* Farnsworth, 177 Mass. 398, 59 N. E. 61.

98. Scheible *v.* Klein, 89 Mich. 376, 50 N. W. 857; Pontifex *v.* Wilkinson, 2 C. B. 349, 52 E. C. L. 348.

99. *Arkansas.*— Fitzgerald *v.* La Porte, 64 Ark. 34, 40 S. W. 261.

Connecticut.— West *v.* Suda, 69 Conn. 60, 36 Atl. 1015.

Florida.— Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

Illinois.— Fowler *v.* Deakman, 84 Ill. 130; Estep *v.* Fenton, 66 Ill. 467.

Maryland.— Annapolis, etc., Short Line R. Co. *v.* Ross, 68 Md. 310, 11 Atl. 820.

Massachusetts.— Rose *v.* O'Riley, 111 Mass. 57; Worcester Medical Inst. *v.* Harding, 11 Cush. (Mass.) 285.

Missouri.— Smith *v.* Clark, 58 Mo. 145.

New York.—Adamant Mfg. Co. *v.* Bach, 26 N. Y. App. Div. 255, 50 N. Y. Suppl. 12; Anderson *v.* Meislahn, 12 Daly (N. Y.) 149; Boughton *v.* Smith, 22 N. Y. Suppl. 148, 51 N. Y. St. 316, in which latter case the evidence showed that work was not originally done in accordance with the contract but that plaintiff, with defendant's permission, undertook to remedy defects.

Pennsylvania.—Coon *v.* Citizens Water Co., 152 Pa. St. 644, 31 Wkly. Notes Cas. (Pa.) 457, 25 Atl. 505; Huckestein *v.* Kelly, etc., Co., 152 Pa. St. 631, 25 Atl. 747.

See 11 Cent. Dig. tit. "Contracts," § 1827.

Whether a deviation from the contract was the fault of the builder is properly left to the jury.— Huckestein *v.* Kelly, etc., Co., 152 Pa. St. 631, 25 Atl. 747.

Where a contract for construction required the building to be similar to another, and it appeared that, at the time of its alleged completion or at some subsequent date, the other building had iron rods to support it and prevent it from spreading, it is proper for the jury to say whether such rods were in the other building when the contract was entered into, and if so whether they formed a necessary part of the plan of the building. Estep *v.* Fenton, 66 Ill. 467.

As to extra work.— Where a contract provides that work shall be done to the satisfaction of the architect, that any dispute as to claims for extra work shall be referred to him, and that his decision shall be final, it is error, in an action by the builder on the contract, to refer to the jury questions as to extra work and the performance of the contract, in the absence of evidence of fraud, or if the question of fraud is not submitted to

to the nature and object of the work;[1] whether building was accepted;[2] whether work was done in a reasonable time and with reasonable diligence, where the contract does not specify a time for its completion;[3] whether certain work or materials were extras, where the contract is uncertain in this regard;[4] whether a builder's tender of performance, after being prevented from going on with his contract, was in good faith;[5] whether a certificate of performance was unreasonably withheld;[6] whether special circumstances, causing a delay in completion, were attributable to the builder,[7] and to what extent those circumstances increased the cost of building;[8] whether a provision providing for arbitration has been waived;[9] and as to the time for payment under a verbal contract.[10] When the terms and language of a building contract are ascertained, in the absence of technical phrases or the existence of latent ambiguities rendering the meaning of the contract uncertain and doubtful, the office of construing its meaning belongs to the court alone,[11] and, for the purpose of determining what meaning was placed upon the words used by the parties, the court will look to the nature of the contract, the situation of the parties, and to all surrounding facts and circumstances that throw light upon the intent of the parties.[12]

the jury. Guthat *v.* Gow, 95 Mich. 527, 55 N. W. 442.

1. Fitzgerald *v.* La Porte, 64 Ark. 34, 40 S. W. 261.

2. Estep *v.* Fenton, 66 Ill. 467.

3. Walling *v.* Warren, 2 Colo. 434.

4. Annapolis, etc., Short Line R. Co. *v.* Ross, 68 Md. 310, 11 Atl. 820; O'Brien *v.* Jackson, 42 N. Y. App. Div. 171, 58 N. Y. Suppl. 1044; Mills *v.* Hall, (Tex. Civ. App. 1895) 30 S. W. 558.

5. Cass County *v.* Gibson, 107 Fed. 363, 46 C. C. A. 341.

6. Gibbons *v.* Russell, 13 N. Y. Suppl. 879, 37 N. Y. St. 402.

7. Galbraith *v.* Chicago Architectural Iron Works, 50 Ill. App. 247.

8. Hough *v.* Cook, 69 Ill. 581.

9. Preston *v.* Syracuse, 92 Hun (N. Y.) 301, 36 N. Y. Suppl. 716, 71 N. Y. St. 782.

Waiver of requirement as to architect's certificate.—Where plaintiff avers a waiver of a requirement of an architect's certificate and defendant, besides answering as to the waiver, alleges that the architect was justified in refusing a certificate, and both parties introduced evidence as to the reasonableness of the refusal the issue as to the refusal is a question for the jury, although there is no reply because, under N. Y. Code Civ. Proc. § 522, an allegation of new matter in the answer is deemed controverted by the adverse party. Fox *v.* Powers, 65 N. Y. App. Div. 112, 72 N. Y. Suppl. 573.

10. Scheible *v.* Klein, 89 Mich. 376, 50 N. W. 857.

11. O'Connor *v.* Adams, (Ariz. 1899) 59 Pac. 105, holding that where extra pay was claimed under a parol contract for erecting the walls of a kitchen to a building, and the builder had originally contracted in writing to do all brick work in the walls of the building according to plans not completed but to be finished, and the plans in evidence, which were admitted to be those under which the building was completed, provided for kitchen walls, the court should have charged that the kitchen walls were included in the written contract. See also Annapolis, etc., Short Line R. Co. *v.* Ross, 68 Md. 310, 11 Atl. 820.

Contract not to be construed by arbiter.—Where it is mutually agreed that all work and materials shall be inspected by a third person, and his decision be final, he cannot give a legal construction of what the contract requires. Brown *v.* Langner, 25 Ind. App. 538, 58 N. E. 743; Mason *v.* Bridge, 14 Me. 468, 31 Am. Dec. 66.

When the jury has fixed the meaning of words their legal effect and consequence must be determined by the court. Warnick *v.* Grosholz, 3 Grant (Pa.) 234.

The meaning of the phrase in a building contract, "when the walls shall be completed," is a question for the court. Worcester Medical Inst. *v.* Harding, 11 Cush. (Mass.) 285.

Question as to what contract includes one for court.—Where specifications are not contradictory and inconsistent, but the only question is whether the building contract includes the erection of smoke, heat, and ventilating flues and stacks, it is a case for construction by the court. Keefer *v.* Sunbury School Dist., (Pa. 1902) 52 Atl. 245.

Submission of the construction of a written contract to the jury no ground of exception, if they decide it right. Ricker *v.* Cutter, 8 Gray (Mass.) 248.

Construction and operation of contract see *supra*, II, C; and, generally, CONTRACTS.

12. Kelly *v.* Fejervary, (Iowa 1899) 78 N. W. 828 [*reversed* on other ground in 111 Iowa 693, 83 N. W. 791].

The facts should be found by a jury, where there is a material conflict in the evidence as to what the surrounding circumstances, relied upon as showing the intention of the parties, were. Kelly *v.* Fejervary, (Iowa 1899) 78 N. W. 828 [*reversed* on other grounds in 111 Iowa 693, 83 N. W. 791].

Evidence tending to show meaning of parties admissible.—A clause providing that, where there is a delay in completing a build-

b. Instructions — (I) *In General.* An instruction given by the court should not invade the province of the jury by withdrawing from its consideration any question of fact,[13] must not be conflicting,[14] ignore material evidence[15] or issues,[16] be misleading,[17] give undue prominence to particular facts,[18] be based upon a mis-

ing after a specified date, the contractor shall pay to the owner a named sum for every day thereafter that the said work shall remain unfinished as and for liquidated damages, is somewhat in the nature of an ambiguous expression, and all evidence tending to disclose the true meaning of the parties should be received. Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791.

Where an owner, after discharging a builder before full performance, employed the foreman of the builder to take charge, and the house was completed under the supervision of the same architect without notifying a subcontractor of any change, it is for the jury to determine whether from the conduct of the parties the owner promised to pay for the work performed and materials furnished by the subcontractor. Blount *v.* Guthrie, 99 N. C. 93, 5 S. E. 890.

13. Estep *v.* Fenton, 66 Ill. 467, holding it erroneous to take from the jury a question whether certain matter formed a necessary part of the plan of the building.

An assumption of material facts in issue.— Where plaintiff agreed to build at a certain rate and to make additions, if required, at the same rate, on condition that such additions should not be of a more costly class of work than the contract contemplated, and additions costing more than the agreed rate were made, instructions assuming that the additions were of the class contemplated by the contract were properly refused. Annapolis, etc., Short Line R. Co. *v.* Ross, 68 Md. 310, 11 Atl. 820.

14. Where a contract gave the employer the right to have its engineer direct force to be applied to any portion of the work which in his judgment required it, and to order an increase or diminution of force at any point he might direct, an instruction in an action by the builder for breach of the contract, that subject to such rights of the employer plaintiff had the right to have the whole work laid out and to work on all parts at once and that delays caused by denying plaintiff such right were not grounds of annulment was improper, as being contradictory. Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 Ky. L. Rep. 146, 11 S. W. 18, 957.

15. In an action where defendant sets off a penalty stipulated for plaintiff's failure to complete the building by a certain time, and there is evidence that it was contemplated when the contract was made that defendant should put in a siding to enable plaintiff to unload materials on the spot, it is error to charge that this siding could have been put in in a day or two, when there was evidence that, in order to put the siding in, a grading of the lot was necessary. Huckestein *v.* Kelly, etc., Co., 139 Pa. St. 201, 27 Wkly. Notes Cas. (Pa.) 387, 21 Atl. 78.

16. Where plaintiff in his declaration alleged that defendant directed what material should be used, and that the same was used, and the structure made as perfect as it could be with such materials, defendant pleaded that he did not designate the materials and direct them to be used. Issue was taken on the plea, and, on trial, defendant moved the court to instruct the jury that the issue was immaterial, and should be disregarded by them. A refusal so to instruct was held correct. McKee *v.* Brandon, 3 Ill. 339.

An instruction ignoring the necessity of a certificate entirely is erroneous, even though the architect had in fact been discharged before completion. Walsh *v.* Walsh, 11 Ill. App. 199.

17. Estep *v.* Fenton, 66 Ill. 467; Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 Ky. L. Rep. 146, 11 S. W. 18, 957; Huckestein *v.* Kelly, etc., Co., 139 Pa. St. 201, 27 Wkly. Notes Cas. (Pa.) 387, 21 Atl. 78.

Misleading instruction as to performance. — An instruction requiring only a substantial compliance with the terms of the building contract and leaving it with the jury to find whether there has been such a performance is improper and well calculated to mislead a jury. Estep *v.* Fenton, 66 Ill. 467.

An instruction that an estimate is not binding on either party if there is a mistake in it is misleading, because the jury is not informed of the nature of an error or mistake that would avoid the decision or estimate of the architect or engineer. Hot Springs R. Co. *v.* Maher, 48 Ark. 522.

In the absence of an allegation that the builder's failure to construct according to contract was caused by the owner and of testimony to that effect, it is misleading to charge that the builder is in fault and cannot recover, if the jury finds from the evidence that the building was not in accordance with the contract and the deficiency was caused by the owner. Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

Instruction that builder cannot recover unless agreement is performed not misleading. — It is not misleading to charge, in an action to recover for work and labor in building, that if plaintiff agreed to build for a specific sum and did not perform his agreement he would not be entitled to any credit, because it is the builder's duty to excuse his failure to perform. Walling *v.* Warren, 2 Colo. 434.

18. Mueller *v.* Rosen, 179 Ill. 130, 53 N. E. 625 [*affirming* 79 Ill. App. 420], holding a charge, that if the jury believe "from the evidence in this case, that in addition to the requirements of the plans and specifications the plaintiff placed in the building certain things," then the jury are instructed that "plaintiff is entitled to recover from the de-

statement of the evidence before the court,[19] or be in any way prejudicial to either party,[20] and must correctly state the law upon the evidence before the jury.[21]

(II) *As to Damages.* The court must duly charge the jury as to the manner in which the damages sustained by plaintiff should be estimated and arrived at.[22]

fendants such additional sum" as it may believe "from all the evidence in this case, to be due to the plaintiff because of the additional work, labor and material in so constructing, building and furnishing said extra articles in said building according as the proof shows the agreement was relative thereto, if any," does not give undue prominence to particular facts.

19. Under a provision, that all payments made on the work during its progress on account of the contract or for any extra work must not be construed as an acceptance of the work executed, but the builder shall be liable to all the conditions of the contract until the work is finished and a final certificate given by the superintendent, an instruction that a certificate given by the architect to the builder for payment by the owner is conclusive evidence as against the owner and in favor of the builder, that so much of the material furnished and work done under the contract as originally made, covered, and paid for by said certificate was so furnished and done pursuant to the terms of the contract is prejudicial error, as it directly contravenes the terms of the contract. Clapp *v.* Bullard, 23 Ill. App. 609. See also Livingston *v.* Anderson, 30 Fla. 117, 11 So. 270.

20. Estep *v.* Fenton, 66 Ill. 467.

21. Atchison First Baptist Church *v.* Sigwald, 39 Kan. 387, 18 Pac. 289; Veazie *v.* Hosmer, 11 Gray (Mass.) 396.

As to right to additional time.—Where defendant sets off a penalty stipulated by plaintiff's failure to complete a building by a certain time, and the proof shows that the intention of the parties was that defendant should do certain work to enable plaintiff to proceed with his work, it is not error to charge that plaintiff should be allowed additional time on account of defendant's delay to do his work. Huckestein *v.* Kelly, etc., Co., 139 Pa. St. 201, 27 Wkly. Notes Cas. (Pa.) 387, 21 Atl. 78.

In an action for extras, an instruction that if any of the alleged extras were called for either in the plans or specifications they could not be recovered as extras is proper. Mills *v.* Hall, (Tex. Civ. App. 1895) 30 S. W. 558.

Refusal to give requested instruction correct where point previously covered.— The court may refuse a request to charge, that if the builder did not do his work under the contract in a workmanlike manner the owner might terminate the contract, where it is charged that a builder failing in the discharge of his duty may rightfully be discharged by his employer, as the latter instruction includes the former. Feaster *v.* Richland Cotton Mills, 51 S. C. 143, 28 S. E. 301.

Where the jury are instructed that if the work has been only partly done and the owner has availed himself of the work the builder may recover what the work was reasonably worth to the owners, it is erroneous to fail to instruct the jury that the builder must have intentionally failed to finish the work. Veazie *v.* Hosmer, 11 Gray (Mass.) 396.

Conclusiveness of certificate.— In an action on a building contract providing that the architect's certificates and decisions should be binding in all matters, an instruction that his certificate was conclusive on defendant, in the absence of collusion with plaintiff, is not erroneous, where the answer charges such collusion, and no instruction based on the theory of independent fraud or gross negligence on the part of the architect is requested. Johnson *v.* White, (Tex. Civ. App. 1894) 27 S. W. 174.

22. Fairfield *v.* Jeffreys, 68 Ind. 578; Veazie *v.* Hosmer, 11 Gray (Mass.) 396.

It is erroneous to instruct that the measure of the builder's damages are prima facie what his work would amount to under the contract and that, if plaintiff was thrown out of employment by reason of defendant's refusal to permit him to perform his contract, plaintiff would not be permitted to do anything if other work could be obtained, but that it was his duty to obtain work if he could, and that any sum that plaintiff might have made at other work during that time should be deducted from such damages as he would *prima facie* be entitled to recover. Fairfield *v.* Jeffreys, 68 Ind. 578.

A request to charge as to the rule of damages for defective workmanship or poor material is properly refused as too general, where there is also a claim for material not furnished and for delay in performing the contract. Healy *v.* Bulkley, 10 N. Y. Suppl. 702, 32 N. Y. St. 243.

In an action to recover a balance due on a building contract and for extras, some of which were for variations from the plans, where it appeared that the architect had certified that the contract had been performed and all but a very small balance of the price had been paid, a charge that work under the original contract should be completed in every particular, but that the jury might deduct the difference in value from any variations from the contract, is not erroneous as a whole, the latter part of it referring to disputed extras merely. O'Brien *v.* Jackson, 42 N. Y. App. Div. 171, 58 N. Y. Suppl. 1044.

Where acceptance by the architect entitled the builder to payment, but the builder was liable to a penalty per day for delay in completion, an instruction to find for plaintiff, at the contract price, if the architect accepted the building, is correct, though the contract called for completion at a date prior to the acceptance as the contract price was

9. VERDICT OR FINDINGS. The verdict or findings must be based upon the evidence before the jury,[23] and be sufficient to support a judgment,[24] but neither a verdict or finding will be disturbed, where there is sufficient evidence to warrant a finding that plaintiff is entitled to recover.[25]

10. JUDGMENT. In a suit to recover for work and material furnished in construction of a house, a judgment not only against the owner of the land on which the house was built but against others is not erroneous, where the others had as much to do with the settlement of the plans and the making of the contract as the owner had.[26]

B. To Recover Damages For Not Being Allowed to Complete — 1. COMPLAINT, DECLARATION, OR PETITION. The complaint, declaration, or petition in an action to recover damages for being prevented from carrying out a building contract must set out a valid contract,[27] and, where the recording of a building contract is required by statute, aver that it was filed for record.[28] It is sufficient, however, to allege an agreement that the owner was to pay a certain price, and that in pursuance of the agreement a building was commenced, and that the builder is ready and willing to complete it, but that defendant prevented plaintiff from so doing and compelled him to desist from the work.[29]

2. ISSUES, PROOF, AND VARIANCE. Plaintiff's evidence must support his complaint, declaration, or petition.[30]

C. To Recover Damages From Builder — 1. INSTITUTION OF SUIT. Notwithstanding the builder is still working under the contract with the owner's consent, an action may be brought by the owner to recover damages from the builder for the breach of a contract to complete by a certain time shortly after

the agreed sum, less the proper deduction for delay. Johnson *v.* White, (Tex. Civ. App. 1894) 27 S. W. 174.

Where the court charged that the contract price should govern, so far as the work was of the character specified in the contract, it properly refused to charge that the price of the extra work should be the price fixed by the contract. Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

Where defendant pleaded payment and payment with leave, and proved that the work had not been approved by the architect, an instruction was held correct which was to the effect that plaintiff was entitled, under the pleading, to recover, upon a proper deduction being made for any deficiency in the work done that caused damage to defendant within a reasonable time after discovery thereof. Normal School *v.* Hauck, 2 Wkly. Notes Cas. (Pa.) 86.

As to measure of damages see *infra*, VII, D; and, generally, DAMAGES.

23. Blazo *v.* Gill, 69 Hun (N. Y.) 69, 23 N. Y. Suppl. 373, 53 N. Y. St. 154.

Where evidence shows that walls are not constructed according to plans and that defendant on several occasions insisted that the defects should be remedied a finding for plaintiff is erroneous. Lynes *v.* Holl, 60 Minn. 632, 63 N. W. 108.

24. May *v.* Menton, 18 Misc. (N. Y.) 737, 41 N. Y. Suppl. 650, 75 N. Y. St. 1036.

25. Walsh *v.* Campbell, 1 N. Y. App. Div. 631, 37 N. Y. Suppl. 362, 72 N. Y. St. 531.

Where there was evidence that a house could not be built without more or less cracking of the walls, a finding refusing to allow defendant for moneys paid to repair the defects in plastering, which were not of an extraordinary kind and not due to bad workmanship, should not be disturbed. Walsh *v.* Campbell, 1 N. Y. App. Div. 631, 37 N. Y. Suppl. 362, 72 N. Y. St. 531.

26. Weese *v.* Pearce, 81 Ill. App. 38.

27. Howard *v.* Maine Industrial School, 78 Me. 230, 3 Atl. 657.

28. Palmer *v.* White, 70 Cal. 220, 11 Pac. 647.

Necessity of recording building contract see *supra*, II, B, 2, c.

29. Black *v.* Woodrow, 39 Md. 194, holding that it is not necessary to specially aver an implied promise on defendant's part to allow the building to be constructed, unless the fact of prevention is alleged as a breach.

30. Stickney *v.* Cassell, 6 Ill. 418, where a builder contracted to put all his men upon a building at a stipulated sum *per diem* and then put them at work to complete any other contractor's work that the employer should wish at a specified price. The builder, however, was not allowed by the owner to complete the building and sued to recover damages alleged to have been sustained by reason of the refusal. It did not appear by the contract either expressly or otherwise that defendant bound himself to allow plaintiff to complete the other parties' work, and there was no testimony which tended to show that defendant hindered or prevented plaintiff from completing, and it was held that plaintiff could not recover, since the declaration was not supported by the evidence.

Damages recoverable by builder see *infra*, VII, D.

a lapse of such time, unless the owner himself has waived his claim for damages.[31]

2. COMPLAINT, DECLARATION, OR PETITION[32] — a. In General. A complaint, declaration, or petition in an action brought by the owner to recover damages from the builder must not improperly unite two or more causes of action,[33] and must properly show a cause of action.[34] Where the cause of action is a failure to perform the declaration must set out a contract that is not so uncertain and indefinite as to be incapable of performance.[35]

b. Particular Averments. Where the cause of action is a failure to construct in a workmanlike manner and with the material contracted for, the plaintiff's pleading should allege wherein the workmanship was faulty or the material furnished by defendant was not such as the contract required.[36] Plaintiff need not allege an offer to pay the amount he had agreed to pay at the time when the building should have been completed, where the cause of action is for non-completion within a time specified.[37]

3. ANSWER OR PLEA. Where the owner seeks to recover damages for the builder's non-performance of his contract upon which the builder was paid, defendant cannot plead that plaintiff was not legally bound by contract to perform his part thereof,[38] or the fact that defendant had nearly completed his work after the time within which he had agreed to complete and was prevented by plaintiff from completing it.[39] Where plaintiff seeks to recover damages for negligent building defendant must allege in his answer or plea any facts showing that the failure in construction was not caused by his fault.[40]

4. REPLICATION OR REPLY. A replication or reply must, where the answer avers an acceptance of the work, allege facts avoiding the acceptance in a case where the acceptance is confessed.[41]

5. ISSUES, PROOF, AND VARIANCE. Where the declaration alleges a failure of the

31. Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637.

32. See, generally, PLEADING.

33. A complaint setting forth a contract to build and a failure of defendant to comply therewith, and alleging damages on account of loss of profits and demanding a judgment therefor, and also claiming money paid by plaintiff to defendant on account of work done, which was not completed in accordance with the contract, does not unite the causes of action. Reedy *v.* Smith, 42 Cal. 245.

34. Paola Bd. of Education *v.* Shaw, 15 Kan. 34, where the owner sued to recover liquidated damages, and plaintiff's pleading set forth facts showing that the builder constructed in accordance with instructions of an architect and to his satisfaction, and that at the time of the architect's final estimate defendant received a final certificate certifying a proper completion of the building upon which possession was taken by the owner, and also set forth facts showing that the architect had altered the original plans and specifications as he was empowered to do by the contract.

Copy of account.— Under Cal. Code Civ. Proc. § 454, requiring a plaintiff to furnish a copy of his account when demanded, a complaint alleging that a builder did not provide material required by his contract and averring damage in consequence of imperfect construction and the use of improper materials is not demurrable on the ground of uncertainty. Long Beach City School Dist. *v.* Dodge, 135 Cal. 401, 67 Pac. 499.

35. Lyle *v.* Jackson County, 23 Ark. 63.

36. Boettler *v.* Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270.

Statement of particular imperfections.— Under Cal. Code Civ. Proc. § 454, requiring plaintiff to furnish a copy of an account when demanded in writing, a statement of the particular imperfections relied on in an action to recover on a contractor's bond on the ground of imperfect construction and the use of improper materials may be required. Long Beach City School Dist. *v.* Dodge, 135 Cal. 401, 67 Pac. 499.

37. Lucas *v.* Snyder, 2 Greene (Iowa) 490.

38. Guilford M. E. Church *v.* Clarke, 74 Me. 110.

39. Shields *v.* Perkins, 2 Bibb (Ky.) 227.

40. Stees *v.* Leonard, 20 Minn. 494, where evidence was offered and excluded, that land on which the building was constructed was not of a character to sustain the building, by reason of which it fell when partly erected, because not pleaded.

41. Petrie *v.* Grover, 39 Ind. 343, holding that a reply, admitting the execution of a note given by plaintiff in payment of a balance, but averring that its only consideration was defendant's agreement to build in a proper manner with material to be furnished by plaintiff, which was furnished, but that work was defective owing to defendant's unskilfulness, was bad, since it did not allege that the material furnished was sufficient, or

builder to build skilfully in accordance with his agreement plaintiff cannot recover for damages resulting from defects in the plan of construction.[42]

6. Evidence[43] — Admissibility. If the action be brought by the owner or employer to recover damages for a forfeiture because of delay in completion, or because of a breach of plans and specifications, evidence of the condition of the building a short time after the breach,[44] or in fact any evidence tending to show the cost and expense which the breach occasioned the owner is admissible.[45] On the other hand, the builder may show that the delay for which the forfeiture is claimed was caused by the architect or owner.[46]

7. Trial[47] — Instructions. Instructions given must duly state the law.[48]

8. Verdict or Findings. The verdict or findings must be duly supported by the evidence before the court.[49]

D. Amount and Extent of Recovery[50] — 1. By Builder — a. In General. A builder may recover for all damages occasioned him by the owners or employers' breach of the contract.[51] Thus he may recover, not merely the sum he may have paid his subcontractors,[52] but for losses caused by his having been compelled to do the work in an unusual and more expensive manner,[53] or in more inclement weather,[54] and for all elements of loss proximately affecting him.[55]

b. Contract Price. If the builder has *bona fide* attempted to perform his contract, but unintentionally omitted some trifling detail, or performed his work in a slightly defective manner, he may recover the contract price,[56] less such

that plaintiff was not aware of the defective work at the time he gave the note.

42. Fairman *v.* Ford, 70 Vt. 111, 39 Atl. 748.

43. See, generally, Evidence.

44. Shields *v.* Perkins, 2 Bibb (Ky.) 227.

The necessity of the owner's assumption of the work may be shown by a report of the superintendent of the building as to the condition thereof, coupled with a demand upon the builder to resume work at once, and the correctness of the report is not disputed by the builder. Watson *v.* De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

45. National Surety Co. *v.* T. B. Townsend Brick, etc., Co., 74 Ill. App. 312.

46. Mahoney *v.* St. Paul's Church, 47 La. Ann. 1064, 17 So. 484; Baasen *v.* Baehr, 7 Wis. 516.

47. See, generally, Trial.

48. An instruction that if defendant had substantially performed his contract according to plans and specifications plaintiff could not recover, even if there are trivial defects, is erroneous. Boteler *v.* Roy, 40 Mo. App. 234.

As to character of default warranting forfeiture.—An instruction authorizing the jury to infer that any kind of default might justify a forfeiture is not erroneous, where another portion of the charge made the right of forfeiture dependent on the builder's abandonment, and the court affirmatively charged that unless the builder had abandoned the contract plaintiff had no right to perform the work himself. Watson *v.* De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

49. Johnson *v.* Pugh, 110 Wis. 167, 85 N. W. 641, where it was held that a verdict for damages because of a defect in the building was supported by evidence that defendant, upon receiving his final payment upon the building contract, stated that the support beneath the building was insufficient and by evidence that he had not remedied the defect.

50. See, generally, Damages.

51. Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325; Heaver *v.* Lanahan, 74 Md. 493, 22 Atl. 263; Linch *v.* Paris Lumber, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208.

The value of the use of tools employed by a builder in doing his work may be recovered, where the contract is abandoned by the owner. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

52. Seaton *v.* New Orleans, 3 La. Ann. 44; Smith *v.* U. S., 11 Ct. Cl. 707.

53. Del Genovese *v.* Third Ave. R. Co., 13 N. Y. App. Div. 412, 43 N. Y. Suppl. 8.

54. Kellogg Bridge Co. *v.* U. S., 15 Ct. Cl. 206.

55. *Illinois.*— Cook County *v.* Sexton, 16 Ill. App. 93.

Kentucky.— Western *v.* Sharp, 14 B. Mon. (Ky.) 144.

Louisiana.— Seaton *v.* New Orleans, 3 La. Ann. 44.

Maryland.— Lanahan *v.* Heaver, 79 Md. 413, 29 Atl. 1036, where a contractor, prevented from completing a building because of the proportion of the land for a street, and who had recovered from the parties certain specified damages therefor, was held to be precluded from subsequently maintaining an action against the owner for a breach of the same contract.

United States.— Smith *v.* U. S., 11 Ct. Cl. 707.

56. *Arkansas.*—Manuel *v.* Campbell, 3 Ark. 324.

amount as will indemnify the owner for the expense of conforming the work to that for which he contracted.[57] Where, however, a contract is fairly entered into by an experienced builder, the fact that a portion of the work proves to be more expensive than was estimated does not entitle the builder, in the absence of fraud or mistake, to any allowance beyond the contract price.[58]

c. For Work and Material Furnished. Though a builder may not be entitled to recover on his express contract yet, if the owner has accepted or is deriving profit or advantage from the work done or material furnished, it is but just and equitable that he should pay for the same,[59] and the builder may, upon abandonment of the contract, or if work or material furnished be of inferior quality, recover their reasonable value not exceeding the contract price,[60] provided the

California.— Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840; Perry *v.* Quackenbush, 105 Cal. 299, 38 Pac. 740.

Connecticut.— Pinches *v.* Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264; Smith *v.* Scott's Ridge School Dist., 20 Conn. 312.

Illinois.— Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247 [*affirming* 88 Ill. App. 485].

Iowa.— Fauble *v.* Davis, 48 Iowa 462.

Minnesota.— Elliott *v.* Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52.

New York.— Lennon *v.* Smith, 161 N. Y. 661, 57 N. E. 1115 [*affirming* 48 N. Y. Suppl. 456, 23 N. Y. App. Div. 293]; Crouch *v.* Gutmann, 134 N. Y. 45, 31 N. E. 271, 45 N. Y. St. 470, 30 Am. St. Rep. 608; Nolan *v.* Whitney, 88 N. Y. 648; Woodward *v.* Fuller, 80 N. Y. 312; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Anderson *v.* Meislahn, 12 Daly (N. Y.) 149; Ryan *v.* Voelkl, 26 Misc. (N. Y.) 840, 56 N. Y. Suppl. 1065; Vogel *v.* Friedman, 68 N. Y. Suppl. 820; Rush *v.* Wagner, 12 N. Y. Suppl. 2, 34 N. Y. St. 798; Rancher *v.* Cronk, 3 N. Y. Suppl. 470, 21 N. Y. St. 527.

North Dakota.— Anderson *v.* Todd, 8 N. D. 158, 77 N. W. 599.

Texas.— Linch *v.* Paris Lumber, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208; Bradford *v.* Whitcomb, 11 Tex. Civ. App. 221, 32 S. W. 571.

57. *California.*— Marchant *v.* Hayes, 117 Cal. 669, 49 Pac. 840; Perry *v.* Quackenbush, 105 Cal. 299, 38 Pac. 740.

Colorado.— Schaefer *v.* Gildea, 3 Colo. 15.

Illinois.—Palmer *v.* Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247 [*affirming* 88 Ill. App. 485]; Keeler *v.* Herr, 157 Ill. 57, 41 N. E. 750; School Directors *v.* Roberson, 65 Ill. App. 298.

Kentucky.— Morford *v.* Mastin, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168; Panke *v.* Fisher, 20 Ky. L. Rep. 1167, 48 S. W. 993; Lexington Ice Mfg., etc., Co. *v.* Farman, 13 Ky. L. Rep. 270.

Maine.— Jewett *v.* Weston, 11 Me. 346 [*citing* Thornton *v.* Place, 1 M. & Rob. 218].

Massachusetts.— Cullen *v.* Sears, 112 Mass. 299; Walker *v.* Orange, 16 Gray (Mass.) 193; Smith *v.* Lowell First Cong. Meeting House, 8 Pick. (Mass.) 178; Hayward *v.* Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268.

Michigan.— Phelps *v.* Beebe, 71 Mich. 554, 39 N. W. 761.

Minnesota.— Leeds *v.* Little, 42 Minn. 414, 44 N. W. 309.

Missouri.— Buschmann *v.* Bray, 68 Mo. App. 8.

New Hampshire.— Danforth *v.* Freeman, 69 N. H. 466, 43 Atl. 621.

New York.— Crouch *v.* Gutmann, 134 N. Y. 45, 31 N. E. 271, 45 N. Y. St. 470, 30 Am. St. Rep. 608; Nolan *v.* Whitney, 88 N. Y. 648; Woodward *v.* Fuller, 80 N. Y. 312; Ryan *v.* Voelkl, 26 Misc. (N. Y.) 840, 56 N. Y. Suppl. 1065; Rush *v.* Wagner, 12 N. Y. Suppl. 2, 34 N. Y. St. 798; Parke *v.* Franco-American Trading Co., 7 N. Y. St. 498; Smith *v.* Clark, 5 N. Y. St. 165.

Ohio.— Kane *v.* Ohio Stone Co., 39 Ohio St. 1; Goldsmith *v.* Hand, 26 Ohio St. 101; Johnson *v.* Slaymaker, 18 Ohio Cir. Ct. 104, 9 Ohio Cir. Dec. 500; Kane *v.* Wilson, etc., Stone Co., 4 Ohio Dec. (Reprint) 509, 2 Clev. L. Rep. 290.

Pennsylvania.— Filbert *v.* Philadelphia, 181 Pa. St. 530, 37 Atl. 545; White *v.* Braddock School Dist., 159 Pa. St. 201, 28 Atl. 136; Liggett *v.* Smith, 3 Watts (Pa.) 331, 27 Am. Rep. 358.

South Dakota.— Aldrich *v.* Wilmarth, 3 S. D. 523, 54 N. W. 811.

Texas.— Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Bradford *v.* Whitcomb, 11 Tex. Civ. App. 221, 32 S. W. 571.

Vermont.— Austin *v.* Austin, 47 Vt. 311.

Wisconsin.— Arndt *v.* Keller, 76 Wis. 274, 71 N. W. 651.

United States.— Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 14 L. ed. 157; Van Buren *v.* Digges, 11 How. (U. S.) 461, 13 L. ed. 771.

58. Cannon *v.* Wildman, 28 Conn. 472.

59. Katz *v.* Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; Blakeslee *v.* Holt, 42 Conn. 226; Wabaunsee County School Dist. *v.* Boyer, 46 Kan. 54, 26 Pac. 484; Austin *v.* Keating, 21 Mo. App. 30.

Materials not in the building and not tendered to the owner nor in any way used by him cannot be recovered for. Parker *v.* McGilway, 7 Rob. (La.) 192.

Where no fixed sum is agreed upon as compensation for constructing a building, the allowance of a reasonable price, commensurate with the labor done, is the rule. Manuel *v.* Campbell, 3 Ark. 324.

60. Estep *v.* Fenton, 66 Ill. 467; Becker *v.* Hecker, 9 Ind. 497; McClure *v.* King, 15 La.

amount expended by the owner in the completion of the structure and the damages to which he is legally entitled do not equal the amount due the builder at the time of default;[61] the amount of which damages should, of course, be deducted.[62]

d. Interest. Interest on capital invested by the builder for material,[63] and on money due to him[64] should be allowed in estimating his damages, notwithstanding the amount he seeks to recover may be reduced because he has deviated from the terms of his contract;[65] but interest should not be allowed on his profits until they are determined by the verdict.[66]

e. Probable Gain or Profits. Where the breach of the contract is caused by some act or fault of the owner or employer, the builder may recover not only for the value of the work or materials furnished,[67] but the profits or gain which he

Ann. 220; Ibers *v.* O'Donnell, 25 Mo. App. 120; Austin *v.* Keating, 21 Mo. App. 30.

In computing this amount, the sum which would have been allowed by the terms of the contract for the same amount of work if the contract had been finished, if this amount may be justly proportioned, is usually the amount recoverable (McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470); and a builder, in order to recover more than such amount, must show that the proportionment has been unjust (Reynolds *v.* Welsh, 8 N. Y. St. 404).

The full compensation agreed upon cannot be recovered, where the builder has abandoned his contract, notwithstanding that the owner is able to complete the building for less than the difference between what he agreed to pay and what he had paid (Blythe *v.* Poultney, 31 Cal. 233), or where he has constructed a building not called for by the contract, though it may be as useful and valuable as the one contracted for (Lewis *v.* Yagel, 77 Hun (N. Y.) 337, 28 N. Y. Suppl. 833, 60 N. Y. St. 23).

Amount recoverable for extra work.— In some instances the contract provides that payment for extra work shall be governed by the contract price, and in such case the value of the extra work would be determined accordingly (Rounds *v.* Aiken Mfg. Co., 58 S. C. 209, 36 S. E. 714), and where extra work is furnished at the expense of the architect, who fails, however, to fix the difference in the cost occasioned thereby, the contract price may be taken as the basis of the recovery therefor (Rude *v.* Mitchell, 97 Mo. 365, 11 S. W. 225); where, however, the price to be paid for extra work and material is not fixed in the contract (Fulton County *v.* Gibson, (Ind. 1902) 63 N. E. 982), or material departures are, at the request of the owner, made from the original contract (Rhodes *v.* Clute, 17 Utah 137, 53 Pac. 990), the builder would be entitled to the reasonable value for the extra material and labor furnished; the law implying a promise by the employer to pay therefor (Flather *v.* Slugging Mach. Economy Co., (N. H. 1902) 52 Atl. 454).

A builder wrongfully prohibited by the owner from using a quantity of material authorized by the contract and required to use a more expensive kind may recover any difference in price, though there has been no formal contract for, nor delivery of, the prohibited material. Brin *v.* McGregor, (Tex. Civ. App. 1901) 64 S. W. 78.

61. Winamac *v.* Hess, 151 Ind. 229, 50 N. E. 81; Allen *v.* Wills, 4 La. Ann. 97.

Where the owner has already recovered damages for the non-performance of the contract, the amount recoverable by the builder would be the actual value of the work and material. Maloney *v.* Rust, 42 Conn. 236.

62. *Massachusetts.*— Bassett *v.* Sanborn, 9 Cush. (Mass.) 58.

Missouri.— Austin *v.* Keating, 21 Mo. App. 30.

New York.— Charlton *v.* Rose, 24 N. Y. App. Div. 485, 48 N. Y. Suppl. 1073.

Texas.— Mills *v.* Hall, (Tex. Civ. App. 1895) 30 S. W. 558.

United States.— Florida R. Co. *v.* Smith, 21 Wall. (U. S.) 255, 22 L. ed. 513; McDonough *v.* Evans Marble Co., 112 Fed. 634, 50 C. C. A. 403.

Damages recoverable by owner see *infra*, VII, D, 2.

63. Kellogg Bridge Co. *v.* U. S., 15 Ct. Cl. 206.

64. Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; Kellogg Bridge Co. *v.* U. S., 15 Ct. Cl. 206.

65. Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495.

66. Swanson *v.* Andrus, 83 Minn. 505, 86 N. W. 465.

67. McDaniel *v.* Webster, 2 Houst. (Del.) 305; Black *v.* Woodrow, 39 Md. 194; Ford *v.* Burchard, 130 Mass. 424; Moran *v.* McSwegan, 33 N. Y. Super. Ct. 350.

That material by reason of its design could not be used elsewhere, and therefore must be sold by the contractor at a loss, should be considered in the estimation of damages. Wells *v.* West Bay City Bd. of Education, 78 Mich. 260, 44 N. W. 267.

Waiver of possible profit.— A builder who, after abandoning the work provided for by the contract, and after the substitution of other work because of a change in the plans, accepts an amount paid, because of the loss of profit on the abandoned work, cannot recover for the profits which he would have made from the substituted work if he had performed it. Gilbert Blasting, etc., Co. *v.* Rex, 7 Can. Exch. 221.

would have made had he been permitted to complete his contract should be included as an element of the damages recoverable by him;[68] but if the employer may suspend the work, such profits cannot be recovered.[69]

2. Against Builder — a. In General. An owner who has sustained injury by reason of a breach of the contract by the builder, may recover either in an independent action, or as a set-off or counter-claim in an action by the builder, all damages therefor, which are the proximate result of the breach.[70] The amount of such damages is usually the difference between the value of the work furnished or building constructed and that contracted for,[71] or the extra cost occasioned the owner in making the work conform to the contract stipulations,[72] but the owner cannot, in such case, enlarge upon the original contract.[73]

68. *Alabama.*— Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60.

Indiana.— Fairfield *v.* Jeffreys, 68 Ind. 578.

Missouri.— Brandt *v.* Schuchmann, 60 Mo. App. 70.

Oregon.— Wisner *v.* Barber, 10 Oreg. 342.

United States.— Cook *v.* Hamilton County, 6 McLean (U. S.) 612, 6 Fed. Cas. No. 3,158; Skelsey *v.* U. S., 23 Ct. Cl. 61; Schnieder *v.* U. S., 19 Ct. Cl. 547.

Compare Clark *v.* New York, 4 N. Y. 338, 53 Am. Dec. 379.

The amount of such profits is usually determined by determining the amount which the builder would have earned and been entitled to recover on performance of the contract, and the amount which it would have actually cost him to carry out the same. Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; Fairfield *v.* Jeffreys, 68 Ind. 578; Graves *v.* Hunt, 8 N. Y. St. 308.

69. Warren-Scharf Asphalt Paving Co. *v.* Laclede Constr. Co., 111 Fed. 695, 49 C. C. A. 552.

A builder cannot recover profits for extra work, the performance of which the engineer might have required of him, but which he had the right to give, and did give, to other persons. Gilbert Blasting, etc., Co. *v.* Rex, 7 Can. Exch. 221.

70. *Colorado.*— Schaefer *v.* Gildea, 3 Colo. 15.

Connecticut.— Maloney *v.* Rust, 42 Conn. 236.

Illinois.— Estep *v.* Fenton, 66 Ill. 467.

Kentucky.— Escott *v.* White, 10 Bush (Ky.) 169.

Pennsylvania.— Blainey *v.* Presbyterian Bd., 200 Pa. St. 406, 50 Atl. 160.

Effect of payment before knowledge of breach.— The doctrine that an owner who has paid the contract price before discovering the defects cannot recover for such defects, because he has negligently parted with his money without an examination of the structure, applies only where the defects are patent and apparent; where the defects are concealed a recovery may be had regardless of the fact of payment, the foundation of the action being fraud and deceit in the builder. Barker *v.* Nichols, 3 Colo. App. 25, 31 Pac. 1024.

Remote or speculative damages are not recoverable. Rogers *v.* Bemus, 69 Pa. St. 432. Thus, damages cannot be allowed an owner for the removing of the shelving from an old store before the new one was ready, which necessitated the piling of the goods upon the floor, and expense of advertising one's removal from one building to another (Walrath *v.* Whittekind, 26 Kan. 482); or the rent one may possibly be compelled to pay before the completion of his house, or for a possible loss he may sustain by being compelled to make a less advantageous contract for its completion (Jaudes *v.* Fisher, 5 Ky. L. Rep. 768).

To reduce the amount of the builder's recovery there should not be taken into consideration the relief from risk and anxiety occasioned the builder because he was bound to perform his contract (Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586), or the fact that the contractor had other jobs on hand at the time of the breach occasioned by the owner (Graves *v.* Hunt, 8 N. Y. St. 308).

Right to withhold payment until liens are paid.—Where the contract provides for the withholding of a certain percentage price until completion of the building, and, in the event of notice of mechanics' lien, claims that the owner may withhold payment until such liens or claims are paid, the owner may withhold the amount until the claims are paid, although they are not procured in compliance with c. 179, acts of the twentieth general assembly. Independent School Dist. *v.* Mardis, 106 Iowa 295, 76 N. W. 794. See also Mechanics' Liens.

71. White *v.* McLaren, 151 Mass. 553, 24 N. E. 911; Moulton *v.* McOwen, 103 Mass. 587; Morton *v.* Harrison, 52 N. Y. Super. Ct. 305; Chamberlain *v.* Hibbard, 26 Oreg. 428, 38 Pac. 437.

72. *Iowa.*— Smith *v.* Bristol, 33 Iowa 24.

Kentucky.— Kiel *v.* Kline, 15 Ky. L. Rep. 158.

Minnesota.— Wheaton *v.* Lund, 61 Minn. 94, 63 N. W. 251.

New York.— Riley *v.* Kenney, 33 Misc. (N. Y.) 384, 67 N. Y. Suppl. 584 (holding that the owner, in the absence of a showing of negligence, was entitled to deduct the actual amount paid by him for a completion of the contract after a breach thereof, notwithstanding expert testimony that it might have been finished for a smaller amount); Beck *v.* Catholic University, 32 Misc. (N. Y.) 567, 67 N. Y. Suppl. 305.

Oregon.— Savage *v.* Glenn, 10 Oreg. 440.

73. Isaacs *v.* Reeve, (N. J. 1899) 44 Atl. 1, where the owner, upon the abandonment

b. For Delay in Completion — (i) *RENTS AND PROFITS.* In some instances the delay of the builder is, of course, excusable;[74] but if inexcusable the amount of damages therefor may be governed by stipulations in the contract itself,[75] or, in the absence of such stipulations, the owner is entitled to the value of the use of the building for the time he was deprived thereof by the builder's delay,[76] the amount of which is usually estimated as the fair rental value during such time;[77] unless it clearly appears that the owner could not, during the delay, have rented the same.[78] While in the estimation of the rental value, the owner cannot be allowed the amount which might have been offered by other parties,[79] or the amount received several months after completion,[80] the rental value of the building as adapted to its particular purpose, but not its value for general business purposes may be recovered.[81]

of work by a contractor, employed other contractors to finish the same, and it was held that no work, either in connection with the building contemplated by the original contract, or on other buildings contiguous thereto, not provided for in the original contract, could be allowed against the original contractor in a settlement with the owner.

Damages for defective repairing.— The sum paid by a landowner to his tenants for injuries caused by an insufficient roof which had been defectively repaired by a contractor, if not excessive, would be the measure of damages in an action against the contractor. Maloney *v.* Brady, 18 N. Y. Suppl. 757, 45 N. Y. St. 864.

74. *California.*— White *v.* Fresno Nat. Bank, 98 Cal. 166, 32 Pac. 979.

Illinois.— Sperry *v.* Fanning, 80 Ill. 371; Marsh *v.* Kauff, 74 Ill. 189.

Louisiana.— Haughery *v.* Thiberge, 24 La. Ann. 442.

Missouri.— Eldridge *v.* Fuhr, 59 Mo. App. 44.

New York.— Dannat *v.* Fuller, 120 N. Y. 554, 24 N. E. 815, 31 N. Y. St. 825; Lauer *v.* Brown, 30 Barb. (N. Y.) 416; Smith *v.* Gugerty, 4 Barb. (N. Y.) 614; Deeves *v.* New York, 60 N. Y. Super. Ct. 339, 17 N. Y. Suppl. 460, 44 N. Y. St. 218; Weeks *v.* Little, 47 N. Y. Super. Ct. 1; Stewart *v.* Ketcltas, 9 Bosw. (N. Y.) 261; Farnham *v.* Ross, 2 Hall (N. Y.) 167; Anderson *v.* Meislahn, 12 Daly (N. Y.) 149.

United States.— Standard Gaslight Co. *v.* Wood, 61 Fed. 74, 26 U. S. App. 15, 9 C. C. A. 362.

Excuses for delay in performance see *supra*, V, B, 7.

75. Nature of stipulations.— Building contracts often have a clause or section therein providing that if the structure be not completed within a certain time the builder shall pay a certain amount per day or per week thereafter until the building be completed; if the sum stated in such stipulation is not disproportionate to the inconvenience which would be occasioned by the delay, which must have been within the contemplation of the parties at the time the contract was executed, and is not otherwise unreasonable or unjust, such sum will be regarded as liquidated damages and recoverable as such. Heard *v.* Dooly County, 101 Ga. 619, 28 S. E. 986; Collier *v.* Betterton, 87 Tex. 440, 29 S. W. 467; McNamara *v.* Skain, 23 Ont. 103 [*following* Foke *v.* Andrews, 8 Q. B. D. 428].

Legality of provision for stipulated damages see *supra*, II, B, 4, c, (x).

As to whether a provision providing for damages is to be regarded as one for a penalty or liquidated damages see *supra*, II, C, 2.

Where a contract provides liquidated damages for delay in completion the employer cannot show actual damage for such delay (Smith *v.* Vail, 53 N. Y. App. Div. 628, 65 N. Y. Suppl. 834 [*affirmed* in 166 N. Y. 611, 59 N. E. 1125]), or retain a percentage as liquidated damages, if he fails on his part to duly keep and perform the covenants as set forth in the contract (Florida Northern R. Co. *v.* Southern Supply Co., 112 Ga. 1, 37 S. E. 130).

Construction and operation of contract see *supra*, II, C.

76. Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637; White *v.* McLaren, 151 Mass. 553, 24 N. E. 911; Dengler *v.* Auer, 55 Mo. App. 548; McConey *v.* Wallace, 22 Mo. App. 377; Ruff *v.* Rinaldo, 55 N. Y. 664.

77. *Colorado.*— McIntire *v.* Barnes, 4 Colo. 285 [*citing* Wagner *v.* Corkhill, 40 Barb. (N. Y.) 175].

Georgia.— Cannon *v.* Hunt, 113 Ga. 501, 38 S. E. 983.

Illinois.— Korf *v.* Lull, 70 Ill. 420; Galbraith *v.* Chicago Architectural Iron Works, 50 Ill. App. 247; Hawley *v.* Florsheim, 44 Ill. App. 320.

Maryland.— Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635.

New York.— Wagner *v.* Corkhill, 40 Barb. (N. Y.) 175; Ansonia Brass, etc., Co. *v.* Gerlach, 8 Misc. (N. Y.) 256, 28 N. Y. Suppl. 546, 59 N. Y. St. 197; Scribner *v.* Jacobs, 9 N. Y. Suppl. 856, 31 N. Y. St. 794.

Oregon.— Savage *v.* Glenn, 10 Oreg. 440.

Pennsylvania.— Rogers *v.* Bemus, 69 Pa. St. 432.

78. Wagner *v.* Corkhill, 40 Barb. (N. Y.) 175. See also Sperry *v.* Fanning, 80 Ill. 371.

79. Hawley *v.* Florsheim, 44 Ill. App. 320.

The sum cannot be entirely out of proportion to the contract price of the building and its rental value. McGeary's Estate, 31 Pittsb. Leg. J. (Pa.) 317.

80. Scribner *v.* Jacobs, 9 N. Y. Suppl. 856, 31 N. Y. St. 794.

81. Cochran *v.* Peoples' R. Co., 113 Mo. 359, 21 S. W. 6.

(II) *WAIVER OF DAMAGES FOR DELAY.* The owner may be held to have waived his claim for damages,[82] or for a forfeiture,[83] because of delay.

BUILDING.[1] A fabric or edifice, such as a house, church or the like;[2] a fabric or edifice constructed for use[3] or convenience, as a house, a church, a shop, etc.;[4] a structure; an edifice;[5] an edifice, erected by art, and fixed upon, or over the soil, composed of brick, stone, marble, wood, or other proper substance connected together, and designed for use in the position in which it is so fixed;[6] a fabric built or constructed;[7] an edifice for any use; that which is built, as a

82. St. Louis Nat. Stock Yards *v.* O'Reilly, 85 Ill. 546; Cook *v.* Odd Fellows' Fraternal Union, 49 Hun (N. Y.) 23, 1 N. Y. Suppl. 498, 17 N. Y. St. 490, holding that where large payments are made on a contract after the time therefor had expired, and changes were made in the plans, and delays were caused partly by the failure of other contractors, and the owner, a claim for damages for delay must be considered waived. Crawford *v.* Becker, 13 Hun (N. Y.) 375; Shute *v.* Hamilton, 3 Daly (N. Y.) 462; Brodek *v.* Farnum, 11 Wash. 565, 40 Pac. 189. See also Collier *v.* Betterton, 87 Tex. 440, 29 S. W. 467.

Merely consenting to an extension of time within which a building was to be completed would not constitute a waiver of a claim for damages for such delay. McIntire *v.* Barnes, 4 Colo. 285 [*citing* Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635]; Oberlies *v.* Bullinger, 75 Hun (N. Y.) 248, 27 N. Y. Suppl. 19, 57 N. Y. St. 752; Sinclair *v.* Tallmadge, 35 Barb. (N. Y.) 602.

83. Eyster *v.* Parrott, 83 Ill. 517; Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 Ky. L. Rep. 146, 11 S. W. 18, 957; Gallagher *v.* Nichols, 60 N. Y. 438; Sinclair *v.* Tallmadge, 35 Barb. (N. Y.) 602 (holding that under a contract providing a forfeiture for non-compliance, if the owner, saying nothing about a forfeiture, allows the builder to complete the same, there is a waiver of the penalty, and although damages might be allowed for the delay in completion, the penalty could not, under the circumstances, be recovered); Dumke *v.* Puhlman, 62 Wis. 18, 21 N. W. 820.

1. "The word 'building' has a double significance, and may be employed to express the idea of original construction, or it may serve the purpose of expressing the idea of reconstruction or the building of an annex to an edifice already constructed, which would form so considerable a part of the building originally added to as to constitute a new building." Willis *v.* Boyd, 103 Ga. 130, 132, 29 S. E. 707.

The word "building" necessarily embraces the foundation on which it rests; and the cellar, if there be one under the edifice, is also included in the term. Davis, J., in Benedict *v.* Ocean Ins. Co., 31 N. Y. 389, 394. See also Cassiano *v.* Ursuline Academy, 64 Tex. 673, 675; Wade *v.* Odle, (Tex. Civ. App. 1899) 54 S. W. 786, 788 (where it is said: "The land upon which the walls of a stone or brick building rest, or, indeed, of any other kind of building which in law is considered as annexed to the soil, and which is not clearly severed therefrom by the terms of the deed itself, must be considered, in our opinion, as part of the building itself").

"'House' and 'building' are synonymous terms." State *v.* Spiegel, 111 Iowa 701, 706, 83 N. W. 722.

Distinguished from "tenement."—"A 'building' is a 'tenement,' but a 'tenement' may be something different from a 'building.'" Com. *v.* Bossidy, 112 Mass. 277, 278, where it was held, however, that the words were used in the indictment as synonyms. See also Easthampton *v.* Hill, 162 Mass. 302, 304, 38 N. E. 502; Com. *v.* McCaughey, 9 Gray (Mass.) 296, 297 (where it is said: "A 'building' is a 'tenement,' though a 'tenement' may be a part of a 'building,' or something besides a 'building' or a part thereof").

2. Cowdrick *v.* Morris, 9 Pa. Co. Ct. 312, 314.

3. McGary *v.* People, 45 N. Y. 153, 161.

4. *Connecticut.*— State *v.* Barr, 39 Conn. 40, 44 [*quoting* Webster Dict.].

Iowa.— State *v.* Gibson, 97 Iowa 416, 419, 66 N. W. 742.

New Jersey.— Coddington *v.* Beebe, 31 N. J. L. 477, 484 [*quoting* Webster Dict.].

Pennsylvania.—Presbyterian Church *v.* Allison, 10 Pa. St. 413, 416 [*quoting* Webster Dict.].

Wisconsin.— Clark *v.* State, 69 Wis. 203, 206, 33 N. W. 436, 2 Am. St. Rep. 732 [*quoting* Imperial Dict.].

Canada.— Reg. *v.* Labadie, 32 U. C. Q. B. 429, 431 [*quoting* Imperial Dict.; Webster Dict.].

5. Century Dict. [*quoted* in Corbett *v.* Spring Garden Ins. Co., 40 N. Y. App. Div. 628, 630, 58 N. Y. Suppl. 148; Favro *v.* State, 39 Tex. Crim. 452, 453, 46 S. W. 932, 73 Am. St. Rep. 950]; Worcester Dict. [*quoted* in Clark *v.* State, 69 Wis. 203, 206, 33 N. W. 436, 2 Am. St. Rep. 732].

6. Bouvier L. Dict. [*quoted* in Rouse *v.* Catskill, etc., Steamboat Co., 59 Hun (N. Y.) 80, 82, 13 N. Y. Suppl. 126, 35 N. Y. St. 491; Anderson *v.* State, 17 Tex. App. 305, 310].

7. Century Dict. [*quoted* in Corbett *v.* Spring Garden Ins. Co., 40 N. Y. App. Div. 628, 630, 58 N. Y. Suppl. 148; Favro *v.* State, 39 Tex. Crim. 452, 453, 46 S. W. 932, 73 Am. St. Rep. 950].

dwelling-house, barn, etc.;[8] a fabric or edifice constructed; a thing built;[9] a structure or edifice enclosing a space within its walls and usually covered with a roof, such as a house, a church, a shop, a barn or a shed;[10] a structure in the nature of a house built where it is to stand.[11] As commonly understood, it is a house for residence, business, or public use, or for shelter of animals or storage of goods[12] and imports a structure of considerable size and intended to be permanent or at least to endure for a considerable time.[13] (Buildings: Accidents From Defective, see NEGLIGENCE. Breaking and Entering, see BURGLARY. Burning, see ARSON. Encroachment by, on Adjoining Lands, see ADJOINING LANDOWNERS; ADVERSE POSSESSION. Lien For Work on, see MECHANICS' LIENS. Party-Walls of, see PARTY-WALLS. Public — Generally, see COUNTIES; MUNICIPAL CORPORATIONS; STATES; UNITED STATES; Mechanics' Liens on, see MECHANICS' LIENS. Regulations, see MUNICIPAL CORPORATIONS. Restrictions and Restrictive Agreements Concerning, see COVENANTS; DEEDS. Right of, to Lateral Support, see ADJOINING LANDOWNERS. Separate Ownership of Different Floors of, see ADJACENT LANDOWNERS.)

8. Standard Dict. [*quoted* in Williams *v.* State, 105 Ga. 814, 815, 32 S. E. 129, 70 Am. St. Rep. 82; Corbett *v.* Spring Garden Ins. Co., 40 N. Y. App. Div. 628, 630, 58 N. Y. Suppl. 148].

9. Webster Dict. [*quoted* in State *v.* Atlantic City, (N. J. 1902) 53 Atl. 399, 401; Anderson *v.* State, 17 Tex. App. 305, 310; Clark *v.* State, 69 Wis. 203, 206, 33 N. W. 436, 2 Am. St. Rep. 732].

10. Nowell *v.* Boston Academy, 130 Mass. 209, 210 [*quoted* in Blakemore *v.* Stanley, (Mass. 1893) 33 N. E. 689, 690].

11. Murray Dict. [*quoted* in Rouse *v.* Catskill, etc., Steamboat Co., 59 Hun (N. Y.) 80, 82, 13 N. Y. Suppl. 126, 35 N. Y. St. 491].

12. *Iowa.*— State *v.* Gibson, 97 Iowa 416, 419, 66 N. W. 742.

Massachusetts.— Truesdell *v.* Gay, 13 Gray (Mass.) 311, 312.

New York.— Corbett *v.* Spring Garden Ins. Co., 40 N. Y. App. Div. 628, 630, 58 N. Y. Suppl. 148 [*quoting* Century Dict.]; Rouse *v.* Catskill, etc., Steamboat Co., 59 Hun (N. Y.) 80, 82, 13 N. Y. Suppl. 126, 35 N. Y. St. 491 [*quoting* Century Dict.]. *Compare* Wright *v.* Evans, 2 Abb. Pr. N. S. (N. Y.) 308, holding that a fence may be a building within the meaning of a covenant not to erect a building within a certain distance from a boundary line.

Texas.— Favro *v.* State, 39 Tex. Crim. 452, 453, 46 S. W. 932, 73 Am. St. Rep. 950 [*quoting* Century Dict.].

Wisconsin.— La Crosse, etc., R. Co. *v.* Vanderpool, 11 Wis. 119, 121, 78 Am. Dec. 691.

United States.—Central Trust Co. *v.* Cameron Iron, etc., Co., 47 Fed. 136.

13. Byles, J., in Stevens *v.* Gourley, 7 C. B. N. S. 99, 112, 1 F. & F. 498, 6 Jur. N. S. 147, 29 L. J. C. P. 1, 1 L. T. Rep. N. S. 33, 8 Wkly. Rep. 85, 97 E. C. L. 99.

BUILDING AND LOAN SOCIETIES

By Charles V. Bardeen
Justice Supreme Court of Wisconsin

CROSS-REFERENCES

For Matters Relating to:

Association's Right to Mechanic's Lien, see MECHANICS' LIENS.

Corporations:

Generally, see CORPORATIONS.

Organized to Build Particular Buildings, see CORPORATIONS.

Taxation of Association's Capital Stock, see TAXATION.

Voluntary Associations Generally, see ASSOCIATIONS.

I. DEFINITION AND NATURE.

The building association, as now existing,[1] is a private corporation, designed for the accumulation by the members of their money by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest and a premium as a preference in securing loans over other members, and continuing their fixed periodical instalments in addition, all of which payments, together with the non-borrower's payments, including fines for failure to pay such fixed instalments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues, go into the common fund until such time as that the instalment payments and profits aggregate the face value of all the shares in the association, when the assets, after payment of expenses and losses, are prorated among all members, which in legal effect cancels the borrower's debt, and gives the non-borrower the amount of his stock.[2]

1. History.— The earliest authentic information regarding building societies fixes their origin in Great Britain about the end of the eighteenth or beginning of the nineteenth century, where they existed as joint-stock companies until about the year 1836, since which time they have been regulated by acts of parliament. About the year 1831 they appeared in this country, and have continued to multiply until they number many thousands. At first they existed as mere private and unincorporated associations. But in nearly, if not all, the states of the Union, they are now authorized and controlled by statutes. Cook v. Equitable Bldg., etc., Assoc., 104 Ga. 814, 30 S. E. 911; Bibb County Loan Assoc. *v.* Richards, 21 Ga. 592; Security Sav., etc., Assoc. v. Elbert, 153 Ind. 198, 54 N. E. 753; Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676; Pratt *v.* Hutchinson, 15 East 511. See also Davis Handbook Bldg. Soc., 1–5; Endlich Bldg. Assoc. § 6; Rosenthal Manual Bldg. Assoc. §§ 13, 14. The scheme upon which they seem to have been operated, even in the early days of their existence, contemplated the issuing of stock to their members, to be paid for in periodical instalments of small amounts. When a sufficient fund had thus been accumulated, it would be loaned to such members of the association as could give security, who would bid therefor the highest premium. The loan would be treated as an advancement upon their stock, and the premium as payment for the privilege of receiving such an advancement; the object of the loan being to enable the member to acquire or improve a home. The profits thus arising would not be divided out among members of the association from time to time, as dividends are usually declared on stock in other corporations, but they would be held until the stock matured (Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 821, 30 S. E. 911); but it has been said that "building and loan associations, as they now exist, bear little relation or resemblance to the original associations." Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 101, 35 S. E. 73.

2. Thompson Bldg. Assoc. § 2 [*quoted* in Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 821, 30 S. E. 911; Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 335, 63 Pac. 489, 84 Am. St. Rep. 793]. See also Albright *v.* Lafayette Bldg., etc., Assoc., 102 Pa. St. 411.

Another definition is given in Rhodes *v.* Missouri Sav., etc., Co., 173 Ill. 621, 629, 50 N. E. 998, 42 L. R. A. 93.

Mutuality is the essential principle of a building association. Schell *v.* Equitable Loan, etc., Assoc., 150 Mo. 103, 51 S. W. 406; Bertche *v.* Equitable Loan, etc., Assoc., 147 Mo. 343, 48 S. W. 954, 71 Am. St. Rep. 571; Eversmann *v.* Schmitt, 53 Ohio St. 174, 41 N. E. 139, 53 Am. St. Rep. 632, 29 L. R. A. 184; Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945; Latimer *v.* Equitable Loan, etc., Co., 81 Fed. 776.

II. GENERAL CLASSES.

A. Terminating Associations. A terminating association is one which is to terminate at a fixed date or when a result specified in its rules has been attained,[3] and is organized on the presumption that all stock will be subscribed at the outset. This, however, is seldom done, and in order to put all members on a basis of equality, when shares are subsequently taken, a sum is charged equal to the amount already paid in by the original subscribers. If profits have been declared, the taker must pay such additional amount on each share as will correspond to the earnings of the original shares at that time. Under this plan all shares are at all times of equal value. When the amount paid in, with accumulated profits, equals the par value of the stock, it is said to have matured and the association terminates. Each stock-holder receives the full value of his shares either in money or, if a borrower, by credit on and cancellation of his mortgage.[4]

B. Permanent Associations. The earliest departure from the original plan consisted in an arrangement for issuing stock in series. The company would be incorporated with a specified capital and the stock would be divided into series, to be issued monthly, quarterly, or annually according as the originators thought desirable. If the scheme proved successful, by the time the last series was issued, the first would begin to mature. Power to issue new stock was usually given such associations so that, in practical effect, the element of perpetuity was insured. The scheme reached further development when by statute in the different states perpetual charters were granted.[5]

III. ORGANIZATION AND STATUS.

A. In General — 1. How Created. In the absence of a statute expressly authorizing the creation of such associations, building and loan societies may be organized as voluntary associations[6] or formed into corporations under the general law,[7] but where there is a general provision for the incorporation of such societies they must be organized thereunder.[8] A literal compliance with the statutory provisions seems to be unnecessary,[9] but the articles of association must

3. Wurtzburg Bldg. Soc. 2.

The earliest associations were all of this class, among which the Bowkett and Starr-Bowkett societies are varieties. The principle upon which these societies is based is set out in Davis Handbook Bldg. Soc. 28. The founder, Dr. Bowkett, states it thus: "The great principle which lies at the bottom of it is the accumulation at compound interest of money lent without interest." See also Thompson Bldg. Assoc. (2d ed.) § 7.

4. Rosenthal Manual Bldg. Assoc. § 23. See also Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 30 S. E. 911.

5. See Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 30 S. E. 911.

In England this class of societies was defined to be "a society which has not by its rules any such fixed date or specified result at which it shall terminate." 37 & 38 Vict. c. 42, § 5. See also Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676.

This scheme differs from the terminating plan in that new subscribers may enter at any time on an equality with the original subscribers, the stock of each dating from time of subscription. No back subscription is required. It is supposed to offer many advantages to both borrowing and investing members not possessed by members under the terminating plan. Endlich Bldg. Assoc. (2d ed.) § 23.

6. Baxter *v.* McIntire, 13 Gray (Mass.) 168, holding that a voluntary loan fund association, established before the passage of Mass. Stat. (1854), c. 454, authorizing the incorporation of such association, is valid.

7. Goodman *v.* Durant Bldg., etc., Assoc., 71 Miss. 310, 14 So. 146; Manship *v.* New South Bldg., etc., Assoc., 110 Fed. 845.

8. Rhoads *v.* Hoernerstown Bldg., etc., Assoc., 82 Pa. St. 180. See also Booz's Appeal, 109 Pa. St. 592, 1 Atl. 36.

Act not repealed.— The Virginia act of May 29, 1852, providing for the incorporation of building and loan societies was not impliedly repealed by Va. Code (1860), c. 65, § 4 *et seq.*, as amended by Va. Acts (1870–71), c. 277, empowering the circuit courts, in their discretion, on proper certificates, to grant charters to joint-stock companies for the conduct of any enterprise or business which may be lawfully conducted by an individual, etc. Davies *v.* Creighton, 33 Gratt. (Va.) 696.

9. **Filing articles of association.**— Where the statute required the filing of a copy of

adhere substantially to the statutes[10] and cover generally[11] the objects and purposes of the association,[12] for they fix the rights of stock-holders and of the corporation which neither party is at liberty to violate.[13]

2. By-Laws[14] — a. In General. A building and loan society has no power to make by-laws which are inconsistent with the law of the land, its charter, or the statute under which it was created,[15] but a member is charged with notice of the

the articles of association, signed by at least seven members, and certified by the secretary, to be recorded in the office of the county clerk, a certificate of the secretary of an association stating that the copy of the constitution furnished by him was a true copy, and that the "persons whose names are thereto signed are members" of the association, was a sufficient compliance with the statute, although the secretary omitted to certify that the seven members whose names appeared to the articles, did in fact sign the same (Lord *v.* Essex Bldg. Assoc. No. 4, 37 Md. 320), and where an association filed a certified copy thereof, instead of a duplicate, as required by statute, in the office of the secretary of state, and then assumed the exercise of corporate functions, it was held that the association was a corporation *de facto* (Williamson *v.* Kokomo Bldg., etc., Assoc., 89 Ind. 389). The articles filed need not be signed by the trustees, for they are not officers, within the meaning of the statute. Second Manhattan Bldg. Assoc. *v.* Hayes, 4 Abb. Dec. (N. Y.) 183, 2 Keyes (N. Y.) 192. Whether they need contain the names of the members, *quære*. West Winsted Sav. Bank, etc., Assoc. *v.* Rice, 27 Conn. 293; West Winsted Sav., etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66; Peoples Sav. Bank *v.* Collins, 27 Conn. 142.

Notice of application.— The ordinary privileges granted to building societies by the Pennsylvania act of April 22, 1850, are not "discounting and banking privileges," within public notice where a charter is sought granting such privileges. Mutual Sav. Fund Assoc. *v.* Seemiller, 3 Phila. (Pa.) 115, 15 Leg. Int. (Pa.) 132.

Paying incorporation tax.— A building society must pay an incorporation tax required by the state constitution. State *v.* McGrath, 95 Mo. 193, 8 S. W. 425.

A petition for incorporation was held sufficient where taken together with the order granting a charter it showed the intent. Redwine *v.* Gate City Loan, etc., Assoc., 54 Ga. 474.

Curing defects.— Defects in incorporation proceedings may be cured by statute (Workingmen's Bldg., etc., Assoc. *v.* Coleman, 89 Pa. St. 428, holding that the fact that an application for the charter of a building society was signed by nine persons instead of ten, as required by the act of 1859, was cured by the Pennsylvania act of May 11, 1874, which is declared to be applicable to such corporations as were transacting business in pursuance and by virtue of charters defective in validity) or by proceedings for that purpose had in pursuance of statute (Spinning *v.* Home Bldg., etc., Assoc., 26 Ohio St. 483, holding that when a certificate was acknowledged before a notary public instead of a justice of the peace the effect of the correction was to make the society a corporation *de jure* from the date of its organization, not only as against persons dealing directly with it, but as against all others).

10. Sumrall *v.* Commercial Bldg. Trust, 20 Ky. L. Rep. 1801, 50 S. W. 69, 44 L. R. A. 659 (holding that a provision making stock preferential is void); Harmony Bldg., etc., Assoc., 6 Phila. (Pa.) 63, 22 Leg. Int. (Pa.) 357.

Including provisions not authorized by statute does not render the charter void but such unauthorized provisions are void or voidable. Smith *v.* Southern Bldg., etc., Assoc., 111 Ga. 811, 35 S. E. 707; Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 30 S. E. 911; Albright *v.* Lafayette Bldg., etc., Assoc., 102 Pa. St. 411; Becket *v.* Uniontown Bldg., etc., Assoc., 88 Pa. St. 211; Matter of Miller, 2 Pearson (Pa.) 348.

Using "National" in the corporate name of such a society is not a violation of U. S. Rev. Stat. (1872), § 5243, prohibiting its use by banking corporations. Lomb *v.* Pioneer Sav., etc., Co., 106 Ala. 671, 17 So. 670.

11. It need not set out the powers sought to be secured where these are set forth and defined in the statutes which have effect as if embodied in the charter. Sheldon *v.* Birmingham Bldg., etc., Assoc., 121 Ala. 278, 25 So. 820.

12. The number and value of the shares proposed to be issued must be stated. *In re* Philadelphia Artisans' Inst., 8 Phila. (Pa.) 229. See also People *v.* Preston, 140 N. Y. 549, 35 N. E. 979, 56 N. Y. St. 480, 24 L. R. A. 57.

13. Barton *v.* Enterprise Loan, etc., Assoc., 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608; Bergman *v.* St. Paul Mut. Bldg. Assoc. No. 1, 29 Minn. 275, 13 N. W. 120 [*followed* in Bergman *v.* St. Paul Mut. Bldg. Assoc. No. 1, 29 Minn. 282, 13 N. W. 122].

14. By-laws relating to withdrawals see *infra*, V, D.

By-laws relating to dues, fines, and assessments see *infra*, VI.

15. Wierman *v.* International Bldg., etc., Union, 67 Ill. App. 550; Martin *v.* Nashville Bldg. Assoc., 2 Coldw. (Tenn.) 418. *Compare* Booz's Appeal, 109 Pa. St. 592, 1 Atl. 36, holding that a by-law may be passed in harmony with statutory provisions, although inconsistent with the articles of association, where the articles contain provisions repugnant to statutory provisions upon the same subject-matter.

Bound by the element of mutuality.— An association based on the mutual plan is

society's by-laws[16] and is bound by such of them as are not repugnant to the rule stated.[17]

b. Amendments. A society authorized by its charter to make such by-laws as are necessary to effect its objects may amend and change the same,[18] although existing rights are thereby affected;[19] but where the articles do not provide for amendments a member is not bound by the mere adoption of an amendment,[20] and where the constitution provides that a by-law shall not be changed or amended an amendment, unless unanimous, is a nullity.[21]

B. Of Foreign Societies —1. In General. The right of foreign societies of this nature, having substantially the same powers and functions,[22] to do business in another state, upon compliance with prescribed conditions, is generally recognized;[23] and, in the absence of an expressed intention otherwise, such societies may enter the state under a law relating to foreign corporations generally.[24]

2. Effect of Non-Compliance With Prescribed Conditions. If the associations fail to comply with the conditions prescribed[25] by a state with regard to the trans-

bound to treat its members equally, and any by-law or contract in contravention of such mutuality is *ultra vires* and void. Wierman *v.* International Bldg., etc., Union, 67 Ill. App. 550; Baltimore Bldg., etc., Assoc. *v.* Powhatan Imp. Co., 87 Md. 59, 39 Atl. 274.

Estoppel to question validity.— The fact that some provisions are not in accord with the statute cannot be questioned by a member who has reaped the advantages and profits of such defect. Mechanics' Bldg., etc., Assoc. *v.* Minnich, 1 Kulp (Pa.) 513.

16. Columbia Bldg., etc., Assoc. *v.* Lyttle, (Colo. App. 1901) 66 Pac. 247; Stilwell *v.* People's Bldg., etc., Assoc., 19 Utah 257, 54 Pac. 14; Columbia Bldg., etc., Assoc. *v.* Junquist, 111 Fed. 645.

17. Mechanics', etc., Sav. Assoc. *v.* Vierling, 66 Ill. App. 621 (although the result of their operation be oppressive); Pioneer Sav., etc., Co. *v.* Brockett, 58 Ill. App. 204; Hundermark *v.* New South Bldg., etc., Assoc., (Miss. 1901) 29 So. 528; O'Malley *v.* People's Bldg., etc., Assoc., 13 Misc. (N. Y.) 688, 35 N. Y. Suppl. 14, 69 N. Y. St. 210 (although he has not signed or read them).

Estoppel to question mode of adoption.— Where a member has recognized the validity of by-laws for many years and on the faith of his admissions others have been induced to act, he is estopped to question the mode by which the by-laws were adopted. Morrison *v.* Dorsey, 48 Md. 461.

How construed.— Where a society and its members have given ambiguous by-laws a uniform and practical construction, that construction, as applied to contracts between the society and said members, will be applied by the court. McDonough *v.* Hennepin County Catholic Bldg., etc., Assoc., 62 Minn. 122, 64 N. W. 106.

18. Crittenden *v.* Southern Home Bldg., etc., Assoc., 111 Ga. 266, 36 S. E. 643; Pawlick *v.* Homestead Loan Assoc., 15 Misc. (N. Y.) 427, 37 N. Y. Suppl. 164, 72 N. Y. St. 474 (holding that a member is bound by an amendment regularly adopted, although he had no notice thereof); Stilwell *v.* People's Bldg., etc., Assoc., 19 Utah 257, 54 Pac. 14.

19. Schrick *v.* St. Louis Mut. House Bldg. Co., 34 Mo. 423. See also Seibel *v.* Victoria Bldg. Assoc. No. 2, 9 Ohio Dec. (Reprint) 422, 13 Cinc. L. Bul. 265, holding that borrowing members are bound by an amendment made in conformity with a statute which in effect amended the society's constitution. *Compare* Savage *v.* People's Bldg., etc., Assoc., 45 W. Va. 275, 31 S. E. 991, holding that the association cannot alter its contract with a member so as to impair his vested rights.

Although notice of withdrawal has been given a member is bound in England by subsequent alterations in the rules. Barnard *v.* Tomson, [1894] 1 Ch. 374, 63 L. J. Ch. 488, 70 L. T. Rep. N. S. 306, 8 Reports 585; Pepe *v.* City, etc., Permanent Bldg. Soc., [1893] 2 Ch. 311, 62 L. J. Ch. 501, 68 L. T. Rep. N. S. 846, 3 Reports 471, 41 Wkly. Rep. 548; Reg. *v.* Brabrook, 58 J. P. 117, 69 L. T. Rep. N. S. 718, 10 Reports 1; Davies *v.* Second Chatham Permanent Ben. Bldg. Soc., 61 L. T. Rep. N. S. 680. See also *infra*, V, D, 4.

20. Krakowski *v.* North New York Bldg., etc., Assoc., 7 Misc. (N. Y.) 188, 27 N. Y. Suppl. 314, 57 N. Y. St. 541.

21. McKeown *v.* Irish Bldg. Assoc. No. 2, 8 Ohio Dec. (Reprint) 17, 5 Cinc. L. Bul. 52.

22. **If the foreign society has additional** powers to the home one, of not so beneficent a character, it may not be permitted to exercise all the special powers and privileges of the local organization of its nature, although it complies with the statutory requirements with regard to doing business in the state. In other words, if the charter of such foreign society legally invests it with powers not contemplated by, or not in conformity with, the general statutory regulations concerning the home association, it cannot avail itself of all the privileges accorded the home society. Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841.

23. Interstate Bldg., etc., Assoc. *v.* Brown, 128 Ala. 462, 29 So. 656.

24. Tootle *v.* Singer, (Iowa 1901) 88 N. W. 446.

25. **For nature of conditions usually required** as a prerequisite to the right of foreign

action of business therein, their contracts are, in some jurisdictions, held to be void and unenforceable.[26] In others the rule is the opposite,[27] unless the legislature clearly expresses an intention that such contracts should be void.[28] In still others, although the enforcement of the contract in its entirety is not allowed, the society may enforce a claim for money loaned.[29]

IV. MEMBERSHIP.

A. How Acquired and Who May Become Members. As a general rule[30] any person capable of contracting[31] may become a member of such an association by becoming the holder of its stock.[32] It is not necessary that he should subscribe the original articles of association[33] or any agreement whatever.[34]

corporations to regularly conduct business within another state see CORPORATIONS.

Conditions not retroactive.— A statute prescribing certain conditions upon compliance with which a loan association might conduct business within a state does not operate retroactively and does not affect the enforcement of contracts already made (Pioneer Sav., etc., Co. *v.* Cannon, 96 Tenn. 599, 36 S. W. 386, 54 Am. St. Rep. 858, 33 L. R. A. 112) or prevent such association from taking additional security for loans made before its passage (Rhodes *v.* Missouri Sav., etc., Co., 63 Ill. App. 77).

26. Henni *v.* Fidelity Bldg., etc., Assoc., 61 Nebr. 744, 86 N. W. 475, 87 Am. St. Rep. 519; Myers Mfg. Co. *v.* Wetzel, (Tenn. Ch. 1896) 35 S. W. 896; Denson *v.* Chattanooga Nat. Bldg., etc., Assoc., 107 Fed. 777, 46 C. C. A. 634. See also American Bldg., etc., Assoc. *v.* Rainbolt, 48 Nebr. 434, 67 N. W. 493, where, although Post, J., uses language directly contrary to the text, the decision hinges upon another point and a part of the court expressly refuses to assent to this dictum.

Enforceable by receiver.— Under the statutes of Indiana, a contract of a building and loan society which has failed to comply with the statutory requirements by reason of which it could not enforce the same may be enforced by a receiver of such society when it has become bankrupt, if such action is necessary to wind up its affairs. Clarke *v.* Darr, 156 Ind. 692, 60 N. E. 688.

27. Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317, holding that whatever the right of the state might be in such case, a mortgagor who had received or obtained benefits under a contract could not be heard to assert its invalidity because of such non-compliance.

28. Eastern Bldg., etc., Assoc. *v.* Snyder, 98 Va. 710, 37 S. E. 298.

29. Maine Guarantee Co. *v.* Cox, 146 Ind. 107, 42 N. E. 915, 44 N. E. 932, where under such circumstances the society was allowed to sue for money loaned, and to obtain interest thereon, but was not allowed anything as premiums, dues, or other charges, generally collectable by it under its rules and by-laws.

30. **One association cannot become a member of another** except by statutory authority. Endlich Bldg. Assoc. § 54. See also Kadish *v.* Garden City Equitable Loan, etc., Assoc., 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256.

31. **A married woman** may hold stock in such an association. Goodrich *v.* Atlanta Nat. Bldg., etc., Assoc., 96 Ga. 803, 22 S. E. 585; Dilzer *v.* Beethoven Bldg. Assoc., 103 Pa. St. 86 [*distinguishing* Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211, decided under an earlier statute]; City Bldg., etc., Assoc. *v.* Jones, 32 S. C. 308, 10 S. E. 1079. See, generally, HUSBAND AND WIFE.

32. Haynes *v.* People's Bldg., etc., Assoc., 3 Ohio S. & C. Pl. Dec. 228; National Sav. Fund, etc., Assoc. *v.* Robinson, 19 Phila. (Pa.) 358, 46 Leg. Int. (Pa.) 5; Setliff *v.* North Nashville Bldg., etc., Assoc., (Tenn. Ch. 1897) 39 S. W. 546.

One who joins solely to secure a loan is nevertheless a member. Setliff *v.* North Nashville Bldg., etc., Assoc., (Tenn. Ch. 1897) 39 S. W. 546. See also Mechanics, etc., Mut. Sav. Bank, etc., Assoc. *v.* Wilcox, 24 Conn. 147.

What constitutes holding stock.— Certificates issued by a building society, conforming to the description of stock mentioned in the by-laws, and in the statute under which the society was organized, and on which dividends were to be paid out of the profits, are certificates of stock, and the holder thereof is a member, subject to all the liabilities imposed by the by-laws or statute. Baker *v.* U. S. Savings, etc., Assoc., 23 R. I. 243, 49 Atl. 967.

Membership denied.—A purchaser at a foreclosure sale by agreeing to pay the association mortgage at a certain rate per month does not thereby become a member. Capitol Hill Bldg. Assoc. No. 2 *v.* Hilton, 1 Mackey (D. C.) 107.

33. Concordia Sav., etc., Assoc. *v.* Read, 93 N. Y. 474.

34. National Sav. Fund, etc., Assoc. *v.* Robinson, 19 Phila. (Pa.) 358, 46 Leg. Int. (Pa.) 5.

Failure of a member to sign the constitution, if he has acted as a member for a long time, will not prevent the association from enforcing a contract with him which it was authorized to make with none but a member. Parker *v.* U. S. Building, etc., Assoc., 19 W. Va. 744.

Estoppel to deny membership.— One who

B. Rights and Liabilities of Members[35] — **1. In General — a. Rights.** A member not in arrears is entitled to a loan on his stock, where such loan has been duly applied for and the association is in funds properly applicable to that purpose;[36] and each member in good standing[37] is entitled for each share held by him to the same amount of the assets.[38] A member may have an accounting of his profits where charter provisions of the association in force when he became a member have been illegally abrogated by the association, to his injury, and without his consent;[39] may sue to restrain unlawful action by the society,[40] notwithstanding he has pledged his stock as collateral to a loan;[41] or, where a member at the time of the settlement, may invoke the aid of a court of equity to correct the errors and mistakes of fact therein made.[42] Where each shareholder is entitled to one vote for officers, every voter must be the holder of at least one share of stock.[43] A member may be both a shareholder and a creditor.[44]

b. Liabilities. Each member, whether a borrower or non-borrower, is liable to contribute to the expenses[45] and losses[46] of the association incurred during his membership.

gives a bond and mortgage reciting that mortgagor is a member is estopped to deny such membership. Howard Mut. Loan, etc., Assoc. *v.* McIntyre, 3 Allen (Mass.) 571; Ohio Bldg. Assoc. *v.* Leyden, 5 Ohio Dec. (Reprint) 344, 4 Am. L. Rec. 765, 7 Ohio Dec. (Reprint) 115, 1 Cinc. L. Bul. 126; Elmira Mut. Bldg. Loan Assoc. *v.* Wahoo Tribe No. 119, I. O. R. M., 9 Kulp (Pa.) 487. See also Bates *v.* Peoples' Sav., etc., Assoc., 42 Ohio St. 655.

35. Right of member to withdraw see *infra*, V, D.

36. See *infra*, VIII, H, 2.

37. A defaulting member cannot share in the earnings with members who have complied with the obligations of their contracts with the association. Payson *v.* Iroquois Bldg., etc., Assoc., 93 Ill. App. 621. And see Overby *v.* Fayetteville Bldg., etc., Assoc., 81 N. C. 41, holding that after a shareholder has redeemed his stock, he cannot participate in the profits of the business without contribution.

38. People *v.* Lowe, 117 N. Y. 175, 22 N. E. 1016, 27 N. Y. St. 138.

39. Sullivan *v.* Jackson Bldg., etc., Assoc., 70 Miss. 94, 12 So. 590.

40. Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096. See also Reg. *v.* D'Eyncourt, 4 B. & S. 820, 10 Jur. N. S. 513, 28 J. P. 116, 33 L. J. M. C. 89, 9 L. T. Rep. N. S. 712, 3 New Rep. 420, 12 Wkly. Rep. 408, 116 E. C. L. 320.

41. Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

42. Mutual Bldg., etc., Assoc.'s Appeal, (Pa. 1886) 2 Atl. 859.

43. Matter of Provident Bldg., etc., Assoc., 62 N. J. L. 590, 41 Atl. 952.

Representation by proxy.— A stock-holder may legally be represented by proxy at a meeting at which action is taken. Broadwell *v.* Inter-Ocean Homestead, etc., Assoc., 161 Ill. 327, 43 N. E. 1067; State *v.* Rohlffs, (N. J. 1890) 19 Atl. 1099. See also Continental Invest., etc., Soc. *v.* People, 167 Ill. 195, 47 N. E. 381.

44. Hennighausen *v.* Tischer, 50 Md. 583.

45. Pioneer Bldg., etc., Assoc. *v.* Jones, 22 Ky. L. Rep. 41, 56 S. W. 657; McGrath *v.* Hamilton Sav., etc., Assoc., 44 Pa. St. 383.

46. *District of Columbia.*— Brown *v.* Sanders, 20 D. C. 455.

Georgia.— Pattison *v.* Albany Bldg., etc., Assoc., 63 Ga. 373.

Illinois.— Chapman *v.* Young, 65 Ill. App. 131.

Indiana.— Wohlford *v.* Citizens' Bldg., etc., Assoc., 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177.

Kentucky.— Pioneer Bldg., etc., Assoc. *v.* Jones, 22 Ky. L. Rep. 41, 56 S. W. 657.

Minnesota.— Knutson *v.* North Western Loan, etc., Assoc., 67 Minn. 201, 69 N. W. 889, 64 Am. St. Rep. 410.

Pennsylvania.—See U. S. Bldg., etc., Assoc. *v.* Silverman, 85 Pa. St. 394, 4 Wkly. Notes Cas. (Pa.) 546; Wittman *v.* Concordia Bldg. Assoc. No. 4, 13 Phila. (Pa.) 195, 36 Leg. Int. (Pa.) 72, 7 Wkly. Notes Cas. (Pa.) 80.

Utah.— Betz *v.* People's Bldg., etc., Assoc., 22 Utah 149, 61 Pac. 334.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 8; and *infra*, VI, A.

How loss apportioned.— Where no one stock-holder more than another is shown to be chargeable with responsibility for losses, all should bear the burden ratably, as they would have shared in profits had the enterprise been successful. Chapman *v.* Young, 65 Ill. App. 131.

Release of liability.— Where a member's liability is illegally released, it may be enforced in winding-up proceedings. Cason *v.* Seldner, 77 Va. 293. In England a company may be formed on such terms as to permit members to withdraw so as to be free from liability in the event of a winding up. *In re* Borough Commercial, etc., Soc., [1893] 2 Ch. 242, 62 L. J. Ch. 456, 69 L. T. Rep. N. S. 96, 3 Reports 339, 41 Wkly. Rep. 313.

Set-off of advances or liabilities incurred.— Where a member's liability is sought to be enforced he may set off advances made or liabilities incurred for the society's benefit. Remington *v.* King, 11 Abb. Pr. (N. Y.) 278.

2. Of Non-Residents. The rights and liabilities of non-resident members are governed by the laws governing the association in the state where organized.[47]

C. Termination of. Membership may terminate by withdrawal under the statute,[48] by the death of the member,[49] by the transfer of stock or the maturity thereof, by forfeiture, or by the dissolution of the association;[50] but the fact that a borrowing member assigns his stock to the association as collateral for his loan does not cancel his membership.[51]

V. STOCK.

A. Kinds — 1. In General. The original scheme of such associations contemplated the issue of stock at the time of its subscription, to be paid for by small periodical payments until the dues, with the accretions from interest, fines, and forfeitures make its value equal to its face, and this class of stock is still an essential feature of building and loan societies.[52] Such stock is frequently issued in

47. Haynes *v.* People's Bldg., etc., Assoc., 3 Ohio S. & C. Pl. Dec. 228; Healy *v.* Eastern Bldg., etc., Assoc., 17 Pa. Super. Ct. 385.

48. A mere notice of withdrawal is not equivalent to withdrawal. Decatur Bldg., etc., Co. *v.* Neal, 97 Ala. 717, 12 So. 780. See also *infra*, V, D, 4.

Withdrawal cannot be compelled.— Unless the statute or by-laws so provide, a member not in default cannot be compelled to withdraw. Bergman *v.* St. Paul Mut. Bldg. Assoc. No. 1, 29 Minn. 275, 13 N. W. 120 [*followed* in Bergman *v.* St. Paul Mut. Bldg. Assoc. No. 1, 29 Minn. 282, 13 N. W. 122].

49. Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413; Shahan *v.* Shahan, 48 W. Va. 477, 37 S. E. 552, 86 Am. St. Rep. 68.

Right of heirs or devisees to succeed to membership.— Under some statutes the heirs or devisees of a deceased member are entitled to succeed to membership in their own right. Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413; Licking County Sav., etc., Assoc. *v.* Bebout, 29 Ohio St. 252.

Amount payable to deceased member's representative.— Where the representatives of a deceased member are entitled to the net value of all the shares held by such deceased member, the proper mode of determining the value of the stock is by ascertaining the market value of the shares themselves. Babcock *v.* Middlesex Sav. Bank, etc., Assoc., 28 Conn. 302, holding that a statement in the bank-book of the deceased of the computed value of his stock made by the treasurer of the company was not conclusive upon the association, which might show that the computation was based upon the nominal value, and not upon the actual value of the assets. See also Hensel *v.* International Bldg., etc., Assoc., 85 Tex. 215, 20 S. W. 116, holding that in estimating the amount due from a deceased stock-holder to a building and loan association he should be credited merely with the withdrawal value of his shares, and not with their estimated value. Where, to enable them to receive the proceeds of their decedent's membership, the heirs or legal representatives elect to return a loan made to him, the amount to be returned is the money actually received by the shareholder, together with the premium bid for precedence. Licking County Sav., etc., Assoc. *v.* Bebout, 29 Ohio St. 252.

50. Thompson Bldg. Assoc. § 39*a*.

51. *California.*—See McNamara *v.* Oakland Bldg., etc., Assoc., 131 Cal. 336, 63 Pac. 670, holding that a borrowing member of a building association occupies the dual relation to the corporation of borrower and stock-holder, each of which is distinct from the other.

Georgia.— Boyd *v.* Robinson, 104 Ga. 793, 31 S. E. 29.

Iowa.— Wilcoxen *v.* Smith, 107 Iowa 555, 78 N. W. 217, 70 Am. St. Rep. 220.

Kansas.— Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Maryland.— Lister *v.* Log Cabin Bldg. Assoc., 38 Md. 115.

Michigan.— Michigan Bldg., etc., Assoc. *v.* McDevitt, 77 Mich. 1, 43 N. W. 760.

New Jersey.— Mechanics' Bldg., etc., Assoc. *v.* Conover, 14 N. J. Eq. 219.

New York.— Breed *v.* Ruoff, 54 N. Y. App. Div. 142, 66 N. Y. Suppl. 422.

Ohio.—Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186.

Pennsylvania.— Freemansburg Building, etc., Assoc. *v.* Watts, 199 Pa. St. 221, 48 Atl. 1075.

West Virginia.— Young *v.* Improvement Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670.

Wisconsin.— Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945.

United States.— Manship *v.* New South Bldg., etc., Assoc., 110 Fed. 845; Tilley *v.* American Bldg., etc., Assoc., 52 Fed. 618.

England.— Bradbury *v.* Wild, [1893] 1 Ch. 377, 57 J. P. 68, 62 L. J. Ch. 503, 68 L. T. Rep. N. S. 50, 3 Reports 195, 41 Wkly. Rep. 361.

Contra, Bird *v.* Kendall, 62 S. C. 178, 40 S. E. 142. See also Winchester Bldg. Assoc. *v.* Gilbert, 23 Gratt. (Va.) 787; White *v.* Mechanics' Bldg. Fund Assoc., 22 Gratt. (Va.) 233, which hold that the assignment of one's shares to a building association for an advance received by the shareholder is an absolute surrender and not an hypothecation for a loan.

52. Endlich Bldg. Assoc. § 461.

series, each of which should be treated as distinct and financially independent of other series.[53]

2. Definite-Term Stock. The issue of stock to mature at a fixed time is contrary to the general scheme of such associations and is not permissible unless directly authorized by statute,[54] and any time of maturity specified will be considered to be an estimated time.[55]

3. Paid-up Stock. Where the statute forbids paid-up stock cannot be issued,[56] but where the statute so provides or does not expressly prohibit a member may pay in advance the face value of his stock and receive interest or dividends thereon, or may pay in such sum as with anticipated accretions will make the stock par at the end of an estimated period,[57] and such stock may be made preferred.[58]

53. Vierling *v.* Mechanics, etc., Assoc., 179 Ill. 524, 53 N. E. 979.

54. *Colorado.*—Columbia Bldg., etc., Assoc. *v.* Lyttle, (Colo. App. 1901) 66 Pac. 247.

Illinois.— Cantwell *v.* Stockmen's Bldg., etc., Union, 88 Ill. App. 247 [*affirmed* in 187 Ill. 275, 58 N. E. 414]; Royal Trust Co. *v.* Culver, 87 Ill. App. 630; Sullivan *v.* Spaniol, 78 Ill. App. 125; International Bldg., etc., Union *v.* King, 68 Ill. App. 640 [*affirmed* in 170 Ill. 135, 48 N. E. 677]; Wierman *v.* International Bldg., etc., Union, 67 Ill. App. 550.

Missouri.— Schell *v.* Equitable Loan, etc., Assoc., 150 Mo. 103, 51 S. W. 406; Bertche *v.* Equitable Loan, etc., Assoc., 147 Mo. 343, 48 S. W. 954, 71 Am. St. Rep. 571.

New York.— O'Malley *v.* People's Bldg., etc., Assoc., 92 Hun (N. Y.) 572, 36 N. Y. Suppl. 1016, 72 N. Y. St. 289; Heslin *v.* Eastern Bldg., etc., Assoc., 28 Misc. (N. Y.) 376, 59 N. Y. Suppl. 572 [*affirmed* in 61 N. Y. App. Div. 458, 70 N. Y. Suppl. 612].

Pennsylvania.— McKean *v.* New York Nat. Bldg., etc., Assoc., 10 Pa. Dist. 197, 24 Pa. Co. Ct. 458.

Tennessee.— Province *v.* Interstate Bldg., etc., Assoc., 104 Tenn. 458, 58 S. W. 265; Miller *v.* Eastern Bldg., etc., Assoc., (Tenn. Ch. 1899) 53 S. W. 231.

Texas.— See Pioneer Sav., etc., Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160, holding that when the association induces a stock subscriber by a statement expressly guaranteeing payment of shares at their face value within a specified time, it is estopped to set up that it is a mutual benefit society. But when stock is issued subject to by-laws the association is not estopped to deny representations of an agent as to time of maturity. Interstate Bldg., etc., Assoc. *v.* Hunter, (Tex. Civ. App. 1899) 51 S. W. 530.

Virginia.— Campbell *v.* Eastern Bldg., etc., Assoc., 98 Va. 729, 37 S. E. 350; Peoples Bldg., etc., Assoc. *v.* Tinsley, 96 Va. 322, 31 S. E. 508.

Compare International Bldg., etc., Assoc. *v.* Bratton, 24 Ind. App. 654, 56 N. E. 105 (holding that an association will not be permitted to say that such a contract was *ultra vires* where it was not forbidden by statute); Williamson *v.* Eastern Bldg., etc., Assoc., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822 (holding that a certificate of stock and circular of the society relating to definite-term stock will prevail, at the instance of one contracting with reference thereto, over by-laws to the contrary); Hammerquist *v.* Pioneer Sav., etc., Co., 15 S. D. 70, 87 N. W. 524.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 14.

Members estopped.— Members accepting definite-term stock with knowledge that the association had no right to issue it cannot question its validity on the ground that its issue was *ultra vires*. Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945.

55. People's Bldg., etc., Assoc. *v.* Morris, 68 Ark. 24, 56 S. W. 266; Union Mut. Bldg., etc., Assoc. *v.* Aichele, (Ind. App. 1901) 61 N. E. 11; O'Malley *v.* People's Bldg., etc., Assoc., 92 Hun (N. Y.) 572, 36 N. Y. Suppl. 1016, 72 N. Y. St. 289; Heslin *v.* Eastern Bldg., etc., Assoc., 28 Misc. (N. Y.) 376, 59 N. Y. Suppl. 572 [*affirmed* in 61 N. Y. App. Div. 458, 70 N. Y. Suppl. 612]; McKean *v.* New York Nat. Bldg., etc., Assoc., 10 Pa. Dist. 197, 24 Pa. Co. Ct. 458.

56. Rhodes *v.* Missouri Sav., etc., Co., 173 Ill. 621, 50 N. E. 998, 42 L. R. A. 93 [*reversing* 63 Ill. App. 77]; Patoka Loan, etc., Assoc. *v.* Holland, 63 Ill. App. 58. See also International, etc., Union *v.* King, 68 Ill. App. 640 [*affirmed* in 170 Ill. 135, 48 N. E. 677]; Wierman *v.* International Bldg., etc., Union, 67 Ill. App. 550.

57. *Alabama.*— Johnson *v.* National Bldg., etc., Assoc., 125 Ala. 465, 28 So. 2, 82 Am. St. Rep. 257, although the society's charter contain no express authority therefor.

Georgia.— Kirklin *v.* Atlas Sav., etc., Assoc., 107 Ga. 313, 33 S. E. 83.

Iowa.— Tootle *v.* Singer, (Iowa 1901) 88 N. W. 446.

Missouri.— Hohenshell *v.* Home Sav., etc., Assoc., 140 Mo. 566, 41 S. W. 948.

New York.— People *v.* Preston, 140 N. Y. 549, 35 N. E. 979, 56 N. Y. St. 480, 24 L. R. A. 57.

Pennsylvania.— Heptasoph Bldg., etc., Assoc. *v.* Linhart, 4 Pa. Dist. 620, 26 Pittsb. Leg. J. N. S. 94.

United States.—Latimer *v.* Equitable Loan, etc., Co., 81 Fed. 776.

England.— *In re* Guardian Permanent Ben. Bldg. Soc., 23 Ch. D. 440, 52 L. J. Ch. 857, 48 L. T. Rep. N. S. 134, 32 Wkly. Rep. 73; *Re* Reliance Permanent Ben. Bldg. Soc., 61 L. J. Ch. 453, 66 L. T. Rep. N. S. 823.

58. *In re* Guardian Permanent Ben. Bldg. Soc., 23 Ch. D. 440, 52 L. J. Ch. 857, 48 L. T.

4. Preferred Stock. An association has no power to issue stock that will give the members a preference over other shareholders,[59] unless empowered so to do by law.[60]

B. Limitation on Holdings. Unless restricted by statute, charter, or by-law,[61] a person may hold any number of shares.[62]

C. Assignment or Transfer—1. In General. Ordinarily a member is entitled to transfer his stock by assignment, but a by-law which provides that no share shall be transferred while any due of any kind against the owner thereof remains unpaid creates a lien upon the shares as against the stock-holder for the indebtedness against him.[63]

2. How Made. The formalities relating to such transfer are provided for in the organic law or by rules and regulations duly adopted,[64] and while the title passes by an assignment[65] it is usually not binding upon the association until entered on its books.[66] The association may, however, waive a transfer on its books,[67] and is estopped to deny the validity of any transfer after recognizing its validity for any purpose advantageous to itself.[68]

3. Effect of. A purchaser of stock, to whom the title has been transferred on the books of the association with its consent, becomes vested with the title to

Rep. N. S. 134, 32 Wkly. Rep. 73; *Re* Reliance Permanent Ben. Bldg. Soc., 61 L. J. Ch. 453, 66 L. T. Rep. N. S. 823. But see Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945, holding that a holder of paid-up stock is not entitled to any preference over other members when the association becomes insolvent. See also *infra*, X, B, 5, c, (II).

59. Forwood *v.* Eubank, 106 Ky. 291, 20 Ky. L. Rep. 1842, 50 S. W. 255; Latimer *v.* Equitable Loan, etc., Co., 81 Fed. 776. See also Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 30 S. E. 911; Daley *v.* People's Bldg., etc., Assoc., 172 Mass. 533, 52 N. E. 1090; Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945.

60. **Preference of paid-up stock** see *supra*, V, A, 3.

61. **In Ohio** an association cannot authorize or permit a member to hold more than twenty shares in his own right (State *v.* Greenville Bldg., etc., Assoc., 29 Ohio St. 92) and an executory contract in relation to such excess is *ultra vires* and cannot be enforced (Simpson *v.* Building, etc., Assoc., 38 Ohio St. 349).

Effect of over-issue.— The issue of more shares of stock to one person than is permitted by the charter of the association is not of itself fraudulent. The contract for the same may be rescinded and the amounts paid thereon recovered. Douglass *v.* Kavanaugh, 90 Fed. 373, 62 U. S. App. 38, 33 C. C. A. 107. A shareholder is estopped to deny the validity of an excess of stock above the shares allowed by statute to be held by him. Victoria Bldg. Assoc. *v.* Arbeiter Bund, 6 Ohio Dec. (Reprint) 1108, 10 Am. L. Rec. 485.

62. Morrison *v.* Glover, 4 Exch. 430, 14 J. P. 84, 19 L. J. Exch. 20.

63. Wetherell *v.* Thirty-First St. Bldg., etc., Assoc., 153 Ill. 361, 39 N. E. 143 [*affirming* 43 Ill. App. 509]. See also Michigan Bldg., etc., Assoc. *v.* McDevitt, 77 Mich. 1, 43 N. W. 760; La Société, etc. *v.* Daveluy, 20 Can. Supreme Ct. 449.

64. See Nooloth *v.* Simplified Permanent Ben. Bldg. Soc., 53 L. T. Rep. N. S. 859, 34 Wkly. Rep. 73.

By-law as to transfer fee.— A by-law that a fee of fifty cents per share shall be paid by the party receiving the transfer may be enforced by the association. McGannon *v.* Central Bldg. Assoc. No. 2, 19 W. Va. 726. *Compare* Northwestern Cent. Bldg. Assoc. *v.* Henderson, 5 Ohio Dec. (Reprint) 581, 6 Am. L. Rec. 755, holding that a rule that each member, on transferring his shares to another, shall pay to the association one dollar on each share transferred does not apply to a member who for his own use subscribed to a number of shares in his own name and in the name of others, and seeks to exercise his right of withdrawal on all by producing proper vouchers from such others.

65. **Order not an assignment.**— An order directing the association to pay the stock at maturity to a third person is not an assignment. Vance *v.* Smith, 124 Cal. 219, 56 Pac. 1031.

66. Bank of Commerce's Appeal, 73 Pa. St. 59.

Remedy for refusal to permit transfer.— A purchaser cannot compel a transfer to him by mandamus, for he has an adequate remedy in a suit for damages (State *v.* People's Bldg., etc., Assoc., 43 N. J. L. 389), the measure thereof being the actual value of the stock at the time of such refusal (German Union Bldg., etc., Assoc. *v.* Sendmeyer, 50 Pa. St. 67; North America Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463, 78 Am. Dec. 349).

67. Denison *v.* Alpena Loan, etc., Assoc., 117 Mich. 98, 75 N. W. 300; Reynolds *v.* New York Bldg. Loan Banking Co., 89 Hun (N. Y.) 609, 35 N. Y. Suppl. 80, 69 N. Y. St. 259.

68. Prairie State Loan, etc., Assoc. *v.* Gorrie, 167 Ill. 414, 47 N. E. 739 [*affirming* 64 Ill. App. 325]; Anchor Bldg., etc., Assoc. *v.* Blouse, 5 Pa. Dist. 321.

all the accumulations therein as fully as if he had originally subscribed for them and paid the dues thereon,[69] and the original owner cannot destroy the stock in the hands of his assignee.[70] After notice of withdrawal has been given, a transfer of stock to another does not make the latter a stock-holder.[71]

D. Withdrawal of Member — 1. Right to Withdraw — a. In General. The right of withdrawal[72] is absolute and cannot be arbitrarily withheld,[73] and where given by statute cannot be waived even by an express declaration in the certificate,[74] although the right to withdraw under particular proceedings therefor may be.[75] The right to withdraw is, however, a privilege reserved, which may be exercised or not at the pleasure of a member,[76] and, if he elect to exercise it, he must comply with the terms prescribed in the by-laws and voluntarily assumed by him.[77]

69. Mutual Sav., etc., Assoc. *v.* Owings, 19 Ky. L. Rep. 1325, 43 S. W. 422.

70. Shober *v.* Accommodation Sav. Fund, 3 Grant (Pa.) 297.

71. St. Louis Loan, etc., Co. *v.* Yantis, 72 Ill. App. 597 [*affirmed* in 173 Ill. 321, 50 N. E. 807].

72. In England the right is provided for by 10 & 11 Vict. c. 96 and 12 & 13 Vict. c. 74. Under the Companies Act of 1862, limited companies had no power to provide for the withdrawal of members (Trevor *v.* Whitworth, 12 App. Cas. 409, 57 L. J. Ch. 28, 57 L. T. Rep. N. S. 457, 36 Wkly. Rep. 145), but unlimited companies had that power, so that the retiring member would be free from liability in the event of a winding up (*In re* Borough Commercial, etc., Soc., [1893] 2 Ch. 242, 62 L. J. Ch. 456, 69 L. T. Rep. N. S. 96, 3 Reports 339, 41 Wkly. Rep. 313).

Right to withdraw from foreign association. — In Illinois it is held that the right to withdraw of a citizen of that state who is a member of a foreign association is governed by Illinois statutes. Granite State Provident Assoc. *v.* Sonderman, 145 Ill. 624, 34 N. E. 143 [*affirming* 48 Ill. App. 433]; Granite State Provident Assoc. *v.* Lloyd, 145 Ill. 620, 34 N. E. 142 [*affirming* 48 Ill. App. 429].

73. Enterprise Bldg., etc., Soc. *v.* Bolin, 12 Colo. App. 304, 55 Pac. 740; Holyoke Bldg., etc., Assoc. *v.* Lewis, 1 Colo. App. 126, 27 Pac. 872; Louisville German Bldg., etc., Assoc. *v.* Wissing, 4 Ky. L. Rep. 443; Fuller *v.* Salem, etc., Loan, etc., Assoc., 10 Gray (Mass.) 94; Wetterwulgh *v.* Knickerbocker Bldg. Assoc., 2 Bosw. (N. Y.) 381. See also Eyre *v.* Building Assoc., 17 Leg. Int. (Pa.) 148, holding that where a resolution is passed permitting certain stock-holders to redeem their stock, a subsequent rescission of the resolution will not affect those who filed their application to redeem pursuant to the resolution before its rescission.

Redeemable at option of association. — Where a certificate of shares in a foreign building association recited that it "is redeemable in cash" after certain payments have been made, "the shareholder being entitled to receive the amount paid in on his shares," it was held to be so redeemable only at the option of the association. Peters *v.* Granite State Provident Assoc., 12 Pa. Co. Ct. 192.

74. Latimer *v.* Equitable Loan, etc., Co., 81 Fed. 776.

75. Decatur Bldg., etc., Co. *v.* Neal, 97 Ala. 717, 12 So. 780, holding that knowingly and intentionally participating as a stock-holder in stock-holders' meetings held six and ten months after giving notice of withdrawal constitutes a waiver of the right to withdraw under said notice. See also Schout *v.* Conkey Ave. Sav., etc., Assoc., 11 Misc. (N. Y.) 454, 32 N. Y. Suppl. 713, 66 N. Y. St. 76 [*affirmed* in 87 Hun (N. Y.) 568, 34 N. Y. Suppl. 1147, 68 N. Y. St. 880], holding that a stock-holder of an association, which wrongfully loans to members money applicable to the claim of such stock-holder on the withdrawal of his shares, of which he had given notice, is estopped to sue the association on that ground, where it appears that he was a director of the association, and attended meetings at which such loans were made, and approved thereof.

Estoppel of association to assert waiver. — Where an association demands, as a condition of the withdrawal of a borrowing stock-holder, a greater sum than that due to it, and persists in such demand after its attention has been called to the error, it is in no position to urge that the stock-holder has lost his right to withdraw by his non-action for several years thereafter, where he offered to pay the amount actually due the association at the time of his proposed withdrawal, and has been ready and willing to settle on that basis ever since. People's Bldg., etc., Assoc. *v.* Furey, 47 N. J. Eq. 410, 20 Atl. 890.

76. Where the privilege is to remain open only until a certain date members who fail to avail themselves of their opportunity before the date so determined cannot do so afterward. Booz's Appeal, 109 Pa. St. 592, 1 Atl. 36.

77. Security Loan Assoc. *v.* Lake, 69 Ala. 456; Carter *v.* Ætna Loan Co., 61 Mo. App. 218, 1 Mo. App. Rep. 355; Synnott *v.* Iron Belt Bldg., etc., Assoc., 89 Fed. 292.

The by-laws given him on becoming a member a person is entitled to treat as all the by-laws such association had, and he is not bound to take notice of modifications of such by-laws, with respect to withdrawing, on the record of the company simply, without further notice to him; which notice must be proven by the defendant company to have

b. Conditions Precedent — (I) *Association Must Be Going.* The right to withdraw can only be exercised when the association has capacity to do business, and if the stock has reached par [78] or the association has become insolvent,[79] withdrawals will not be permitted.

(II) *Existence of Available Funds.* It is generally provided that only a certain portion of receipts shall be applied to the payment of withdrawals, and in such case only such funds are available for that purpose. It is, moreover, the generally accepted rule that unless there is money in the treasury legally applicable to the payment of his claim, a withdrawing member cannot sue and get judgment thereon,[80] but the unauthorized application by the directors of funds to loans in preference to withdrawals cannot defeat the right of a withdrawing member.[81]

(III) *Notice of Withdrawal.* A prescribed notice of withdrawal is usually required by the by-laws,[82] but such notice need not be in writing unless so

been given. McKenney *v.* Diamond State Loan Assoc., 8 Houst. (Del.) 557, 18 Atl. 905.

78. Laurel Run Bldg. Assoc. *v.* Sperring, 106 Pa. St. 334.

79. *Illinois.*— Gibson *v.* Safety Homestead, etc., Assoc., 170 Ill. 44, 48 N. E. 580, 39 L. R. A. 202; Dooling *v.* Smith, 89 Ill. App. 26; Chapman *v.* Young, 65 Ill. App. 131.

Indiana.— Bingham *v.* Marion Trust Co., (Ind. App. 1901) 61 N. E. 29.

Minnesota.—Knutson *v.* Northwestern Loan, etc., Assoc., 67 Minn. 201, 69 N. W. 889, 64 Am. St. Rep. 410.

Missouri.— Hohenshell *v.* Home Sav., etc., Assoc., 140 Mo. 566, 41 S. W. 948.

Ohio.— Galvin *v.* Albers, 9 Ohio S. & C. Pl. Dec. 279, 6 Ohio N. P. 273.

Pennsylvania.—See Christian's Appeal, 102 Pa. St. 184; Haney *v.* Enterprise Sav. Fund, etc., Assoc., 16 Wkly. Notes Cas. (Pa.) 450.

England.— *In re* Sunderland 36th Universal Bldg. Soc., 24 Q. B. D. 394, 54 J. P. 613, 59 L. J. Q. B. 217, 62 L. T. Rep. N. S. 293, 38 Wkly. Rep. 509; Brownlie *v.* Russell, 8 App. Cas. 235, 47 J. P. 757, 48 L. T. Rep. N. S. 881; Kemp *v.* Wright, [1894] 2 Ch. 462.

Test of right to withdraw.— The question whether an investing member may withdraw so as to obtain priority over other members does not depend on the answer to be given to the question whether the society was solvent or insolvent when his notice matured, or whether the members or officers knew that it was insolvent. The line is to be drawn at the time when there is a stoppage of the society's business, or a recognition, by those entitled to form a judgment, that business must be stopped. *In re* Ambition Invest. Bldg. Soc., [1896] 1 Ch. 89, 65 L. J. Ch. 113, 73 L. T. Rep. N. S. 508, 2 Manson 607, 44 Wkly. Rep. 141. See also Rickert *v.* Suddard, 80 Ill. App. 204.

80. Heinbokel *v.* National Sav., etc., Assoc., 58 Minn. 340, 59 N. W. 1050, 49 Am. St. Rep. 519, 25 L. R. A. 215; Engelhardt *v.* Fifth Ward Permanent Dime Sav., etc., Assoc., 148 N. Y. 281, 42 N. E. 710, 35 L. R. A. 289 [*reversing* 5 Misc. (N. Y.) 518, 25 N. Y. Suppl. 835, 58 N. Y. St. 92]; Pawlick *v.* Homestead Loan Assoc., 15 Misc. (N. Y.) 427, 37 N. Y. Suppl. 164, 72 N. Y. St. 474; Healy *v.* Eastern Bldg., etc., Assoc., 17 Pa. Super. Ct. 385 (construing the New York law); Texas Homestead Bldg., etc., Assoc. *v.* Kerr, (Tex. 1890) 13 S. W. 1020; Eastern Bldg., etc., Assoc. *v.* Snyder, 98 Va. 710, 37 S. E. 298. *Contra*, Huntington County Loan, etc., Assoc. *v.* Emerick, 23 Ind. App. 175, 55 N. E. 106; U. S. Building, etc., Assoc. *v.* Silverman, 85 Pa. St. 394, 4 Wkly. Notes Cas. (Pa.) 546 [*disapproved* in Christian's Appeal, 102 Pa. St. 184]; Hanney *v.* Enterprise Sav. Fund, etc., Assoc., 16 Wkly. Notes Cas. (Pa.) 450 (holding that although he may obtain judgment against the association he cannot compel payment by execution or attachment to the exclusion of the claims of general creditors). See also Printers' Bldg., etc., Assoc. *v.* Paxton, (Tex. Civ. App. 1895) 33 S. W. 389, holding that a provision in the charter of an association, that "at no time shall more than one-half of the funds in the treasury be subject to the demand of withdrawing members," does not prevent a member who has given proper notice of his withdrawal from recovering judgment on claim for the amount paid in by him.

81. Wolfe *v.* Conkey Ave. Sav., etc., Assoc., 75 Hun (N. Y.) 201, 27 N. Y. Suppl. 44, 58 N. Y. St. 656.

82. Hartford *v.* Coöperative Mut. Homestead Co., 128 Mass. 494; Farnsworth *v.* Robbins, 36 Minn. 369, 31 N. W. 349; Heslin *v.* Eastern Bldg., etc., Assoc., 61 N. Y. App. Div. 458, 70 N. Y. Suppl. 612.

Sufficiency of notice.—Notice of withdrawal given by the owner of stock, and received by the secretary without objection, is good, although the transfer of such stock had not been entered on the books of the association (Reynolds *v.* New York Bldg. Loan Banking Co., 89 Hun (N. Y.) 609, 35 N. Y. Suppl. 80, 69 N. Y. St. 259); and a notice of withdrawal given to the directors at a meeting of the board is not invalid because of the fact that a quorum is not present, the charter merely requiring one month's notice to the directors (William Brown Bldg., etc., Assoc.'s Estate, 12 Wkly. Notes Cas. (Pa.) 207).

The giving of notice was not waived by a

required,[88] and even where required the association may waive a written and accept an oral notice.[84]

(iv) *REPAYMENT OF LOAN.* As a general rule a borrowing member cannot withdraw before his loan is wholly repaid,[85] but the right of withdrawal may exist after an unconditional tender of such repayment in lawful money,[86] or upon the consent of the directors under a by-law.[87]

2. ORDER OF PAYMENT. It is ordinarily provided that payments to withdrawing members shall be made in the order of notice given and by-laws to this effect have been deemed reasonable.[88] This order of payment will prevail in the absence of a statute or by-law regulating the matter.[89]

3. WITHDRAWAL VALUE. A withdrawing member is not entitled to profits except by statute or rule of the association,[90] and where such provisions exist as to the amount payable on withdrawal members are bound thereby;[91] but a member

resolution of the stock-holders providing that every stock-holder be considered as giving notice to withdraw at the time of such resolution, it appearing that the resolution was passed in the absence of some of the stock-holders. William Brown Bldg., etc., Assoc.'s Estate, 12 Wkly. Notes Cas. (Pa.) 207.

83. St. Louis Loan, etc., Co. *v.* Yantis, 173 Ill. 321, 50 N. E. 807.

84. McKenney *v.* Diamond State Loan Assoc., 8 Houst. (Del.) 557, 18 Atl. 905.

85. *California.*— McNamara *v.* Oakland Bldg., etc., Assoc., 131 Cal. 336, 63 Pac. 670.

District of Columbia.— Pabst *v.* Economical Bldg., Assoc., 1 McArthur (D. C.) 385.

Indiana.— Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405.

Minnesota.— State *v.* Redwood Falls Bldg., etc., Assoc., 45 Minn. 154, 47 N. W. 540, 10 L. R. A. 752.

Missouri.— Edinger *v.* Missouri Guarantee Sav., etc., Assoc., 83 Mo. App. 615, holding that otherwise the borrower must continue to pay the monthly due until the stock has reached par value, before he can receive its value or have it applied to his credit on the loan.

Pennsylvania.— Wadlinger *v.* Washington German Bldg., etc., Assoc., 153 Pa. St. 622, 26 Atl. 647; Laurel Run Bldg. Assoc. *v.* Sperring, 106 Pa. St. 334; Watkins *v.* Workingmen's Bldg., etc., Assoc., 97 Pa. St. 514.

United States.— Kinney *v.* Columbia Sav., etc., Assoc., 113 Fed. 359.

The amount to be paid and the credits to which a borrowing member is entitled are dependent upon the construction of particular by-laws or statutes of which some have been construed in the following cases:

Alabama.— Security Loan Assoc. *v.* Lake, 69 Ala. 456.

Illinois.— Agnew *v.* Macomb Bldg., etc., Assoc., 96 Ill. App. 665 [*affirmed* in 197 Ill. 256, 64 N. E. 260].

Kentucky.— Safety Bldg., etc., Assoc. *v.* Montjoy, 21 Ky. L. Rep. 1189, 54 S. W. 719.

New Jersey.— People's Bldg., etc., Assoc. *v.* Furey, 47 N. J. Eq. 410, 20 Atl. 890.

Ohio.—Windhorst *v.* Germania Bldg. Assoc. No. 3, 8 Ohio Dec. (Reprint) 286, 7 Cinc. L. Bul. 29.

Pennsylvania.— Winterer *v.* Fairmount Bldg. Assoc., 19 Phila. (Pa.) 426, 44 Leg. Int. (Pa.) 122; Sherman Bldg. Assoc. *v.* Rock, 9 Phila. (Pa.) 75, 29 Leg. Int. (Pa.) 140.

Texas.— International Bldg., etc., Assoc. *v.* Biering, (Tex. Civ. App. 1893) 23 S. W. 1025.

West Virginia.— Haigh *v.* U. S. Building, etc., Assoc., 19 W. Va. 792.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 19.

A member may withdraw and repay his debt at the same time and as a part of one and the same transaction. Southern Bldg., etc., Assoc. *v.* Harris, 98 Ky. 41, 17 Ky. L. Rep. 721, 32 S. W. 261.

Right to reduce stock.— Where the rules permit a member to reduce the number of shares held by him, he cannot do so until he has paid all dues and arrears on his old certificate. Fulton *v.* American Bldg., etc., Assoc., 46 Minn. 190, 48 N. W. 781.

86. Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405.

87. McNamara *v.* Oakland Bldg., etc., Assoc., 131 Cal. 336, 63 Pac. 670.

88. Engelhardt *v.* Fifth Ward Permanent Dime Sav., etc., Assoc., 148 N. Y. 281, 42 N. E. 710, 35 L. R. A. 289 [*reversing* 5 Misc. (N. Y.) 518, 25 N. Y. Suppl. 835, 58 N. Y. St. 92]; Pawlick *v.* Homestead Loan Assoc., 15 Misc. (N. Y.) 427, 37 N. Y. Suppl. 164, 72 N. Y. St. 474; Eastern Bldg., etc., Assoc. *v.* Snyder, 98 Va. 710, 37 S. E. 298; Brett *v.* Monarch Invest. Bldg. Soc., [1894] 1 Q. B. 367, 58 J. P. 367, 63 L. J. Q. B. 237, 70 L. T. Rep. N. S. 146, 9 Reports 141, 42 Wkly. Rep. 209.

89. Hoyt *v.* Interocean Bldg. Assoc., 58 Minn. 345, 60 N. W. 678.

90. Letourneau *v.* Berlin Bldg., etc., Assoc., 68 N. H. 366, 44 Atl. 532.

91. *Colorado.*—Hawley *v.* North Side Bldg., etc., Assoc., 11 Colo. App. 93, 52 Pac. 408.

Delaware.— McKenney *v.* Diamond State Loan Assoc., 8 Houst. (Del.) 557, 18 Atl. 905.

Indiana.— Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405.

New York.— House *v.* Eastern Bldg., etc., Assoc., 52 N. Y. App. Div. 163, 66 N. Y. Suppl. 109.

is not bound by an amendment of the by-laws which has been irregularly adopted,[92] nor can vested rights be affected either by change in the statute[93] or by-laws.[94] If, on withdrawing, a member is entitled to a sum in addition to what he has put in, it is an adjusted profit, and not interest on money loaned, and the association cannot withhold a part on the ground of usury, nor can it retain a part thereof to guard against subsequent insolvency.[95]

4. Effect of Withdrawal or Notice Thereof. One whose withdrawal of stock from a solvent association is completed ceases to be a member.[96] It has been held that by giving notice of withdrawal a stock-holder becomes a creditor,[97] but

Pennsylvania.— Eaton *v.* Eastern Bldg., etc., Assoc., 7 Pa. Dist. 440.

South Dakota.—Beach *v.* Co-operative Sav., Assoc., 10 S. D. 549, 74 N. W. 889.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 19.

Payment in scrip.— A by-law requiring withdrawing members to accept scrip payable at the time when their stock would have matured is a proper and reasonable regulation. Hundermark *v.* New South Bldg., etc., Assoc., (Miss. 1901) 29 So. 528.

Payment of less than amount paid in.— Under a statute of Minnesota providing that in case of extraordinary losses which have to be charged against capital actually paid in all withdrawing shares shall be subject to a *pro rata* charge thereof, it has been held that, as long as the assets of the company equaled the amounts paid in on stock, a withdrawing stock-holder was entitled to at least the amount paid in by him, and the company was not justified in making the reduction. Baker *v.* U. S. Savings, etc., Assoc., 23 R. I. 243, 49 Atl. 967.

Right to interest after notice of withdrawal. — Where the amount due on withdrawal of stock is wrongfully withheld, and an action is brought to recover same, interest from the commencement of the action can be recovered, regardless of a provision of the by-laws that interest shall cease upon notice of withdrawal. Sinteff *v.* People's Bldg., etc., Assoc., 37 N. Y. App. Div. 340, 57 N. Y. Suppl. 611 [*affirmed* in 166 N. Y. 630, 60 N. E. 1120]. See also Enterprise Bldg., etc., Soc. *v.* Bolin, 12 Colo. App. 304, 55 Pac. 740.

Compromising claim.— An association has power to compromise with a member and release him from further obligation to the corporation (State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258), and, where the parties to the compromise have acted in good faith, the transaction will not be rescinded because the released member was paid a greater sum than he would have received upon a *pro rata* distribution of the assets (Wangerien *v.* Aspell, 47 Ohio St. 250, 24 N. E. 405).

92. Johnson *v.* Mutual Guarantee Bldg., etc., Assoc., 66 N. J. L. 683, 51 Atl. 150.

93. Enterprise Bldg., etc., Soc. *v.* Bolin, 12 Colo. App. 304, 55 Pac. 740; Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

94. Sinteff *v.* People's Bldg., etc., Assoc., 37 N. Y. App. Div. 340, 57 N. Y. Suppl. 611 [*affirmed* in 166 N. Y. 630, 60 N. E. 1120]; Savage *v.* People's Bldg., etc., Assoc., 45 W. Va. 275, 31 S. E. 991.

Reducing amount of receipts applicable to withdrawals.—Where, by the original articles and by-laws, the option to withdraw the amount paid, with interest up to the time of application for withdrawal, is unconditional, an amendment providing that only one half of the receipts shall be applicable to withdrawals is not binding on existing shareholders, because it affects not the remedy merely, but the contract. Sinteff *v.* People's Bldg., etc., Assoc., 37 N. Y. App. Div. 340, 57 N. Y. Suppl. 611 [*affirmed* in 166 N. Y. 630, 60 N. E. 1120]. *Contra,* Bearden *v.* People's Bldg., etc., Assoc., (Tenn. Ch. 1898) 49 S. W. 64.

Estoppel to question by-law.— Where a shareholder knew of an amendment which reduced the withdrawal value of his shares below their actual value, but for two years made no protest, while other members paid their dues on the new basis, he is estopped afterward, on withdrawal from the association, to claim any greater sum than he was entitled to under the amendment. Gardner *v.* New York Mut. Sav., etc., Assoc., 35 Misc. (N. Y.) 115, 71 N. Y. Suppl. 240 [*affirmed* in 67 N. Y. App. Div. 141, 73 N. Y. Suppl. 604].

95. Jungkuntz *v.* West Liberty Bldg. Assoc. No. 1, 8 Ohio Dec. (Reprint) 242, 6 Cinc. L. Bul. 428.

96. Rickert *v.* Suddard, 184 Ill. 149, 56 N. E. 344 [*reversing* 80 Ill. App. 204]; *In re* Sheffield, etc., Permanent Bldg., Soc., 22 Q. B. D. 470, 53 J. P. 375, 58 L. J. Q. B. 265, 60 L. T. Rep. N. S. 186; *In re* West Riding, etc., Permanent Ben. Bldg. Soc., 45 Ch. D. 463, 59 L. J. Ch. 823, 63 L. T. Rep. N. S. 483, 39 Wkly. Rep. 74. See also Enterprise Bldg., etc., Soc. *v.* Bolin, 12 Colo. App. 304, 55 Pac. 740, holding that at the expiration of the term of notice a stock-holder's withdrawal is complete, and as between himself and the other shareholders he ceases to be a member and become a creditor of the association to the extent of his legal claim.

97. Browne *v.* Sanders, 20 D. C. 455; Southern Bldg., etc., Assoc. *v.* Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206; Lepore *v.* Twin Cities Nat. Bldg., etc., Assoc., 5 Pa. Super. Ct. 276, 40 Wkly. Notes Cas. (Pa.) 548; William Brown Bldg., etc., Assoc.'s Estate, 12 Wkly. Notes Cas. (Pa.) 207; Moore *v.* Southern Mut. Bldg., etc., Assoc., 50 S. C. 89, 27 S. E. 543.

Effect of assignment of stock after notice of withdrawal see *supra,* V, C, 3.

it has also been held that this is not true in an absolute, only in a limited and qualified, sense.[98]

E. Maturity of Stock—**1. In General.** Stock matures when the fund in which a shareholder has an interest actually amounts to the sum per share specified in the articles of association,[99] at which time borrowers and non-borrowers stand on an equal footing,[1] and the shareholder is entitled to payment without being compelled to bid a premium for the privilege.[2]

2. Dividends. Although a provision for declaring dividends at stated intervals be mandatory the amount of the dividend is discretionary,[3] but each number is entitled to receive such proportion of the earnings as the value[4] of his shares bears to the total value of all the shares.[5]

VI. DUES, FINES, AND ASSESSMENTS.

A. Assessments. It is the duty of each member to bear his share of the losses and expenses of the association,[6] and if the by-laws are expressly made a

98. Heinbokel *v.* National Sav., etc., Assoc., 58 Minn. 340, 59 N. W. 1050, 49 Am. St. Rep. 519, 25 L. R. A. 215; Pawlick *v.* Homestead Loan Assoc., 15 Misc. (N. Y.) 427, 37 N. Y. Suppl. 164, 72 N. Y. St. 474; Christian's Appeal, 102 Pa. St. 184; Sibun *v.* Pearce, 44 Ch. D. 354, 62 L. T. Rep. N. S. 388; Walker *v.* General Mut. Bldg. Soc., 36 Ch. D. 777, 52 J. P. 278, 57 L. T. Rep. N. S. 574; Davies *v.* Second Chatham Permanent Ben. Bldg. Soc., 61 L. T. Rep. N. S. 680.

99. Campbell *v.* Perth Amboy Mut. Loan, etc., Assoc., (N. J. 1901) 50 Atl. 444.

Method of ascertaining maturity.— A provision in the constitution of a building and loan association that "where it shall be ascertained" that the value of each share of stock amounts to two hundred dollars, a meeting of the shareholders shall be convened, at which time a division shall take place, etc., does not obligate a shareholder to abide by any particular mode of computation, or the mode adopted and used by the association in determining the value of his shares. Charles Tyrrell Loan, etc., Assoc. *v.* Haley, 163 Pa. St. 301, 35 Wkly. Notes Cas. (Pa.) 269, 30 Atl. 154.

1. Mercer *v.* Amber Bldg., etc., Assoc., 10 Pa. Co. Ct. 51.

2. Deering *v.* Bishop Bayley Bldg., etc., Assoc. No. 2, (N. J. 1892) 24 Atl. 575; Mechanics', etc., Bldg. Assoc.'s Appeal, (Pa. 1887) 7 Atl. 728; Rodgers *v.* Southwestern Mut. Sav. Fund, etc., Assoc., 7 Wkly. Notes Cas. (Pa.) 95.

3. Marks *v.* Monroe County Permanent Sav., etc., Assoc., 22 N. Y. Suppl. 589, 52 N. Y. St. 451, holding that such dividend need not be of the whole of the net profits of the corporation during the quarter included; especially when it does not appear that the debts to become due or the business of the association do not require the detention of money.

Guaranteed dividends on paid-up stock can only be paid out of the surplus profits, without injuring the capital stock. Bingham *v.* Marion Trust Co., (Ind. App. 1901) 61 N. E. 29.

What constitute earnings see Boone *v.* Homestead Loan Assoc., 23 N. Y. Suppl. 203, 54 N. Y. St. 63; Marks *v.* Monroe County Permanent Sav., etc., Assoc., 22 N. Y. Suppl. 589, 52 N. Y. St. 451.

4. What value affords basis of distribution. — The proper basis for distribution of earnings is the amount of dues paid on each share and the other credits to the share, whether or not a loan has been awarded on such a share. Seibel *v.* Victoria Bldg. Assoc. No. 2, 43 Ohio St. 371, 2 N. E. 417. A borrowing member of a building and loan association who elects to treat all payments as made on the debt is not entitled to dividends on the stock, having by his election paid nothing on the stock. Williams *v.* National Bldg., etc., Assoc., 22 Ky. L. Rep. 962, 59 S. W. 321. Nor is a borrowing member of a building association who makes payment in advance on the amount borrowed entitled to dividends on such payment, or on any dues, except such as accrued as stated dues at the times for semiannual dividends, but he is entitled to credit on his premium in so far as his payment canceled the loan. Turner Ban-Verein No. 3 *v.* Woodburn, 11 Ohio Dec. (Reprint) 578, 27 Cinc. L. Bul. 409.

A member may be estopped to question the mode of apportioning earnings by knowingly accepting, through a considerable period, an apportionment on a different basis than that fixed by statute. Ruehlman *v.* Atlantic Bldg. Assoc. Co., 6 Ohio Cir. Ct. 285.

5. Seibel *v.* Victoria Bldg. Assoc. No. 2, 9 Ohio Dec. (Reprint) 422, 13 Cinc. L. Bul. 265.

6. See *supra*, IV, B, 1, b.

In Illinois a loan association may make its assets sufficient by an assessment charged on its books *pro rata* against the amounts paid in by its members on stock. Continental Invest., etc., Soc. *v.* People, 167 Ill. 195, 47 N. E. 381; Broadwell *v.* Inter-Ocean Homestead, etc., Assoc., 161 Ill. 327, 43 N. E. 1067.

In Indiana the board of directors of a building association may assess on the entire amount of the unpaid stock of both its bor-

part of the contract or certificate of stock and expressly give the association power to make sufficient assessments so that stock will mature within a fixed time, a stock-holder cannot question the action of the association in making such assessments, where no fraud is practised upon him.[7]

B. Fines — 1. Power to Impose — a. In General. Although some courts regard fines as penalties and will not lend their aid to enforce them independently of statutory enactment,[8] the weight of authority is to the effect that building associations have the right to impose fines whether any express warrant is found for it in the statute under which such associations are incorporated or not.[9]

b. Limitations of Power. Fines must be reasonable in amount and equitable in every respect.[10] The repeated imposition of the same fine, increased upon the

rowing and non-borrowing members, when winding up the association, a sum sufficient to pay the indebtedness of the association, including an amount sufficient to equalize the borrowing members who have paid out in due course of time and also the non-borrowing members. Wohlford *v.* Citizens Bldg., etc., Assoc., 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177.

7. Pioneer Sav., etc., Co. *v.* Miller, 58 Ill. App. 211.

A borrowing member on ceasing to pay severs his connection with the association as a stock-holder and cannot thereafter be charged for expenses. Dowell *v.* Safety Bldg., etc., Co., 21 Ky. L. Rep. 1267, 54 S. W. 845. But in Ohio a borrowing shareholder who has made full payment in dues and dividends of the amount loaned to him is not thereby relieved of personal liability on such shares, until there has been an actual adjustment between the shareholder and the association, but is liable to an assessment. Eversmann *v.* Schmitt, 53 Ohio St. 174, 41 N. E. 139, 53 Am. St. Rep. 632, 29 L. R. A. 184.

8. Lincoln Bldg., etc., Assoc. *v.* Graham, 7 Nebr. 173. See also Building Assoc. *v.* Schuller, 3 Wkly. Notes Cas. (Pa.) 431, holding that fines for unpaid dues can only be imposed when expressly authorized by the charter or by-laws.

9. The imposition of adequate fines is justified in order to prevent default in the punctual payment of dues upon which the success of the association depends, or in case of default that some reasonable equivalent for the consequent damage sustained may be provided.

Arkansas.— Roberts *v.* American Bldg., etc., Assoc., 62 Ark. 572, 36 S. W. 1085, 54 Am. St. Rep. 309, 33 L. R. A. 744.

Indiana.— Kenner *v.* Whitelock, 152 Ind. 635, 53 N. E. 232.

Maryland.—Shannon *v.* Howard Mut. Bldg. Assoc., 36 Md. 383.

Mississippi.— Goodman *v.* Durant Bldg., etc., Assoc., 71 Miss. 310, 14 So. 146.

New York.— Mutual Ben. Loan, etc., Co. *v.* Lynch, 54 N. Y. App. Div. 559, 67 N. Y. Suppl. 6.

Ohio.— Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186.

Pennsylvania.— Lynn *v.* Freemansburg Bldg., etc., Assoc., 117 Pa. St. 1, 11 Atl. 537, 2 Am. St. Rep. 639, holding that a right to enact a by-law imposing a fine for the non-payment of dues is a right which building associations possess of enacting suitable by-laws for their government.

Tennessee.— Barrows *v.* Southern Bldg., etc., Assoc., (Tenn. Ch. 1898) 50 S. W. 665; Hughes *v.* Farmers' Sav., etc., Assoc., (Tenn. Ch. 1897) 46 S. W. 362; Setliff *v.* North Nashville Bldg., etc., Assoc., (Tenn. Ch. 1897) 39 S. W. 546.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 26.

10. *Arkansas.*—Roberts *v.* American Bldg., etc., Assoc., 62 Ark. 572, 36 S. W. 1085, 54 Am. St. Rep. 309, 33 L. R. A. 744, holding that a provision in the by-laws of a building association imposing on its stock-holders a fine of ten cents per share to be imposed for each and every month that payment is not made is reasonable.

Illinois.— Vierling *v.* Mechanics', etc., Assoc., 179 Ill. 524, 53 N. E. 979, holding that fines of twenty-five cents per share for failure to pay interest instalments when due, and ten cents per share for delinquent instalments of principal, are oppressive.

Iowa.—Iowa Sav., etc., Assoc. *v.* Heidt, 107 Iowa 297, 77 N. W. 1050, 70 Am. St. Rep. 197, 43 L. R. A. 689, holding that fines of five cents on each share for the first default, and ten cents for each subsequent default, are not so unreasonable as to be void.

Kentucky.— Safety Bldg., etc., Assoc. *v.* Montjoy, 21 Ky. L. Rep. 1189, 54 S. W. 719.

Ohio.— Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186 [*followed* in Forrest City United Land, etc., Assoc. *v.* Gallagher, 25 Ohio St. 208].

Pennsylvania.— Lynn *v.* Freemansburg Bldg., etc., Assoc., 117 Pa. St. 1, 11 Atl. 537, 2 Am. St. Rep. 639; Harris Bldg., etc., Assoc. *v.* Simon, 19 Pa. Co. Ct. 110.

Tennessee.— Barrows *v.* Southern Bldg., etc., Assoc., (Tenn. Ch. 1898) 50 S. W. 665.

West Virginia.— McGannon *v.* Central Bldg. Assoc. No. 2, 19 W. Va. 726.

England.— Parker *v.* Butcher, L. R. 3 Eq. 762, 36 L. J. Ch. 552; *Re* Middlesbrough Bldg. Soc., 49 J. P. 278, 54 L. J. Ch. 592, 51 L. T. Rep. N. S. 743.

Increase of amount.— Where the weekly instalment of premium to be paid for shares purchased in a building association has been fixed in and secured by a mortgage on the property of a member purchasing, it cannot be increased and covered by the mortgage by

principle of arithmetical progression, will not be permitted.[11] There are, moreover, authorities to the effect that no more than one fine for the non-payment of the same stated due can be assessed or collected.[12]

2. NATURE. Fines provided for by the by-laws of a building association are not intended as penalties, but are to be considered as liquidated damages fixed by consent of the parties to indemnify the association for the loss it has sustained by reason of the failure of the defaulting member to make prompt payments.[13]

3. FOR WHAT IMPOSED — a. In General. Fines can be imposed only by way of punishment for some delinquency in the performance of a duty which the member may owe to the association by reason of his membership.[14]

b. Default in Payment of Interest. Fines cannot be imposed for default in payment of interest on loans,[15] unless expressly authorized by the statute creating the association.[16]

4. SECURITY FOR PAYMENT.[17] Where a loan is advanced to a member upon his stock it is within the capacity of the association to take security from such member by mortgage or otherwise for the payment of the fines as well as stated dues;[18] but fines imposed by the association upon its members for defaults in

the subsequent action of the association, unless the constitution and by-laws of the association confer such authority in plain and unmistakable language. Burke *v.* Home Bldg. Assoc., 8 Ohio Dec. (Reprint) 341, 7 Cinc. L. Bul. 114.

11. Second New York Bldg. Assoc. *v.* Gallier [*cited* in Citizens Mut. Loan, etc., Assoc. *v.* Webster, 25 Barb. (N. Y.) 263, 272]; Lynn *v.* Freemansburg Bldg., etc., Assoc., 117 Pa. St. 1, 11 Atl. 537, 2 Am. St. Rep. 639.

A by-law of a building association which provides that each stock-holder who fails to pay his monthly assessments shall be fined for the first and second weeks five cents, for the third week ten cents, and for each succeeding week fifteen cents, for each share of stock he owns, does not allow a fine of more than fifteen cents a week on each share, although there is a failure to pay assessments for several successive months. Gouchenour *v.* Sullivan Bldg., etc., Assoc., 119 Ind. 441, 21 N. E. 1088. See also Dupuy *v.* Eastern Bldg., etc., Assoc., 93 Va. 460, 25 S. E. 537, 35 L. R. A. 215, holding that under a by-law of a building association, providing that "borrowing members who shall neglect to pay any instalments as the same become due, shall pay to the Association a fine of twenty cents per month on each $100 that they have borrowed from the Association," the fine for one month is not repeated and added to that of each succeeding month, making the amount increase in arithmetical progression, but only twenty cents on each hundred dollars can be imposed in any one month.

12. Monumental Permanent Bldg., etc., Soc. *v.* Lewin, 38 Md. 445; Shannon *v.* Howard Mut. Bldg. Assoc., 36 Md. 383; Forrest City United Land, etc., Assoc. *v.* Gallagher, 25 Ohio St. 208; Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186; Setliff *v.* North Nashville Bldg., etc., Assoc., (Tenn. Ch. 1897) 39 S. W. 546; McGannon *v.* Central Bldg. Assoc. No. 2, 19 W. Va. 726. See also Pentz *v.* Citizens' F. Ins., etc., Co., 35 Md. 73.

13. Roberts *v.* American Bldg., etc., Assoc., 62 Ark. 572, 36 S. W. 1085, 54 Am. St. Rep. 309, 33 L. R. A. 744; Ocmulgee Bldg., etc., Assoc. *v.* Thomson, 52 Ga. 427; Shannon *v.* Howard Mut. Bldg. Assoc., 36 Md. 383; McGannon *v.* Central Bldg. Assoc. No. 2, 19 W. Va. 726. *Compare* Lincoln Bldg., etc., Assoc. *v.* Graham, 7 Nebr. 173.

14. Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186; McGannon *v.* Central Bldg. Assoc. No. 2, 19 W. Va. 726.

15. *Maryland.*— See Shannon *v.* Howard Mut. Bldg. Assoc., 36 Md. 383.

North Carolina.— Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 257, 26 S. E. 40; Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841.

Ohio.— Forrest City United Land, etc., Assoc. *v.* Gallagher, 25 Ohio St. 208; Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186.

Tennessee.— Setliff *v.* North Nashville Bldg., etc., Assoc., (Tenn. Ch. 1897) 39 S. W. 546.

West Virginia.— Parker *v.* U. S. Building, etc., Assoc., 19 W. Va. 744.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 68.

Interest cannot be imposed on fines.— Kenner *v.* Whitelock, 152 Ind. 635, 53 N. E. 232; Parker *v.* Butcher, L. R. 3 Eq. 762, 36 L. J. Ch. 552.

16. Clarksville Bldg., etc., Assoc. *v.* Stephens, 26 N. J. Eq. 351; Association *v.* Neurath, 2 Wkly. Notes Cas. (Pa.) 95. See also Gouchenour *v.* Sullivan Bldg., etc., Assoc., 119 Ind. 441, 21 N. E. 1088; Parker *v.* Butcher, L. R. 3 Eq. 762, 36 L. J. Ch. 552; *In re* Middlesbrough Bldg. Soc., 49 J. P. 278, 54 L. J. Ch. 592, 51 L. T. Rep. N. S. 743.

17. See also *infra*, VIII, H, 5, c, (III).

18. Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186. See also Provident Permanent Bldg. Soc. *v.* Greenhill, 9 Ch. D. 122, 38 L. T. Rep. N. S. 140, 27 Wkly. Rep. 110, holding that fines secured by covenant in a mortgage to a building society form part of

payment of dues cannot be collected by foreclosure of a mortgage given to secure payment of a sum borrowed or of dues, unless the parties have agreed that the fines may be so collected.[19]

5. REMISSION. The association may remit or condone fines.[20]

C. Duration and Extent of Liability—1. IN GENERAL. The obligation of a borrowing member to pay dues and fines does not cease on the filing of a bill to foreclose the mortgage given as security for the loan and the payment of dues and fines.[21] It has been held, however, that such obligation ceases upon the foreclosure and sale of the association's lien on such member's stock,[22] or upon his death.[23] It has also been held that the failure of a shareholder to pay his dues is excused by the refusal of the officers of the association to allow him to inspect the books.[24]

2. DISSOLUTION OF ASSOCIATION. All the members of an association, borrowing as well as non-borrowing, must continue to pay their dues and fines until the asso-

the principal in taking the account of principal, interest, and costs in a foreclosure suit by the building society, and are payable with interest.

Payment of the principal and interest due on a mortgage given by a member of a loan association conditioned for the payment of a loan and of the monthly dues does not extinguish the mortgage, but it remains as security for the faithful performance of the mortgagor's duties as a member of the association. Hence it can be used to enforce the payment of the monthly dues. Everham *v.* Oriental Sav., etc., Assoc., 47 Pa. St. 352.

19. Bowen *v.* Lincoln Bldg., etc., Assoc., 51 N. J. Eq. 272, 28 Atl. 67; Hazel Loan, etc., Assoc. *v.* Groesbeck, 17 Phila. (Pa.) 242, 41 Leg. Int. (Pa.) 16.

20. People *v.* Lowe, 117 N. Y. 175, 22 N. E. 1016, 27 N. Y. St. 138. But see Wilson *v.* Upper Canada Bldg. Soc., 12 Grant Ch. (U. C.) 206, holding that a rule of a building society for the payment of fines cannot be waived by the directors.

Waiver of part of authorized fine.— Where the constitution of a building association prescribes the fines to be imposed on delinquent members, it thereby fixes the limit beyond which the association cannot go, but it may, by by-law, waive some part of the fine so authorized, and impose smaller ones. Dupuy *v.* Eastern Bldg., etc., Assoc., 93 Va. 460, 25 S. E. 537, 35 L. R. A. 215.

21. Union Bldg. Loan Assoc. *v.* Masonic Hall Assoc., 29 N. J. Eq. 389. See also Hutchinson *v.* Straub, 64 Ohio St. 413, 60 N. E. 602, 83 Am. St. Rep. 764 (holding that the filing by a building association mortgages of answer and cross petition in a proceeding brought by an assignee for the benefit of creditors for authority to sell land is not such an election to forfeit the stock of the member as will estop the association from claiming fines for non-payment of dues accruing after the assignment); White *v.* Mechanics' Bldg. Fund Assoc., 22 Gratt. (Va.) 233 (where it appeared that a shareholder in a building association obtained an advance of money on his shares, and the association thereby acquired the rights of property therein and it was held that the assignment of his shares by such shareholder to the association did not release him from his covenant, as a party to the articles of association, to make his regular monthly payments on shares and on account of fines).

Where settlements with and release of members of a building association by allowing payments in advance or otherwise is contrary to the constitution of the association, such payments and release, although made in good faith, will not release members where it turns out that there will be a deficiency as to non-retiring members. McKeown *v.* Irish Bldg. Assoc. No. 2, 8 Ohio Dec. (Reprint) 17, 5 Cinc. L. Bul. 52, 9 Ohio Dec. (Reprint) 257, 12 Cinc. L. Bul. 6.

Withdrawal of member.— Under a by-law of a building association providing that a fine may be imposed on shares of a member for redeeming them by paying off the loan for which they are pledged to it, the fine may be imposed, although at the same time the member withdraws the shares, that is returns them to the association, and becomes entitled to receive from it their then value. Safety Co-operative Bldg., etc., Assoc. *v.* Robinson, 47 N. Y. App. Div. 534, 62 N. Y. Suppl. 511 [*affirmed* in 170 N. Y. 568, 62 N. E. 1100]. But see Miller *v.* Second Jefferson Bldg. Assoc., 50 Pa. St. 32, where it appeared that a stock-holder in a building association, under a resolution of the association permitting borrowers to withdraw on the payment of a stipulated amount the stock to be then "withdrawn and canceled," withdrew, having paid off his loans and stock, and the stock was then marked on the books as "canceled" and "withdrawn." It was held that the company could not afterward recover for dues which subsequently accrued thereon.

22. Dakota Bldg., etc., Assoc. *v.* Logan, (Tex. Civ. App. 1896) 33 S. W. 1088.

On the election of an association to declare a debt due from a borrower the payment of fines ceases. Murphy *v.* Goodland Bldg., etc., Assoc., 2 Kan. App. 330, 43 Pac. 863.

23. Shahan *v.* Shahan, 48 W. Va. 477, 37 S. E. 552, 86 Am. St. Rep. 68.

24. Buker *v.* Leighton Lea Assoc., 164 N. Y. 557, 58 N. E. 1085 [*reversing* 18 N. Y. App. Div. 548, 46 N. Y. Suppl. 35].

ciation is dissolved or is in a condition to be dissolved.[25] An association is dissolved, or is in a condition to be dissolved, so as to terminate the liability to pay dues and fines upon its ceasing to do business,[26] upon its insolvency,[27] or upon the appointment of a receiver for it.[28]

D. Payment — 1. NOTICE. If the charter or by-laws provide for the time of payment of dues and no provision is made for special notice, a member is not entitled to special notice that a payment is due.[29]

2. MEDIUM OF PAYMENT. If the constitution or by-laws require the payment of all dues in money a payment by a member in checks, afterward fraudulently appropriated by an officer of the company, is invalid.[30]

3. TIME AND PLACE OF PAYMENT. If the constitution or by-laws require payment of dues at regular stated meetings the association is not bound by payments made at other times to the secretary and embezzled by him.[31] If, however, there is

25. *Illinois.*— Sullivan *v.* Spaniol, 78 Ill. App. 125.

Indiana.— Wayne International Bldg., etc., Assoc. *v.* Skelton, 27 Ind. App. 624, 61 N. E. 951. *Compare* Lime City Bldg., etc., Assoc. *v.* Wagner, 122 Ind. 78, 23 N. E. 689, 17 Am. St. Rep. 342.

Maryland.— Lister *v.* Log Cabin Bldg. Assoc., 38 Md. 115.

New Jersey.— Somerset County Bldg., etc., Assoc. *v.* Camman, 11 N. J. Eq. 382.

New York.— Breed *v.* Ruoff, 54 N. Y. App. Div. 142, 66 N. Y. Suppl. 422.

North Dakota.— Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318.

Ohio.—Seibel *v.* Victoria Bldg. Assoc. No. 2, 43 Ohio St. 371, 2 N. E. 417.

Pennsylvania.— Freemansburg Bldg., etc., Assoc. *v.* Watts, 199 Pa. St. 221, 48 Atl. 1075.

Virginia.— Cason *v.* Seldner, 77 Va. 293.

Canada.— Wilson *v.* Upper Canada Bldg. Soc., 12 Grant Ch. (U. C.) 206, which holds that although a building society should, if properly managed, have terminated in ten years, yet, if it did not then terminate, borrowing members, as well as non-borrowing members, are bound to continue paying their monthly subscriptions until they reach the full amount of their shares.

26. Number Four Fidelity Bldg., etc., Union *v.* Smith, 155 Ind. 679, 58 N. E. 70; Blakeley *v.* El Paso Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 292. See also Cook *v.* Kent, 105 Mass. 246, holding that the liability of a member for the payment of dues and fines cannot extend beyond the existence of the association.

After liquidation is entered upon, the obligation of both borrowing and non-borrowing members to pay dues ceases, and hence there can be no fines imposed for failure to pay dues. Seventeenth Ward Bldg. Assoc. *v.* Fitzgerald, 11 Ohio S. & C. Pl. Dec. 133, 8 Ohio N. P. 160. See also Hinman *v.* Ryan, 3 Ohio Cir. Ct. 529.

27. *Connecticut.*— Curtis *v.* Granite State Provident Assoc., 69 Conn. 6, 36 Atl. 1023, 61 Am. St. Rep. 17.

Indiana.— Number Four Fidelity Bldg., etc., Union *v.* Smith, 155 Ind. 679, 58 N. E. 70.

Iowa.— Hale *v.* Kline, 113 Iowa 523, 85 N. W. 814.

Maryland.— Low St. Bldg. Assoc. No. 6 *v.* Zucker, 48 Md. 448.

New Hampshire.— Bank Com'rs *v.* Granite State Provident Assoc., 68 N. H. 554, 44 Atl. 605.

North Dakota.— Hale *v.* Cairns, 8 N. D. 145, 77 N. W. 1010, 73 Am. St. Rep. 746, 44 L. R. A. 261.

Pennsylvania.— Strohen *v.* Franklin Sav. Fund, etc., Assoc., 115 Pa. St. 273, 8 Atl. 843.

West Virginia.— Young *v.* Improvement Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670.

Wisconsin.— Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945.

United States.—Manorita *v.* Fidelity Trust, etc., Co., 101 Fed. 8.

As to insolvency of association see *infra*, X, B.

28. Number Four Fidelity Bldg., etc., Union *v.* Smith, 155 Ind. 679, 58 N. E. 70; Peter's Bldg. Assoc. No. 5 *v.* Jaecksch, 51 Md. 198; Buist *v.* Bryan, 44 S. C. 121, 21 S. E. 537, 51 Am. St. Rep. 787, 29 L. R. A. 127.

29. Morrison *v.* Dorsey, 48 Md. 461.

30. Mueller *v.* Cohen, 11 Ohio Dec. (Reprint) 575, 27 Cinc. L. Bul. 353. See also People's Bldg., etc., Assoc. *v.* Wroth, 43 N. J. L. 70, holding that if the dues and fines payable by the members to the association are by the constitution and by-laws to be paid to the treasurer in cash, it is a breach of the duty appertaining to the office of treasurer for him to accept the promise or voucher of any member of the association in place of cash.

Stock of other association.— An agent of a building association, who, with the acquiescence of the association, establishes local boards, solicits stock, negotiates loans, and collects the price of prepaid stock, has no authority to accept stock of another association in payment for prepaid stock. German-American Bldg. Assoc. *v.* Droge, 14 Ind. App. 691, 43 N. E. 475.

31. Morrow *v.* James, 4 Mackey (D. C.) 59; Killian *v.* Building, etc., Assoc., 21 Pa. Co. Ct. 58.

nothing in the constitution or by-laws requiring payments to be made at stated meetings, payment to the proper officer outside thereof is good.[32]

4. To Whom Payable. Dues must be paid to an officer or agent of the association authorized to receive the same.[33]

E. Forfeiture For Non-Payment — 1. In General. It is competent for building and loan associations, in the absence of statutory or charter inhibitions, to provide in their by-laws for a forfeiture of stock of members who fail for a specified period to pay dues, fines, and assessments.[34] Forfeitures, however, are not favored, and must be created by unambiguous language;[35] and they cannot be

32. Schutte *v.* California Bldg., etc., Assoc., 146 Pa. St. 324, 23 Atl. 336. See also Louchheim *v.* Richmond Mut. Bldg., etc., Assoc. No. 1, 16 Pa. Super. Ct. 33 (holding that provisions in the by-laws of a building and loan association that stated monthly meetings of the board of directors shall be held on a day specified, at such hour and such place as the board of directors may designate, for the purpose of receiving from the stockholders the money due the association, and that the secretary shall attend at all meetings of the board of directors, and shall receive all moneys due the association, and pay the same to the treasurer as soon as he has made a record of the same, do not prevent the secretary from receiving moneys at other times and places, thereby binding the association); Tyler *v.* Old Post Bldg. Assoc., 87 Ind. 323 (where it appeared that the by-laws required dues and assessments to be paid to the secretary at weekly meetings, and also required that officer to give a bond for the faithful performance of his duties, and it was held that the bond covered all moneys received by him in his official character, whether paid at the times required or not).

33. Morrow *v.* James, 3 Mackey (D. C.) 27 (holding that where a stock-holder pays his dues to an officer who has no authority to receive the money, and such officer fails to pay it over to the association, the stock-holder is not discharged); Van Wagenen *v.* Genesee Falls Permanent Sav., etc., Assoc., 88 Hun (N. Y.) 43, 34 N. Y. Suppl. 491, 68 N. Y. St. 498 (holding that a loan association is not estopped to deny payment to its secretary on the ground that he was unauthorized to receive the same, because the secretary gave a pass-book to the person who gave him money to pay the association, and because on each occasion the secretary returned it to him with an entry, as of the date of the regular meeting, of the amount given him to pay the association); Killian *v.* Building, etc., Assoc., 21 Pa. Co. Ct. 58.

A director who receives deposits from members who are employees under him without authority directly or indirectly from the company acts as agent of the members, and not as agent of the association. Hasselmeyer *v.* Avondale Loan, etc., Co., 10 Ohio S. & C. Pl. Dec. 570, 8 Ohio N. P. 195.

Estoppel of association to deny receipt of funds.— Where moneys left with the secretary were placed with him on the theory that they were deposits in the association upon which interest was to be paid, but the association did not, in fact, receive these deposits, or any part of them, and the secretary did not have authority from the association to receive them for it, and was not held out by the association as having such authority, and the association did not authorize their receipt and did not receive the benefit of them, it is not estopped to deny its liability and it is not bound by the unauthorized acts of the secretary. Christopher Columbus Bldg., etc., Assoc. *v.* Kriete, 192 Ill. 128, 137, 61 N. E. 510.

34. *Alabama.*— Southern Bldg., etc., Assoc. *v.* Anniston L. & T. Co., 101 Ala. 582, 15 So. 123, 46 Am. St. Rep. 138, 29 L. R. A. 120.

California.— Occidental Bldg., etc., Assoc. *v.* Sullivan, 62 Cal. 394.

Illinois.— Freeman *v.* Ottawa Bldg., etc., Assoc., 114 Ill. 182, 28 N. E. 611.

Indiana.— Lime City Bldg., etc., Assoc. *v.* Black, 136 Ind. 544, 35 N. E. 829.

Michigan.— People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373.

Pennsylvania.— Watkins *v.* Workingmen's Bldg., etc., Assoc., 97 Pa. St. 514.

South Dakota.— Mueller *v.* Madison Bldg., etc., Assoc., 11 S. D. 43, 75 N. W. 277.

Tennessee.— Barrows *v.* Southern Bldg., etc., Assoc., (Tenn. Ch. 1898) 50 S. W. 665.

Texas.— Pioneer Sav., etc., Co. *v.* Oxford, (Tex. Civ. App. 1896) 35 S. W. 1078.

Virginia.— Nickels *v.* People's Bldg., etc., Assoc., 93 Va. 380, 25 S. E. 8.

England.— Reg. *v.* D'Eyncourt, 4 B. & S. 820, 10 Jur. N. S. 513, 28 J. P. 116, 33 L. J. M. C. 89, 9 L. T. Rep. N. S. 712, 3 New Rep. 420, 12 Wkly. Rep. 408, 116 E. C. L. 320; Moore *v.* Rawlins, 6 C. B. N. S. 289, 28 L. J. C. P. 247, 95 E. C. L. 289; Card *v.* Carr, 1 C. B. N. S. 197, 26 L. J. C. P. 113, 87 E. C. L. 197.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 69.

35. Occidental Bldg., etc., Assoc. *v.* Sullivan, 62 Cal. 394. See also Mueller *v.* Madison Bldg., etc., Assoc., 11 S. D. 43, 75 N. W. 277, holding that a by-law providing for arbitrary forfeiture and cancellation of stock for non-payment of dues and fines can be sustained, if at all, only by force of a statute expressly authorizing such proceeding.

Wrongful forfeiture.— An action to recover the value of stock wrongfully forfeited will lie against the association. Carpenter *v* American Bldg., etc., Assoc., 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345; Allen *v.* American Bldg., etc., Assoc., 49 Minn. 544, 42 N. W. 144, 32 Am. St. Rep. 574.

declared without allowing credit on account of payments previously made on the stock.[36]

2. DECLARATION AND NOTICE OF FORFEITURE. Stock will not be deemed to have been forfeited until action declaring the forfeiture is taken by the association.[37] A forfeiture may be declared, however, without notice to the delinquent member.[38]

3. EFFECT OF FORFEITURE. Where a loan association elects under its contract to forfeit a member's stock for non-payment and to declare the debt due, the shareholder's relation as a member is thereby terminated and he cannot be charged with subsequent fines.[39]

4. WAIVER OF FORFEITURE. A building and loan association may waive, either expressly or impliedly, its right to declare a forfeiture of stock.[40]

VII. OFFICERS AND AGENTS.

A. Compensation. An officer is not entitled to compensation unless the sum is fixed by a legal by-law or resolution.[41]

B. Powers. Officers and directors of building and loan societies possess such powers as are granted by statute, charter, and by-laws, and such as are not inconsistent therewith which are necessary to the discharge of their several offices,[42] but any substantial departure therefrom is *ultra vires*.[43] Each acts, in a way, as

36. Randall *v.* National Bldg., etc., Union, 43 Nebr. 876, 62 N. W. 252; Rowland *v.* Old Dominion Bldg., etc., Assoc., 115 N. C. 825, 18 S. E. 965, 116 N. C. 877, 22 S. E. 8; Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 51 S. C. 420, 29 S. E. 77, 64 Am. St. Rep. 683. See also Tilley *v.* American Bldg., etc., Assoc., 52 Fed. 618. *Contra*, Southern Bldg., etc., Assoc. *v.* Anniston L. & T. Co., 101 Ala. 582, 15 So. 123, 46 Am. St. Rep. 138, 29 L. R. A. 120; Freeman *v.* Ottawa Bldg., etc., Assoc., 114 Ill. 182, 28 N. E. 611.

In Minnesota and South Dakota a building association cannot forfeit absolutely to its own use the shares of a member who defaults in the payment of instalments, but must sell such shares, and after indemnifying itself out of the proceeds of such sale pay the balance thereof, if any, to the shareholder. Barton *v.* Pioneer Sav., etc., Co., 69 Minn. 85, 71 N. W. 906, 65 Am. St. Rep. 549; Henkel *v.* Pioneer Sav., etc., Co., 61 Minn. 35, 63 N. W. 243; Mueller *v.* Madison Bldg., etc., Assoc., 11 S. D. 43, 75 N. W. 277.

37. Watkins *v.* Workingmen's Bldg., etc., Assoc., 97 Pa. St. 514.

38. Freeman *v.* Ottawa Bldg., etc., Assoc., 114 Ill. 182, 28 N. E. 611. See also People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373, holding that where the bond given by a member in consideration of a loan provides that, on default in payment of dues on his stock transferred as security, the association may, at its option, declare the stock forfeited, and apply its withdrawal value on the bond, a formal foreclosure is not necessary to such application.

39. Armstrong *v.* Douglas Park Bldg. Assoc., 176 Ill. 298, 52 N. E. 886.

40. Barrows *v.* Southern Bldg., etc., Assoc., (Tenn. Ch. 1898) 50 S. W. 665. See also Nickels *v.* People's Bldg., etc., Assoc., 93 Va. 380, 25 S. E. 8, holding that although under the by-laws a member's stock might have been forfeited on default of payment of dues, the association is not obliged to declare a forfeiture, but has the right to continue the stock in force and to apply any payments to the liquidation of any of its dues against the member.

Acceptance of delinquent dues.— The right of a building society under its by-laws to forfeit the stock of one of its members for non-payment of dues and fines is waived by its acceptance of delinquent dues. Lime City Bldg., etc., Assoc. *v.* Black, 136 Ind. 544, 35 N. E. 829.

41. Fritze *v.* Equitable Bldg., etc., Soc., 186 Ill. 183, 57 N. E. 873 [*affirming* 83 Ill. App. 18]; Myers *v.* Equitable Bldg., etc., Assoc., 92 Ill. App. 27.

42. *Illinois.*— Citizens' Sav., etc., Assoc. *v.* Ruhl, 55 Ill. App. 65, holding that the president and secretary have no authority to withdraw funds from the custody of the treasurer and deposit them elsewhere, where by the society's charter they are required to be kept with the treasurer.

Indiana.— Wohlford *v.* Citizens' Bldg., etc., Assoc., 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177.

Massachusetts.— Manahan *v.* Varnum, 11 Gray (Mass.) 405.

Missouri.— St. Louis Domicile, etc., Assoc. *v.* Augustin, 2 Mo. App. 123, holding that where a committee is authorized by a resolution of the directors to make collections due the association, it may institute proceedings to collect in the name of the association, without an order specifying the mode of collecting the particular indebtedness, or without any more particular authority in reference thereto.

Pennsylvania.— Harmony Bldg. Assoc. *v.* Goldbeck, 13 Wkly. Notes Cas. (Pa.) 24.

43. Latimer *v.* Equitable Loan, etc., Assoc., 78 Mo. App. 463; *Re* Kent Ben. Bldg. Soc., 1 Drew. & Sm. 417, 7 Jur. N. S. 1045,

agent for the society and has power to bind it within the scope of the apparent authority possessed.[44]

C. Liabilities. Officers are not liable for *bona fide* mistakes of judgment,[45] nor are they insurers of property and money coming into their hands, and are not liable therefor if lost without negligence on their part.[46] They are liable, however, for losses resulting from violation of the by-laws of the society.[47]

VIII. FUNCTIONS AND DEALINGS.

A. In General. Building associations can exercise only such powers as are conferred by the legislative body creating them, either by express terms or by necessary implication.[48]

30 L. J. Ch. 785, 4 L. T. Rep. N. S. 610, 9 Wkly. Rep. 686; Grimes *v.* Harrison, 26 Beav. 435, 5 Jur. N. S. 528, 23 J. P. 421, 28 L. J. Ch. 823. See also Cullerne *v.* London, etc., Permanent Bldg. Soc., 25 Q. B. D. 485, 55 J. P. 148, 59 L. J. Q. B. 525, 63 L. T. Rep. N. S. 511, 39 Wkly. Rep. 88.

The president and general manager cannot enter into a contract with the association, through its board of directors, which may be and is intended to yield a profit to him at the expense of and to the detriment of the association. Com. *v.* Penn Germania Bldg., etc., Assoc., 9 Pa. Dist. 617, 3 Dauph. Co. Rep. (Pa.) 226, 6 Lack. Leg. N. (Pa.) 282.

44. *Georgia.*— Freeman *v.* Mutual Bldg., etc., Assoc., 90 Ga. 190, 15 S. E. 758.

Illinois.— Prairie State Loan, etc., Assoc. *v.* Nubling, 64 Ill. App. 329; Prairie State Loan, etc., Assoc. *v.* Gorrie, 64 Ill. App. 325.

Indiana.— German-American Bldg. Assoc. *v.* Droge, 14 Ind. App. 691, 43 N. E. 475.

Michigan.— Sawyer *v.* Menominee Loan, etc., Assoc., 103 Mich. 228, 61 N. W. 521.

Pennsylvania.— Kilpatrick *v.* Home Bldg., etc., Assoc., 119 Pa. St. 30, 12 Atl. 754; Gass *v.* Citizens' Bldg., etc., Assoc., 95 Pa. St. 101; Jones *v.* National Bldg. Assoc., 94 Pa. St. 215.

Wisconsin.— North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 29.

Association not bound by expression of opinion.— A statement by an officer as to how many more payments would have to be made on a note given to secure the payment of a series of small sums for an indefinite time, being, of necessity, but a mere opinion, does not estop the association on an injunction to restrain the foreclosure of a trust deed given in security of the note. Hammerslough *v.* Kansas City Bldg., etc., Assoc., 79 Mo. 80.

Signing or accepting commercial paper.— A treasurer has no power to create liabilities against the association by signing or accepting commercial paper. Jewett *v.* West Somerville Co-operative Bank, 173 Mass. 54, 52 N. E. 1085, 73 Am. St. Rep. 259. See also Slattery *v.* North End Sav. Bank, 175 Mass. 380, 56 N. E. 606.

45. Goodrich *v.* City Loan, etc., Assoc., 54 Ga. 98; Citizens Bldg., etc., Assoc. *v.* Coriell, 34 N. J. Eq. 383; Bank of Commerce's Appeal, 73 Pa. St. 59; Com. *v.* Anchor Bldg., etc., Assoc., 10 Pa. Dist. 167, 4 Dauph. Co. Rep. (Pa.) 15; Cullerne *v.* London, etc., Permanent Bldg. Soc., 25 Q. B. D. 485, 55 J. P. 148, 59 L. J. Q. B. 525, 63 L. T. Rep. N. S. 511, 39 Wkly. Rep. 88; Sheffield, etc., Permanent Bldg. Soc. *v.* Aizlewood, 44 Ch. D. 412, 59 L. J. Ch. 34, 62 L. T. Rep. N. S. 678.

46. Mowbray *v.* Antrim, 123 Ind. 24, 23 N. E. 858; Hibernia Bldg. Assoc. *v.* McGrath, 154 Pa. St. 296, 32 Wkly. Notes Cas. (Pa.) 233, 26 Atl. 377, 35 Am. St. Rep. 828.

47. Citizens Bldg., etc., Assoc. *v.* Coriell, 34 N. J. Eq. 383; Cross *v.* Fisher, [1892] 1 Q. B. 467, 56 J. P. 372, 61 L. J. Q. B. 609, 65 L. T. Rep. N. S. 114, 40 Wkly. Rep. 265; Cullerne *v.* London, etc., Permanent Bldg. Soc., 25 Q. B. D. 485, 55 J. P. 148, 59 L. J. Q. B. 525, 63 L. T. Rep. N. S. 511, 39 Wkly. Rep. 88; Richardson *v.* Williamson, L. R. 6 Q. B. 276, 40 L. J. Q. B. 145; *In re* Oxford Ben. Bldg., etc., Soc., 35 Ch. D. 502, 56 L. J. Ch. 98, 55 L. T. Rep. N. S. 598, 35 Wkly. Rep. 116; Blackburn, etc., Ben. Bldg. Soc. *v.* Cunliffe, 29 Ch. D. 902, 54 L. J. Ch. 1091, 53 L. T. Rep. N. S. 741.

48. *Illinois.*— Fritze *v.* Equitable Bldg., etc., Assoc., 186 Ill. 183, 57 N. E. 873; National Home Bldg., etc., Assoc. *v.* Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245.

Kansas.— Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Maryland.— Davis *v.* West Saratoga Bldg. Union, No. 3, 32 Md. 285.

Minnesota.— National Invest. Co. *v.* National Sav., etc., Assoc., 49 Minn. 517, 52 N. W. 1381.

Ohio.— Vos *v.* Cedar Grove Land, etc., Assoc., 8 Ohio Dec. (Reprint) 682, 9 Cinc. L. Bul. 194.

Pennsylvania.— Ashland Banking Co. *v.* Centralia Mut. Sav. Fund Assoc., 1 Kulp (Pa.) 38.

England.— Small *v.* Smith, 10 App. Cas. 119.

Investment of funds.— It is an abuse of corporate power for a building association to invest all its funds, leaving nothing with which to pay withdrawing members. National Loan, etc., Assoc. *v.* Hubley, 34 Leg. Int. (Pa.) 6.

May provide for insuring property.— A so-

B. Acquiring and Trading in Real Estate. Where the statute relating to building and loan societies organized under the general law did not abridge the capacity conferred thereby of taking, holding, or conveying real estate, it has been held that they might do either so far as limited by their charters, or, if not so limited, so far as their business might require.[49] In some states, however, it is held that the business of trading in real estate or acquiring the same, except such as has been mortgaged to them, is wholly foreign to the purposes for which such societies have been created.[50]

C. Assigning Mortgages, Bonds, Etc. In the absence of express prohibition a society has implied power to assign its mortgages, bonds, etc., in payment of or as collateral for a debt,[51] but the statute may prohibit their sale,[52] or regulate the manner of their assignment.[53]

D. Borrowing Money. Where there is an express prohibition against borrowing it must be obeyed,[54] and where borrowing is authorized a borrowing within the limits fixed by the statute or rules will be sustained.[55] Where there is no statutory restriction it has generally been held that the society may borrow when it is reasonably necessary in order to carry out the purposes of its organization,[56] although a borrowing not properly incident to the society's business has been held *ultra vires*,[57] and the right to borrow money to loan has been expressly denied.[58]

E. Dealing in Own Stock. A building and loan society has no power to traffic in shares of its own stock,[59] at least to the prejudice of its creditors.[60]

F. Dividing and Distributing Funds. A building and loan association has no power to divide or distribute its funds among its members in advance of the distribution at the winding up of the corporation.[61]

G. Doing Banking Business. While a building society may be authorized

ciety, authorized by its charter to make a loan and provide for the security of the same, may, as an incident of such right, provide for insuring property taken in security, and an action will lie for a breach of the agreement to insure. Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453.

May make contracts for erection of homesteads.— A charter of a building and loan association, authorizing it to aid its members in acquiring and improving land, empowers it to make contracts with members for the erection of homesteads. Heady *v.* Bexar Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 468.

49. Cahall *v.* Citizens' Mut. Bldg. Assoc., 61 Ala. 232.

50. National Home Bldg., etc., Assoc. *v.* Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, 72 Am. St. Rep. 245; Vos *v.* Cedar Grove Land, etc., Assoc., 8 Ohio Dec. (Reprint) 682, 9 Cinc. L. Bul. 194. See also Faulkner's Appeal, 11 Wkly. Notes Cas. (Pa.) 48.

51. Quein *v.* Smith, 108 Pa. St. 325; North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

52. Trowbridge *v.* Hamilton, 18 Wash. 686, 52 Pac. 328.

53. Bowlley *v.* Kline, (Ind. App. 1901) 60 N. E. 712.

54. Blackburn Bldg. Soc. *v.* Cunliffe, 22 Ch. D. 61, 52 L. J. Ch. 92, 48 L. T. Rep. N. S. 33, 31 Wkly. Rep. 98.

55. Maury County Bldg., etc., Assoc. *v.* Cowley, (Tenn. Ch. 1899) 52 S. W. 312; Bosang *v.* Iron Belt Bldg., etc., Assoc., 96 Va. 119, 30 S. E. 440; Looker *v.* Wrigley, 9 Q. B. D. 397, 46 J. P. 758; Laing *v.* Reed, L. R. 5 Ch. 4, 34 J. P. 134, 39 L. J. Ch. 1, 21 L. T. Rep. N. S. 773, 18 Wkly. Rep. 76.

56. *Indiana.*— Marion Trust Co. *v.* Crescent Loan, etc., Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257.

Missouri.—Woerheide *v.* Johnston, 81 Mo. App. 193.

Pennsylvania.— Heptasoph Bldg., etc., Assoc. *v.* Linhart, 4 Pa. Dist. 620, 26 Pittsb. L. J. N. S. 94.

Wisconsin.— North Hudson Mut. Bldg., etc., Assoc. *v.* Hudson First Nat. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

England.— Blackburn Bldg. Soc. *v.* Cunliffe, 22 Ch. D. 61, 52 L. J. Ch. 92, 48 L. T. Rep. N. S. 33, 31 Wkly. Rep. 98; Murray *v.* Scott, 9 App. Cas. 519, 53 L. J. Ch. 745, 51 L. T. Rep. N. S. 462, 33 Wkly. Rep. 173.

57. Blackburn Bldg. Soc. *v.* Cunliffe, 22 Ch. D. 61, 52 L. J. Ch. 92, 48 L. T. Rep. N. S. 33, 31 Wkly. Rep. 98.

58. State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258. See also Columbus Bldg., etc., Assoc. *v.* Kriete, 87 Ill. App. 51; Stile's Appeal, 95 Pa. St. 122.

59. State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258.

60. Heggie *v.* People's Bldg., etc., Assoc., 107 N. C. 581, 12 S. E. 275.

61. State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258.

to receive deposits and the like,[62] it is *ultra vires* for an association to do what is practically a banking business without such authority.[63]

H. Loans — 1. Authority to Make — a. In General. A building association has implied authority to loan its accumulated funds to its members.[64]

b. To Non-Members. In the absence of express statutory authority [65] a building association cannot make a loan to one not a member of the association.[66]

c. For Other Than Building Purposes. In the absence of statutory restriction [67] a building association may loan its money for other than building purposes.[68]

62. Criswell's Appeal, 100 Pa. St. 488; Looker *v.* Wrigley, 9 Q. B. D. 397, 46 J. P. 758.

63. Columbus Bldg., etc., Assoc. *v.* Kriete, 87 Ill. App. 51; Manufacturers', etc., Sav., etc., Co. *v.* Conover, 5 Phila. (Pa.) 18, 19 Leg. Int. (Pa.) 116.

Exercise of banking and discounting privilege.— The collection of money from and advancing the same to members, by a building and loan association, is not the exercise of banking powers, within the meaning of a constitutional provision declaring that no act authorizing associations with banking powers shall take effect until it shall be submitted to the people. Forrest City United Land, etc., Assoc. *v.* Gallagher, 25 Ohio St. 208. See also Schober *v.* Accommodation Sav. Fund, etc., Assoc., 35 Pa. St. 223 (holding that a loan by a saving-fund society to one of its members, for which security is given, deducting the premium agreed upon for the sum advanced, is not a discount, within the prohibition of a constitutional provision); Sweeney *v.* El Paso Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 290 [*distinguishing* Anderson *v.* Cleburne Bldg., etc., Assoc., (Tex. App. 1890) 16 S. W. 298].

64. Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624. See also Kelly *v.* Mobile Bldg., etc., Assoc., 64 Ala. 501, holding, under a statute authorizing a building and loan association to loan money to shareholders on real estate security, subject to the terms and conditions prescribed by its by-laws, that a loan is not *ultra vires*, although made in violation of the by-laws. But see Young *v.* Improvement Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670, holding that the statute relating to a building association and its by-laws so far as they touch its loans are a part of the contract of loan made by it, and that where the contract of loan violates such statute or by-laws it is void.

65. Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Meriden Agency Co., 24 Conn. 159.

66. *California.*— McNamara *v.* Oakland Bldg., etc., Assoc., 131 Cal. 336, 63 Pac. 670.

Illinois.— People's Loan, etc., Assoc. *v.* Keith, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65.

Indiana.— The fact that a building association exceeded its powers in loaning money to one not a member does not bar a recovery against the latter in an action on a note given for the loan. Poock *v.* Lafayette Bldg. Assoc., 71 Ind. 357.

Kansas.— St. Joseph, etc., Loan Assoc. *v.* Thompson, 19 Kan. 321.

Massachusetts.— Howard Mutual Loan, etc., Assoc. *v.* McIntyre, 3 Allen (Mass.) 571.

Michigan.— Although the by-laws provide that no loan shall be made except to members, the fact that, on a loan being made to a member, the joint bond of the member and one not a member is taken, does not open to them the defense of *ultra vires*. People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373.

Minnesota.— National Invest. Co. *v.* National Sav., etc., Assoc., 49 Minn. 517, 52 N. W. 138.

North Dakota.— Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318.

Ohio.— State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258; State *v.* Greenville Bldg., etc., Assoc., 29 Ohio St. 92.

Pennsylvania.— Wolbach *v.* Lehigh Bldg. Assoc., 84 Pa. St. 211.

Texas.— Anderson *v.* Cleburne Bldg., etc., Assoc., (Tex. App. 1890) 16 S. W. 298, holding that where a building and loan association made a loan to one not a member by taking his note therefor, the transaction was a discounting, and in violation of a provision of its charter that it should not lend money to any person other than its own members.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 37.

Loan for benefit of third person.— The fact that a loan is obtained from a building association by a member, for the use of a third person, and that it is secured by a trust deed given by such third person, does not vitiate the loan as between the original parties, and the giving of the trust deed does not make the third person a member of the association. Kadish *v.* Garden City Equitable Loan, etc., Assoc., 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256 [*affirming* 47 Ill. App. 602].

67. Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676, holding that under the provisions of W. Va. Code, c. 54, it is the duty of a building association to see that money paid by its members on loans is used by such members in buying lots or houses or in building or repairing houses.

68. Kadish *v.* Garden City Equitable Loan, etc., Assoc., 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256. See also Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186; Johnston *v.* Elizabeth Bldg., etc., Assoc., 104 Pa. St. 394; Juniata Bldg., etc., Assoc. *v.* Mixell, 84 Pa. St. 313, which hold that building corporations are not required to ascertain the use to which a member who obtains a loan on his stock intends to apply the money.

d. Estoppel to Question. A borrowing member cannot question the authority of the association to make a loan.[69]

2. Right to Loan. A building association cannot refuse a loan to a member entitled to it under the charter and by-laws of the association, if in the possession of funds properly applicable to that purpose.[70]

3. Nature of Transaction. There is much diversity of opinion as to the nature of the transaction by which a building association loans or advances its funds to members. Some courts regard the transaction as a loan.[71] Others deem it to be a dealing in partnership funds.[72] Others hold it to be an advance on the

69. Victoria Bldg. Assoc. *v.* Arbeiter Bund, 6 Ohio Dec. (Reprint) 1108, 10 Am. L. Rec. 485; Provident Loan, etc., Assoc. *v.* Carter, 107 Wis. 383, 83 N. W. 655. See also Lurton *v.* Jacksonville Loan, etc., Assoc., 187 Ill. 141, 58 N. E. 218 (holding that where the loan is one which the association has power to make and is within the scope of its franchise, neither party who has had the benefit of it can set up as a defense that legal formalities were not complied with, or that the power was improperly exercised); Morrison *v.* Dorsey, 48 Md. 461.

As to defense of ultra vires see *infra*, IX, A, 4.

70. Bergman *v.* St. Paul Mut. Bldg. Assoc. No. 1, 29 Minn. 282, 13 N. W. 122 [*following* Bergman *v.* St. Paul Mut. Bldg. Assoc. No. 1, 29 Minn. 275, 13 N. W. 120]; State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258; State *v.* Greenville Bldg., etc., Assoc., 29 Ohio St. 92.

Defective security.— Equity will not compel a building association to lend money to one of its members who has bid off such loan, where the title to the lands offered by such member as security therefor by way of mortgage is pronounced by the association's attorney to be defective and the directors for that reason decline to make the loan. Conklin *v.* Peoples Bldg., etc., Assoc., 41 N. J. Eq. 20, 2 Atl. 615. See also Conway *v.* Log Cabin Permanent Bldg. Assoc., 52 Md. 136, where it appeared that plaintiff, a member of a building and loan association, executed a mortgage to it for the purpose of procuring a loan. The mortgage was not accepted by the association, but its counselor, without any authority under the by-laws or constitution, had it recorded. It was held that, as plaintiff was a member of the association, he was bound by its constitution and by-laws, and was therefore not entitled to the loan, it appearing that the association never ratified its counselor's act.

Notice of withdrawal.— Where the articles of association provide that, after notice of withdrawal of shares, the amount thereof shall be refunded to such member as soon as the necessary funds are in the treasury, the association cannot lend any of its funds while withdrawal notices are on file. Wolfe *v.* Conkey Ave. Sav., etc., Assoc., 75 Hun (N. Y.) 201, 27 N. Y. Suppl. 44, 58 N. Y. St. 656.

71. *Idaho.*— Fidelity Sav. Assoc. *v.* Shea, (Ida. 1899) 55 Pac. 1022; Stevens *v.* Home Sav., etc., Assoc., (Ida. 1898) 51 Pac. 779, 986.

Illinois.— Borrowers', etc., Bldg. Assoc. *v.* Eklund, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637; People's Loan, etc., Assoc. *v.* Keith, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65; Freeman *v.* Ottawa Bldg., etc., Assoc., 114 Ill. 182, 28 N. E. 611.

Kentucky.— Simpson *v.* Kentucky Citizens Bldg., etc., Assoc., 101 Ky. 496, 19 Ky. L. Rep. 1176, 41 S. W. 570, 42 S. W. 834; Henderson Bldg., etc., Assoc. *v.* Johnson, 88 Ky. 191, 10 Ky. L. Rep. 830, 10 S. W. 787, 3 L. R. A. 289; Herbert *v.* Kenton Bldg., etc., Assoc., 11 Bush (Ky.) 296.

Louisiana.— American Homestead Co. *v.* Linigan, 46 La. Ann. 1118, 15 So. 369.

Nebraska.— Livingston Loan, etc., Assoc. *v.* Drummond, 49 Nebr. 200, 68 N. W. 375; Randall *v.* National Bldg., etc., Union, 42 Nebr. 809, 60 N. W. 1019, 29 L. R. A. 133; Lincoln Bldg., etc., Assoc. *v.* Graham, 7 Nebr. 173.

North Carolina.—Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Hoskins *v.* Mechanics' Bldg., etc., Assoc., 84 N. C. 838; Overby *v.* Fayetteville Bldg., etc., Assoc., 81 N. C. 41.

South Carolina.—Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 51 S. C. 420, 29 S. E. 77, 64 Am. St. Rep. 683; Buist *v.* Bryan, 44 S. C. 121, 21 S. E. 537, 51 Am. St. Rep. 787, 29 L. R. A. 127; Mechanics', etc., Bldg., etc., Assoc. *v.* Dorsey, 15 S. C. 462; Columbia Bldg., etc., Assoc. *v.* Bollinger, 12 Rich. Eq. (S. C.) 124, 78 Am. Dec. 463.

Texas.— Jackson *v.* Cassidy, 68 Tex. 282, 4 S. W. 541.

Utah.— Howells *v.* Pacific States Sav., etc., Co., 21 Utah 45, 60 Pac. 1025, 81 Am. St. Rep. 659.

Washington.— U. S. Savings, etc., Co. *v.* Parr, 26 Wash. 115, 66 Pac. 109; Hopkins *v.* Hale, 23 Wash. 790, 63 Pac. 1134; Hale *v.* Stenger, 22 Wash. 516, 61 Pac. 156, 63 Pac. 554.

72. *Maryland.*— Robertson *v.* American Homestead Assoc., 10 Md. 397, 69 Am. Dec. 145.

Massachusetts.— Delano *v.* Wild, 6 Allen (Mass.) 1, 83 Am. Dec. 605.

New Hampshire.— Shannon *v.* Dunn, 43 N. H. 194.

United States.— Tilley *v.* American Bldg., etc., Assoc., 52 Fed. 618; Johnson *v.* Potomac Bldg. Assoc., 13 Fed. Cas. No. 7,406, 14 Leg. Int. (Pa.) 393, 2 Quart. L. J. 347.

England.— *In re* Durham County Permanent Invest., etc., Soc., L. R. 12 Eq. 516, 41

stock to which the borrower expects to be entitled at the termination of the association.[73] Still others consider it as a sale by the borrower of his shares of stock to the association.[74]

4. Construction of Contract. Where there is uncertainty or ambiguity in the terms of a contract for a loan a construction most favorable to the borrower will be adopted.[75]

5. Security — a. In General. The power possessed by a building association to loan its funds carries with it, by implication, the power to take security for the loan.[76]

b. Nature of Security. In the absence of statutory restriction[77] a building association has the power to loan money on the same security as individuals.[78] In making a loan, security on the property of a third person may be taken.[79]

c. Mortgages — (i) *Power to Take.* A building association has implied power to take a mortgage to secure the repayment of a loan made by it.[80]

L. J. Ch. 124, 25 L. T. Rep. N. S. 83; Silver *v.* Barnes, 6 Bing. N. Cas. 180, 37 E. C. L. 571; Seagrave *v.* Pope, 1 De G., M. & G. 783, 16 Jur. 1099, 22 L. J. Ch. 258, 50 Eng. Ch. 605; Burbridge *v.* Cotton, 5 De G. & Sm. 17, 15 Jur. 1070, 21 L. J. Ch. 201, 8 Eng. L. & Eq. 57.

73. *Alabama.*— Security Loan Assoc. *v.* Lake, 69 Ala. 456.

Connecticut.—Curtis *v.* Granite State Provident Assoc., 69 Conn. 6, 36 Atl. 1023, 61 Am. St. Rep. 17.

Minnesota.— Fagan *v.* People's Sav., etc., Assoc., 55 Minn. 437, 57 N. W. 142.

Mississippi.— Sullivan *v.* Jackson Bldg., etc., Assoc., 70 Miss. 94, 12 So. 590.

New Jersey.— Clarksville Bldg., etc., Assoc. *v.* Stephens, 26 N. J. Eq. 351.

Ohio.— Seventeenth Ward Bldg. Assoc. *v.* Fitzgerald, 11 Ohio S. & C. Pl. Dec. 133, 8 Ohio N. P. 160.

Oregon.— Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 63 Pac. 489, 84 Am. St. Rep. 793.

Pennsylvania.—Kupfert *v.* Guttenberg Bldg. Assoc., 30 Pa. St. 465.

Tennessee.—See Patterson *v.* Workingmen's Bldg., etc., Assoc., 15 Lea (Tenn.) 677, holding that the transaction is in substance a sale by the member to the association of his expected dividend of his subscription at the winding up of the association for a money advance. *Compare* Martin *v.* Nashville Bldg. Assoc., 2 Coldw. (Tenn.) 418.

74. Eastern Bldg., etc., Assoc. *v.* Olmsted, 16 App. Cas. (D. C.) 387; Armstrong *v.* U. S. Building, etc., Assoc., 15 App. Cas. (D. C.) 1; Pabst *v.* Economical Bldg. Assoc., 1 McArthur (D. C.) 385; Parker *v.* Fulton Loan, etc., Assoc., 46 Ga. 166. See also Michigan Bldg., etc., Assoc. *v.* McDevitt, 77 Mich. 1, 43 N. W. 760; Winchester Bldg. Assoc. *v.* Gilbert, 23 Gratt. (Va.) 787; White *v.* Mechanics' Bldg. Fund Assoc., 22 Gratt. (Va.) 233.

75. Eastern Bldg., etc., Assoc. *v.* Olmsted, 16 App. Cas. (D. C.) 387.

76. Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

As to security for payment of fines see *supra*, VI, B, 4.

An assignment of stock in a building association, absolute in terms, may be shown to be made only as collateral security and not in payment of the note, even though the rules of the association required such an assignment to be absolute in terms. Ginz *v.* Stumph, 73 Ind. 209.

77. Home Sav., etc., Co. *v.* Maryland Fidelity, etc., Co., (Iowa 1902) 88 N. W. 821, where it appeared that the articles of a building association prohibited a loan on real estate for more than one half its appraised value. It was held that, although the building association could loan money only on the security prescribed by statute, it could, on receiving an application for a loan exceeding twice the value of the real estate offered as security, take a bond conditioned for the erection of such improvements on the land as would make the real estate exceed twice the loan.

The by-laws of a building association provided that borrowers from it must secure the payment of a loan with legal interest by satisfactory bond or mortgage upon real estate. It was held that both securities might be taken, and that the association was not restricted to the pursuit of one before the other. Juniata Bldg., etc., Assoc. *v.* Hetzel, 103 Pa. St. 507.

78. Union Bldg. Loan Assoc. *v.* Masonic Hall Assoc., 29 N. J. Eq. 389.

79. Kadish *v.* Garden City Equitable Loan, etc., Assoc., 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256; Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624 (where it was held that a building association may loan money to one of its members and take the joint note and mortgage of such member and another person, although the property mortgaged belongs to such other person); Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676. See also Johnston *v.* Elizabeth Bldg., etc., Assoc., 104 Pa. St. 394, holding that where a member of a building association gives a mortgage to it to secure a loan to a fellow member, he is as liable as if the loan had been made to himself, and cannot plead usury in an action on the mortgage.

80. Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

(II) *VALIDITY.* A mortgage given by a member to secure a loan based on more shares of the stock of the association than the statute permits a member to own is binding on such member.[81]

(III) *ITEMS SECURED.* The mortgage executed by a borrowing member may cover not only the loan obtained but assessments,[82] dues,[83] and fines.[84] It may also secure the repayment of any insurance[85] or taxes[86] on the property conveyed by it; but a mortgage which by its terms is for the loan, accruing interest, and dues does not include fines.[87]

(IV) *FORECLOSURE* — (A) *Right to Foreclose* — (1) IN GENERAL. Where all the members of a building association, which has been mistaken in its basis of business, by common consent stop paying dues, there is no default as to borrowing members in the sense that the maturity of the mortgages is thereby accelerated under the default clause therein.[88]

81. Victoria Bldg. Assoc. *v.* Arbeiter Bund, 6 Ohio Dec. (Reprint) 1108, 10 Am. L. Rec. 485.

Loan not effected.— A bond and mortgage executed to a building association by one of its members to secure an anticipated loan cannot, if the loan is not made, be retained as security for items owing by the mortgagor, which were to be deducted from the gross amount of the loan when made, where they were neither given nor received as security for such items. Furey *v.* K. of P. Bldg., etc., Assoc., (N. J. 1896) 34 Atl. 380.

82. Wohlford *v.* Citizens' Bldg., etc., Assoc., 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177.

83. *Maryland.*— McCahan *v.* Columbian Bldg. Assoc., 40 Md. 226.

Massachusetts.— Baxter *v.* McIntire, 13 Gray (Mass.) 168.

New York.— Concordia Sav., etc., Assoc. *v.* Read, 93 N. Y. 474; Franklin Bldg. Assoc. *v.* Mather, 4 Abb. Pr. (N. Y.) 274.

Ohio.— Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186.

West Virginia.— Parker *v.* U. S. Building, etc., Assoc., 19 W. Va. 769.

Compare Eastern Bldg., etc., Assoc. *v.* Olmsted, 16 App. Cas. (D. C.) 387; Fagan *v.* People's Sav., etc., Assoc., 55 Minn. 437, 57 N. W. 142; Beso *v.* Eastern Bldg., etc., Assoc., 201 Pa. St. 355, 50 Atl. 953.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 72.

Maturity of loan.— Where a mortgage to a building association is conditioned to repay a loan, and also to pay the monthly dues of the mortgagor as a member of the association, and the loan matures and is fully repaid, the association may use the mortgage to enforce the payment of the dues. Loan Co. *v.* Everham, 5 Phila. (Pa.) 62, 19 Leg. Int. (Pa.) 260.

84. *Massachusetts.*— Baxter *v.* McIntire, 13 Gray (Mass.) 168.

Minnesota.— Fagan *v.* People's Sav., etc., Assoc., 55 Minn. 437, 57 N. W. 142.

New York.— Concordia Sav., etc., Assoc. *v.* Read, 93 N. Y. 474.

Ohio.— Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186.

Pennsylvania.— Everham *v.* Oriental Sav., etc., Assoc., 47 Pa. St. 352.

West Virginia.— Parker *v.* U. S. Building, etc., Assoc., 19 W. Va. 769.

England.— Provident Permanent Bldg. Soc. *v.* Greenhill, 9 Ch. D. 122, 38 L. T. Rep. N. S. 140, 27 Wkly. Rep. 110.

See also *supra*, VI, B, 4.

85. Parker *v.* U. S. Building, etc., Assoc., 19 W. Va. 769. But see Butler *v.* Mutual Aid, etc., Co., 94 Ga. 562, 20 S. E. 101, holding that a building and loan company cannot, in an action on bonds given to it for a loan, recover expenditures for insurance, unless alleged or claimed in the declaration.

86. Huntington Bldg. Assoc. *v.* Melsheimer, 14 Wkly. Notes Cas. (Pa.) 344; Parker *v.* U. S. Building, etc., Assoc., 19 W. Va. 769.

87. Bowen *v.* Lincoln Bldg., etc., Assoc., 51 N. J. Eq. 272, 28 Atl. 67; Hazel Loan, etc., Assoc. *v.* Groesbeck, 17 Phila. (Pa.) 242, 41 Leg. Int. (Pa.) 16. See also Hamilton Bldg. Assoc. *v.* Reynolds, 5 Duer (N. Y.) 671, holding that a mortgage to a building association in the usual form is a valid security for the stipulated monthly payments only and not for fines or other dues to the association.

88. Hinman *v.* Ryan, 3 Ohio Cir. Ct. 529. See also Sumter Bldg., etc., Assoc. *v.* Winn, 45 S. C. 381, 23 S. E. 29, holding that a building and loan association, which voluntarily closes its business, in violation of its charter and by-laws, requiring its continuance for ten years, unless within that time each share of one hundred dollars shall, by its earnings, reach the value of two hundred dollars, forfeits its right to foreclose a mortgage given to secure the purchase of its stock or to collect monthly instalments subsequently becoming due by the contract of sale.

A building and loan association organized under a void statute cannot enforce a mortgage given by one of its stock-holders to secure a loan, but a receiver may obtain an accounting in equity for the debt. Burton *v.* Schildbach, 45 Mich. 504, 8 N. W. 497.

Failure to sign constitution.— The failure of one who has for a long time acted as a member of an association to sign the constitution as required by statute will not prevent the association from enforcing a deed of trust executed by him to secure the payment of dues, as well as the repayment of a loan. Parker *v.* U. S. Building, etc., Assoc., 19 W. Va. 744.

(2) ON DEFAULT. Although the mortgage provides that the entire amount secured thereby shall become at once due and payable on default for a specified time in the payment of interest and instalments, the association is not compelled to act at the expiration of the specified time in order to protect its rights.[89]

(3) ON INSOLVENCY. On the insolvency of the association a mortgage given by a borrowing member to secure a loan becomes due and may be foreclosed.[90]

(B) *Time of Foreclosure.* Where at the time of borrowing it is estimated that the stock will mature and pay the loan in a certain time and a note is given, payable in such time, a mortgage given to secure such note may be foreclosed at the expiration of such time, even though such stock has not then matured.[91]

(C) *Pleading.* A complaint by a building and loan association to foreclose a mortgage need not exhibit a copy of its constitution and by-laws.[92]

(D) *Evidence.* In an action to foreclose, the certificate of stock held by the borrower in the association and which is referred to in the note and mortgage is admissible.[93]

The incorporation of an unincorporated loan-fund association does not affect the right of its trustees to maintain an action on a mortgage bond previously given to them. Merrill *v.* McIntire, 13 Gray (Mass.) 157.

89. U. S. Savings, etc., Co. *v.* Cade, 15 Wash. 38, 45 Pac. 656, holding that the association is entitled to an accounting in accordance with the original contract to the time when it elects to foreclose.

90. Home Sav., etc., Assoc. *v.* Mason, 127 Mich. 676, 87 N. W. 74; Breed *v.* Ruoff, 54 N. Y. App. Div. 142, 66 N. Y. Suppl. 422; Strauss *v.* Carolina Inter State Bldg., etc., Assoc., 117 N. C. 308, 23 S. E. 450, 53 Am. St. Rep. 585, 30 L. R. A. 693, 118 N. C. 556, 24 S. E. 116; Buist *v.* Fitzsimons, 44 S. C. 130, 21 S. E. 610. But see Buist *v.* Bryan, 44 S. C. 121, 21 S. E. 537, 51 Am. St. Rep. 787, 29 L. R. A. 127, holding that where the monthly payments of dues and interest made by a stock-holder who had bid in an advance of stock, and executed a bond and mortgage for its payment, aggregated, at the time of the appointment of a receiver for the association, a sum equal to that for which the mortgage was given, an action to foreclose the mortgage could not be maintained.

Foreclosure by receiver.— Although the appointment of a receiver for a building and loan association causes the debts due it by borrowing members and the mortgage securities to mature, yet the receivers cannot foreclose the same under the power of sale contained in the mortgage, the association alone being authorized to foreclose by sale. Strauss *v.* Carolina Inter State Bldg., etc., Assoc., 117 N. C. 308, 23 S. E. 450, 53 Am. St. Rep. 585, 30 L. R. A. 693, 118 N. C. 556, 24 S. E. 116.

91. Kinney *v.* Columbia Sav., etc., Assoc., 113 Fed. 359.

Limitations.— Where a borrowing member, in order to secure the loan, gave a deed of trust and a note, the note being payable one day after date, and no time for payment fixed in the trust deed, it being understood that the loan should be paid by the maturity of the borrower's stock, limitations did not run against the trust deed until the insolvency of the association; there having been no default in the payment of dues or interest by the borrower prior thereto, and the stock not having reached maturity. Johnston *v.* Grosvenor, 105 Tenn. 353, 59 S. W. 1028.

Premature foreclosure.—Where the by-laws provided that, in case of non-payment of instalments of interest, premiums, and fines by borrowing stock-holders for the space of six months, the directors may compel payment of principal and interest by proceeding on the bond or mortgage, and the by-law was made a part of defendant's mortgage, and defendant defaulted in the payment of his dues on the second Monday in April, an action to foreclose the mortgage filed on September 21 was premature. Provident Loan, etc., Assoc. *v.* Carter, 107 Wis. 383, 83 N. W. 655.

92. Newman *v.* Ligonier Bldg., etc., Assoc., 97 Ind. 295.

In Georgia where a declaration in an action against a borrowing member on a bond secured by deed to land contains a complete statement of the account between the parties, the notice required by Ga. Code, § 3968*a*, as to the status of the account, may be dispensed with. Hawkins *v.* Americus Nat. Bldg., etc., Assoc., 96 Ga. 206, 22 S. E. 711.

Declaration of default.— Under a by-law of a building association providing that, in case of non-payment of interest and fines by a borrowing stock-holder for a period of six months, payment of the principal, interest, and fines may be enforced by legal proceedings against the security, upon the order of the board of directors, an allegation in a bill to foreclose a mortgage given by a stock-holder that default in making such payments had continued for more than six months, and that by reason thereof the association had elected to declare the whole sum immediately due and payable, is a sufficient allegation that proper action to that end had been taken by the directors, where defendant treats it as sufficient, and by his answer joins issue on the question as one of fact. Cantwell *v.* Welch, 187 Ill. 275, 58 N. E. 414.

93. U. S. Savings., etc., Assoc. *v.* Cade, 15 Wash. 38, 45 Pac. 656.

Maturity of stock.— It is error to exclude evidence that the series of stock to which de-

(v) *ASSIGNMENT.* An agreement whereby a mortgage given to a building and loan association to secure dues, fines, and assessments made on the mortgagor's stock is assigned to a third person, in consideration of his agreement to pay such dues, fines, and assessments, is valid.[94]

d. Recourse to Stock Security. Where a borrowing member gives as security for a loan a mortgage on land belonging to a person not a member and also assigns to the association his stock, recourse must first be had to the stock for payment of the loan.[95]

6. PREMIUMS — a. Definition. A premium is a bonus charged to a member wishing to borrow, for the privilege of anticipating the ultimate value of his stock, by obtaining the immediate use of the money his stock will be worth at the end of the period contemplated by the parties to the transaction.[96]

b. Right to Take. The fact that a member in taking a loan for the amount of his stock agrees to pay a premium, does not, according to some authorities, render the contract usurious.[97] Other authorities, however, hold that the exac-

fendant belonged had matured and that it was worth a sum equaling the amount of the bond, as these facts, if true, are equivalent to a payment of the bond. Charles Tyrrell Loan, etc., Assoc. *v.* Haley, 139 Pa. St. 476, 27 Wkly. Notes Cas. (Pa.) 244, 20 Atl. 1063, 23 Am. St. Rep. 199.

94. Eigenman *v.* Rockport Bldg., etc., Assoc., 79 Ind. 41.

95. Massey *v.* Citizens Bldg., etc., Assoc., 22 Kan. 624. See also Phillipsburg Mut. Loan, etc., Assoc. *v.* Hawk, 27 N. J. Eq. 355, holding that where stock is assigned by a shareholder in a loan and building association as collateral security for a loan to him by the association, also secured by a mortgage, which is the first upon the premises mortgaged, such stock must, as between the association and the holder of a second mortgage on the same premises, be applied to the payment of the mortgage before recourse is had to the land; and this equity is not defeated by a levy on the stock under a judgment against the mortgagor.

The right of an association taking an assignment of a member's shares of stock as collateral security for a loan, for which the member had also given a mortgage, to appropriate such shares, at their maturity, to the satisfaction of the loan, instead of exhausting the security furnished by the mortgage, is not affected by an attachment of the stock by a judgment creditor of the member. Hemperley *v.* Tyson, 170 Pa. St. 385, 37 Wkly. Notes Cas. (Pa.) 301, 32 Atl. 1081. See also Early's Appeal, 89 Pa. St. 411, holding that where a shareholder in a building association has assigned his stock to the association as security for a loan, which is also secured by a judgment, he may elect, on sale of his real estate by the sheriff, to have the value of the stock deducted from the amount of the judgment before such judgment, is permitted to share in the proceeds of the real estate.

96. Curtis *v.* Granite State Provident Assoc., 69 Conn. 6, 11, 36 Atl. 1023, 61 Am. St. Rep. 17 [*citing* Endlich Bldg. Assoc. (2d ed.) § 399].

Other definitions are: "The difference, estimated by the association and its borrowing member, between the par value of the member's shares of stock and their present real value." Sullivan *v.* Jackson Bldg., etc., Assoc., 70 Miss. 94, 99, 12 So. 590 [*quoted* in Washington Invest Assoc. *v.* Stanley, 38 Oreg. 319, 334, 63 Pac. 489, 84 Am. St. Rep. 793].

"A bonus which a member agrees to pay, in competition with fellow-members, for the privilege of having an advance made to him, by way of loan, of the par value of his stock." Seventeenth Ward Bldg. Assoc. *v.* Fitzgerald, 11 Ohio S. & C. Pl. Dec. 133, 134, 8 Ohio N. P. 160.

"A bonus in reality, or a definite fixed sum or amount agreed upon between the contracting parties — the association and the borrower." Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 335, 63 Pac. 489, 84 Am. St. Rep. 793.

"The conventional difference between the par value of the share advanced and the amount actually received by the borrower." Endlich Bldg. Assoc. § 388 [*quoted* in Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 334, 63 Pac. 489, 84 Am. St. Rep. 793].

"The amount which a stockholder, desiring to borrow, is willing to pay for the privilege of anticipating the ultimate value of his stock, by obtaining at once the use of the amount of money his stock will be worth when the association is wound up." Thornton & Blackl. Bldg. & L. Assoc. § 222 [*quoted* in Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 334, 63 Pac. 489, 84 Am. St. Rep. 793].

"A bonus charged to a stockholder wishing to borrow, for the privilege of anticipating the ultimate value of his stock by obtaining the immediate use of the money his stock will be worth at the winding up." Wrigley's "The Workingman's Way to Wealth," 67 [*quoted* in Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 333, 63 Pac. 489, 84 Am. St. Rep. 793].

97. *Alabama.*— Beyer *v.* National Bldg., etc., Assoc., 131 Ala. 369, 31 So. 113; Pioneer Sav., etc., Co. *v.* Nonnemacher, 127 Ala. 521, 30 So. 79; Sheldon *v.* Birmingham Bldg., etc., Assoc., 121 Ala. 278, 25 So. 820; Security

tion by the association of such a premium in addition to the legal rate of interest has such effect.[98]

Loan Assoc. *v.* Lake, 69 Ala. 456; Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413.

Arkansas.— Taylor *v.* Van Buren Bldg. Assoc., 56 Ark. 340, 19 S. W. 918.

Connecticut.— Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Wilcox, 24 Conn. 147.

District of Columbia.— Mulloy *v.* Fifth Ward Bldg. Assoc., 2 McArthur (D. C.) 594.

Georgia.— Redwine *v.* Gate City Loan, etc., Assoc., 54 Ga. 474; Parker *v.* Fulton Loan, etc., Assoc., 46 Ga. 166.

Illinois.— Jamieson *v.* Jurgens, 195 Ill. 86, 62 N. E. 917; Borrowers', etc., Bldg. Assoc. *v.* Eklund, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637; Holmes *v.* Smythe, 100 Ill. 413; Rhodes *v.* Missouri Sav., etc., Co., 63 Ill. App. 77; Conservative Bldg., etc., Assoc. *v.* Cady, 55 Ill. App. 469.

Indiana.— U. S. Savings, etc., Co. *v.* Rider, 155 Ind. 704, 58 N. E. 674; International Bldg., etc., Assoc. *v.* Wall, 153 Ind. 554, 55 N. E. 431; Kenner *v.* Whitelock, 152 Ind. 635, 53 N. E. 232; McLaughlin *v.* Citizens Bldg., etc., Assoc., 62 Ind. 264.

Kansas.— Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Louisiana.—American Homestead Co. *v.* Linigan, 46 La. Ann. 1118, 15 So. 369.

Massachusetts.— Merrill *v.* McIntire, 13 Gray (Mass.) 157.

Michigan.— People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373.

Minnesota.— Central Bldg., etc., Assoc. *v.* Lampson, 60 Minn. 422, 62 N. W. 544.

Mississippi.— Sullivan *v.* Jackson Bldg., etc., Assoc., 70 Miss. 94, 12 So. 590.

Missouri.—Fry *v.* Missouri Guarantee Sav., etc., Assoc., 88 Mo. App. 289; Fowles *v.* Ætna Loan Co., 86 Mo. App. 103; State *v.* Stockton, 85 Mo. App. 477; Miller *v.* Missouri Guarantee Sav., etc., Assoc., 83 Mo. App. 669; Barnes *v.* Missouri Guarantee Sav., etc., Assoc., 83 Mo. App. 466; Brown *v.* Archer, 62 Mo. App. 277.

Nebraska.— South Omaha Loan, etc., Assoc. *v.* Wirrick, (Nebr. 1902) 88 N. W. 694; Livingston Loan, etc., Assoc. *v.* Drummond, 49 Nebr. 200, 68 N. W. 375.

New Hampshire.— Shannon *v.* Dunn, 43 N. H. 194.

New Jersey.— Bowen *v.* Lincoln Bldg., etc., Assoc., 51 N. J. Eq. 272, 28 Atl. 67; People's Bldg., etc., Assoc. *v.* Furey, 47 N. J. Eq. 410, 20 Atl. 890.

New York.— Concordia Sav., etc., Assoc. *v.* Read, 93 N. Y. 474; Citizens' Mut. Loan, etc., Assoc. *v.* Webster, 25 Barb. (N. Y.) 263.

North Dakota.— Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318.

Ohio.— State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258; State *v.* Greenville Bldg., etc., Assoc., 29 Ohio St. 92.

Oregon.— Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 63 Pac. 489, 84 Am. St. Rep. 793.

Pennsylvania.— Stiles' Appeal, 95 Pa. St. 122.

South Dakota.— Co-operative Sav., etc., Assoc. *v.* Fawick, 11 S. D. 589, 79 N. W. 847.

Tennessee.— McCauley *v.* Workingman's Bldg., etc., Assoc., 97 Tenn. 421, 37 S. W. 212, 56 Am. St. Rep. 813, 35 L. R. A. 244; Post *v.* Building., etc., Assoc., 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; Pioneer, etc., Loan Co. *v.* Cannon, 96 Tenn. 599, 36 S. W. 386, 54 Am. St. Rep. 858, 33 L. R. A. 112; Patterson *v.* Workingmen's Bldg., etc., Assoc., 14 Lea (Tenn.) 677.

West Virginia.— McConnell *v.* Cox, 50 W. Va. 469, 40 S. E. 349; Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 38 S. E. 653, 87 Am. St. Rep. 805, 54 L. R. A. 536; Gray *v.* Baltimore Bldg., etc., Assoc., 48 W. Va. 164, 37 S. E. 533, 54 L. R. A. 217.

United States.— Manship *v.* New South Bldg., etc., Assoc., 110 Fed. 845; Hieronymus *v.* New York Nat. Bldg., etc., Assoc., 101 Fed. 12 [*affirmed* in 107 Fed. 1005, 46 C. C. A. 684]; Johnson *v.* Potomac Bldg. Assoc., 13 Fed. Cas. No. 7,406, 14 Leg. Int. (Pa.) 393, 2 Quart. L. J. 347.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 43.

A foreign building association may contract for premiums and fines in addition to legal interest upon money loaned on stock when so authorized by the law of the state of its creation. Freie *v.* No. 4 Fidelity Bldg., etc., Union, 166 Ill. 128, 46 N. E. 784, 57 Am. St. Rep. 123.

98. *Iowa.*— Burlington Mut. Loan Assoc. *v.* Heider, 55 Iowa 424, 5 N. W. 578, 7 N. W. 686; Hawkeye Ben., etc., Assoc. *v.* Blackburn, 48 Iowa 385. See also Wilcoxen *v.* Smith, 107 Iowa 555, 78 N. W. 217, 70 Am. St. Rep. 220; Iowa Sav., etc., Assoc. *v.* Heidt, 107 Iowa 297, 77 N. W. 1050, 70 Am. St. Rep. 197, 43 L. R. A. 689.

Kentucky.— Safety Bldg., etc., Co. *v.* Ecklar, 106 Ky. 115, 20 Ky. L. Rep. 1770, 50 S. W. 50; Simpson *v.* Kentucky Citizens', Bldg., etc., Assoc., 101 Ky. 496, 19 Ky. L. Rep. 1176, 41 S. W. 570, 42 S. W. 834; U. S. Savings, etc., Co. *v.* Scott, 98 Ky. 695, 17 Ky. L. Rep. 1244, 34 S. W. 235; Gordon *v.* Winchester Bldg., etc., Assoc., 12 Bush (Ky.) 110, 23 Am. Rep. 713; Bull *v.* Safety Bldg., etc., Co., 22 Ky. L. Rep. 852, 58 S. W. 984; Mack *v.* Workingmen's Bldg., etc., Assoc., 5 Ky. L. Rep. 520.

Maryland.— White *v.* Williams, 90 Md. 719, 45 Atl. 1001; Geiger *v.* Eighth German Bldg. Assoc., 58 Md. 569; Citizens' Security, etc., Co. *v.* Uhler, 48 Md. 455.

North Carolina.— Rowland *v.* Old Dominion Bldg., etc., Assoc., 116 N. C. 877, 22 S. E. 8; Mills *v.* Salisbury Bldg., etc., Assoc., 75 N. C. 292.

South Carolina.— Mechanics', etc., Bldg., etc., Assoc. *v.* Dorsey, 15 S. C. 462; Columbia Bldg., etc., Assoc. *v.* Bollinger, 12 Rich. Eq. (S. C.) 124, 78 Am. Dec. 463.

c. Determination by Competitive Bidding — (I) *In General.* The rule obtains in some states that if the premium charged for a loan is not the result of open competitive bidding the transaction will be usurious if the total amount paid for the use of the money exceeds the legal rate of interest.[99] Statutes in other states permit a building association to agree with a borrower on a given rate of premium for preference in procuring a loan without bidding therefor.[1]

(II) *Manner of Making Bid.* A letting of loans may be made as well by written as by oral bids.[2] A prospective borrower may also appoint an agent to bid for him.[3]

d. Interest on Premium. Some authorities hold that interest cannot be collected on the premium, although stipulated for in the contract.[4] Other authori-

Texas.— International Bldg., etc., Assoc. *v.* Biering, 86 Tex. 476, 25 S. W. 622, 26 S. W. 39; Abbott *v.* International Bldg., etc., Assoc., 86 Tex. 467, 25 S. W. 620; Bexar Bldg., etc., Assoc. *v.* Robinson, 78 Tex. 163, 14 S. W. 227, 22 Am. St. Rep. 36, 9 L. R. A. 292; Jackson *v.* Cassidy, 68 Tex. 282, 4 S. W. 541; State Nat. L. & T. Co. *v.* Fuller, (Tex. Civ. App. 1901) 63 S. W. 552.

99. *Illinois.*— Jamieson *v.* Jurgens, 195 Ill. 86, 62 N. E. 917 [*affirming* 97 Ill. App. 557]; Borrowers', etc., Bldg. Assoc. *v.* Eklund, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637; Wightman *v.* Suddard, 93 Ill. App. 142; Forsell *v.* Suddard, 90 Ill. App. 407.

Iowa.— See Iowa Sav., etc., Assoc. *v.* Heidt, 107 Iowa 297, 77 N. W. 1050, 70 Am. St. Rep. 197, 43 L. R. A. 689.

Missouri.—Fry *v.* Missouri Guarantee Sav., etc., Assoc., 88 Mo. App. 289; Fowles *v.* Ætna Loan Co., 86 Mo. App. 103; State *v.* Stockton, 85 Mo. App. 477; Clark *v.* Missouri Guarantee Sav., etc., Assoc., 85 Mo. App. 388; Miller *v.* Missouri Guarantee Sav., etc., Assoc., 83 Mo. App. 669; Barnes *v.* Missouri Guarantee Sav., etc., Assoc., 83 Mo. App. 466; Brown *v.* Archer, 62 Mo. App. 277.

Nebraska.—South Omaha Loan, etc., Assoc. *v.* Wirrick, (Nebr. 1902) 88 N. W. 694.

Ohio.— State *v.* Oberlin Bldg., etc., Assoc., 35 Ohio St. 258; State *v.* Greenville Bldg., etc., Assoc., 29 Ohio St. 92.

Oregon.— Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 63 Pac. 489, 84 Am. St. Rep. 793.

Pennsylvania.— Stiles' Appeal, 95 Pa. St. 122.

Tennessee.— McCauley *v.* Workingman's Bldg., etc., Assoc., 97 Tenn. 421, 37 S. W. 212, 56 Am. St. Rep. 813, 35 L. R. A. 244; Post *v.* Building, etc., Assoc., 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201.

United States.— Coltrane *v.* Baltimore Bldg., etc., Assoc., 110 Fed. 293.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 46.

Estoppel to question.— One who bids for a loan at a specified premium which is accepted and upon which the money is loaned in good faith is estopped to deny the validity of the loan, on the ground that there was no competitive bidding. McNamara *v.* Oakland Bldg., etc., Assoc., 131 Cal. 336, 63 Pac. 670; Lurton *v.* Jacksonville Loan, etc., Assoc., 187 Ill. 141, 58 N. E. 218. See also Tootle *v.* Singer, (Iowa 1901) 88 N. W. 446; State *v.* Stockton, 85 Mo. App. 477.

Transfer of loan.— Where one obtains a loan from a building association, it is not necessary that on transfer of the debt to another association and the giving it a new note and mortgage there should be a competitive sale of money by the latter association, as in case of a new loan. Palmer *v.* Bosley, (Tenn. Ch. 1900) 62 S. W. 195.

1. U. S. Savings, etc., Co. *v.* Rider, 155 Ind. 704, 58 N. E. 674. See also New Jersey Bldg., etc., Co. *v.* Bachelor, 54 N. J. Eq. 600, 35 Atl. 745; Manship *v.* New South Bldg., etc., Assoc., 110 Fed. 845.

In South Dakota a building association may fix a premium below which no bid for a loan will be accepted. Co-operative Sav., etc., Assoc. *v.* Fawick, 11 S. D. 589, 79 N. W. 847.

In West Virginia a building association may fix a minimum premium payable in advance or in periodical instalments, but such premium must be a lump sum, certain and definite, and not a percentage payable indefinitely at fixed periods. McConnell *v.* Cox, 50 W. Va. 469, 40 S. E. 349; Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 38 S. E. 653, 87 Am. St. Rep. 805, 54 L. R. A. 536; Gray *v.* Baltimore Bldg., etc., Assoc., 48 W. Va. 164, 37 S. E. 533, 54 L. R. A. 217.

Under a statute providing that a building association may loan its funds on such conditions as are prescribed by its by-laws, a building association is not required to loan to the highest bidder or call for bids unless its by-laws so prescribe. Beyer *v.* National Bldg., etc., Assoc., 131 Ala. 369, 31 So. 113.

2. Farmers Sav., etc., Assoc. *v.* Kent, 131 Ala. 246, 30 So. 874; Ruppel *v.* Missouri Guarantee, etc., Assoc., 158 Mo. 613, 59 S. W. 1000; State *v.* Stockton, 85 Mo. App. 477; Miller *v.* Missouri Guarantee Sav., etc., Assoc., 83 Mo. App. 669; Edinger *v.* Missouri Guarantee Sav., etc., Assoc., 83 Mo. App. 615; Barnes *v.* Missouri Guarantee Sav., etc., Assoc., 83 Mo. App. 466; Hughes *v.* Farmers' Sav., etc., Assoc., (Tenn. Ch. 1897) 46 S. W. 362.

3. State *v.* Stockton, 85 Mo. App. 477.

4. *Iowa.*— Burlington Mut. Loan Assoc. *v.* Heider, 55 Iowa 424, 5 N. W. 578, 7 N. W. 686; Hawkeye Ben., etc., Assoc. *v.* Blackburn, 48 Iowa 385.

Mississippi.— Goodman *v.* Durant Bldg.,

ties are to the effect that where the taking of premiums is not illegal the reserving of interest thereon is proper.[5]

7. INTEREST AND USURY — a. Right to Reserve Interest. A building association has implied power to reserve interest upon loans made by it.[6]

b. Usury[7] — (I) *IN GENERAL.* On the question of usury in loans made by building associations the authorities are not harmonious. Some hold that a loan in the usual form is not usurious, although the borrower may be required to pay a greater price for the use of the money advanced to him than would be allowable under the statute regulating the rate of interest.[8] Others are to the effect that a

etc., Assoc., 71 Miss. 310, 14 So. 146; Sullivan *v.* Jackson Bldg., etc., Assoc., 70 Miss. 94, 12 So. 590.

Ohio.— Risk *v.* Delphos Bldg., etc., Assoc., 31 Ohio St. 517; Forrest City United Land, etc., Assoc. *v.* Gallagher, 25 Ohio St. 208.

South Carolina.— Columbia Bldg., etc., Assoc. *v.* Bollinger, 12 Rich. Eq. (S. C.) 124, 78 Am. Dec. 463.

Texas.— Jackson *v.* Cassidy, 68 Tex. 282, 4 S. W. 541.

Virginia.—Edelin *v.* Pascoe, 22 Gratt. (Va.) 826.

West Virginia.— Pfeister *v.* Wheeling Bldg. Assoc., 19 W. Va. 676.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 47.

5. *Alabama.*— Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413.

Connecticut.— West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66.

Georgia.—Bibb County Loan Assoc. *v.* Richards, 21 Ga. 592.

Nebraska.— Livingston Loan, etc., Assoc. *v.* Drummond, 49 Nebr. 200, 68 N. W. 375.

New Jersey.— Bowen *v.* Lincoln Bldg., etc., Assoc., 51 N. J. Eq. 272, 28 Atl. 67.

New York.— Citizens' Mut. Loan, etc., Assoc. *v.* Webster, 25 Barb. (N. Y.) 263.

North Dakota.— Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318.

Compare Birmingham *v.* Maryland Land, etc., Assoc., 45 Md. 541.

6. City Bldg., etc., Co. *v.* Fatty, 1 Abb. Dec. (N. Y.) 347, 4 Transcr. App. (N. Y.) 311.

As to interest on premium see *supra*, VIII, H, 6, d.

Refusal of application.— A custom of a building association to charge interest on money bid by a borrower whose application for a loan is subsequently refused is not a binding custom. Winterer *v.* Fairmount Bldg. Assoc., 19 Phila. (Pa.) 426, 44 Leg. Int. (Pa.) 122.

7. As to usury in exaction of premium see *supra*, VIII, H, 6, b.

8. *Alabama.*— Farmers Sav., etc., Assoc. *v.* Kent, 131 Ala. 246, 30 So. 874; Interstate Bldg., etc., Assoc. *v.* Brown, 128 Ala. 462, 29 So. 656; National Bldg., etc., Assoc. *v.* Ballard, 126 Ala. 155, 27 So. 971; Johnson *v.* National Bldg., etc., Assoc., 125 Ala. 465, 28 So. 2, 82 Am. St. Rep. 257; Sheldon *v.* Birmingham Bldg., etc., Assoc., 121 Ala. 278, 25 So. 820.

Arkansas.— Farmers' Sav., etc., Assoc. *v.* Ferguson, 69 Ark. 352, 63 S. W. 797; Reeve *v.* Ladies' Bldg. Assoc., 56 Ark. 335, 19 S. W. 917, 18 L. R. A. 129.

Connecticut.— West Winsted Sav., etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66. *Compare* Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Wilcox, 24 Conn. 147.

District of Columbia.— Burns *v.* Metropolitan Bldg. Assoc., 3 Mackey (D. C.) 333; Mulloy *v.* Fifth Ward Bldg. Assoc., 2 McArthur (D. C.) 594; Pabst *v.* Economical Bldg. Assoc., 1 McArthur (D. C.) 385.

Georgia.—Morgan *v.* Interstate Bldg., etc., Assoc., 108 Ga. 185, 33 S. E. 964; Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 30 S. E. 911; Goodrich *v.* Atlanta Nat. Bldg., etc., Assoc., 96 Ga. 803, 22 S. E. 585; Hawkins *v.* Americus Nat. Bldg., etc., Assoc., 96 Ga. 206, 22 S. E. 711; Parker *v.* Fulton Loan, etc., Assoc., 46 Ga. 166; Bibb County Loan Assoc. *v.* Richards, 21 Ga. 592.

Illinois.— Freie *v.* No. 4 Fidelity Bldg., etc., Union, 166 Ill. 128, 46 N. E. 784, 57 Am. St. Rep. 123; Winget *v.* Quincy Bldg., etc., Assoc., 128 Ill. 67, 21 N. E. 12; Holmes *v.* Smythe, 100 Ill. 413; Hedley *v.* Geissler, 90 Ill. App. 565.

Indiana.— Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198, 54 N. E. 753.

Iowa.— See Iowa Sav., etc., Assoc. *v.* Heidt, 107 Iowa 297, 77 N. W. 1050, 70 Am. St. Rep. 197, 43 L. R. A. 689. *Compare* Iowa Cent. Bldg., etc., Assoc. *v.* Vogt, (Iowa 1901) 87 N. W. 726; Burlington Mut. Loan Assoc. *v.* Heider, 55 Iowa 424, 5 N. W. 578, 7 N. W. 686.

Kansas.— Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Louisiana.— Latchford's Succession, 42 La. Ann. 529, 7 So. 628.

Massachusetts.—Bowker *v.* Mill River Loan Fund Assoc., 7 Allen (Mass.) 100; Delano *v.* Wild, 6 Allen (Mass.) 1, 83 Am. Dec. 605; Barker *v.* Bigelow, 15 Gray (Mass.) 130.

Michigan.— Phelps *v.* American Sav., etc., Assoc., 121 Mich. 343, 80 N. W. 120; People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373.

Minnesota.— Central Bldg., etc., Assoc. *v.* Lampson, 60 Minn. 422, 62 N. W. 544.

Missouri.— Ruppel *v.* Missouri Guarantee, etc., Assoc., 158 Mo. 613, 59 S. W. 1000; Hammerslough *v.* Kansas City Bldg., etc., Assoc., 79 Mo. 80.

Nebraska.— Livingston Loan, etc., Assoc. *v.* Drummond, 49 Nebr. 200, 68 N. W. 375.

loan is usurious if the borrower is liable to pay more than the amount loaned and legal interest.[9] It may, however, be said that whether or not a loan is tainted with usury depends upon the amount agreed in good faith to be paid as interest on the sum made as a loan or advancement on the stock.[10] Accordingly if a

New Hampshire.— Shannon *v.* Dunn, 43 N. H. 194.

New Jersey.— Franklin Bldg. Assoc. *v.* Marsh, 29 N. J. L. 225; New Jersey Bldg., etc., Assoc. *v.* Bachelor, 54 N. J. Eq. 600, 35 Atl. 745; Granite State Provident Assoc. *v.* Monk, (N. J. 1895) 30 Atl. 872; Bowen *v.* Lincoln Bldg., etc., Assoc., 51 N. J. Eq. 272, 28 Atl. 67; People's Bldg., etc., Assoc. *v.* Furey, 47 N. J. Eq. 410, 20 Atl. 890; Red Bank Mut. Bldg., etc., Assoc. *v.* Patterson, 27 N. J. Eq. 223; Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427; Somerset County Bldg., etc., Assoc. *v.* Camman, 11 N. J. Eq. 382.

New York.— City Bldg., etc., Co. *v.* Fatty, 1 Abb. Dec. (N. Y.) 347, 4 Transcr. App. (N. Y.) 311; Mutual Ben. Loan, etc., Co. *v.* Lynch, 54 N. Y. App. Div. 559, 67 N. Y. Suppl. 6; Citizens' Mut. Loan, etc., Assoc. *v.* Webster, 25 Barb. (N. Y.) 263.

North Dakota.— Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318.

Oregon.— Washington Invest. Assoc. *v.* Stanley, 38 Oreg. 319, 63 Pac. 489, 84 Am. St. Rep. 793.

Tennessee.— Patterson *v.* Workingmen's Bldg., etc., Assoc., 14 Lea (Tenn.) 677.

Virginia.—White *v.* Mechanics' Bldg. Fund Assoc., 22 Gratt. (Va.) 233.

West Virginia.—Archer *v.* Baltimore Bldg., etc., Assoc., 45 W. Va. 37, 30 S. E. 241.

England.—Silver *v.* Barnes, 6 Bing. N. Cas. 180, 37 E. C. L. 571.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 49.

Monthly payments of interest.— Where a borrowing member pays only the maximum rate of interest the contract is not usurious because the association may have secured more by exacting monthly payments of interest. Briggs *v.* Iowa Sav. Loan Assoc., 114 Iowa 232, 86 N. W. 320.

9. *Idaho.*— Fidelity Sav. Assoc. *v.* Shea, (Ida. 1899) 55 Pac. 1022; Stevens *v.* Home Sav., etc., Assoc., (Ida. 1898) 51 Pac. 779, 986.

Kentucky.— Simpson *v.* Kentucky Citizens Bldg., etc., Assoc., 101 Ky. 496, 19 Ky. L. Rep. 1176, 41 S. W. 570, 42 S. W. 834; U. S. Savings, etc., Co. *v.* Scott, 98 Ky. 695, 17 Ky. L. Rep. 1244, 34 S. W. 235; Southern Bldg., etc., Assoc. *v.* Harris, 98 Ky. 41, 17 Ky. L. Rep. 721, 32 S. W. 261; Herbert *v.* Kenton Bldg., etc., Assoc., 11 Bush (Ky.) 296; Centennial Bldg., etc., Assoc. *v.* Mitchell, 5 Ky. L. Rep. 698.

Maryland.— Waverly Mut., etc., Assoc. *v.* Buck, 64 Md. 338, 1 Atl. 561; Border State Perpetual Bldg. Assoc. *v.* McCarthy, 57 Md. 555; Peter's Bldg. Assoc. No. 5 *v.* Jaecksch, 51 Md. 198; Citizens' Security, etc., Co. *v.* Uhler, 48 Md. 455; Williar *v.* Baltimore Butchers' Loan, etc., Assoc., 45 Md. 546; Baltimore Permanent Bldg., etc., Soc. *v.* Taylor, 41 Md. 409.

Mississippi.— Shannon *v.* Georgia State Bldg., etc., Assoc., 78 Miss. 955, 30 So. 51, 84 Am. St. Rep. 657; Southern Home Bldg., etc., Assoc. *v.* Tony, 78 Miss. 916, 29 So. 825. See also Hart *v.* American Bldg., etc., Assoc., (Miss. 1901) 29 So. 999.

North Carolina.—Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Vann *v.* Fayetteville Bldg., etc., Assoc., 75 N. C. 494; Mills *v.* Salisbury Bldg., etc., Assoc., 75 N. C. 292.

Ohio.— Bates *v.* Peoples' Sav., etc., Assoc., 42 Ohio St. 655; State *v.* Greenville Bldg., etc., Assoc., 29 Ohio St. 92. But see Lucas *v.* Greenville Bldg., etc., Assoc., 22 Ohio St. 339, holding that a building association may recover from a member interest on a loan made to him at a rate within the limits allowed by the statute under which the association was organized, although it exceeds the maximum rate allowed by the general law. To same effect is Home Bldg. Assoc. *v.* Boning, 6 Ohio Dec. (Reprint) 1149, 10 Am. L. Rec. 626.

Pennsylvania.—Unincorporated associations cannot recover more than was actually advanced with legal interest. Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15; Jarrett *v.* Cope, 68 Pa. St. 67; Houser *v.* Hermann Bldg. Assoc., 41 Pa. St. 478; Hansbury *v.* Pfeiffer, 12 Phila. (Pa.) 250, 35 Leg. Int. (Pa.) 395.

South Carolina.— Mechanics', etc., Bldg., etc., Assoc. *v.* Dorsey, 15 S. C. 462. But a contract for repayment in instalments of the sum borrowed, although otherwise usurious, is prevented from being illegal, where it stipulates that on final settlement the amount to be retained by the association shall not exceed the sum actually loaned, with interest thereon at the legal rate. Turner *v.* Interstate Bldg., etc., Assoc., 47 S. C. 397, 25 S. E. 278; Thompson *v.* Gillison, 28 S. C. 534, 6 S. E. 333.

Texas.— International Bldg., etc., Assoc. *v.* Biering, 86 Tex. 476, 25 S. W. 622, 26 S. W. 39; Abbott *v.* International Bldg., etc., Assoc., 86 Tex. 467, 25 S. W. 620; Hensel *v.* International Bldg., etc., Assoc., 85 Tex. 215, 20 S. W. 116; Jackson *v.* Cassidy, 68 Tex. 282, 4 S. W. 541; People's Bldg., etc., Assoc. *v.* Rising, (Tex. Civ. App. 1896) 34 S. W. 147; Dakota Bldg., etc., Assoc. *v.* Logan, (Tex. Civ. App. 1896) 33 S. W. 1088; Walters *v.* Texas Bldg., etc., Assoc., 8 Tex. Civ. App. 500, 29 S. W. 51; International Bldg., etc., Assoc. *v.* Mayers, (Tex. Civ. App. 1894) 25 S. W. 1132.

10. Home Mut. Bldg. Assoc. *v.* Thursby, 58 Md. 284; Crider *v.* San Antonio Real Estate, etc., Assoc., 89 Tex. 597, 35 S. W. 1047; International Bldg., etc., Assoc. *v.* Abbott, 85

so-called payment of dues on stock or the exaction of a premium is a mere device to cover a payment for the use of money of more than the law recognizes as legal interest, the contract is an usurious one.[11]

(11) *Loans to Non-Members.* Loans made to persons who are not members are subject to the general laws as to interest and usury.[12]

8. Payment — a. In General. A borrowing member on settling a loan with the society should be charged with the amount of the loan with legal interest.[13]

Tex. 220, 20 S. W. 118; Lee *v.* Ryan, 11 Tex. Civ. App. 11, 31 S. W. 1098; International Bldg., etc., Assoc. *v.* Biering, (Tex. Civ. App. 1893) 23 S. W. 621; Tilley *v.* American Bldg., etc., Assoc., 52 Fed. 618. See also Peightal *v.* Cotton States Bldg. Co., (Tex. Civ. App. 1901) 61 S. W. 428, holding that the fact that the sum taken as interest exceeds the legal rate does not show usury, where the amount of the excess is insignificant and it is apparent that the excess was paid simply for the convenience of the parties with the intention of deducting it from the last payment.

11. *Alabama.*— Mobile Bldg., etc., Assoc. *v.* Robertson, 65 Ala. 382.

Connecticut.— Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Wilcox, 24 Conn. 147.

Idaho.—Fidelity Sav. Assoc. *v.* Shea, (Ida. 1899) 55 Pac. 1022; Stevens *v.* Home Sav., etc., Assoc., (Ida. 1898) 51 Pac. 779, 986.

Illinois.—Rhodes *v.* Missouri Sav., etc., Co., 173 Ill. 621, 50 N. E. 998, 42 L. R. A. 93.

Iowa.— Wilcoxen *v.* Smith, 107 Iowa 555, 78 N. W. 217, 70 Am. St. Rep. 220; Hawkeye State Sav., etc., Assoc. *v.* Johnston, 106 Iowa 218, 76 N. W. 678.

Kansas.— People's Bldg., etc., Assoc. *v.* Kidder, 9 Kan. App. 385, 58 Pac. 798.

Kentucky.— Watts *v.* National Bldg., etc., Assoc., 102 Ky. 29, 19 Ky. L. Rep. 1007, 42 S. W. 839; Henderson Bldg., etc., Assoc. *v.* Johnson, 88 Ky. 191, 10 Ky. L. Rep. 830, 10 S. W. 787, 3 L. R. A. 289.

Maryland.— Waverly Mut., etc., Assoc. *v.* Buck, 64 Md. 338, 1 Atl. 561; Peter's Bldg. Assoc. No. 5 *v.* Jaecksch, 51 Md. 198.

Minnesota.— City Loan Co. *v.* Cheney, 61 Minn. 83, 63 N. W. 250; Central Bldg., etc., Assoc. *v.* Lampson, 60 Minn. 422, 62 N. W. 544.

Missouri.— Clark *v.* Missouri Guarantee Sav., etc., Assoc., 85 Mo. App. 388.

Nebraska.— National Mut. Bldg., etc., Assoc. *v.* Keeney, 57 Nebr. 94, 77 N. W. 442.

New York.— Melville *v.* American Ben. Bldg. Assoc., 33 Barb. (N. Y.) 103.

Oregon.— Pacific Bldg. Co. *v.* Hill, (Oreg. 1901) 67 Pac. 103; Western Sav. Co. *v.* Houston, 38 Oreg. 377, 65 Pac. 611.

Tennessee.— McCauley *v.* Workingman's Bldg., etc., Assoc., 97 Tenn. 421, 37 S. W. 212, 56 Am. St. Rep. 813, 35 L. R. A. 244.

Texas.— Jackson *v.* Cassidy, 68 Tex. 282, 4 S. W. 541; American Mut. Bldg., etc., Assoc. *v.* Daugherty, (Tex. Civ. App. 1901) 66 S. W. 131; State Nat. L. & T. Co. *v.* Fuller, (Tex. Civ. App. 1901) 63 S. W. 552; Cotton States Bldg. Co. *v.* Rawlins, (Tex. Civ. App. 1901) 62 S. W. 805.

Utah.—Howells *v.* Pacific States Sav., etc., Co., 21 Utah 45, 60 Pac. 1025, 81 Am. St. Rep. 659.

United States.— Tilley *v.* American Bldg., etc., Assoc., 52 Fed. 618.

The fact that a person subscribes to stock only for the purpose of securing a loan is not of itself sufficient to show that the subscription was merely a scheme to disguise usury. Interstate Bldg., etc., Assoc. *v.* Crawford, (Tex. Civ. App. 1901) 63 S. W. 1071; Leary *v.* People's Bldg., etc., Assoc., (Tex. Civ. App. 1899) 49 S. W. 632.

12. St. Joseph, etc., Loan, etc., Assoc. *v.* Thompson, 19 Kan. 321.

As to power to loan to non-members see *supra*, VIII, H, 1, b.

An association which lends money to one not a member and receives a bonus therefor, besides the lawful rate of interest, can only recover from such borrower the principal sum. Mechanics', etc., Mut. Sav. Bank, etc., Assoc. *v.* Meriden Agency Co., 24 Conn. 159.

13. *Iowa.*— Briggs *v.* Iowa Sav. Loan Assoc., 114 Iowa 232, 86 N. W. 320.

Kansas.— Hekelnkæmper *v.* German Bldg., etc., Assoc., 22 Kan. 549. See also Salina Bldg., etc., Assoc. *v.* Nelson, 22 Kan. 751.

Kentucky.— Safety Bldg., etc., Co. *v.* Ecklar, 106 Ky. 115, 20 Ky. L. Rep. 1770, 50 S. W. 50.

Maryland.— Middle States Loan, etc., Co. *v.* Hagerstown Mattress, etc., Co., 82 Md. 506, 33 Atl. 886.

Massachusetts.— Delano *v.* Wild, 6 Allen (Mass.) 1, 83 Am. Dec. 605; Barker *v.* Bigelow, 15 Gray (Mass.) 130.

Mississippi.— Ricks *v.* Durant Bldg., etc., Assoc., (Miss. 1895) 18 So. 359.

New Jersey.— People's Bldg., etc., Assoc. *v.* Furey, 47 N. J. Eq. 410, 20 Atl. 890.

North Carolina.—Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Hanner *v.* Greensboro Bldg., etc., Assoc., 78 N. C. 188; Mills *v.* Salisbury Bldg., etc., Assoc., 75 N. C. 292.

Ohio.—Seibel *v.* Victoria Bldg. Assoc. No. 2, 43 Ohio St. 371, 2 N. E. 417.

South Dakota.— Hale *v.* Gullick, 13 S. D. 637, 84 N. W. 196.

Tennessee.— Johnston *v.* Grosvenor, 105 Tenn. 353, 59 S. W. 1028; Bowman *v.* Cleveland Bldg., etc., Assoc., (Tenn. Ch. 1900) 59 S. W. 669.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 65.

Running of interest.— Although a building association, by agreement of its members, suspended its operations, including payment of monthly dues, until its mortgage securities could be realized on, with the understanding that, in case such securities did not realize a sufficient sum to close up the association as contemplated by its charter, payment of

He should be credited with all amounts paid directly thereon.[14] It has also been held that he should be credited with usurious interest or premiums paid.[15]

b. Charge For Losses and Expenses. The true indebtedness of a member of a building and loan association is not necessarily the difference between the cash received by him and the cash which he has paid in or refunded, but losses and expenses must be taken into consideration, and a member must bear his due proportion thereof.[16] But a building association cannot by an arbitrary provision of its by-laws fix an amount to be retained by it for expenses upon settlement with a borrowing member. The association must exhibit a settlement of accounts for expenses before the borrowing member is chargeable with his proportional part thereof.[17]

c. Payments on Stock. Some authorities hold that all payments made by a borrowing shareholder to the society should be credited on the loan.[18] Others

monthly dues was to be resumed, a member must pay interest on the amount of his indebtedness to the association from the date of such agreement to the date of the judgment against him therefor. Thomson *v.* Ocmulgee Bldg., etc., Assoc., 56 Ga. 350. And where a building association had ceased to do business, and was winding up its affairs, interest on a loan made before that time should be computed to the time of taking the account on foreclosure of the mortgage securing it, and not to the time the association went out of business; the association having done nothing to abrogate the contract under which the interest was due. Bowman *v.* Cleveland Bldg., etc., Assoc., (Tenn. Ch. 1900) 59 S. W. 669.

14. *Iowa.*— Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317; Wilcoxen *v.* Smith, 107 Iowa 555, 78 N. W. 217, 70 Am. St. Rep. 220.

Massachusetts.— Delano *v.* Wild, 6 Allen (Mass.) 1, 83 Am. Dec. 605; Barker *v.* Bigelow, 15 Gray (Mass.) 130.

Mississippi.— Ricks *v.* Durant Bldg., etc., Assoc., (Miss. 1895) 18 So. 359.

North Carolina.— Mills *v.* Salisbury Bldg., etc., Assoc., 75 N. C. 292.

South Dakota.— Hale *v.* Gullick, 13 S. D. 637, 84 N. W. 196.

Tennessee.— Johnston *v.* Grosvenor, 105 Tenn. 353, 59 S. W. 1028.

Set-off of assigned claims.— A shareholder in a building association who had executed a mortgage to it may set off against the mortgage debt claims of withdrawing members against the association assigned to him, there being nothing in the constitution of the association making it inequitable to allow such a set-off. Hennighausen *v.* Tischer, 50 Md. 583.

15. Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317; Wilcoxen *v.* Smith, 107 Iowa 555, 78 N. W. 217, 70 Am. St. Rep. 220; Brown *v.* Archer, 62 Mo. App. 277; Carpenter *v.* Richardson, 101 Tenn. 176, 46 S. W. 452; McCauley *v.* Workingman's Bldg., etc., Assoc., 97 Tenn. 421, 37 S. W. 212, 56 Am. St. Rep. 813, 35 L. R. A. 244; Post *v.* Mechanics' Bldg., etc., Assoc., 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; Southern Bldg., etc., Assoc. *v.* Johnson, 111 Fed. 657.

Where a loan is usurious because a bonus has been reserved, the association is entitled to recover from the borrower only the principal of the debt contracted, less the bonus reserved and the payments actually made by the borrower. Lincoln Bldg., etc., Assoc. *v.* Benjamin, 7 Nebr. 181.

16. Pattison *v.* Albany Bldg., etc., Assoc., 63 Ga. 373.

As to assessments for losses and expenses see *supra*, VI, A.

Insurance of mortgaged property.— Where a mortgage to a building and loan association covenanted that the mortgagor would keep the premises insured, and that in case of his failure to do so the mortgagee should have the privilege of placing the insurance, the sums so paid by the mortgagee, in consequence of the mortgagor's failure to insure, are chargeable against the latter upon his withdrawal from the association and a settlement between them. Overby *v.* Fayetteville Bldg., etc., Assoc., 81 N. C. 41.

17. U. S. Building, etc., Assoc. *v.* Cassidy, 22 Ky. L. Rep. 726, 58 S. W. 606; Safety Bldg., etc., Assoc. *v.* Montjoy, 21 Ky. L. Rep. 1189, 54 S. W. 719.

18. *California.*— Hale *v.* Barker, 129 Cal. 419, 62 Pac. 168. *Compare* Homeseekers' Loan Assoc. *v.* Gleeson, 133 Cal. 312, 65 Pac. 617.

Kentucky.— Safety Bldg., etc., Co. *v.* Ecklar, 106 Ky. 115, 20 Ky. L. Rep. 1770, 50 S. W. 50; Simpson *v.* Kentucky Bldg. Citizens', etc., Assoc., 101 Ky. 496, 19 Ky. L. Rep. 1176, 41 S. W. 570, 42 S. W. 834; Johnson *v.* Bush, 23 Ky. L. Rep. 1399, 64 S. W. 628, 65 S. W. 158.

Maryland.— Middle States Loan, etc., Co. *v.* Hagerstown Mattress, etc., Co., 82 Md. 506, 33 Atl. 886.

Massachusetts.— Delano *v.* Wild, 6 Allen (Mass.) 1, 83 Am. Dec. 605; Barker *v.* Bigelow, 15 Gray (Mass.) 130.

North Carolina.—Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Hanner *v.* Greensboro Bldg., etc., Assoc., 78 N. C. 188; Mills *v.* Salisbury Bldg., etc., Assoc., 75 N. C. 292. See also Rowland *v.* Old Dominion Bldg., etc., Assoc., 118 N. C. 173, 24 S. E. 366.

South Dakota.— Hale *v.* Gullick, 13 S. D. 637, 84 N. W. 196.

Utah.— Snyder *v.* Fidelity Sav. Assoc., 23 Utah 291, 64 Pac. 870; Howells *v.* Pacific States Sav., etc., Co., 21 Utah 45, 60 Pac.

are to the effect that payments on stock are not *ipso facto* payments on the loan and do not operate of themselves to extinguish it *pro tanto*.[19] Still others permit the borrower to elect to have stock payments applied on the loan.[20]

1025, 81 Am. St. Rep. 659; People's Bldg., etc., Assoc. *v.* Fowble, 17 Utah 122, 53 Pac. 999; Sawtelle *v.* North American Sav., etc., Co., 14 Utah 443, 48 Pac. 211.

Washington.— U. S. Saving, etc., Co. *v.* Parr, 26 Wash. 115, 66 Pac. 109.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 62.

A junior mortgagee cannot compel a building and loan association to credit on the first mortgage dues, usurious interest, premiums, and fines received by it from the borrower on his debt, unless there is a stipulation to that effect. Bird *v.* Kendall, 62 S. C. 178, 40 S. E. 142.

19. *Alabama.*— Southern Bldg., etc., Assoc. *v.* Anniston L. & T. Co., 101 Ala. 582, 15 So. 123, 46 Am. St. Rep. 138, 29 L. R. A. 120.

Arkansas.— Reeve *v.* Ladies' Bldg. Assoc., 56 Ark. 335, 19 S. W. 917, 18 L. R. A. 129.

Illinois.—Pioneer Sav., etc., Co. *v.* Brockett, 58 Ill. App. 204. See also Dooling *v.* Smith, 89 Ill. App. 26.

Iowa.— See Briggs *v.* Iowa Sav. Loan Assoc., 114 Iowa 232, 86 N. W. 320.

Kansas.— Hekelnkæmper *v.* German Bldg., etc., Assoc., 22 Kan. 549.

Missouri.— Sappington *v.* Ætna Loan Co., 76 Mo. App. 242.

Nebraska.—Randall *v.* National Bldg., etc., Union, 43 Nebr. 876, 62 N. W. 252.

New Jersey.— Merchantville Bldg., etc., Assoc. *v.* Zane, (N. J. 1897) 38 Atl. 420; People's Bldg., etc., Assoc. *v.* Furey, 47 N. J. Eq. 410, 20 Atl. 890; Mechanics' Bldg., etc., Assoc. *v.* Conover, 14 N. J. Eq. 219.

Ohio.—Seibel *v.* Victoria Bldg. Assoc. No. 2, 43 Ohio St. 371, 2 N. E. 417.

Pennsylvania.—Harris' Appeal, (Pa. 1886) 3 Atl. 776; Economy Bldg. Assoc. *v.* Hungerbuehler, 93 Pa. St. 258; Link *v.* Germantown Bldg. Assoc., 89 Pa. St. 15; Spring Garden Assoc. *v.* Tradesmen's Loan Assoc., 46 Pa. St. 493; North America Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463, 78 Am. Dec. 349; Plymouth Bldg. Assoc. *v.* Mangan, 2 Kulp (Pa.) 210; Laurel Run Bldg. Assoc. *v.* Bayley, 1 Kulp (Pa.) 215; Saving Fund *v.* Murray, 14 Leg. Int. (Pa.) 133; Building Assoc. *v.* Taylor, 13 Wkly. Notes Cas. (Pa.) 13. See also Kelly *v.* Perseverance Bldg. Assoc., 39 Pa. St. 148.

Tennessee.— Johnston *v.* Grosvenor, 105 Tenn. 353, 59 S. W. 1028; Carpenter *v.* Richardson, 101 Tenn. 176, 46 S. W. 452; Post *v.* Mechanics' Bldg., etc., Assoc., 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; Pioneer, etc., Loan Co. *v.* Cannon, 96 Tenn. 599, 36 S. W. 386, 54 Am. St. Rep. 858, 33 L. R. A. 112.

Texas.—El Paso Bldg., etc., Assoc. *v.* Lane, 81 Tex. 369, 17 S. W. 77; Pioneer Sav., etc., Co. *v.* Everheart, (Tex. Civ. App. 1898) 44 S. W. 885; Dakota Bldg., etc., Assoc. *v.* Logan, (Tex. Civ. App. 1896) 33 S. W. 1038; Blakeley *v.* El Paso Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 292; Sweeney *v.* El Paso Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 290.

United States.— Andruss *v.* People's Bldg., etc., Assoc., 94 Fed. 575, 36 C. C. A. 336; Tilley *v.* American Bldg., etc., Assoc., 52 Fed. 618.

Fines paid by a borrowing stock-holder should not be credited on the loan. Mechanics' Bldg., etc., Assoc. *v.* Conover, 14 N. J. Eq. 219.

Where an association agrees to accept the stock of a defaulting borrower upon condition that he be credited with the amount paid thereon, he is not entitled to receive any credit therefor if the amount paid thereon has been previously deducted from his debt. Mutual Bldg., etc., Assoc. *v.* Tascott, 143 Ill. 305, 32 N. E. 376.

20. Randall *v.* National Bldg., etc., Union, 42 Nebr. 809, 60 N. W. 1019, 29 L. R. A. 133, 43 Nebr. 876, 62 N. W. 252; Watkins *v.* Workingmen's Bldg., etc., Assoc., 97 Pa. St. 514; North America Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463, 78 Am. Dec. 349; Plymouth Bldg. Assoc. *v.* Rood, 2 Kulp (Pa.) 246; Plymouth Bldg. Assoc. *v.* Mangan, 2 Kulp (Pa.) 210; Hazel Loan, etc., Assoc. *v.* Groesbeck, 17 Phila. (Pa.) 242, 41 Leg. Int. (Pa.) 16. *Compare* Philadelphia Mercantile Loan Assoc. *v.* Moore, 47 Pa. St. 233.

Assignment of stock.— A member who has assigned his shares of stock in the association to a third party as collateral security for a debt cannot, when sued upon his mortgage to the association, claim a credit for the value of such shares of stock. Schober *v.* Accommodation Sav. Fund, etc., Assoc., 35 Pa. St. 223. And where a stock-holder gives the association a judgment on real estate as security for a loan, and also makes an absolute assignment and delivery to it of his certificates of stock, as required by its constitution and by-laws, he cannot, after making a second assignment of such stock to a third person, direct that the payments on such stock shall not be applied by the association on his judgment until after the real estate is exhausted; and such association may first appropriate and apply such payments on the judgment, especially where, by the terms of the assignment to it, he waives and relinquishes all benefits which may thereafter accrue to him. Wadlinger *v.* Washington German Bldg., etc., Assoc., 153 Pa. St. 622, 26 Atl. 647.

Who may elect.— The mortgagor or the association, by virtue of an assignment of the stock, taken as collateral security for the payment of the mortgage, may apply payments on the stock of a loan association to the payment of the mortgage debt; but, if neither make the application, strangers cannot compel it. Spring Garden Assoc. *v.* Tradesmen's Loan Assoc., 46 Pa. St. 493. See also Springville Sav. Fund, etc., Assoc. *v.* Raber, 11 Phila.

d. Where Society Is Insolvent. Three views have been advanced in regard to the relative rights and obligations of the borrowing and the non-borrowing shareholders on the insolvency of the society. The first view is that the relation between the society and the borrowing shareholder has been changed by the circumstances to one subsisting between an ordinary creditor and debtor, and that the borrowing shareholder is to be charged with the amount actually received by him, with interest at the legal rate and credited with all payments made, whether by way of dues, interest, or premium, according to the rule governing partial payments.[21] The second view is, that the borrowing shareholder is entitled to credit upon his loan for the amount of interest and premium paid by him, but is not entitled to have the amount of the dues paid by him on account of stock applied upon his loan.[22] The third view differs from the second in that instead of crediting the borrowing shareholder with the whole premium it credits him

(Pa.) 546, 33 Leg. Int. (Pa.) 329; Building Assoc. *v.* Eshelbach, 7 Phila. (Pa.) 189; Conrow *v.* Tradesmen's Sav. Fund, etc., Assoc., 21 Leg. Int. (Pa.) 109.

21. *Georgia.*— City Loan, etc., Assoc. *v.* Goodrich, 48 Ga. 445.

Maryland.— Waverly Mut., etc., Assoc. *v.* Buck, 64 Md. 338, 1 Atl. 561; Hampstead Bldg. Assoc. No. 1 *v.* King, 58 Md. 279; Low St. Bldg. Assoc. No. 6 *v.* Zucker, 48 Md. 448; Windsor *v.* Bandel, 40 Md. 172.

Massachusetts.— Cook *v.* Kent, 105 Mass. 246.

North Carolina.—Williams *v.* Maxwell, 123 N. C. 586, 31 S. E. 821; Thompson *v.* North Carolina Bldg., etc., Assoc., 120 N. C. 420, 27 S. E. 118; Strauss *v.* Carolina Interstate Bldg., etc., Assoc., 117 N. C. 308, 23 S. E. 450, 53 Am. St. Rep. 585, 30 L. R. A. 693.

South Carolina.— Buist *v.* Bryan, 44 S. C. 121, 21 S. E. 537, 51 Am. St. Rep. 787, 29 L. R. A. 127.

Utah.— Hale *v.* Thomas, 20 Utah 426, 59 Pac. 241; People's Bldg., etc., Assoc. *v.* Fowble, 17 Utah 122, 53 Pac. 999.

Washington.— See Hale *v.* Stenger, 22 Wash. 516, 699, 61 Pac. 156, 63 Pac. 554.

United States.— Miles *v.* New South Bldg., etc., Assoc., 111 Fed. 946. But he is not entitled to credit for admission fees or fines paid. Coltrane *v.* Baltimore Bldg., etc., Assoc., 110 Fed. 293.

England.— Brownlie *v.* Russell, 8 App. Cas. 235, 47 J. P. 757, 48 L. T. Rep. N. S. 881.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 63.

22. *Arkansas.*— Hale *v.* Phillips, 68 Ark. 382, 59 S. W. 35.

Connecticut.—Curtis *v.* Granite State Provident Assoc., 69 Conn. 6, 36 Atl. 1023, 61 Am. St. Rep. 17.

Illinois.— Choisser *v.* Young, 69 Ill. App. 252. See also Hedley *v.* Geissler, 90 Ill. App. 565.

Indiana.— Number Four Fidelity Bldg., etc., Union *v.* Smith, 155 Ind. 679, 58 N. E. 70; James *v.* Sidwell, 153 Ind. 697, 54 N. E. 752; Huter *v.* Union Trust Co., 153 Ind. 204, 54 N. E. 755; Marion Trust Co. *v.* Edwards Lodge I. O. O. F., 153 Ind. 96, 54 N. E. 444; Boice *v.* Rabb, 24 Ind. App. 368, 55 N. E. 880.

Iowa.— Tootle *v.* Singer, (Iowa 1901) 88 N. W. 446; Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317; Hale *v.* Kline, 113 Iowa 523, 85 N. W. 814; Wilcoxen *v.* Smith, 107 Iowa 555, 78 N. W. 217, 70 Am. St. Rep. 220.

Kentucky.—Reddick *v.* U. S. Building, etc., Assoc., 106 Ky. 94, 20 Ky. L. Rep. 1720, 49 S. W. 1075; Rogers *v.* Rains, 100 Ky. 295, 18 Ky. L. Rep. 768, 38 S. W. 483; Vinton *v.* National Bldg., etc., Assoc., 23 Ky. L. Rep. 2021, 66 S. W. 510; Globe Bldg., etc., Co. *v.* Spillman, 23 Ky. L. Rep. 1431, 65 S. W. 444; U. S. Building, etc., Assoc. *v.* Brunner, 23 Ky. L. Rep. 1253, 64 S. W. 996; U. S. Bldg., etc., Assoc. *v.* Green, 23 Ky. L. Rep. 1189, 64 S. W. 962; Columbia Finance, etc., Co. *v.* Swartz, 23 Ky. L. Rep. 1097, 64 S. W. 743; U. S. Building, etc., Assoc. *v.* Reed, 23 Ky. L. Rep. 342, 62 S. W. 1020; Globe Bldg., etc., Co. *v.* Wood, 22 Ky. L. Rep. 1500, 60 S. W. 858; Globe Bldg., etc., Co. *v.* Stephens, 22 Ky. L. Rep. 1441, 60 S. W. 723; U. S. Building, etc., Assoc. *v.* Rowland, 22 Ky. L. Rep. 1433, 60 S. W. 707.

Michigan.— Phelps *v.* American Sav., etc., Assoc., 121 Mich. 343, 80 N. W. 120; Russell *v.* Pierce, 121 Mich. 208, 80 N. W. 118.

Minnesota.—Knutson *v.* Northwestern Loan, etc., Assoc., 67 Minn. 201, 69 N. W. 889, 64 Am. St. Rep. 410.

Missouri.— Woerhide *v.* Johnston, 81 Mo. App. 193; Brown *v.* Archer, 62 Mo. App. 277. See also Hohenshell *v.* Home Sav., etc., Assoc., 140 Mo. 566, 41 S. W. 948.

Nebraska.—Anselme *v.* American Sav., etc., Assoc., (Nebr. 1902) 88 N. W. 665.

New Hampshire.— Bank Com'rs *v.* Granite State Provident Assoc., 68 N. H. 554, 44 Atl. 605. See also Sullivan *v.* Ferryall, 69 N. H. 192, 44 Atl. 109.

New Jersey.— Moran *v.* Gray, (N. J. 1897) 38 Atl. 668; Weir *v.* Granite State Provident Assoc., 56 N. J. Eq. 234, 38 Atl. 643.

New York.— Breed *v.* Ruoff, 54 N. Y. App. Div. 142, 66 N. Y. Suppl. 422. *Compare* Rochester Sav. Bank *v.* Whitmore, 25 N. Y. App. Div. 491, 49 N. Y. Suppl. 862.

North Dakota.— Hale *v.* Cairns, 8 N. D. 145, 77 N. W. 1010, 73 Am. St. Rep. 746, 44 L. R. A. 261.

Ohio.— See Eversmann *v.* Schmitt, 53 Ohio St. 174, 41 N. E. 139, 53 Am. St. Rep. 632, 29 L. R. A. 184.

Pennsylvania.— Strohen *v.* Franklin Sav.,

with only the part estimated as unearned.[23] The authorities all agree that the borrower should be charged with the amount loaned to him with interest at the rate fixed by law.[24]

I. Making Promissory Note. It is generally held that the society may make a promissory note in the absence of statutory restriction.[25]

IX. ACTIONS.

A. By Association — 1. Right and Nature of. Building and loan societies may protect and maintain their rights in appropriate actions,[26] like other corporate bodies.[27]

etc., Assoc., 115 Pa. St. 273, 8 Atl. 843; Mechanics', etc., Bldg., etc., Assoc. *v.* Swartz, 5 Pa. Dist. 318; Twin Cities Nat. Bldg., etc., Assoc. *v.* Lepore, 17 Pa. Co. Ct. 426.

Tennessee.— Johnston *v.* Grosvenor, 105 Tenn. 353, 59 S. W. 1028; Carpenter *v.* Richardson, 101 Tenn. 176, 46 S. W. 452; Post *v.* Mechanics' Bldg., etc., Assoc., 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; Rogers *v.* Hargo, 92 Tenn. 35, 20 S. W. 430; Williamson *v.* Globe Bldg., etc., Co., (Tenn. Ch. 1901) 64 S. W. 298; Southern Bldg., etc., Assoc. *v.* Easley, (Tenn. Ch. 1900) 59 S. W. 440.

Texas.— Price *v.* Kendall, 14 Tex. Civ. App. 26, 36 S. W. 810.

West Virginia.— Young *v.* Martinsburg Imp. Loan & Bldg. Assoc., 48 W. Va. 512, 38 S. E. 670.

Wisconsin.— Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945.

United States.— Douglass *v.* Kavanaugh, 90 Fed. 373, 62 U. S. App. 38, 33 C. C. A. 107; Towle *v.* American Bldg., etc., Soc., 61 Fed. 446.

23. Dooling *v.* Smith, 89 Ill. App. 26; Barry *v.* Downs, 87 Ill. App. 486; Dooling *v.* Davis, 84 Ill. App. 393; Sullivan *v.* Spaniol, 78 Ill. App. 125; MacMurray *v.* Gosney, 106 Fed. 11; Manorita *v.* Fidelity Trust, etc., Co., 101 Fed. 8; Sullivan *v.* Stucky, 86 Fed. 491.

24. *Connecticut.*— Curtis *v.* Granite State Provident Assoc., 69 Conn. 6, 36 Atl. 1023, 61 Am. St. Rep. 17.

Georgia.— City Loan, etc., Assoc. *v.* Goodrich, 48 Ga. 445.

Illinois.— Sullivan *v.* Spaniol, 78 Ill. App. 125.

Indiana.— Marion Trust Co. *v.* Edwards Lodge I. O. O. F., 153 Ind. 96, 54 N. E. 444.

Iowa.— Tootle *v.* Singer, (Iowa 1901) 88 N. W. 446; Hale *v.* Kline, 113 Iowa 523, 85 N. W. 814.

Kentucky.— Rogers *v.* Rains, 100 Ky. 295, 18 Ky. L. Rep. 768, 38 S. W. 483.

Maryland.— Waverly Mut., etc., Assoc. *v.* Buck, 64 Md. 338, 1 Atl. 561; Hampstead Bldg. Assoc. No. 11 *v.* King, 58 Md. 279; Low St. Bldg. Assoc. No. 6 *v.* Zucker, 48 Md. 448; Windsor *v.* Bandel, 40 Md. 172.

Michigan.— Phelps *v.* American Sav., etc., Assoc., 121 Mich. 343, 80 N. W. 120; Russell *v.* Pierce, 121 Mich. 208, 80 N. W. 118.

Minnesota.—Knutson *v.* Northwestern Loan, etc., Assoc., 67 Minn. 201, 69 N. W. 889, 64 Am. St. Rep. 410.

Missouri.— Brown *v.* Archer, 62 Mo. App. 277.

New Hampshire.— Bank Com'rs *v.* Granite State Provident Assoc., 68 N. H. 554, 44 Atl. 605.

New Jersey.— Moran *v.* Gray, (N. J. 1897) 38 Atl. 668; Weir *v.* Granite State Provident Assoc., 56 N. J. Eq. 234, 38 Atl. 643.

North Carolina.—Williams *v.* Maxwell, 123 N. C. 586, 31 S. E. 821; Strauss *v.* Carolina Interstate Bldg., etc., Assoc., 117 N. C. 308, 23 S. E. 450, 53 Am. St. Rep. 585, 30 L. R. A. 693.

Pennsylvania.— Strohen *v.* Franklin Sav., etc., Assoc., 115 Pa. St. 273, 8 Atl. 843; Twin Cities Nat. Bldg., etc., Assoc. *v.* Lepore, 17 Pa. Co. Ct. 426; State Sav., etc., Assoc. *v.* Carroll, 15 Pa. Co. Ct. 522.

Tennessee.— Rogers *v.* Hargo, 92 Tenn. 35, 20 S. W. 430; Southern Bldg., etc., Assoc. *v.* Easley, (Tenn. Ch. 1900) 59 S. W. 440.

Texas.— Park *v.* Kribs, (Tex. Civ. App. 1900) 60 S. W. 905.

Wisconsin.— Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945.

United States.—Manorita *v.* Fidelity Trust, etc., Co., 101 Fed. 8; Douglass *v.* Kavanaugh, 90 Fed. 373, 62 U. S. App. 38, 33 C. C. A. 107; Sullivan *v.* Stucky, 86 Fed. 491.

England.— Brownlie *v.* Russell, 8 App. Cas. 235, 47 J. P. 757, 48 L. T. Rep. N. S. 881.

See 8 Cent. Dig. tit. "Building and Loan Associations," § 66.

25. Marion Trust Co. *v.* Crescent Loan, etc., Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257; Davis *v.* West Saratoga Bldg. Union No. 3, 32 Md. 285; Metropolitan Bldg., etc., Assoc. *v.* Van Pelt, 36 Nebr. 3, 53 N. W. 1031; Grommes *v.* Sullivan, 81 Fed. 45. *Contra,* Ashland Banking Co. *v.* Centralia Mut. Sav. Fund Assoc., 1 Kulp (Pa.) 38.

26. A suit in equity, although a remedy at law exists, may be maintained to compel officers to account for the waste or misapplication of the funds of a building and loan association, as the existence of a remedy at law does not oust a court of equity of its jurisdiction in actions of this nature. Citizens' Loan Assoc. *v.* Lyon, 29 N. J. Eq. 110.

27. Maintenance after expiration of charter. — Under a statute providing that building

2. PLEADINGS. The complaint in an action on a bond given to a building and loan association is sufficient if it shows that the instalments sued for were due and payable at the time the action was brought.[28] If the action be on a note conditioned for the payment of assessments, the method of making the assessment need not be alleged with particularity.[29]

3. EVIDENCE — PRESUMPTIONS. Where the association sues to recover fines, dues, or assessments from a member or his assignee, evidence tending to show the amount lawfully payable to plaintiff would, of course, be admissible;[30] but where under the charter of an association a borrower is entitled to credit only for the amount paid by him, he cannot, in an action against him to enforce a loan, show the market value of his stock.[31]

4. DEFENSES. As a rule a party who has received the profits incidental to membership in the association or has obtained the benefits of a loan therefrom cannot set up as a defense to an action by such society to enforce its claim against him an irregularity in the adoption of its by-laws, that the whole capital stock had not been taken,[32] or that by reason of non-compliance with some provision of its by-laws or charter the association had no right to make the loan;[33] but where the irregularity alleged amounts to a gross perversion of the spirit and design of such

associations may institute, and carry on suits already instituted, for any debt due them, although their charters have expired, a warrant of attorney executed by the officers of an association after the expiration of the charter thereof is sufficient to carry on a suit already instituted. Harmony Bldg. Assoc. *v.* Berger, 17 Phila. (Pa.) 314, 41 Leg. Int. (Pa.) 280.

28. Buist *v.* Fitzsimons, 44 S. C. 130, 21 S. E. 610, holding also that where a receiver had been appointed to wind up the affairs of such an association and authorized by the court to bring the action, the mere fact that the association had not carried out its original designs and contracts with defendant would not render the complaint demurrable.

29. Borchus *v.* Huntington Bldg., etc., Assoc., 97 Ind. 180 [*followed* in Wohlford *v.* Citizens' Bldg., Loan & Sav. Assoc., 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177].

Effect of reference in note to constitution and by-laws.— The fact that a note payable to a building and loan association which is made a part of the complaint contains a stipulation that it was given for money loaned under the constitution, by-laws, and regulations of such association does not by such reference necessitate the inclusion and filing of such by-laws and regulations as a part of the complaint. Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405.

Variance.—Under a complaint drawn on the theory that a member of a building association is in arrears with the principal and interest on his note, and praying a foreclosure of the mortgage securing it, the association cannot recover an assessment made upon the stock of such member, and evidence to this effect will not support the allegation. Cummings *v.* Citizens' Bldg., etc., Assoc., 142 Ind. 600, 42 N. E. 213.

30. For this purpose the constitution and by-laws of an association, and an order of its board of directors authorizing the assignment of the claim by the holder to the assignee is admissible. Eigenman *v.* Rockport Bldg., etc., Assoc., 79 Ind. 41, holding also that the secretary of the association might testify to the amount due from defendant without accompanying the statement with data from which it was made, as defendant, if he desired to bring forth the source of the witnesses' information, could do so by cross-examination.

31. Hence evidence of the number of members who had defaulted in the payment of premiums and thereby increased the value of the stock by rendering their stock forfeitable would be wholly irrelevant and inadmissible. Watkins *v.* Workingmen's Bldg., etc., Assoc., 97 Pa. St. 514.

Presumptions.— In an action by a building association to enforce the payment of premiums and interest by a member, a plea by defendant that the scheme of the association is a device to evade the usury laws must be clearly proved by him, for so long as the transaction between the parties is one of the nature for which the association is chartered, usury will not be presumed. Van Pelt *v.* Home Bldg., etc., Assoc., 79 Ga. 439, 4 S. E. 501. But on the other hand, a breach of a contract by defendant will not be presumed to aid a complaint of an association, as such breach must be affirmatively alleged and proved as one of the elements of plaintiff's cause of action. Lime City Bldg., etc., Assoc. *v.* Wagner, 122 Ind. 78, 23 N. E. 689, 17 Am. St. Rep. 342.

32. Morrison *v.* Dorsey, 48 Md. 461.

33. *Indiana.*— Poock *v.* Lafayette Bldg. Assoc., 71 Ind. 357.

Michigan.— Peoples' Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373.

Minnesota.— Central Bldg., etc., Assoc. *v.* Lampson, 60 Minn. 422, 62 N. W. 544.

Ohio.— Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186; Victoria Bldg. Assoc. *v.* Arbeiter Bund, 6 Ohio Dec. (Reprint) 1108, 10 Am. L. Rec. 485.

Tennessee.— Palmer *v.* Bosley, (Tenn. Ch. 1900) 62 S. W. 195.

organizations,[34] and is *ultra vires* in that it is in contravention of both statutory and constitutional provisions,[35] the opposite view has been held.

B. Against Association — 1. Right and Nature of. A stock-holder or creditor[36] of a building and loan association is governed in the institution of an action by the laws under which the association was organized,[37] or by conditions in his certificate of membership.[38] Where, however, his right of action exists,[39] the nature thereof will depend upon the relief sought. In some instances he may sue in assumpsit,[40] or in either equity or law at his option;[41] but if an accounting between the members and the association is desired,[42] if illegal acts of association

34. Stiles' Appeal, 95 Pa. St. 122, where it was held that the fact that a building and loan association, having by its charter power to loan only the money in its treasury derived from interest, dues, and fines received from its members, had borrowed money from banks for the purpose of loaning the same, and had also fixed a minimum rate of premium below which they would not accept bids, should be allowed to be shown by the debtor. But it is also held that to constitute such irregularity a good defense, the debtor must show that such acts operate to his detriment, and if it is clear that the minimum rate fixed had nothing to do with the transaction in question it cannot be accepted as a defense. Orangeville Mut. Sav. Fund, etc., Assoc. *v.* Young, 9 Wkly. Notes Cas. (Pa.) 251.

35. Anderson *v.* Cleburne Bldg., etc., Assoc., (Tex. App. 1890) 16 S. W. 298.

36. Terms distinguished. — If under the charter and by-laws of a building and loan association the members are mere depositors of money, with the right, after a stated period, to demand a return of the deposits with interest, such members are not, as to the corporation itself and to each other, in any legal sense stock-holders; and after this period is reached and the demand for payment is made, such subscribers are nothing more than ordinary creditors of the association, and hence may demand the enforcement of all equitable remedies appropriate to their demand. Barley *v.* Gittings, 15 App. Cas. (D. C.) 427.

37. Thus, under a statute providing that not more than one half of the amount received in payment on stock by a building association in a stated period should be used to pay withdrawals without the consent of the board of directors, a member cannot, after having given notice of withdrawal, bring an action for the amount due him, when there are no funds in the treasury legally applicable to the payment of his claim. Heinbokel *v.* National Sav., etc., Assoc., 58 Minn. 340, 59 N. W. 1050, 49 Am. St. Rep. 519, 25 L. R. A. 215.

Waiver of right by association. — Where, under the by-laws of a building association, it has a right to object to the bringing of an action within sixty days, should it desire further evidence of a claim against it than is furnished in the proof presented, an objection only to the amount due on the claim without any objection to its validity, would constitute a waiver of this right. O'Malley *v.* People's Bldg., etc., Assoc., 13 Misc. (N. Y.) 688, 35 N. Y. Suppl. 14, 69 N. Y. St. 210.

38. Daley *v.* People's Bldg., etc., Assoc., 178 Mass. 13, 59 N. E. 452, holding that a condition on the back of a certificate of membership to the effect that an action thereon must be brought in a certain county within the state of New York, which condition was referred to and made a part of the contract, was binding upon the holder, and that the action must be brought as provided by such condition.

39. No right of action exists on certificates of deposits issued by a building association until their maturity, and the fact that the complaint does not show maturity constitutes a good answer to plaintiff's right of action. Emporia Mut. Loan, etc., Assoc. *v.* Atkinson, 63 Kan. 848, 66 Pac. 995.

The fact that a stock-holder has pledged the stock of a building and loan association as collateral for a loan does not preclude him from suing to restrain unlawful action by the board of directors, as he still has such rights as owner of the equity of redemption as will authorize his interposition. Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

It is unnecessary to surrender the certificates of stock in an action of conversion by the assignee of certain shareholders whose stock had been illegally sold for non-payment of dues and purchased by the association, where the transfer or assignment of such certificates could give the transferee no greater rights than the assignor. Carpenter *v.* American Bldg. & Loan Assoc., 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345 [*followed* in Allen *v.* American Bldg. & Loan Assoc., 55 Minn. 86, 56 N. W. 577].

40. Haigh *v.* U. S. Building, etc., Assoc., 19 W. Va. 792, holding that a member who had complied with the constitution and by-laws of the association, and under their provision had duly withdrawn, could recover the amount due him on the common counts in this action, and that no special count was necessary.

41. Fuller *v.* Salem, etc., Assoc., 10 Gray (Mass.) 94, holding that the statute giving the courts of equity jurisdiction in actions between loan associations and their members was only cumulative, and that a party might proceed at common law where a common-law remedy existed, if he so desired.

42. Myers *v.* Schoyer, 20 D. C. 254, holding, however, that under such bill the general

officials are sought to be restrained,[43] or if the rights and equities of other shareholders are necessarily involved in determining plaintiff's rights,[44] a suit in equity is the proper remedy.

2. PLEADINGS. A complaint stating in substance that plaintiff purchased and paid for a certain number of shares of stock which defendant had neglected and refused to issue, states a sufficient cause of action for a recovery of money paid.[45] So, too, a complaint presumably drawn to recover usury may be sufficient to authorize a recovery for excessive collections.[46] On the other hand, if the contract itself is not usurious at its inception the complaint should allege the existence of facts at that time which would render it so;[47] and if the action be for rescission on the ground of fraudulent representations of the agent, the general rule as to the averment of such representations prevails.[48]

3. EVIDENCE. In an action by a withdrawing member the evidence must be sufficient to show that at the time of the commencement of the action the association had on hand sufficient funds which it could lawfully use for the payment of withdrawals.[49] If the right of a member to withdraw is fixed by the by-laws and certificates of membership issued by the association, evidence that withdrawals had been made in other ways is inadmissible;[50] but a statement of the association's assets prior to the lawful rescission by a stock-holder of his contract would be admissible in his behalf as tending to show the value of his stock.[51]

4. DEFENSES. The fact that an association, while exercising powers analogous to those conferred, may have gone beyond the scope of the statute would not justify its setting up the defense of *ultra vires*, where it has received the benefit

affairs of the association and the rights and liabilities of the members as between themselves or creditors of the association could not be determined.

43. Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

44. Maloney *v.* Real-Estate Bldg., etc., Assoc., 57 Mo. App. 384; Campbell *v.* Perth Amboy Mut. Loan, etc., Assoc., (N. J. 1901) 50 Atl. 444. See also O'Rourke *v.* West Penn. Loan, etc., Assoc., 93 Pa. St. 308 [*affirming* 14 Phila. (Pa.) 145, 37 Leg. Int. (Pa.) 27].

45. German-American Bldg. Assoc. *v.* Droge, (Ind. App. 1895) 41 N. E. 397.

46. Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695.

Allegation for recovery of interest.— Under a provision that a member of a building and loan association may recover the amount paid upon his shares with interest thereon at such rate as the profits or by-laws may have determined, it is necessary, to authorize a recovery of interest, that the rate of interest or a proportion of profits which the by-laws had determined be alleged; but the absence of such allegations would defeat the recovery only for the interest, and not for the amount of the shares. Whitefoot *v.* National Fraternity Bldg., etc., Assoc., 18 Mont. 164, 44 Pac. 514.

47. Tutwiler *v.* National Bldg., etc., Assoc., 127 Ala. 103, 28 So. 654.

48. That is that the agent knew them to be false and made them with intent to deceive. Beyer *v.* National Bldg., etc., Assoc., 131 Ala. 369, 31 So. 113.

Averment of statutory authorization of association.— If, by the provisions of a special statute, a member of an association can recover the amount paid upon his shares only when the association is organized by virtue of this provision, the complaint must allege that the association was formed by virtue of the same. Whitefoot *v.* National Fraternity Bldg., etc., Assoc., 18 Mont. 164, 44 Pac. 514.

49. Teator *v.* New York Mut. Sav., etc., Assoc., 59 N. Y. App. Div. 307, 69 N. Y. Suppl. 261, where the evidence as to such showing is examined and held insufficient. See also Broughall *v.* Savings Fund, 2 Leg. Rec. (Pa.) 384; North Texas Sav., etc., Assoc. *v.* Jackson, (Tex. Civ. App. 1901) 63 S. W. 344, the latter case holding that evidence that the stock-holder had paid but one hundred and eighty dollars on his stock at the time of the rescission of his contracts, and that the assets of the company were insufficient to bring the value of the stock up to five hundred dollars was insufficient to support a finding that his stock was worth five hundred dollars.

50. American Bldg., etc., Assoc. *v.* Mordock, 39 Nebr. 413, 58 N. W. 107.

51. Although such statements, when made two years prior to the rescission, would not have great weight as against direct evidence as to the present value. North Texas Sav., etc., Assoc. *v.* Jackson, (Tex. Civ. App. 1901) 63 S. W. 344.

The constitution, by-laws, and articles of incorporation of a building association may be examined in an action by a stock-holder for a balance due after a sale under foreclosure for the purpose of determining when the mortgage contract terminated. McCahan *v.* Columbian Bldg. Assoc., 40 Md. 226.

of the transaction.[52] Nor can it plead the improper acts of its officials as a defense against a stock-holder.[53]

5. Judgment. The nature of the judgment rendered is dependent, of course, upon the nature and purpose of plaintiff's action.[54] If of an equitable nature the amount due the association from plaintiff should be ascertained and judgment rendered for the overplus;[55] and where defendant in its answer admits the value of plaintiff's claim, a recovery for that amount is proper, although it be more than the claim alleged by plaintiff.[56]

X. TERMINATION OF ASSOCIATION.

A. In General — 1. By Operation of Law or Agreement. The existence of a building and loan association as a going concern may be terminated by the expiration of its franchise,[57] or upon the accomplishment of the purposes for which it was organized.[58] Such an association may also cease operations by the

52. Peterson *v.* People's Bldg., etc., Assoc., 124 Mich. 573, 83 N. W. 606, 7 Detroit Leg. N. 344; O'Malley *v.* People's Bldg., etc., Assoc., 13 Misc. (N. Y.) 688, 35 N. Y. Suppl. 14, 69 N. Y. St. 210.

53. Beethoven Bldg. Assoc. *v.* Weber, (Pa. 1886) 5 Atl. 235.

The depleted condition of the treasury of an association at the time of the withdrawal of a stock-holder may, under some statutes, preclude him from at once recovering the amount due him, and be pleaded against him as a defense in a suit by him to recover money put in. Male *v.* Bldg., etc., Assoc., 16 Wkly. Notes Cas. (Pa.) 380. But under this provision it is necessary to aver that the losses and debts by which the amount in the treasury was diminished below a certain amount were incurred before plaintiff withdrew from the association, as he could not be charged with losses occurring after he ceased to be a member thereof. U. S. Building, etc., Assoc. *v.* Silverman, 85 Pa. St. 394.

54. If the action is for an accounting by members of a loan association and for an allowance of the privilege of remitting loans made by the association to them, the court, after having had an account stated, should render its decree against the members for the amount found to be due from them to the association, and name some reasonable day for its payment, and order the sale of their property on default of such payment. Ricks *v.* Durant Bldg., etc., Assoc., (Miss. 1895) 18 So. 359.

Judgment by default.— A judgment for want of an affidavit of defense cannot be taken against a building and loan association by a withdrawing member, upon evidence insufficient to entitle him to recover, if only such evidence were placed before a jury. Love *v.* Building, etc., Assoc., 11 Wkly. Notes Cas. (Pa.) 303. Nor could it be so taken for this reason upon an instrument signed by the association notifying plaintiff that a member had transferred to him a certain number of shares of stock of a specified value, and that notification of withdrawal had been given on the shares and that they would be paid in "regular order of notice," inasmuch as such writing is more in the nature of proof that there was a certificate to which plaintiff was entitled than "an instrument in writing for the payment of money." Newlin *v.* Milton Bldg., etc., Assoc. No. 2, 9 Wkly. Notes Cas. (Pa.) 220. See also Britton *v.* American Bldg., etc., Assoc., 12 Phila. (Pa.) 430, 35 Leg. Int. (Pa.) 474.

55. Olliges *v.* Kentucky Citizens Bldg., etc., Assoc., 23 Ky. L. Rep. 2067, 66 S. W. 617.

56. International Bldg., etc., Assoc. *v.* Biering, 86 Tex. 476, 25 S. W. 622, 26 S. W. 39.

57. Ferrell *v.* Evans, 25 Mont. 444, 65 Pac. 714.

A provision that such associations may maintain suits after the expiration of their charter for the purpose of winding up their affairs is not in conflict with the constitutional provision prohibiting the renewal or extension of corporate franchises, inasmuch as such statute does not renew or extend the time of the existence of the association, but simply provides for the collection and distribution of its assets. Cooper *v.* Oriental Sav., etc., Assoc., 100 Pa. St. 402; Harmony Bldg. Assoc. *v.* Berger, 17 Phila. (Pa.) 314, 41 Leg. Int. (Pa.) 280.

58. *District of Columbia.*—Burns *v.* Metropolitan Bldg. Assoc., 2 Mackey (D. C.) 7, holding that in determining whether or not a building association's assets had reached the aggregate at which its constitution required it to close up, the price bid by the association for real property, bought at public auction, must be taken, as against it, as conclusive of the value thereof, but the real value, if greater, might be shown by witnesses.

Georgia.— Home Bldg., etc., Assoc. *v.* Van Pelt, 94 Ga. 615, 21 S. E. 606; Van Pelt *v.* Home Bldg., etc., Assoc., 87 Ga. 370, 13 S. E. 574.

Ohio.— Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186.

Pennsylvania.— Laurel Run Bldg. Assoc. *v.* Sperring, 106 Pa. St. 334.

Virginia.— Cason *v.* Seldner, 77 Va. 293.

unanimous acquiescence of its members;[59] but unless the charter has expired, or the purpose of organization has been accomplished, the consent of the members must be unanimous,[60] unless the statute authorizes a termination by a lesser number.[61]

2. By Assignment For Benefit of Creditors. While such associations are peculiar in their features,[62] and their affairs, when tangled,[63] may be wound up by a court of equity,[64] there appears to be no good reason why they cannot also make an assignment for the benefit of creditors,[65] and such right has been recognized;[66] but the fact that such assignment has been made is no reason for withholding judgment against the association.[67]

3. Distribution of Assets. While the rights of the members, where there has been a voluntary termination or liquidation, must often be determined by a reference to the charter or by-law provisions of the association,[68] if the affairs are voluntarily wound up before the termination of the charter, or under circum-

59. City Loan, etc., Assoc. *v.* Goodrich, 48 Ga. 445; Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427; White Haven Loan, etc., Assoc. *v.* Kelley, 1 Kulp (Pa.) 9.

60. Barton *v.* Enterprise Loan, etc., Assoc., 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608; People *v.* Love, 47 Hun (N. Y.) 577; Pfaff *v.* Kensington Bldg. Assoc., 6 Wkly. Notes Cas. (Pa.) 349. To a similar effect see Sumter Bldg., etc., Assoc. *v.* Winn, 45 S. C. 381, 23 S. E. 29.

61. Eminence Bldg., etc., Assoc. *v.* Bohannan, 21 Ky. L. Rep. 1589, 55 S. W. 1074, holding that dissolution at the instance of a majority, in pursuance of statute, had the same effect as a termination by expiration of charter.

If the statute requires a two-thirds vote for voluntary liquidation a majority vote is insufficient. Mechanics, etc., Assoc. *v.* People, 72 Ill. App. 160.

62. Woerheide *v.* Johnston, 81 Mo. App. 193.

63. **The liability to its stock-holders is to be considered** in determining whether or not an association is insolvent, so that it may make an assignment for the benefit of creditors (U. S. Building, etc., Assoc. *v.* Jones, 23 Ky. L. Rep. 853, 64 S. W. 447); and where the association cannot pay the amount due to withdrawing members or obtain funds to lend its stock-holders, and therefore cannot mature its stock, thereby accomplishing the objects for which it was organized, it is insolvent, and may make an assignment (Globe Bldg., etc., Co. *v.* Wood, 22 Ky. L. Rep. 1500, 60 S. W. 858).

64. See *infra*, X, B, 1.

65. Woerheide *v.* Johnston, 81 Mo. App. 193.

66. Globe Bldg., etc., Co. *v.* Wood, 22 Ky. L. Rep. 1500, 60 S. W. 858; Woerheide *v.* Johnston, 81 Mo. App. 193; Christian's Appeal, 102 Pa. St. 184; Criswell's Appeal, 100 Pa. St. 488; Kisterbock *v.* Premium Loan Assoc., 7 Phila. (Pa.) 185.

Directors must be authorized by shareholders.— But the directors have no authority either by statute or at common law to make such assignment without authority from the shareholders, when the association is not in fact insolvent. Powers *v.* Blue Grass Bldg., etc., Assoc., 86 Fed. 705.

Effect on rights of borrowing member.—An assignment for the benefit of creditors by a building and loan association would preclude the application of payments made by a borrowing stock-holder on his stock subscription, as credits on his loan, although such payments would have been sufficient to extinguish the debt if the stock-holder had sought to have them thus applied prior to the assignment. U. S. Building, etc., Assoc. *v.* Reed, 23 Ky. L. Rep. 342, 62 S. W. 1020. See also *In re* National Sav., etc., Assoc., 9 Wkly. Notes Cas. (Pa.) 79, where the general effect of an assignment for the benefit of creditors of such associations and the proper procedure therein is commented upon.

67. Connolly *v.* Practical Bldg., etc., Assoc., 6 Wkly. Notes Cas. (Pa.) 176.

See, generally, Assignments For Benefit of Creditors.

68. Pioneer Sav., etc., Assoc. *v.* Wilkins, 14 S. D. 490, 85 N. W. 994 (holding that under the constitution and by-laws of the building association in question it could not be considered as a mutual benefit association, and that therefore a borrower holding a fully matured certificate at the time the association was voluntarily liquidated was entitled to the full amount agreed to be paid thereon, and not to its depreciated value); Brownlie *v.* Russell, 8 App. Cas. 235, 47 J. P. 757, 48 L. T. Rep. N. S. 881; *In re* Counties Conservative Permanent Ben. Bldg. Soc. [1900] 2 Ch. 819, 69 L. J. Ch. 798, 49 Wkly. Rep. 71 (where, under the rules of a building society which had been voluntarily wound up, it was held that members whose notices of withdrawal had matured before the winding up were entitled to be paid in full in priority to members whose notices matured after the winding up, and also the members who had given no notice of withdrawal, notwithstanding that such payment would exhaust the whole of the assets of the society); *In re* Alliance Soc., 28 Ch. D. 559, 54 L. J. Ch. 540, 52 L. T. Rep. N. S. 695.

Effect of charter or by-law provisions in insolvency proceedings see *infra*, X, B, 5, c, (II).

stances or arrangements whereby the charter provisions are dispensed with, the court endeavors to apportion the expenses, losses, and profits among the members upon the purest principles of equity, as applicable to the facts of each particular case.[69]

B. By Judicial Proceedings — 1. Jurisdiction. Resort may be had to courts of equity not only for the appointment of receivers for building and loan associations, but for the determination of other matters peculiarly applicable to such courts, such as the enforcement of an accounting and the distribution of funds and assets among contending stock-holders.[70]

2. Grounds of Judicial Intervention. While many acts or irregularities do not, of themselves, work a dissolution of the association,[71] they may furnish grounds for the institution of judicial proceedings to restrain the association from further using its corporate rights.[72] So, too, the court will intervene on behalf of a stock-holder or other duly authorized party and appoint a receiver for the association, when it appears that it is unsafe and inexpedient to further continue the business,[73] either because of a loss of public confidence therein,[74] or of its insolvency or mismanagement;[75] but where, by statute, the directors of the association upon

69. Goodrich *v.* City Loan, etc., Assoc., 54 Ga. 98; City Loan, etc., Assoc. *v.* Goodrich, 48 Ga. 445 (holding that, even though the rules of the company under the charter were not obnoxious to laws against usury, still, as under the agreement by which the affairs were to be wound up the rules of the charter must be disregarded, it was not competent for the majority to adopt a scheme repudiating the rate of interest prescribed by law between persons having moneyed dealings with each other); Ferrell *v.* Evans, 25 Mont. 444, 65 Pac. 714 (holding that, where a stock-holder had borrowed from the association, giving a bonus, and the charter of the association had expired before the maturity of the stock, the stock-holder should be credited with so much of the bonus as was unearned, computed by dividing the amount of bonus by the number of months which would be required to mature the stock, and multiplying the quotient by the number of months still to elapse before its maturity); Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427; People *v.* Lowe, 117 N. Y. 175, 22 N. E. 1016, 27 N. Y. St. 138 [*affirmed* in (N. Y. 1890) 23 N. E. 1144].

Priority of deceased members.— Where the rules of a building association contain no provisions as to deceased members, it would seem that whether or not a member gives notice of withdrawal he would, upon his death, cease to be a member, and that therefore his executor would be entitled to be paid in priority to all the members who had given notice of withdrawal subsequent to the death of such member. *In re* Counties Conservative Permanent Ben. Bldg. Soc., [1900] 2 Ch. 819, 69 L. J. Ch. 798, 49 Wkly. Rep. 71.

70. Sjoberg *v.* Security Sav., etc., Assoc., 73 Minn. 203, 75 N. W. 1116, 72 Am. St. Rep. 616; Amer *v.* Union Bldg., etc., Assoc., 50 N. J. Eq. 170, 24 Atl. 552. But see Gormerly *v.* Port Richmond Bldg., etc., Assoc., 3 Wkly. Notes Cas. (Pa.) 11; Edelin *v.* Pascoe, 22 Gratt. (Va.) 826.

71. Such as cessation of business (Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427), neglect to elect officers (St. Louis Domicile, etc., Assoc. *v.* Augustin, 2 Mo. App. 123; Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450), or a misuser of its franchises (Reg. *v.* D'Eyncourt, 4 B. & S. 820, 10 Jur. N. S. 513, 28 J. P. 116, 33 L. J. M. C. 89, 9 L. T. Rep. N. S. 712, 3 New Rep. 420, 12 Wkly. Rep. 408, 116 E. C. L. 320).

72. State *v.* American Sav., etc., Assoc., 64 Minn. 349, 67 N. W. 1.

73. Com. *v.* Pennsylvania Bldg., etc., Assoc., 20 Pa. Co. Ct. 589.

Appointment discretionary with court.— The general rule that the appointment of a receiver and an order for the winding up of a concern rests largely within the sound discretion of the court applies. Hence such appointment will not be made where no perceptible benefit will result therefrom, or it is not made clear that the intervention of the court is necessary to prevent loss and injury. People *v.* Union Bldg., etc., Assoc., 127 Cal. 400, 58 Pac. 822, 59 Pac. 692; Steinberger *v.* Independent Loan, etc., Assoc., 84 Md. 625, 36 Atl. 439; Frostburg Bldg., etc., Assoc. *v.* Stark, 47 Md. 338; Behrens *v.* Equality Bldg. Assoc., 3 Ohio S. & C. Pl. Dec. 275; *In re* Professional, etc., Ben. Bldg. Soc., L. R. 6 Ch. 859, 25 L. T. Rep. N. S. 397, 19 Wkly. Rep. 1153; *In re* Planet Ben. Bldg., etc., Soc., L. R. 14 Eq. 441, 41 L. J. Ch. 738, 27 L. T. Rep. N. S. 638, 20 Wkly. Rep. 935; *In re* Second Commercial Bldg. Soc., 48 L. J. Ch. 753; *Re* London Permanent Ben. Bldg. Soc., 20 L. T. Rep. N. S. 388, 17 Wkly. Rep. 513, 717. See also Barton *v.* Enterprise Loan, etc., Assoc., 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608.

74. State *v.* Phœnix Loan Assoc., 159 Mo. 102, 60 S. W. 74, where, it appearing that the effect of a recent decision of the appellate court was such as to destroy public confidence in the association and jeopardize the rights of its stock-holders, thereby rendering it unsafe and inexpedient to continue the business, a receiver was appointed.

75. Bingham *v.* Marion Trust Co., (Ind. App. 1901) 61 N. E. 29; Com. *v.* Penn Germania Bldg., etc., Assoc., 9 Pa. Dist. 617, 6

dissolution for any reason are appointed trustees for the creditors and shareholders, the court will not appoint a receiver, unless it is clear that the complaining party is injured by the action of such trustees.[76]

3. By Whom Instituted. As a rule, an application for the appointment of a receiver and the winding up of the affairs of such association must proceed from persons interested and suing as members,[77] although in some jurisdictions the duty to institute such proceedings is by statute placed upon certain state officials,[78] or the right to so proceed denied the stock-holder until after application and complaint to such official.[79]

4. Pleadings.[80] If the action be to wind up the affairs of the association, all

Lack. Leg. N. (Pa.) 282, 3 Dauph. Co. Rep. (Pa.) 226; Andrews *v.* Roanoke Bldg. Assoc., etc., Co., 98 Va. 445, 36 S. E. 531, 49 L. R. A. 659; Universal Sav., etc., Co. *v.* Stoneburner, 113 Fed. 251.

What constitutes insolvency.— The rule in determining whether or not the affairs of a building and loan association are in such condition as to justify its continuance in business is that when its available and collectable assets are not sufficient to pay back to its shareholders who have not filed applications of withdrawal the amount of their actual contributions to the loan fund, and the amount that may be due to withdrawing members that have given notice of withdrawal, the condition is such as to justify a discontinuance of the business unless it appears that such deficiency can readily be made up. People *v.* National Home Bldg., etc., Assoc., 28 Chic. Leg. N. 207. Or, put in another way, the association is insolvent when it cannot pay back to its stock-holders the amount of their contributions, dollar for dollar. Chapman *v.* Young, 65 Ill. App. 131; Globe Bldg., etc., Co. *v.* Wood, 22 Ky. L. Rep. 1500, 60 S. W. 858; Towle *v.* American Bldg., etc., Soc., 61 Fed. 446. But see Sjoberg *v.* Security Sav., etc., Assoc., 73 Minn. 203, 75 N. W. 1116, 72 Am. St. Rep. 616; Knutson *v.* Northwestern Loan, etc., Assoc., 67 Minn. 201, 69 N. W. 889, 64 Am. St. Rep. 410, from which it seems that where there are no general creditors or liabilities of the association except to its stock-holders on account of their stock, the inability of the association to pay back the amount actually paid in by such stock-holders would not constitute insolvency in the sense that the word is used in the statute of that state, providing for the appointment of a receiver.

Effect of subsequent solvency.— If after the institution of proceedings the association has been made solvent by lawful assessments against the stock-holders, which assessments are duly charged to their credits, and the auditor of public accounts and the stock-holders approve of such action, the attorney-general cannot complain of the refusal of the court to order the dissolution. Broadwell *v.* Inter-Ocean Homestead & Loan Assoc., 161 Ill. 327, 43 N. E. 1067 [*followed* in Continental Invest., etc., Soc. *v.* People, 167 Ill. 195, 47 N. E. 381]. See also Com. *v.* Industrial Bldg., etc., Assoc., 25 Pa. Co. Ct. 11.

76. Ferrell *v.* Evans, 25 Mont. 444, 65 Pac. 714. See also Sjoberg *v.* Security Sav., etc., Assoc., 73 Minn. 203, 75 N. W. 1116, 72 Am. St. Rep. 616.

77. Bingham *v.* Marion Trust Co., (Ind. App. 1901) 61 N. E. 29; Bowker *v.* Mill River Loan Fund Assoc., 7 Allen (Mass.) 100 (where such application was denied a mere debtor, bound under his agreement to repay in full his obligation); *In re* Professional, etc., Ben. Bldg. Soc., L. R. 6 Ch. 856, 25 L. T. Rep. N. S. 397, 19 Wkly. Rep. 1153. See also *Re* National Permanent Bldg. Soc., L. R. 5 Ch. 309, 34 J. P. 341, 22 L. T. Rep. N. S. 284, 18 Wkly. Rep. 388.

78. Ulmer *v.* Falmouth Loan, etc., Assoc., 93 Me. 302, 45 Atl. 32 (where, under the statute, it was held that the power of invoking the interference of the court was vested in the bank examiner alone, and that he only could pray for an injunction and a receiver); State *v.* Flitcraft, (Mo. 1896) 36 S. W. 675 (construing the statute by virtue of which the state treasurer was *ex officio* supervisor of all such associations, and holding that under the provisions thereof the supervisor whose duty it was to institute such proceedings might have the same dismissed or stricken from the docket without the knowledge or consent of the attorney-general whose duty it was to conduct such proceedings; the provision that such suits should be conducted by the attorney-general being construed as not mandatory). See also Kelly *v.* Building Assoc., 1 Wkly. Notes Cas. (Pa.) 218, where it appears that proceedings for the dissolution of a building association should be instituted by the attorney-general.

79. Waiver of statutory requirements.— A statute of this nature is for the purpose of protecting the association from captious and vexatious litigation, instituted by shareholders, and the association may waive such provision by submitting itself to the jurisdiction of the court. Hence the objection that the statute had not been complied with cannot be made after answer and upon a hearing in the higher court to reverse the action of the chancellor in appointing a receiver. Falls *v.* Anglo-Teutonia Bldg., etc., Assoc., 105 Tenn. 18, 58 S. W. 325.

80. Intervening petitioners who desire to be declared special creditors in insolvency proceedings will not be held to the same strictness of allegations as the original suitors in the proceedings. Christopher Columbus Bldg., etc., Assoc. *v.* Kriete, 192 Ill. 128, 61 N. E. 510 [*modifying* 87 Ill. App. 51].

shareholders should be made parties thereto.[81] If to restrain the continuance of its business because of mismanagement and illegal practice, the acts of mismanagement should be specifically shown, and the failure to correct such practices within the time allowed by law should be averred.[82] If to forfeit the charter, the specific violations of the statute should be alleged.[83]

5. Effect of Insolvency — a. In General. Upon the insolvency of a building and loan association, the obligation of the members for the payment of dues and assessments at once ceases,[84] the debts of the members become due and collectable,[85] the purpose of the organization is abandoned, and nothing remains to be done except to make settlement and distribution.[86]

b. Powers and Duties of Receivers. The receiver of an insolvent building and loan association represents the affairs and interests of both the creditors and stock-holders.[87] He may ascertain the amount of losses and make assessments to meet the same,[88] and, under the approval of the court, may make such settlements with borrowing stock-holders as the association itself could have made had it been a going concern;[89] but as it is his duty to wind up the affairs, rather than to continue the association, he is without authority to collect dues maturing after his appointment.[90] An assignment of the corporate property after his appointment would be void as against him.[91]

c. Distribution of Assets — (1) *In General.* The interposition of the court necessarily carries with it the power to collect and distribute the assets among the interested parties,[92] whose rights are determined by the law of the state of the association's domicile, where such law has been authoritatively declared.[93] It follows, therefore, that different rules of distribution may be applied in different jurisdictions,[94] and the method which would be applicable were the association solvent does not necessarily apply where it is insolvent,[95] although it has been

81. Arling *v.* Kenton Bldg., etc., Assoc., 26 Am. L. Reg. N. S. 273; Cason *v.* Seldner, 77 Va. 293.

82. People *v.* National Home Bldg., etc., Loan Assoc., 28 Chic. Leg. N. 207.

83. State *v.* Southern Bldg., etc., Assoc., (Ala. 1902) 31 So. 375.

84. Hinman *v.* Ryan, 3 Ohio Cir. Ct. 529; Johnston *v.* Grosvenor, 105 Tenn. 353, 59 S. W. 1028. See also *supra*, VI, C, 2.

85. Young *v.* Martinsburg Imp. Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670.

86. No. 2 Fidelity Bldg., etc., Sav. Union *v.* No. 4 Fidelity Bldg., etc., Union, (Ind. App. 1901) 61 N. E. 213 [*citing* Alexander *v.* Southern Home Bldg., etc., Assoc., 110 Fed. 267].

87. Bingham *v.* Marion Trust Co., (Ind. App. 1901) 61 N. E. 29.

88. Eversmann *v.* Schmitt, 53 Ohio St. 174, 41 N. E. 139, 53 Am. St. Rep. 632, 29 L. R. A. 184.

89. Miles *v.* New South Bldg., etc., Assoc., 111 Fed. 946, where it is said that where there is a large number of borrowing stockholders it is permissible and advisable in the interest of economical administration and to facilitate settlements without litigation to authorize the receiver *in limine* to make a uniform allowance to the borrowing stockholders as a credit on their indebtedness, where it is possible to make such allowance without endangering the rights of other parties in interest.

90. Strohen *v.* Franklin Sav. Fund, etc., Assoc., 115 Pa. St. 273, 8 Atl. 843 [*followed* in Heyne *v.* Franklin Sav. Fund, etc., Assoc., (Pa. 1887) 8 Atl. 845].

91. Hinman *v.* Ryan, 3 Ohio Cir. Ct. 529.

92. Hedley *v.* Geissler, 90 Ill. App. 565.

93. Coltrane *v.* Baltimore Bldg., etc., Assoc., 110 Fed. 293.

94. See *supra*, VIII, H, 8, d.

95. *Illinois.*— Chapman *v.* Young, 65 Ill. App. 131.

Indiana.— No. 2 Fidelity Bldg., etc., Union *v.* No. 4 Fidelity Bldg., etc., Union, (Ind. App. 1901) 61 N. E. 213.

Iowa.— Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317, holding that therefore a stipulation in a mortgage to a building and loan association that it is to be non-negotiable and non-collectable by any other person than the association does not preclude a receiver from collecting the same.

Kentucky.— Reddick *v.* U. S. Building, etc., Assoc., 106 Ky. 94, 20 Ky. L. Rep. 1720, 49 S. W. 1075.

Maryland.— See Waverly Mut., etc., Assoc. *v.* Buck, 64 Md. 338, 1 Atl. 561, holding that when any alteration in the original relations of the parties had created an exigency demanding the intervention of the court, it will enforce the rights upon equitable grounds.

North Dakota.— Hale *v.* Cairns, 8 N. D. 145, 77 N. W. 1010, 73 Am. St. Rep. 746, 44 L. R. A. 261.

West Virginia.—Young *v.* Martinsburg Imp. Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670.

United States.— Coltrane *v.* Baltimore Bldg., etc., Assoc., 110 Fed. 272.

held that the liability of a member to contribute to losses is proportioned to his charter right to share in the profits.[96] After payment of the debts of the association borrowing members are entitled to share the residue on final distribution,[97] *pro rata* with non-borrowers.[98] If dividends have been paid on certain stock when the association was in fact insolvent, the receiver should deduct such amount in settling with the holders of such stock.[99] In such proceedings the court may also consider the speedy collection of the assets as well as the strict equities of the parties.[1]

(II) *PRIORITIES.* After the ordinary costs of winding up the association are paid,[2] interested parties occupying the position of general creditors are entitled to be paid in preference to those whose claims are founded upon the relation which they sustain to the association as members thereof,[3] unless the irregular acts of

This does not mean that mere insolvency will justify the abrogation of an express contract between the association and one of its members, and the substitution for such contract of some arrangement which a court may deem equitable, where the party stands ready and willing to perform his part of the contract. Armstrong *v.* U. S. Building, etc., Assoc., 15 App. Cas. (D. C.) 1. See also Miles *v.* New South Bldg., etc., Assoc., 111 Fed. 946, holding, where a charter of a building and loan association provided for the division of its capital stock into two classes, the distinction between the two funds was always maintained, and they were kept separate by the association during all the time it was a going concern, that in proceedings to wind up the association, neither class of stock-holders would have any right or interest in the funds so expressly appropriated to the other, or in the assets belonging to such fund.

In England no distinction seems to be made, so far as the prescribed rules by which the rights of the parties are to be determined are concerned, between voluntary and involuntary liquidations. Walton *v.* Edge, 10 App. Cas. 33, 49 J. P. 468, 54 L. J. Ch. 362, 52 L. T. Rep. N. S. 666, 33 Wkly. Rep. 417; *In re* Blackburn, etc., Ben. Bldg. Soc., 24 Ch. D. 421, 52 L. J. Ch. 894, 49 L. T. Rep. N. S. 730, 32 Wkly. Rep. 159; *Re* Norwich, etc., Provident Bldg. Soc., 45 L. J. Ch. 785; *Re* Middlesbrough, etc., Permanent Ben. Bldg. Soc., 53 L. T. Rep. N. S. 203.

96. *In re* Building Assoc., 5 Ohio S. & C. Pl. Dec. 556, 7 Ohio N. P. 518.

97. Young *v.* Martinsburg Imp. Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670.

98. Brown *v.* Archer, 62 Mo. App. 277; Strohen *v.* Franklin Sav. Fund, etc., Assoc., 115 Pa. St. 273, 8 Atl. 843 [*followed* in Heyne *v.* Franklin Sav. Fund, etc., Assoc., (Pa. 1887) 8 Atl. 845]; Post *v.* Mechanics' Bldg., etc., Assoc., 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201.

99. Bingham *v.* Marion Trust Co., (Ind. App. 1901) 61 N. E. 29.

Where a borrowing stock-holder has made a settlement with the association and is credited with his share of the profits, and thereupon renews his loan for a balance owing the association, the court will not, in the insolvency proceedings, go back of such settlement in computing the amount due the association. Tootle *v.* Singer, (Iowa 1901) 88 N. W. 446.

1. Alexander *v.* Southern Home Bldg., etc., Assoc., 110 Fed. 267, where it was held permissible in the winding up of the affairs of an insolvent association to compute the probable dividends which would be payable to the borrowing stock-holders, and to allow the same as credits on their loans rather as a compromise to aid in the speedy collection of the assets than as a matter of right or strict equity. See also Young *v.* Martinsburg Imp. Loan, etc., Assoc., 48 W. Va. 512, 38 S. E. 670.

2. *In re* West London, etc., Ben. Bldg. Soc., [1894] 2 Ch. 352, 63 L. J. Ch. 506, 70 L. T. Rep. N. S. 796, 8 Reports 764, 42 Wkly. Rep. 535.

3. Cook *v.* Emmet Perpetual, etc., Bldg. Assoc., 90 Md. 284, 44 Atl. 1022; Steinberger *v.* Independent Loan, etc., Assoc., 84 Md. 625, 36 Atl. 439; Christian's Appeal, 102 Pa. St. 184; Criswell's Appeal, 100 Pa. St. 488; McKean *v.* New York Nat. Bldg., etc., Assoc., 10 Pa. Dist. 197, 24 Pa. Co. Ct. 458, 7 Lack. Leg. N. (Pa.) 28; *In re* Mutual Aid Permanent Ben. Bldg. Soc., 30 Ch. D. 434, 55 L. J. Ch. 111, 53 L. T. Rep. N. S. 802, 34 Wkly. Rep. 143; *In re* Blackburn, etc., Ben. Bldg. Soc., 24 Ch. D. 421, 52 L. J. Ch. 894, 49 L. T. Rep. N. S. 730, 32 Wkly. Rep. 159; *Re* Norwich, etc., Provident Bldg. Soc., 45 L. J. Ch. 785; *Re* Middlesbrough, etc., Permanent Ben. Bldg. Soc., 53 L. T. Rep. N. S. 203.

What constitutes a creditor.— The holder of a certificate lawfully and authoritatively issued by a building association showing that he had paid a certain sum on which he is entitled to interest, and which is to be redeemable at its face value, and that such holders by the acceptance of the certificate waived all benefits in the earnings of the organization above the interest, is a creditor and entitled to priority of payment before the assets are distributed among the stock-holders, such certificate being a direct obligation for the payment of money, and not a certificate of stock. State *v.* Phœnix Loan Assoc., 86 Mo. App. 301. So, too, a stock-holder who, upon the maturity of his stock, allows the amount due thereon to remain as a deposit with the association under an agreement with its directors

the creditor caused the insolvency;[4] but the courts are inclined to treat the rights of all those holding the relation of stock-holders as equal and to allow no priorities in their claims.[5] This is true, notwithstanding the stock-holder has given notice of withdrawal,[6] although such notice has matured and he has received orders from the treasurer for the payment of the withdrawal value of his stock;[7] but where the rules and by-laws of the association are held to govern the distribution in insolvency the same as when the association was a going concern the rule may be otherwise.[8]

that interest is to be paid thereon, is a creditor and entitled to priority upon the distribution of the assets in insolvency. Com. *v.* Anchor Bldg., etc., Assoc., 10 Pa. Dist. 167, holding also that the president and directors of such association having become indorsers on notes given by the association, the proceeds of which were applied to its interest, would occupy the position of creditors, notwithstanding the amount borrowed was in excess of that authorized by law.

4. Kisterbock's Appeal, 51 Pa. St. 483, where the cause of the insolvency being the fraudulent acts of the directors in declaring illegal dividends, the claim of a director who had loaned money to the association for the purpose of paying such dividends was postponed until the claims of the stock-holders were satisfied; the court acting on the theory that inasmuch as someone must lose, it should be the participant in the fraud rather than an innocent stock-holder.

5. *Illinois.*— Christopher Columbus Bldg., etc., Assoc. *v.* Kriete, 192 Ill. 128, 61 N. E. 510 [*modifying* 87 Ill. App. 51]; Mutual Loan, etc., Assoc. *v.* Stolz, 93 Ill. App. 164.

Indiana.— MacMurray *v.* Sidwell, 155 Ind. 560, 58 N. E. 722, 80 Am. St. Rep. 255; No. 2 Fidelity Bldg., etc., Union *v.* No. 4 Fidelity Bldg., etc., Union, 27 Ind. App. 325, 61 N. E. 213.

Missouri.— Hohenshell *v.* Home Sav., etc., Assoc., 140 Mo. 566, 41 S. W. 948.

North Carolina.— Heggie *v.* People's Bldg., etc., Assoc., 107 N. C. 581, 12 S. E. 275.

Pennsylvania.— Criswell's Appeal, 100 Pa. St. 488 (holding that holders of matured stock would share *pro rata* with holders of unmatured stock after the claims of depositors and creditors had been satisfied); *In re* National Sav., etc., Assoc., 9 Wkly. Notes Cas. (Pa.) 79.

Tennessee.— Post *v.* Mechanics', Bldg., etc., Assoc., 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201.

Texas.—Price *v.* Kendall, 14 Tex. Civ. App. 26, 36 S. W. 810.

Wisconsin.— Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945.

United States.— Coltrane *v.* Baltimore Bldg., etc., Assoc., 110 Fed. 272; Towle *v.* American Bldg., etc., Assoc., 75 Fed. 938.

Holders of full-paid or paid-up stock.— A person holding what is known as "full-paid stock," or "paid-up stock," is nevertheless a member of the association, and is entitled to no preference over other members when the association becomes insolvent, in the absence of any stipulations in the charter or by-laws giving such preference. Gibson *v.* Safety Homestead, etc., Assoc., 170 Ill. 44, 48 N. E. 580, 39 L. R. A. 202; Mutual Union Loan, etc., Assoc. *v.* Stolz, 93 Ill. App. 164; Hohenshell *v.* Home Sav., etc., Assoc., 140 Mo. 566, 41 S. W. 948; Leahy *v.* National Bldg., etc., Assoc., 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945; Coltrane *v.* Baltimore Bldg., etc., Assoc., 110 Fed. 272; Towle *v.* American Bldg., etc., Assoc., 75 Fed. 938. See also *supra*, V, A, 3.

Where one shareholder has made an advance and has at the same time contributed his share of dues and instalments as they have fallen due, it is plain that from the fund to be distributed he should receive the advance which he has thus made, inasmuch as the other shareholders had in no way contributed to that part of the fund. Munhall *v.* Boedecker, 44 Ill. App. 131.

6. Gibson *v.* Safety Homestead, etc., Assoc., 170 Ill. 44, 48 N. E. 580, 39 L. R. A. 202; Dooling *v.* Smith, 89 Ill. App. 26; Chapman *v.* Young, 65 Ill. App. 131; Reddick *v.* U. S. Building, etc., Assoc., 106 Ky. 94, 20 Ky. L. Rep. 1720, 49 S. W. 1075; Coltrane *v.* Baltimore Bldg., etc., Assoc., 110 Fed. 272; Alexander *v.* Southern Home Bldg., etc., Assoc., 110 Fed. 267.

7. Provided the withdrawing stock-holder should not be required to share losses resulting from mismanagement after he had ceased to be an active member. Christian's Appeal, 102 Pa. St. 184 [*approved* in Hohenshell *v.* Home Sav., etc., Assoc., 140 Mo. 566, 41 S. W. 948].

8. Walton *v.* Edge, 10 App. Cas. 33, 49 J. P. 468, 54 L. J. Ch. 362, 52 L. T. Rep. N. S. 666, 33 Wkly. Rep. 417; Sibun *v.* Pearce, 44 Ch. D. 354, 62 L. T. Rep. N. S. 388; *In re* Blackburn, etc., Ben. Bldg. Soc., 24 Ch. D. 421, 52 L. J. Ch. 894, 49 L. T. Rep. N. S. 730, 32 Wkly. Rep. 159; *Re* Norwich, etc., Provident Bldg. Soc., 45 L. J. Ch. 785; *Re* Middlesbrough, etc., Permanent Ben. Bldg. Soc., 53 L. T. Rep. N. S. 203. See also Coltrane *v.* Baltimore Bldg., etc., Assoc., 110 Fed. 272, 280, where the court, after reviewing the American cases upon the subject, say: "After all the reasoning of the English and American courts is boiled down, it comes very much to this: The American courts say that it is clear that the provisions of the by-laws were not intended to apply to insolvent associations. The provisions of the by-laws governing withdrawals, like many of the pro-

BUILDING ASSOCIATION. See BUILDING AND LOAN SOCIETIES.

BUILDING LEASE. A lease of land for a long term of years, usually ninety-nine, at a rent called a "ground rent," the lessee covenanting to erect certain edifices thereon according to specification, and to maintain the same, etc., during the term.[1]

BUILDING SOCIETY. See BUILDING AND LOAN SOCIETIES.

BUILT. Constructed;[2] completed for the purpose intended.[3]

BULL. The male of the bovine genus of animals.[4] In the language of the stock exchange, one who speculates for a rise in the market.[5] (See, generally, ANIMALS.)

BULLA. The name of the leaden seal which is affixed to the Pope's ordinances or decrees, imparting to them the term by which they are known of Papal Bulls.[6]

BULLION. Uncoined gold and silver in the mass;[7] uncoined gold and silver, either smelted, refined, or in the condition in which it is used for coining.[8] (Bullion: As Medium of Payment, see PAYMENT.)

visions of the by-laws with reference to the borrowing members, are obviously intended and equitably applicable only so long as the association is a going concern, from which all the members may ultimately hope and expect to receive approximately equal benefits. The English courts say that the by-laws do not provide that members whose notices of withdrawal have matured before the association has ceased doing business shall upon its subsequent ceasing to do business be deprived of the right to be paid in full. . . . The real question to be considered, therefore, by this court, is which rule would practically be the most equitable, and the least liable to abuse. Members who have given notice of withdrawal are distinguished from the other members of the association merely by that fact. They are entitled to no extra privileges, because they are exposed to no extra burdens over those of all their fellow stockholders. . . . It is admitted that when the association goes into the hands of a receiver the right to give further notices of withdrawal ceases. Why should not the right cease as well to be paid on notices of withdrawal already given? Equality is equity. . . . The safe and equitable rule, as it seems to me, is that which has in the last few years received rapid and almost general recognition from the American courts, and that is that if a member gives a notice of withdrawal which matures when the association is actually insolvent, although its insolvency may not be known or suspected by the person giving such notice, and before the member giving the notice is paid the withdrawal value of his stock, the association ceases to do business and is wound up in equity as an insolvent corporation, such member has no priority over other stockholders."

1. Black L. Dict.

2. Hutchinson *v.* Olympia, 2 Wash. Terr. 314, 320, 5 Pac. 606; U. S. *v.* Dalles Military Road Co., 51 Fed. 629, 636, 7 U. S. App. 297, 2 C. C. A. 419.

3. The Paradox, 61 Fed. 860, 861.

4. State *v.* McMinn, 34 Ark. 160, 162 [*citing* Webster Dict.]. **The uncastrated animal** is so called as distinguished from the castrated animal or STEER, *q. v.* State *v.* Royster, 65 N. C. 539.

5. Wharton L. Lex.

6. Counsel *v.* Vulture Min. Co., 5 Daly (N. Y.) 74, 78, where it is said: "*Bulla* in the Latin meant any small object rounded by art, such as a boss or stud in a girdle, and was originally the small thin circular plate of gold or other metal, with some insignia or device engraved or stamped upon it, which was worn suspended from the neck by the children of Roman patricians as their distinguishing mark, and afterwards by all Roman children who were of free birth. From this origin it came in time to be used in the Latin for the seal hanging by a band to a legal instrument, or to the executive decrees of sovereigns or other public functionaries, as well as the term for the matrix or die with which a seal was impressed or a coin was stamped."

7. Thalheim *v.* State, 38 Fla. 169, 204, 20 So. 938; 1 Hale P. C. 188.

8. Counsel *v.* Vulture Min. Co., 5 Daly (N. Y.) 74, 77, where it is said that it "has, from the earliest period, been associated with or employed as a term denoting money. It is derived from the French word *billon*, which Savary, in his *Dictionnaire Universal de Commerce*, defines as a term for money, '*Terme de Monnoye*;' and one of the earliest English authorities upon those words that are derived from the French, Cotgrave, in his French and English Dictionary of 1632, defines bullion, 'money, *Monnoye de billon*.' Bayley, more than a century afterwards, defines it in his English Dictionary of 1763, 'money having no stamp upon it;' and our own contemporary authority, Webster, says, 'the word is often used to denote gold and silver coined and uncoined, when reckoned by weight and in mass, including especially foreign or uncurrent coin' (Webster's Dict. Unabridged of 1864); and Locke, in his paper on Raising the Value of Money, so employs the word in this passage. 'Foreign coin hath no value here for its stamp, and our coin is bullion in foreign countries.'"

BUM-BAILIFF. A person employed to dun one for a debt; the bailiff employed to arrest for debt.[9] (See, generally, BOUND-BAILIFF.)

BURDEN OF PROOF. See CRIMINAL LAW; EVIDENCE.

BURGESS. An inhabitant or freeman of a borough; an elector or voter; a representative or magistrate of a borough.[10] (See, generally, MUNICIPAL CORPORATIONS.)

BURGLARITER. Burglariously. In old criminal pleading a necessary word in indictments for burglary.[11] (See, generally, BURGLARY.)

9. Wharton L. Lex.
10. Burrill L. Dict.
11. Burrill L. Dict.

BURGLARY

By Arthur Lee

CROSS-REFERENCES

For Civil Liability For Unlawful Entry of Premises, see FORCIBLE ENTRY AND DETAINER; TRESPASS.

Criminal Responsibility For Entering Premises Without Intent to Commit Other Offense, see FORCIBLE ENTRY AND DETAINER; TRESPASS.

General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

Burglary as a common-law offense is the breaking and entering of the dwelling-house of another, in the night-time, with the intent to commit a felony therein,[1] whether the felony is committed or not.[2] But in most jurisdictions, as will appear in the following subdivisions, the offense has been extended by statute so as to include breaking and entries which were not burglary at common law.[3]

II. NATURE AND ELEMENTS OF THE OFFENSE.

A. In General — 1. At Common Law. At common law burglary is a felony.[4] And it is an offense against the habitation, and not against the property.[5] The following are the essential elements of the offense at common law: (1) a breaking, (2) and entry, (3) of the dwelling-house (4) of another, (5) in the night-time, (6) with intent to commit a felony therein.[6]

2. Under the Statutes — a. In General. There is probably no jurisdiction in which statutes are not now in force extending the offense of burglary beyond the common-law definition. In most jurisdictions it has been extended so as to include breaking and entering shops, warehouses, and other premises, thus

1. **Burglary defined.**— 4 Bl. Comm. 224; 1 East P. C. 495; 1 Hale P. C. 358, 559; 1 Hawkins P. C. c. 38, § 1; 3 Inst. 63. Among the cases in which burglary has been in substance or literally defined as above see:

Alabama.— Anderson *v.* State, 48 Ala. 665, 17 Am. Rep. 36; State *v.* McCall, 4 Ala. 643, 39 Am. Dec. 314.

Maryland.— Robinson *v.* State, 53 Md. 151, 36 Am. Rep. 399.

Massachusetts.— Com. *v.* Newell, 7 Mass. 245.

New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

New York.— People *v.* Edwards, 1 Wheel. Crim. (N. Y.) 371.

Tennessee.—Wyatt *v.* State, 2 Swan (Tenn.) 394.

Texas.— Wilburn *v.* State, 41 Tex. 237.

Virginia.— Clarke *v.* Com., 25 Gratt. (Va.) 508.

See 8 Cent. Dig. tit. "Burglary," § 1.

2. See *infra*, II, G, 5.

"A burglar is he that in the night time breaketh and entereth into a mansion house of another of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not. 3 Inst. 63; *In re* McVey, 50 Nebr. 481, 70 N. W. 51; Conners *v.* State, 45 N. J. L. 340; People *v.* McCloskey, 5 Parker Crim. (N. Y.) 57.

"The word burglary," says Mr. Chitty in his excellent and accurate treatise on criminal law, "is a compound of the Saxon term *burgh*, a house, and *laron*, theft; and originally signified no more than the robbery of a dwelling; and it is now defined to be the breaking and entering the house of another in the night-time with intent to commit a felony, whether the felony be actually committed or not." Anderson *v.* State, 48 Ala. 665, 666, 17 Am. Rep. 36.

3. See *infra*, II, A, 2.

4. 3 Inst. 63; 4 Bl. Comm. 228; 1 Hawkins P. C. c. 38, § 1.

5. See *infra*, II, E.

6. See State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216; and further as to the elements of the offense, *infra*, II, B, C, D, F, G.

making it an offense against property, and not merely against the habitation,[7] and so as to include entry without breaking,[8] breaking and entry in the daytime,[9] etc. It is generally a felony under the statutes, but in some states certain housebreakings are misdemeanors only. In some states the offense is divided into different degrees, and the punishment graded according to the circumstances.

b. Construction of the Statutes. Sometimes a statute punishing burglary does not define it, and when this is so the common-law definition applies. When a statute does define the offense it is of course controlling, however much it may restrict or extend the offense,[10] but terms used in the statute, like "breaking," "entry," "dwelling-house," etc., are to be given the same meaning as at common law, unless there is something to show a different intention.[11]

B. The Breaking — **1. Necessity For a Breaking.** To constitute burglary at common law, and also under the statutes, unless a contrary intention appears, there must be some breaking of the house, either actual or constructive. An entry through an open door, window, or other aperture, although there may be an intent to commit a felony, is not enough,[12] unless the entry is effected under

7. See *infra*, II, E.
8. See *infra*, II, B.
9. See *infra*, II, D.
10. People *v.* Barry, 94 Cal. 481, 29 Pac. 1026; Neubrandt *v.* State, 53 Wis. 89, 9 N. W. 82.
11. *Alabama.*— Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1; *Ex p.* Vincent, 26 Ala. 145, 62 Am. Dec. 714.
Illinois.— Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809.
Indiana.— Sims *v.* State, 136 Ind. 358, 36 N. E. 278.
Michigan.— Pitcher *v.* People, 16 Mich. 142.
Nebraska.— McGrath *v.* State, 25 Nebr. 780, 41 N. W. 780.
New York.— Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87.
Ohio.— Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376.
Virginia.— Finch *v.* Com., 14 Gratt. (Va.) 643.
Wisconsin.—Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870.
England.— Reg. *v.* Wenmouth, 8 Cox C. C. 348.
See 8 Cent. Dig. tit. "Burglary," § 2.
12. *Alabama.*—Miller *v.* State, 77 Ala. 41; Green *v.* State, 68 Ala. 539; Carter *v.* State, 68 Ala. 96; Ray *v.* State, 66 Ala. 281; Stone *v.* State, 63 Ala. 115; Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1; Brown *v.* State, 55 Ala. 123, 28 Am. Rep. 693; Pines *v.* State, 50 Ala. 153.
Delaware.— State *v.* Fisher, 1 Pennew. (Del.) 303, 41 Atl. 208.
Georgia.— White *v.* State, 51 Ga. 285.
Kentucky.— Rose *v.* Com., 19 Ky. L. Rep. 272, 40 S. W. 245.
Maine.— State *v.* Newbegin, 25 Me. 500.
Massachusetts.— See also Com. *v.* Strupney, 105 Mass. 588, 7 Am. Rep. 556; Com. *v.* Trimmer, 1 Mass. 476; Com. *v.* Steward, 7 Dane Abr. 136.
Missouri.— State *v.* Kennedy, 16 Mo. App. 287.
Nebraska.— McGrath *v.* State, 25 Nebr. 780, 41 N. W. 780.
New Hampshire.— State *v.* Moore, 12 N. H. 42.
New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.
North Carolina.— State *v.* Whit, 49 N. C. 349; State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555.
Ohio.— Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376; State *v.* Rivers, 2 Ohio Dec. (Reprint) 102, 1 West. L. Month. 387.
Tennessee.— Adkinson *v.* State, 5 Baxt. (Tenn.) 569, 30 Am. Rep. 69.
Texas.— Mathews *v.* State, 36 Tex. 675; Smith *v.* State, (Tex. Crim. 1901) 60 S. W. 668. And see St. Louis *v.* State, (Tex. Crim. 1900) 59 S. W. 889. See *infra*, II, B, 2, g, (v).
Virginia.—Clarke *v.* Com., 25 Gratt. (Va.) 908; Hunter *v.* Com., 7 Gratt. (Va.) 641, 56 Am. Dec. 121.
England.— Rex *v.* Smith, Car. C. L. 293, 1 Moody 178; Rex *v.* Hyams, 7 C. & P. 441, 32 E. C. L. 697; Rex *v.* Lewis, 2 C. & P. 628, 12 E. C. L. 773; Reg. *v.* Davis, 6 Cox C. C. 369; Rex *v.* Hughes, 2 East P. C. 491, 1 Leach C. C. 452; Rex *v.* Spriggs, 1 M. & Rob. 357; 4 Bl. Comm. 226; 1 Hale P. C. 551, 552; 1 Hawkins P. C. c. 38, §§ 3, 4.
Victoria.— Reg. *v.* Payne, 13 Vict. L. R. 359.
See 8 Cent. Dig. tit. "Burglary," § 1.
For a guest at an inn to enter the bar-room and steal money is not burglary, when there is no breaking or opening of doors to enter. State *v.* Moore, 12 N. H. 42.
Hole in the roof.— To enter through a hole in the roof of a house, left there for the purpose of light, is not burglary. Rex *v.* Spriggs, 1 M. & Rob. 357.
Other cases.— The same is true of an entry through an open transom (McGrath *v.* State, 25 Nebr. 780, 41 N. W. 780); or through a hole left in a cellar window for the purpose of light (Rex *v.* Lewis, 2 C. & P. 628, 12 E. C. L. 773); or by removing a loose plank in a partition wall (Com. *v.* Trimmer, 1 Mass. 476); or by putting the hand or an instrument through an existing hole in a corn-crib and removing corn (Miller *v.* State, 77 Ala. 41).
Window slightly raised by the accused in

such circumstances that there is a constructive breaking.[13] The statutes, however, sometimes expressly punish as burglary the entering of a dwelling-house or other building with intent to steal or commit some other felony therein, without requiring that there shall be any breaking at all, or without requiring a breaking when the entry is at night, and in such a case a breaking is not necessary.[14] But a statute making it burglary to enter a house without breaking and commit a crime therein, and then break a door or window to get out, does not make an entry without breaking burglary, where there is no breaking out.[15]

2. SUFFICIENCY OF BREAKING — a. In General. To constitute a breaking there must be some degree of force and a "breaking, removing, or putting aside of something material, which constitutes a part of the dwelling-house and is relied on as a security against intrusion."[16] If a door, window, or transom is open or partly open, it is not burglary to enter, although it has to be pushed further open to admit the body, unless it is punished by statute.[17] And it has been held not to be burglary to enter by removing a loose plank in a partition wall.[18] It is not necessary, however, that any great degree of force shall be used; but the least actual breaking is sufficient. There is a breaking at common law, and generally under the statutes, even when they require a "forcible" breaking and entry, if there is a removal or putting aside of any fastenings, or any material part of the house, intended as a security against intrusion.[19] There is a sufficient breaking at

the daytime.— It has been held, however, that the fact that the accused very slightly raised a window in the daytime, so that the bolt which fastened it down would not be effectual, does not prevent his subsequently raising the window and entering in the night-time from being burglary. People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046.

That the upper part of a door was open and might have been entered without any breaking is immaterial, where the lower part was closed and hooked, and was unhooked and opened in order to enter. Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512. And see Webb *v.* Com., 18 Ky. L. Rep. 220, 35 S. W. 1038.

13. See *infra*, II, B, 2, g.

14. People *v.* Barry, 94 Cal. 481, 29 Pac. 1026; State *v.* Watkins, 11 Nev. 30; State *v.* Hughes, 86 N. C. 662.

15. Under a New York statute declaring guilty of burglary in the second degree any person who should enter a dwelling-house of another by day or night with intent to commit a crime, or, being in the dwelling-house of another, should commit a crime, and should in the night-time break any outer door, etc., to get out of the house, it was held that one who entered the dwelling-house of another in the daytime through an open window, with intent to commit a crime, but did not break out of the house in the night-time, was not guilty of the offense. People *v.* Arnold, 6 Park. Crim. (N. Y.) 638.

16. State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555.

17. See *supra*, II, B, 1; and the following cases:

Kentucky.— Rose *v.* Com., 19 Ky. L. Rep. 272, 40 S. W. 245.

Massachusetts.— Com. *v.* Strupney, 105 Mass. 588, 7 Am. Rep. 556; Com. *v.* Steward, 7 Dane Abr. 136.

New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

Ohio.— Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376; State *v.* Long, 5 Ohio S. & C. Pl. Dec. 617.

England.— Rex *v.* Smith, Car. C. L. 293, 1 Moody 178; Rex *v.* Hyams, 7 C. & P. 441, 32 E. C. L. 697.

"The law on the point is, that if the owner leaves his doors open, or partly open, or his windows raised, or partly raised and unfastened, it will be such negligence or folly on his part, as is calculated to induce or tempt a stranger to enter; and if he does so through the open door or window, or by pushing open the partly opened door, or further raising the window that is a little up, it will not be burglary." Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376.

18. Com. *v.* Trimmer, 1 Mass. 476.

19. *Alabama.*— Carter *v.* State, 68 Ala. 96; Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1; Fisher *v.* State, 43 Ala. 17.

Delaware.— State *v.* Snow, (Del. 1901) 51 Atl. 607.

Georgia.— Grimes *v.* State, 77 Ga. 762, 4 Am. St. Rep. 112.

Kansas.— State *v.* Herbert, 63 Kan. 516, 66 Pac. 235; State *v.* Moon, 62 Kan. 801, 64 Pac. 609.

Massachusetts.— Com. *v.* Stephenson, 8 Pick. (Mass.) 354.

Nebraska.— Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512; Metz *v.* State, 46 Nebr. 547, 65 N. W. 190.

North Carolina.— State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555.

Ohio.— Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376; State *v.* Rivers, 2 Ohio Dec. (Reprint) 102, 1 West. L. Month. 387.

Texas.— Burke *v.* State, 5 Tex. App. 74. And see *infra*, II, B, 2, g, (v).

See 8 Cent. Dig. tit. "Burglary," § 7.

common law, and a "forcible breaking" within the meaning of a statute,[20] when a person enters a house by unlocking or unlatching a door, or even by pushing open a door which is shut, but neither locked nor latched, or a window, transom, or trap-door which is entirely closed, although not fastened, but held in place by its weight only, or by pulley weights,[21] and in many other cases where a very slight degree of force is used.[22]

"The degree of force or violence which may be used is not of importance — it may be very slight. The lifting the latch of a door; the picking of a lock, or opening with a key; the removal of a pane of glass, and, indeed, the displacement or unloosing of any fastening, which the owner has provided as a security to the house, is a breaking — an actual breaking — within the meaning of the term as employed in the definition of burglary at common law, and as it is employed in the statute." Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1. "The application of the law does not depend upon the degree of the force used, but upon the fact that force of some degree, however slight, was used." Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376.

20. The terms "break" and "forcibly break" in a statute defining and punishing burglary are to be given the same meaning as the term "break" at common law, unless a contrary intention appears.

Alabama.— Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1.

Indiana.— Sims *v.* State, 136 Ind. 358, 36 N. E. 278.

Ohio.— Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376.

Texas.— State *v.* Robertson, 32 Tex. 159.

Wisconsin.— Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870.

In a statute punishing any one who shall "forcibly break and enter" a dwelling-house, the word "forcibly" only expresses the degree of force that was implied at common law from the word "break," and a breaking sufficient at common law is sufficient under the statute. Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376.

21. *Alabama.*— Hild *v.* State, 67 Ala. 39.

Delaware.— State *v.* Snow, (Del. 1901) 51 Atl. 607; State *v.* Carpenter, 1 Houst. Crim. Cas. (Del.) 367; State *v.* Manluff, 1 Houst. Crim. Cas. (Del.) 208.

Florida.— May *v.* State, 40 Fla. 426, 24 So. 498.

Georgia.— Kent *v.* State, 84 Ga. 438, 11 S. E. 355, 20 Am. St. Rep. 376; Grimes *v.* State, 77 Ga. 762, 4 Am. St. Rep. 112.

Illinois.— Lyons *v.* People, 68 Ill. 271.

Iowa.— State *v.* Conners, 95 Iowa 485, 64 N. W. 295; State *v.* O'Brien, 81 Iowa 93, 46 N. W. 861; State *v.* Reid, 20 Iowa 413.

Kansas.— State *v.* Herbert, 63 Kan. 516, 66 Pac. 235; State *v.* Moon, 62 Kan. 801, 64 Pac. 609; State *v.* Groning, 33 Kan. 18, 5 Pac. 446.

Kentucky.— Webb *v.* Com., 18 Ky. L. Rep. 220, 35 S. W. 1038.

Michigan.— People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046; Dennis *v.* People, 27 Mich. 151; People *v.* Nolan, 22 Mich. 229.

Mississippi.— Frank *v.* State, 39 Miss. 705.

Missouri.— State *v.* Woods, 137 Mo. 6, 38 S. W. 722; State *v.* Hecox, 83 Mo. 531.

Nebraska.— Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512.

New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

New York.— McCourt *v.* People, 64 N. Y. 583; Tickner *v.* People, 6 Hun (N. Y.) 657; People *v.* Bush, 3 Park. Crim. (N. Y.) 552; People *v.* Edwards, 1 Wheel. Crim. (N. Y.) 371.

North Carolina.— State *v.* Fleming, 107 N. C. 905, 12 S. E. 131; State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555.

Ohio.— Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376.

Tennessee.— Bass *v.* State, 1 Lea (Tenn.) 444.

Texas.— Hedrick *v.* State, 40 Tex. Crim. 532, 51 S. W. 252; Wagner *v.* State, (Tex. Crim. 1898) 47 S. W. 372; Parker *v.* State, (Tex. Crim. 1897) 38 S. W. 790; Matthews *v.* State, (Tex. Crim. 1896) 38 S. W. 172; Edwards *v.* State, 36 Tex. Crim. 387, 37 S. W. 438; Sparks *v.* State, 34 Tex. Crim. 86, 29 S. W. 264; Nash *v.* State, 20 Tex. App. 384 (incorrectly reported as Harrison *v.* State, in 20 Tex. App. 387, 54 Am. Rep. 529). And see *infra*, II, B, 2, g, (v).

Virginia.— Finch *v.* Com., 14 Gratt. (Va.) 643.

United States.— U. S. *v.* Bowen, 4 Cranch C. C. (U. S.) 604, 24 Fed. Cas. No. 14,629.

England.— Rex *v.* Hyams, 7 C. & P. 441, 32 E. C. L. 697; Brown's Case, 2 East P. C. 487, 2 Leach 1016 note; Rex *v.* Russell, 1 Moody 377; Rex *v.* Haines, R. & R. 335; Rex *v.* Hall, R. & R. 264; 4 Bl. Comm. 226; 1 Hale P. C. 552. *Contra*, Rex *v.* Lawrence, 4 C. & P. 231, 19 E. C. L. 490.

See 8 Cent. Dig. tit. "Burglary," § 8.

22. Other cases of actual breaking by slight force.— The following breakings have been held sufficient to constitute burglary:

Breaking or pushing in part of a pane of glass which had been previously cut out, but the whole of which still remained in its place. Reg. *v.* Bird, 9 C. & P. 44, 38 E. C. L. 38. And see Ryan *v.* Shilcock, 7 Exch. 72, 15 Jur. 1200, 21 L. J. Exch. 55; Rex *v.* Robinson, 1 Moody 327; Rex *v.* Smith, R. & R. 309.

Opening a door by unhooking a chain hooked over a nail. State *v.* Hecox, 83 Mo. 531.

Removing a window fastening with a knife or other sharp instrument operated from the outside, and lifting the window. State *v.* Moore, 117 Mo. 395, 22 S. W. 1086.

Removing of a window screen fastened with

b. Statutes Requiring an "Actual" Breaking. In Texas a statute providing that an entry into a house for the purpose of committing theft, unless the same is effected by an "actual" breaking, is not burglary when the same is done by a domestic servant, or other inhabitant of the house,[23] is construed as requiring a real breaking, and not merely such as was sufficient at common law; and an entry by merely opening a closed door by turning a knob or raising a latch is not within the statute.[24]

c. Breaking by Burning. Burning a hole in a house in order to enter for the purpose of committing a felony is a sufficient breaking to constitute burglary, and the breaking is not lost in the consumption of the house by fire.[25]

d. The Thing Broken Must Be a Part of the House. To make one guilty of burglary it is necessary that some part of the house shall be broken.[26] It is not sufficient to break a part of the premises on the outside, but forming no part of

nails. Sims *v.* State, 136 Ind. 358, 36 N. E. 278.

Removing a netting nailed over an otherwise open window. Com. *v.* Stephenson, 8 Pick. (Mass.) 354.

Removing a wire screen in a window. State *v.* Herbert, 63 Kan. 516, 66 Pac. 235.

Breaking a canvas covering a window. Grimes *v.* State, 77 Ga. 762, 4 Am. St. Rep. 112.

Pushing open a screen door, although the inner or permanent door is not closed. State *v.* Conners, 95 Iowa 485, 64 N. W. 295.

Digging a hole under a building made of logs and which had no floor except the ground. Pressley *v.* State, 111 Ala. 34, 20 So. 647.

Boring a hole in the floor of a corn-crib from the outside, and drawing corn into a sack. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1. And see State *v.* Crawford, 8 N. D. 539, 80 N. W. 193, 73 Am. St. Rep. 772, 46 L. R. A. 312.

Removing a board loosely fastened over a hole. Carter *v.* State, 68 Ala. 96. *Compare* Com. *v.* Trimmer, 1 Mass. 476.

Removing a board near the bottom of a corn-crib. Metz *v.* State, 46 Nebr. 547, 65 N. W. 190.

Removing an iron grating covering an area opposite a cellar window of a store. People *v.* Nolan, 22 Mich. 229. And see Com. *v.* Bruce, 79 Ky. 560.

Entering a barn by pulling away rails that were driven into the hay leaving the ends covering an opening. State *v.* Rivers, 2 Ohio Dec. (Reprint) 102, 1 West. L. Month. 387.

Removing a post leaning against a door to keep it closed. State *v.* Powell, 61 Kan. 81, 58 Pac. 968.

Removal of props from a warehouse door in order to enter. Rose *v.* Com., 19 Ky. L. Rep. 272, 40 S. W. 245.

Entering a factory through a hole left for a band in operating machinery, by pushing aside the band to make room for the body. Marshall *v.* State, 94 Ga. 589, 20 S. E. 432.

As to whether pushing aside a cloth hung over two nails at the top of an open window is a sufficient breaking, the cloth being loose at the bottom see Hunter *v.* Com., 7 Gratt. (Va.) 641, 56 Am. Dec. 121, where Field, J., was of the opinion that it was not, but the majority of the court declined to express any opinion.

Upper part of door open, but lower closed. — Where a door to a building is in two parts, the upper part being open and the lower part closed, one who enters by unhooking and opening the lower part is guilty of a burglarious breaking and entry, although he might have entered through the upper part and without any breaking. Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512. And see Webb *v.* Com., 18 Ky. L. Rep. 220, 35 S. W. 1038.

23. Tex. Pen. Code, art. 848.

24. Under this statute a domestic servant or other inhabitant of a house is not guilty of burglary in entering by lifting a latch on a door from the outside through a crevice. Neiderluck *v.* State, 23 Tex. App. 38, 3 S. W. 573. And a servant or other person living in a livery stable is not guilty of burglary in opening the unlocked door of an oat-bin at night and stealing oats therefrom. Peters *v.* State, 33 Tex. Crim. 170, 26 S. W. 61. The statute does not apply where a boarder in a house enters the room of another boarder and steals therein. Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405.

"Domestic servant." — A farm-hand who eats and sleeps outside of his master's house, although he does chores inside the house when directed, is not a domestic servant within the meaning of the statute. Waterhouse *v.* State, 21 Tex. App. 663, 2 S. W. 889. The statute has no application where a saloon at an hotel is entered, by unlocking the door at night, by one who is employed for certain work in the hotel, where the saloon is operated separately from the hotel, and such employee performs no services therein. Jackson *v.* State, (Tex. Crim. 1901) 64 S. W. 864.

A domestic servant, conspiring with other persons who are not servants, may be guilty of burglary without the "actual" breaking required by this statute. Neiderluck *v.* State, 23 Tex. App. 38, 3 S. W. 573.

25. White *v.* State, 49 Ala. 344.

26. Pressley *v.* State, 111 Ala. 34, 20 So. 647; Com. *v.* Bruce, 79 Ky. 560; State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

the house, the house itself being entered without breaking;[27] or to enter a house without breaking and break into trunks, cupboards, and the like.[28]

e. Breaking an Inner Door or Window. If a person enters a house through an open door or window, and breaks or opens an inner door, window, or other obstruction, with intent to commit a felony, or if a servant, guest, or other person, being lawfully in a house, enters a room which he has no right to enter, with felonious intent, by breaking or opening an inner door, it is as much burglary as if he had entered by breaking an outer door or window.[29] Such a breaking is a breaking and entering of the house.[30] This rule generally applies under statutes punishing the breaking and entering of dwelling-houses and other buildings, as well as at common law;[31] but sometimes a statute defining burglary expressly or impliedly requires that the breaking shall be of an outer door, and

27. **Breaking outside of gate, fence, or other structure.**—Rex *v.* Paine, 7 C. & P. 135, 32 E. C. L. 538; Rex *v.* Davis, R. & R. 239; Rex *v.* Bennett, R. & R. 214.

A **shutter-box** projecting from the side of shop window was held not a part of the house so as to make breaking and entering of the same burglary. Rex *v.* Paine, 7 C. & P. 135, 32 E. C. L. 538.

Cellar grating.— A grating in the street protecting an entrance to the cellar under a storehouse, the cellar being used for the storage of goods, and being connected with the store by a hatchway, was held a part of the store, so as to make it burglary under a statute to remove the grating and enter the cellar with intent to steal. Com. *v.* Bruce, 79 Ky. 560.

Digging under a building made of logs, and which had no floor other than the ground, has been held sufficient breaking. Pressley *v.* State, 111 Ala. 34, 20 So. 647.

28. **Breaking into trunks, cupboards, etc.**— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216; 1 Hale P. C. 554.

29. *Alabama.*—Carter *v.* State, 68 Ala. 96; Hild *v.* State, 67 Ala. 39.

California.— People *v.* Young, 65 Cal. 225, 3 Pac. 813.

Delaware.— State *v.* Manluff, 1 Houst. Crim. Cas. (Del.) 208.

Georgia.— Marshall *v.* State, 94 Ga. 589, 20 S. E. 432; Colbert *v.* State, 91 Ga. 705, 17 S. E. 840; Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238.

New Hampshire.— State *v.* Scripture, 42 N. H. 485.

New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

New York.—Smith's Case, 4 City Hall Rec. (N. Y.) 62.

Pennsylvania.—Rolland *v.* Com., 85 Pa. St. 66, 27 Am. Rep. 626.

Texas.— Anderson *v.* State, 17 Tex. App. 305; Martin *v.* State, 1 Tex. App. 525.

Vermont.— State *v.* Clark, 42 Vt. 629.

United States.— U. S. *v.* Bowen, 4 Cranch C. C. (U. S.) 604, 24 Fed. Cas. No. 14,629.

England.— Rex *v.* Johnson, 2 East P. C. 488; Edmonds' Case, Hutton 20; Rex *v.* Gray, 1 Str. 481; 4 Bl. Comm. 226, 227; 1 Hale P. C. 553, 554, 556; 1 Hawkins P. C. c. 38, § 4.

See 8 Cent. Dig. tit. "Burglary," § 12.

Illustrations.— Entering an open outer cellar door and breaking an inner cellar door and entering the house is a burglarious breaking and entering. McCourt *v.* People, 64 N. Y. 583; Smith's Case, 4 City Hall Rec. (N. Y.) 62. An entry into the second story of a mill by passing through the open door of the lower story and then pushing aside a board loosely fastened over a hole in the upper floor is a burglarious breaking and entering. Carter *v.* State, 68 Ala. 96. Entering the lower story of a gin-house or factory through an open door, and entering into the closed upper stories through a hole left for a band operating machinery, by pushing the band aside to make room for the body, may be a burglarious breaking and entry. Marshall *v.* State, 94 Ga. 589, 20 S. E. 432.

Felony in a different room.—It is not necessary that he shall commit or intend to commit the felony in the particular room, the door of which is broken. Rolland *v.* Com., 85 Pa. St. 66, 27 Am. Rep. 626.

Breaking inner door without entering.— It is not burglary to enter a house through an open outer door and to break an inner door without entering, for in such a case there is merely a breaking without an entry. Reg. *v.* Davis, 6 Cox C. C. 369.

A partition eight or nine feet high in a house, although not reaching to the ceiling, is not sufficient to constitute the inclosed space a room in which burglary may be committed by breaking and entering the same, after entering the building without breaking. People *v.* Young, 65 Cal. 225, 3 Pac. 813.

A servant lodging in a house is guilty of burglary if he breaks and enters the sleeping-room of his master with intent to kill him. U. S. *v.* Bowen, 4 Cranch C. C. (U. S.) 604, 24 Fed. Cas. No. 14,629; and cases cited *supra*, this note.

30. **Breaking inner door is breaking of house.**— People *v.* Young, 65 Cal. 225, 3 Pac. 813; Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238; State *v.* Scripture, 42 N. H. 485; and other cases cited *supra*, notes just preceding.

31. Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238, where it was held that it was burglary under a statute to enter an open outer door of a railroad depot, and break and enter an inner door with intent to steal. See also Martin *v.* State, 1 Tex. App. 525.

entering through an open outer door, followed by a technical breaking by opening a closed inner door, will not constitute the offense.[32]

f. Entering Without Breaking and Breaking Out — (I) *At Common Law.* Although there was some doubt and difference of opinion on the subject, the weight of authority is to the effect that it was not burglary under the English common law to enter a dwelling-house without breaking with intent to commit a felony, and afterward break out in order to escape.[33] The weight of authority in this country is to the same effect.[34]

(II) *By Statute.* This difference of opinion in England led to the passage of 12 Anne, which statute, after reciting the doubt existing on the subject, provided that if any person should enter into the dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony, or, being in such house, should commit any felony, and should in the night-time break the said house to get out of the same, he should be guilty of burglary.[35] This statute was repealed, but has been substantially reënacted.[36] By the weight of authority the statute of Anne is not in force in the United States as a part of the common law,[37] but in some states similar statutes have been enacted.[38]

g. Constructive Breaking — (I) *Entry by Fraud.* Although a person may enter a house without any actual breaking at all, and even through an open door, the circumstances may be such as to make his entry a constructive breaking, so as to render him guilty of burglary. Such is the case when a person effects an entrance into a house by a false hue and cry, or by an abuse of legal process,[39] or

32. See People *v.* Fralick, Lalor (N. Y.) 63.

33. It was said by Sir Matthew Hale: "If a man enter in the night-time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this I think is not burglary, . . . for *fregit et exivit, non fregit et intravit.*" 1 Hale P. C. 554. And see Clarke's Case, 4 Bl. Comm. 227; 2 East P. C. 490. Lord Bacon's opinion was the contrary. 4 Bl. Comm. 227; Elm. 65.

34. *Alabama.*— Brown *v.* State, 55 Ala. 123, 28 Am. Rep. 693.

Georgia.— White *v.* State, 51 Ga. 285.

North Carolina.— State *v.* McPherson, 70 N. C. 239, 16 Am. Rep. 769.

Ohio.— Wine *v.* State, 25 Ohio St. 69.

Pennsylvania.—Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758.

Tennessee.— Adkinson *v.* State, 5 Baxt. (Tenn.) 569, 30 Am. Rep. 69.

Texas.— Edwards *v.* State, 36 Tex. Crim. 387, 37 S. W. 438.

Contra.— State *v.* Ward, 43 Conn. 489, 21 Am. Rep. 665; State *v.* Manluff, 1 Houst. Crim. Cas. (Del.) 208; *In re* Guche, 6 City Hall Rec. (N. Y.) 2; State *v.* Bee, 29 S. C. 81, 6 S. E. 911.

35. 12 Anne, c. 7, § 3; 4 Bl. Comm. 227.

36. 7 & 8 Geo. IV, c. 29, § 11; 24 & 25 Vict. c. 96, § 51. The last cited statute provides that "whosoever shall enter the Dwelling House of another with Intent to commit any Felony therein, or being in such Dwelling House shall commit any Felony therein, and shall in either Case break out of the said Dwelling House in the Night, shall be deemed guilty of burglary."

The breaking to get out need be such only as was a sufficient breaking at common law. Thus opening a door by lifting the latch is a sufficient breaking. Reg. *v.* Wheeldon, 8 C. & P. 747, 34 E. C. L. 998. See also Rex *v.* Compton, 7 C. & P. 139, 32 E. C. L. 540; Rex *v.* Lawrence, 4 C. & P. 231, 19 E. C. L. 490; Brown's Case, 2 East P. C. 487, 2 Leach 1016 note; Rex *v.* Callan, R. & R. 117. As to the construction of the statute see Reg. *v.* Wenmouth, 8 Cox C. C. 348.

A servant or lodger in a house is guilty under the statute if he commits a felony therein and then breaks out in order to escape. Reg. *v.* Wheeldon, 8 C. & P. 747, 34 E. C. L. 998.

37. Brown *v.* State, 55 Ala. 123, 28 Am. Rep. 693; Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758.

Contra.— State *v.* Ward, 43 Conn. 489, 21 Am. Rep. 665.

38. See N. Y. Pen. Code, § 498; Minn. Pen. Code, § 385. A statute providing that if "any person who, after having entered" any of the premises made the subject of burglary "with intent to commit a felony, break any such premises, he shall be punished in the same way as if he had broken into the premises in the first instance," is merely declaratory of the common law, by which a breaking of inner doors with intent to commit a felony, after an entry without breaking, is burglary, and does not make it burglary to enter a house without breaking and break out merely to escape. Adkinson *v.* State, 5 Baxt. (Tenn.) 569, 30 Am. Rep. 69. Entry without breaking and concealing oneself in a house, and breaking out in the night-time, carrying away stolen goods, is not within a statute punishing any one who breaks into and enters a house. Brown *v.* State, 55 Ala. 123, 28 Am. Rep. 693; White *v.* State, 51 Ga. 285; Wine *v.* State, 25 Ohio St. 69.

39. Farr's Case, 2 East P. C. 660, J. Kel. 43; Lemott's Case, 2 East P. C. 485, J. Kel. 42; 4 Bl. Comm. 226; 1 Hale P. C. 552, 553; 1 Hawkins P. C. c. 38, § 5.

by false pretenses or other trick or fraud.[40] A statute punishing any one who shall "forcibly break and enter" only requires such a degree of force as was implied at common law from the word "break," and the statute applies when an entry is effected by trickery or deception, so as to constitute a constructive breaking at common law.[41]

(II) *Entry Through Chimney of House.* If a person enters by coming down the chimney of a house, with intent to commit a felony, there is a constructive breaking, and a burglary, for a chimney "is as much closed as the nature of things will permit."[42]

(III) *Entry Procured by Threats or Intimidation.* There is a constructive breaking so as to constitute burglary where a person compels the occupant of a house to open the door by threats or a display of force, and then enters with intent to commit a felony.[43]

(IV) *Opening of Door by Servant or Other Person in the House.* If a servant or other person in a house opens the door for the purpose of letting in a confederate, and the latter enters with intent to commit a felony, there is a constructive breaking, and both are guilty of burglary.[44]

(V) *Entry by "Force, Threats, or Fraud" Under Texas Statute.* In Texas it is declared by statute that the offense of burglary is constituted "by entering a house by force, threats or fraud, at night, or in like manner by enter-

40. *Delaware.*— State *v.* Carter, 1 Houst. Crim. Cas. (Del.) 402.

Massachusetts.—Com. *v.* Lowrey, 158 Mass. 18, 32 N. E. 940.

North Carolina.— State *v.* Mordecai, 68 N. C. 207; State *v.* Johnson, 61 N. C. 186, 93 Am. Dec. 587; State *v.* Henry, 31 N. C. 463.

Ohio.— Ducher *v.* State, 18 Ohio 308.

Pennsylvania.— Johnston *v.* Com., 85 Pa. St. 54, 27 Am. Rep. 622; Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758.

Texas.— Summers *v.* State, 9 Tex. App. 396.

Virginia.—Clarke *v.* Com., 25 Gratt. (Va.) 908.

Wisconsin.—Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870.

England.— Cornwall's Case, 2 East P. C. 486, 2 Str. 881; Lemott's Case, 2 East P. C. 485, J. Kel. 42; 4 Bl. Comm. 226; 1 Hale P. C. 552, 553.

See 8 Cent. Dig. tit. "Burglary," § 9.

False pretenses.— There is a constructive breaking so as to constitute burglary if a person procures the door to be opened by false pretense of business or a friendly visit, and enters immediately or soon after with intent to commit a felony. Com. *v.* Lowrey, 158 Mass. 18, 32 N. E. 940; State *v.* Johnson, 61 N. C. 186, 93 Am. Dec. 587; Johnston *v.* Com., 85 Pa. St. 54, 27 Am. Rep. 622; Lemott's Case, 2 East P. C. 485, J. Kel. 42; and cases cited *supra*, this note. "When a person rings the door-bell of a house, the owner has a right to presume that his visitor calls for the purpose of friendship or business. If, in obedience to the summons, he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner and constitutes a constructive breaking." Johnston *v.* Com., 85 Pa. St. 54, 27 Am. Rep. 622.

Delay in entering.— But in such a case the entry must be made within a reasonable time after the door is opened. State *v.* Henry, 31 N. C. 463, where it was held by a majority of the court that there was no breaking because the prisoner did not enter until after the lapse of some ten or fifteen minutes.

Concealing oneself in a box and thus, by shipment of the box, effecting an entrance into an express car, with intent to steal therein, is a constructive breaking. Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870.

41. Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376; Ducher *v.* State, 18 Ohio 308; Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870.

42. Olds *v.* State, 97 Ala. 81, 12 So. 409; Walker *v.* State, 52 Ala. 376; Donohoo *v.* State, 36 Ala. 281; State *v.* Willis, 52 N. C. 190; State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555; Rex *v.* Brice, R. & R. 334; 4 Bl. Comm. 226; 1 Hale P. C. 552; 1 Hawkins P. C. c. 58, § 4.

Entry at night through a chimney into a log cabin occupied as a dwelling, with intent to steal therein, was held burglary, although the chimney was made of logs and sticks, and was in a state of decay, and was only five and one-half feet high. State *v.* Willis, 52 N. C. 190.

43. State *v.* Foster, 130 N. C. 666, 40 S. E. 209; Rex *v.* Swallow, 2 Russ. C. & M. 8; 1 Hale P. C. 553. And see Clarke *v.* Com., 25 Gratt. (Va.) 908. Where persons, with intent to commit larceny, break into a store, and then, with loaded revolvers pointed at a clerk therein, drive him before them into his sleeping-room opening off of the store, there is a technical breaking into the sleeping-room. State *v.* Foster, 130 N. C. 666, 40 S. E. 209.

44. State *v.* Rowe, 98 N. C. 629, 4 S. E. 506; Clarke *v.* Com., 25 Gratt. (Va.) 908; Cornwall's Case, 2 East P. C. 486, 2 Str. 881; 4 Bl. Comm. 227; 1 Hale P. C. 553; 1 Hawkins P. C. c. 38, § 14.

ing a house during the day, and remaining concealed therein until night, with the intent, in either case, of committing felony or the crime of theft";[45] and it is further declared that the "entry" into a house, within the meaning of the statute, includes every kind of entry but one made by the free consent of the occupant, or of one authorized to give such consent, and that it is not necessary that there shall be any actual breaking except when entry is made in the daytime.[46] It is also declared that the term breaking in the statute means that the entry must be made with actual force, but that the slightest force is sufficient, and that it may be by lifting the latch of a door that is shut, or by raising a window, or entering at a chimney or other unusual place, or by introducing the hand or any instrument to draw out property through an aperture made by the offender for that purpose.[47]

3. Effect of Right to Enter Premises. There is no breaking in entering a house or room, and therefore no burglary, if the person entering has a right to do so, although he may intend to commit and may actually commit a felony, and although he may enter in such a way that there would be a breaking if he had no right to enter.[48] But he is guilty of burglary if he exceeds his rights either with respect to the time of entering or the room into which he enters.[49] And this rule applies not only to entry by servants,[50] but is equally applicable to entry by

45. Tex. Pen. Code, art. 838.
46. Tex. Pen. Code, art. 840.
47. Tex. Pen. Code, art. 842.

Breaking necessary — Entry through open door.— To constitute burglary under this statute, a breaking, actual or constructive, is necessary. The statute does not apply to an entry in the usual way through an open door, without any force against the building or occupant, although with intent to commit a felony or the crime of theft. Matthews *v.* State, 36 Tex. 675; Smith *v.* State, (Tex. Crim. 1901) 60 S. W. 668; St. Louis *v.* State, (Tex. Crim. 1900) 59 S. W. 889; Edwards *v.* State, 36 Tex. Crim. 387, 37 S. W. 438; Costello *v.* State, (Tex. Crim. 1893) 21 S. W. 360; Williams *v.* State, (Tex. App. 1890) 13 S. W. 609; Melton *v.* State, 24 Tex. App. 287, 6 S. W. 303; Hamilton *v.* State, 11 Tex. App. 116. If the entry was through an open door of a store at night but during business hours, in the same manner as other persons enter, the case is not within the statute, although the accused intended to remain concealed until close of the store, and although he committed a theft and afterward broke out of the store. Edwards *v.* State, 36 Tex. Crim. 387, 37 S. W. 438. See also Smith *v.* State, (Tex. Crim. 1901) 60 S. W. 668; St. Louis *v.* State, (Tex. Crim. 1900) 59 S. W. 889.

Slightest force sufficient.—Any breaking by actual force is sufficient, as where an entry is effected by turning a lock or lifting a latch and opening a door, or by opening a closed but unfastened door, etc. Hedrick *v.* State, 40 Tex. Crim. 532, 51 S. W. 252; Wagner *v.* State, (Tex. Crim. 1898) 47 S. W. 372; Parker *v.* State, (Tex. Crim. 1897) 38 S. W. 790; Matthews *v.* State, (Tex. Crim. 1896) 38 S. W. 172; Edwards *v.* State, 36 Tex. Crim. 387, 37 S. W. 438; Sparks *v.* State, 34 Tex. Crim. 86, 29 S. W. 264; Nash *v.* State, 20 Tex. App. 384; Burke *v.* State, 5 Tex. App. 74. Raising the latch of the door of a store, in the usual way, and entering with intent to commit larceny, is a sufficient breaking within the Texas statute, although the store is open for business. Gonzales *v.* State, (Tex. Crim. 1899) 50 S. W. 1018.

Entry by fraud — Unusual place of entry. — An entry is effected by fraud within the meaning of the statute where it is effected by means of a ladder through an upper story window. Rogers *v.* State, 43 Tex. 406. The same is true of an entry of a mill-house by crawling through a small hole under the sill. Knotts *v.* State, (Tex. Crim. 1895) 32 S. W. 532. And of entry of a corn-crib through openings left for throwing in corn. Painter *v.* State, 26 Tex. App. 454, 9 S. W. 774. An unusual place of entry is the same whether applied to a burglary committed in the day or night. Green *v.* State, (Tex. Crim. 1900) 58 S. W. 99. What constitutes an unusual place of entry within the meaning of the statute is a question of fact for the jury. Green *v.* State, (Tex. Crim. 1900) 58 S. W. 99. The mere fact that the accused took off his shoes when he entered through an open door without the consent of any one does not bring the case within the statute. Hamilton *v.* State, 11 Tex. App. 116.

48. State *v.* Moore 12 N. H. 42; Clarke *v.* Com., 25 Gratt. (Va.) 908.
49. Hild *v.* State, 67 Ala. 39; Lowder *v.* State, 63 Ala. 143, 35 Am. Rep. 9.
50. A servant is not guilty of burglary in entering his master's premises, if he has a right to enter by virtue of his employment, although he may intend to commit, and may actually commit, a felony. Lowder *v.* State, 63 Ala. 143, 35 Am. Rep. 9. But he is guilty if he breaks and enters with such intent at a time when he has no right to enter by virtue of his employment, or if he breaks and enters a room in the house into which he has no right to enter. Hild *v.* State, 67 Ala. 39; Lowder *v.* State, 63 Ala. 143, 35 Am. Rep. 9. If a servant has a key to his master's house,

guests or lodgers at a hotel or lodging-house,[51] entry by one of several joint occupants of a room,[52] etc.

4. Consent of Occupant, or His Servant, to the Entry — a. In General. Except in cases of constructive breaking, where an entry is effected by fraud or intimidation,[53] there can be no breaking, and therefore there is no burglary, where the occupant of a house, or an agent or servant having authority, expressly or impliedly invites or consents to the entry.[54] This does not apply, however, where a servant gives consent without authority,[55] or where the wife of the occupant of a building consents to another's entry for an unlawful purpose,[56] or where the entry is into another place than that intended in giving the consent.[57] It is not necessary that the occupant of the house shall protest or object to the entry.[58]

b. Cases of Entrapment. It follows from the above that there is no burglary where the occupant of a house, or his servant or agent by his direction, or a public officer or detective with his consent, opens the door or window to admit a suspect, and thereby consents to the entry, or takes active steps to aid the suspect, or to induce him to enter, although this may be done for the purpose of

or an office in which the master sleeps, and opens the door and enters with intent to steal at a time when he has no right to enter, he is guilty of burglary; but it is otherwise if the servant is in the habit of sleeping there, and he enters for such purpose, and afterward forms the intent to steal. Lowder *v.* State, 63 Ala. 143, 35 Am. Rep. 9. An employee placed on the outside of a house to protect it from fire is not authorized to enter, and he is guilty of burglary if he enters through a window with intent to steal. Morrow *v.* State, (Tex. Crim. 1894) 25 S. W. 284. The same is true of one who is employed to watch his employer's room and protect it from fire, and who enters a separate building used as a storehouse and steals therefrom. Van Walker *v.* State, 33 Tex. Crim. 359, 26 S. W. 507.

51. A guest at a hotel or lodging-house does not commit burglary in entering the bar-room or any other public room, if he has a right to enter the same, although he may intend to commit a felony. State *v.* Moore, 12 N. H. 42. But he is guilty if he breaks into the bar-room after it is closed, with such intent, or if he breaks and enters the room of another guest or lodger with such intent. Colbert *v.* State, 91 Ga. 705, 17 S. E. 840; Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405; State *v.* Clark, 42 Vt. 629. A statute providing that "an entry into a house for the purpose of committing theft, unless the same is effected by the actual breaking, is not burglary when the same is done by a domestic servant or other inhabitant of such house; and a theft committed by such person after entering a house is only punishable as simple theft," does not cover a case where a boarder in a house enters the room of a fellow boarder and steals therein. Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405.

52. Joint occupants of room.— If persons occupy a room jointly, and have the right to enter at any time, neither is guilty of burglary in unlocking the door and entering, although he may enter with intent to steal from the other. Clarke *v.* Com., 25 Gratt. (Va.) 908.

53. See *supra*, II, B, 2, g.

54. Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 477; State *v.* Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284; Turner *v.* State, 24 Tex. App. 12, 5 S. W. 511; Rex *v.* Eggington, 2 B. & P. 508, 2 East P. C. 494, 666, 2 Leach 913, 5 Rev. Rep. 689.

Business buildings — Implied consent.— There is no implied consent that the public may enter a business building outside of business hours and when it is closed, particularly for the purpose of committing larceny therein, and therefore one who enters a closed factory between four and five o'clock in the morning, by undoing a bolt, with intent to steal, is guilty of a burglarious breaking and entry. Kent *v.* State, 84 Ga. 438, 11 S. E. 355, 20 Am. St. Rep. 376. But where a store was lighted up, and the doors were not fastened to exclude the public, but were merely latched in the usual manner, the clerks being in the store ready to attend customers, it was held that one who, before eight in the evening, carefully lifted the latch and entered the store by the door, with intent to commit larceny, and did so, was not guilty of burglary, since there was a license to the public to enter, and there was therefore no breaking. State *v.* Newbegin, 25 Me. 500. See also Edwards *v.* State, 36 Tex. Crim. 387, 37 S. W. 438. But see Gonzales *v.* State, (Tex. Crim. 1899) 50 S. W. 1018.

55. State *v.* Abley, 109 Iowa 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862.

56. Forsythe *v.* State, 6 Ohio 19.

57. Where a person obtains from a warehouseman a key for the purpose of opening and entering an apartment leased to his employer, and uses another key on the same ring to open and enter another apartment, with intent to steal, there is a burglarious breaking and entry. Com. *v.* Ballard, 18 Ky. L. Rep. 782, 38 S. W. 678.

58. Under a statute punishing any person who shall feloniously break into a dwelling-house, and feloniously take away anything of value, although the owner or any other may not be there, it is immaterial whether or not the owner or other person present at the commission of the offense objects or protests.

apprehending and prosecuting him, and although he may intend to commit a felony in the house.[59] But there is no consent where the occupant or his agent merely lies in wait to apprehend the suspect when the latter breaks and enters, instead of taking steps to prevent the entry,[60] or where a servant opens the door to admit a confederate.[61] And one who breaks into a building with intent to commit a felony and does every act essential to a burglarious breaking and entry cannot escape responsibility merely because a detective was with and apparently assisting him.[62] If the detective alone does the breaking and entering, or the breaking, the suspect is not guilty of burglary, for since the detective has no felonious intent no burglary is committed.[63]

C. The Entry — 1. Necessity For an Entry. Burglary is the "breaking and entering" of a dwelling-house, and therefore, both at common law and generally under the statutes, the offense is not committed unless there is an entry as well as a breaking.[64] A statute, however, may punish as burglary a breaking with intent to commit a felony, although there may be no entry.[65]

2. Sufficiency of the Entry — a. In General. The entry must be made into the house, and not merely into some outside part of the house.[66] But it is not

Duncan *v.* Com., 85 Ky. 614, 9 Ky. L. Rep. 142, 4 S. W. 321.

59. *Alabama.*—Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 477.

Illinois.— Love *v.* People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139.

Kansas.— State *v.* Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284.

Michigan.—People *v.* McCord, 76 Mich. 200, 42 N. W. 1106.

Oklahoma.— Roberts *v.* Territory, 8 Okla. 326, 57 Pac. 840.

Texas.— Speiden *v.* State, 3 Tex. App. 156, 30 Am. Rep. 126.

England.— Reg. *v.* Johnson, C. & M. 218, 41 E. C. L. 123; Rex *v.* Eggington, 3 B. & P. 508, 2 East P. C. 494, 666, 2 Leach 913, 5 Rev. Rep. 689.

See 8 Cent. Dig. tit. "Burglary," § 23.

Excess of authority by agent or servant.— The agent or servant must not exceed his authority. Where a clerk in a store who had neither the custody nor the right to admit any one thereto, learning that a person intended to commit a burglary, loaned a detective a key in order to allow a duplicate to be made for the use of the suspect, without the knowledge or consent of the owner of the store, it was held that the clerk's consent to the entry of the store by means of the key could not be imputed to the owner, and that the suspect in using the duplicate key and entering to commit larceny was guilty of burglary. State *v.* Abley, 109 Iowa 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862.

60. *Indiana.*— Thompson *v.* State, 18 Ind. 386, 81 Am. Dec. 364.

Iowa.— State *v.* Abley, 109 Iowa 61, 80 N. W. 225, 77 Am. St. Rep. 520, 46 L. R. A. 862.

Kansas.— State *v.* Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284.

Missouri.— State *v.* Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360.

Nebraska.— State *v.* Sneff, 22 Nebr. 481, 35 N. W. 219.

Texas.— Robinson *v.* State, 34 Tex. Crim. 71, 29 S. W. 40, 53 Am. St. Rep. 701.

Utah.— People *v.* Morton, 4 Utah 407, 11 Pac. 512.

61. See *supra*, II, B, 2, g, (IV).

62. Presence and participation of detective. — State *v.* Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284; State *v.* Jansen, 22 Kan. 498; Robinson *v.* State, 34 Tex. Crim. 71, 29 S. W. 40, 53 Am. St. Rep. 701.

63. People *v.* Collins, 53 Cal. 185; Love *v.* People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139; State *v.* Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360.

Contra.— Com. *v.* Seybert, 4 Pa. Co. Ct. 152.

64. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1; State *v.* McCall, 4 Ala. 643, 39 Am. Dec. 314; State *v.* Fisher, 1 Pennew. (Del.) 303, 41 Atl. 208; State *v.* Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360 [State *v.* Staehlin, 16 Mo. App. 559, seems to the contrary, but it is very meagerly reported]; Reg. *v.* Meal, 3 Cox C. C. 70; Anonymous, 1 Dyer 99*a*; Rex *v.* Hughes, 2 East P. C. 491, 1 Leach 452; Rex *v.* Rust, 1 Moody 183; 4 Bl. Comm. 227; 1 Hale P. C. 555; 1 Hawkins P. C. c. 38, § 3.

Contra.— Fielding's Case, Dyer 99*a*, note 58, Beale Cas. Crim. L. 783.

Breaking inner door without entering.— Although it is burglary at common law to enter an outer door without breaking and then break and enter an inner door with felonious intent, it is not burglary to enter an outer door without breaking and afterward break an inner door without entering. Reg. *v.* Davis, 6 Cox C. C. 369.

65. Entry unnecessary under a statute.— Under a Kentucky statute providing that if any person should break a warehouse with intent to steal, he should be punished, etc., it was held that a person might be punished for breaking a smoke-house with intent to steal meat therefrom, although there was no entry or theft. Mullins *v.* Com., 14 Ky. L. Rep. 569, 20 S. W. 1035.

66. State *v.* McCall, 4 Ala. 643, 39 Am. Dec. 314; Rex *v.* Rust, 1 Moody 183.

Outside blinds.— Breaking and entering

necessary that the party shall get his whole body into the house. The least entry of any part of the body is sufficient, as the entry of the hand, or a finger only, or of the head or foot.[67] If a person enters a chimney of a building with intent to steal in the building there is a sufficient entry, although he does not get into any of the rooms.[68] The term "enter" in a statute defining and punishing burglary is to be given the same meaning as at common law, unless the statute shows a contrary intent.[69]

b. Entry by an Instrument Only. It is not even necessary, in order to constitute burglary, that the entry shall be by any part of the body; it may be by an instrument, as in a case where a hook or other instrument is put in with intent to take out goods, or a pistol or gun with intent to kill.[70] But it is necessary that the instrument shall be put within the house,[71] unless it is otherwise provided by statute;[72] and that it shall be inserted for the immediate purpose of committing the felony or aiding in its commission, and not merely for the purpose of making an opening to admit the hand or body, or in other words for the sole purpose of breaking.[73]

within outside blinds is not a sufficient entry where the window sash is not broken or opened. State *v.* McCall, 4 Ala. 643, 39 Am. Dec. 314.

Shutter-box.— Breaking and entering a shutter-box projecting from the outside of a shop window is not a sufficient breaking and entry of the shop. Rex *v.* Paine, 7 C. & P. 135, 32 E. C. L. 538.

67. *Alabama.*—Fisher *v.* State, 43 Ala. 17; State *v.* McCall, 4 Ala. 643, 39 Am. Dec. 314.

Illinois.— Feister *v.* People, 125 Ill. 348, 17 N. E. 748.

Kentucky.— Kelley *v.* Com., 21 Ky. L. Rep. 1306, 54 S. W. 949.

Massachusetts.— Com. *v.* Glover, 111 Mass. 395.

Texas.— It is so in Texas by express provision of the statute. Tex. Pen. Code, art. 841. And see Franco *v.* State, 42 Tex. 276; Nash *v.* State, 20 Tex. App. 384 (incorrectly reported as Harrison *v.* State, in 20 Tex. App. 387, 54 Am. Rep. 529); Anderson *v.* State, 17 Tex. App. 305; Burke *v.* State, 5 Tex. App. 74; Martin *v.* State, 1 Tex. App. 525.

England.— Rex *v.* Perkes, 1 C. & P. 300, 12 E. C. L. 180; Reg. *v.* O'Brien, 4 Cox C. C. 398; Rex *v.* Gibbons, 2 East P. C. 490; Rex *v.* Davis, R. & R. 371; Rex *v.* Bailey, R. & R. 253; 4 Bl. Comm. 227; 1 Hale P. C. 555; 1 Hawkins P. C. c. 38, § 7.

Inside shutters.—Breaking and entering the window of a house is a sufficient entry, although inside shutters are not opened. Rex *v.* Bailey, R. & R. 253. But *compare* Rex *v.* Rust, 1 Moody 183.

Entry of the finger, or the forepart only thereof, on breaking a pane of glass in a window with felonious intent is a sufficient entry. Rex *v.* Davis, R. & R. 371.

Entry of the arm for the purpose of opening an inner shutter, after breaking the window, is sufficient, although the shutter is not opened. Rex *v.* Perkes, 1 C. & P. 300, 12 E. C. L. 180.

Pushing up a trap-door in a floor a foot is sufficient to constitute a burglarious entry. Nash *v.* State, 20 Tex. App. 384 (incorrectly reported as Harrison *v.* State, in 20 Tex. App. 387, 54 Am. Rep. 529).

Intent.— Where a part of the body enters, as hand or arm, it is none the less burglary because it is merely in the act of breaking, and to make an opening for the body, and not for the immediate purpose of committing the intended felony. See *infra*, II, G, 4.

68. Olds *v.* State, 97 Ala. 81, 12 So. 409.

69. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1.

70. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1; State *v.* McCall, 4 Ala. 643, 39 Am. Dec. 314; State *v.* Crawford, 8 N. D. 539, 80 N. W. 193, 73 Am. St. Rep. 772, 46 L. R. A. 312; 4 Bl. Comm. 227; 1 Hale P. C. 555; 1 Hawkins P. C. c. 38, § 7.

The term "enter" in a statute, since it is to be given the same meaning as at common law, unless a contrary intent appears, includes entry by an instrument for the purpose of committing a felony. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1.

Boring into corn-crib or granary to steal corn.— One who, intending to steal shelled corn or wheat, bores a hole through the floor or side of a corn-crib or granary from the outside, so that the auger enters, and then draws the corn or wheat into a sack below, is guilty of burglary under a statute making it burglary to break into and enter any building in which goods are kept, with intent to steal. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1. And see State *v.* Crawford, 8 N. D. 539, 80 N. W. 193, 73 Am. St. Rep. 772, 46 L. R. A. 312.

71. Shooting into a house with intent to kill is not burglary, unless made so by statute, if no part of the weapon is within the house. Resolution, And. 114, Beale Crim. Cas. 782.

72. In Texas, by express statutory provision, the entry "may be constituted by the discharge of fire-arms or other deadly missile into the house, with intent to injure any person therein." Tex. Pen. Code, art. 841.

73. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1; Roberts' Case, 2 East P. C. 487, Car. C. L. 293; Rex *v.* Hughes, 2 East P. C. 491, 1 Leach 452; Rex *v.* Rust, 1 Moody 183. Where the prisoner bored a hole through the door of a house with an auger near one of the

D. The Time of Breaking and Entering — 1. In General. At common law burglary is not committed at all unless the breaking and entering are both in the night-time; and this is also true under statutes punishing burglary, except when there is a provision to the contrary.[74] In many jurisdictions, however, there are statutes which also expressly punish as burglary breaking and entering in the daytime.[75]

2. What Constitutes "Night-Time." In the absence of statutory provision to the contrary, the "night-time," within the definition of burglary, is, as was held at common law, that period between sunset and sunrise during which there is not daylight enough by which to discern a man's face.[76] In some jurisdictions, how-

bolts, but it did not appear that any instrument, except the point of the auger, or any part of the prisoner's body, was within the house, it was held that there was not such an entry as to constitute burglary, although there was a breaking. Rex *v.* Hughes, 2 East P. C. 491, 1 Leach C. C. 452. But where a person, intending to steal shelled corn, bored a hole with an auger through the floor of a corn-crib, the auger penetrating to the inside, and thus drew the corn into a sack, it was held that there was a sufficient entry to constitute burglary, as the entry by the auger was not merely for the purpose of effecting an entry of the body or another instrument, but for the immediate purpose of stealing the corn. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1. And see State *v.* Crawford, 8 N. D. 539, 80 N. W. 193, 73 Am. St. Rep. 772, 46 L. R. A. 312.

74. *California.*— People *v.* Griffin, 19 Cal. 578.

Connecticut.—State *v.* Morris, 47 Conn. 179.

Delaware.— State *v.* Fisher, 1 Pennew. (Del.) 303, 41 Atl. 208.

Michigan.—People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771.

Mississippi.— Thomas *v.* State, 5 How. (Miss.) 20.

Nebraska.— *In re* McVey, 50 Nebr. 481, 70 N. W. 51.

New Hampshire.— State *v.* Bancroft, 10 N. H. 105.

North Carolina.— State *v.* McKnight, 111 N. C. 690, 16 S. E. 319; State *v.* Whit, 49 N. C. 349; State *v.* Jim, 7 N. C. 3.

Ohio.— Adams *v.* State, 31 Ohio St. 462.

Texas.— Levine *v.* State, 22 Tex. App. 683, 3 S. W. 660.

Utah.— State *v.* Miller, (Utah 1902) 67 Pac. 790.

Virginia.— Com. *v.* Weldon, 4 Leigh (Va.) 652.

England.— 4 Bl. Comm. 224; 1 Hale P. C. 549, 550; 1 Hawkins P. C. c. 38, § 2; 3 Inst. 63.

See 8 Cent. Dig. tit. "Burglary," § 13.

Entry consummated after daylight.— An indictment for nocturnal burglary is sustained by proof of any breaking and entering during the night-time, although the entry may not have been fully consummated until after daylight. Com. *v.* Glover, 111 Mass. 395.

Larceny in daytime after nocturnal entry. — If a house is entered in the night-time with intent to commit larceny therein, the fact that it is daytime when the goods are stolen and carried away does not prevent the offense from being burglary. People *v.* Gibson, 58 Mich. 368, 25 N. W. 316.

75. See People *v.* Barnhart, 59 Cal. 381; State *v.* Neddo, 92 Me. 71, 42 Atl. 253; Butler *v.* People, 4 Den. (N. Y.) 68; Davis *v.* State, 3 Coldw. (Tenn.) 77.

Under the Georgia statute burglary may be committed either in the daytime or in the night-time, and no distinction is made with respect to the punishment imposed. Ga. Crim. Code (1895), §§ 149, 150. See Jones *v.* State, 63 Ga. 141; Bethune *v.* State, 48 Ga. 505.

Under the Texas statute "the offense of burglary is constituted by entering a house by force, threats or fraud, at night, or in like manner by entering a house during the day and remaining concealed therein until night, with the intent, in either case, of committing felony or the crime of theft;" and "he is also guilty of burglary who, with intent to commit a felony or theft, by breaking, enters a house in the day time." Tex. Pen. Code, art. 839. Actual breaking is not necessary, except when the entry is made in the daytime. Tex. Pen. Code, art. 840. Under this statute where an actual breaking is shown it is altogether immaterial whether the entry was by night or by day. State *v.* Robertson, 32 Tex. 159; Shaffer *v.* State, (Tex. Crim. 1901) 65 S. W. 1072; Wilks *v.* State, (Tex. Crim. 1899) 51 S. W. 902; Sampson *v.* State, (Tex. Crim. 1892) 20 S. W. 708; Finlan *v.* State, (Tex. App. 1890) 13 S. W. 866; Buchanan *v.* State, 24 Tex. App. 195, 5 S. W. 847; Bravo *v.* State, 20 Tex. App. 188.

76. *California.*— People *v.* Griffin, 19 Cal. 578.

Connecticut.—State *v.* Morris, 47 Conn. 179.

Mississippi.— Thomas *v.* State, 5 How. (Miss.) 20.

New Hampshire.— State *v.* Bancroft, 10 N. H. 105.

North Carolina.— State *v.* McKnight, 111 N. C. 690, 16 S. E. 319.

Vermont.— State *v.* Clark, 42 Vt. 629.

Wisconsin.— Klieforth *v.* State, 88 Wis. 163, 59 N. W. 507, 43 Am. St. Rep. 875.

England.— 4 Bl. Comm. 224; 1 Hale P. C. 550, 551; 1 Hawkins P. C. c. 38, § 2; 3 Inst. 63.

Other light than daylight.— It is not the less night-time, within the definition of bur-

ever, night-time is defined by the statutes, the definitions varying in the different jurisdictions.[77]

3. Breaking and Entering at Different Times. The breaking and entering need not be at the same time, nor even on the same night. A breaking on one night and entry on another night will constitute burglary, if both are done with intent to commit a felony.[78]

E. The Character of the Premises — 1. In General. At common law burglary is an offense, not against the property merely as property, but against the security of the habitation, and to constitute the offense, the breaking and entering must be of the dwelling-house of another,[79] except in the case of breaking and entering a church[80] or a walled town.[81] The statutes generally punish specifically the breaking and entering of dwelling-houses, but also go further, and punish the breaking and entering of other places, as shops, warehouses, stores, buildings, railroad cars, etc.[82]

2. Dwelling-Houses — a. In General. In order that a house may come within the common-law definition of burglary it must be in fact the dwelling-house of another at the time of the breaking and entry; and the same is true under a statute punishing the breaking and entering of a dwelling-house.[83] The charac-

glary, because the street lamps, or reflection from the snow, or the moon, or all together, give sufficient light to discern a man's face, but the test is, whether there is sufficient daylight. State *v.* Morris, 47 Conn. 179. And see Thomas *v.* State, 5 How. (Miss.) 20; State *v.* McKnight, 111 N. C. 690, 16 S. E. 319.

77. Statutory definitions of "night-time." — In England night-time is defined by statute as from nine in the evening to six in the morning. 24 & 25 Vict. c. 96, § 1. In California and Minnesota it is defined from sunset to sunrise. Cal. Pen. Code, § 463; People *v.* Griffin, 19 Cal. 578; Minn. Pen. Code, § 387. In Texas by statutory provision, the term "daytime" means "any time of the twenty-four hours from thirty minutes before sunrise until thirty minutes after sunset." Tex. Pen. Code, art. 844. And night-time is from thirty minutes after sunset until thirty minutes before sunrise. Laws *v.* State, 26 Tex. App. 643, 10 S. W. 220.

78. Com. *v.* Glover, 111 Mass. 395; Rex *v.* Jordan, 7 C. & P. 432, 32 E. C. L. 693; Rex *v.* Smith, R. & R. 309; 4 Bl. Comm. 226; 1 Hale P. C. 551, 553. See also People *v.* Gibson, 58 Mich. 368, 25 N. W. 316.

79. Fuller *v.* State, 48 Ala. 273; *Ex p.* Vincent, 26 Ala. 145, 62 Am. Dec. 714; Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87; Hollister *v.* Com., 60 Pa. St. 103; Rex *v.* Lyons, 2 East P. C. 497, 1 Leach 221; Rex *v.* Martin, R. & R. 80; 4 Bl. Comm. 224; 1 Hale P. C. 550, 556; and other cases cited *infra*, II, E, 2.

80. See *infra*, II, E, 5.

81. 4 Bl. Comm. 224; 1 Hale P. C. 556; 1 Hawkins P. C. c. 38, § 17.

A burial-vault is not the subject of burglary at common law. People *v.* Richards, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373.

82. See *infra*, II, E, 3.

The Penal Code of Texas, prior to 1899, made no distinction between burglary of dwelling-houses and other houses, but defined burglary as the breaking and entering or entering of "a house," and defined the term "house" as including "any building or structure erected for public or private use, . . . of whatever material it may be constructed." Tex. Pen. Code, arts. 838, 839, 843. But in 1899 the statute was amended by adding sections 839*a*, 845*a*, and 845*b*, defining "the offense of burglary of a private residence as entering a private residence by force, threats or fraud, at night, or in any manner by entering a private residence at any time, either day or night, and remaining concealed therein until night, with intent, in either case, of committing a felony or the crime of theft;" declaring an intention to make this a separate offense and not to affect the provisions of the penal code as to other premises; and imposing a specific punishment. Tex. Acts (1899), p. 318. This amendment makes it a separate and distinct offense to burglarize a private residence at night. It applies only to burglary at night, and burglary of a private residence in the daytime is still governed by the former provisions of the penal code. Williams *v.* State, (Tex. Crim. 1901) 62 S. W. 1057 [*affirming* (Tex. Crim. 1901) 61 S. W. 395, and *overruling* Osborn *v.* State, (Tex. Crim. 1901) 61 S. W. 491]. See also Fonville *v.* State, (Tex. Crim. 1901) 62 S. W. 573; Cleland *v.* State, (Tex. Crim. 1901) 61 S. W. 492; Harvey *v.* State, (Tex. Crim. 1901) 61 S. W. 492.

83. *Alabama.*— Fuller *v.* State, 48 Ala. 273; *Ex p.* Vincent, 26 Ala. 145, 62 Am. Dec. 714.

Mississippi.— Scott *v.* State, 62 Miss. 781.

Missouri.— State *v.* Clark, 89 Mo. 423 1 S. W. 332.

New York.— Quinn *v.* People, 71 N. Y. 561. 27 Am. Rep. 87.

North Carolina.— State *v.* Potts, 75 N. C. 129.

Pennsylvania.— Hollister *v.* Com., 60 Pa. St. 103.

ter of the house is generally immaterial if it is occupied as a dwelling.[84] The house must be occupied as a dwelling-house, and not merely be suitable or intended for such purpose. The owner or occupant, or some member of his family, or a servant, must sleep there.[85] If it is so occupied the temporary absence of the occupant will not prevent it from being the subject of burglary as a dwelling-house;[86] but a house, although furnished as a dwelling-house, loses its character as such for the purposes of burglary, if the occupant leaves it without the intention to return.[87] Occasionally sleeping in a house is not enough to make it a dwelling-house.[88] In some states, by statute, dwelling-houses are the subject of burglary, and may be described as such, whether they are occupied or not.[89]

b. Outhouses and Rooms. Stables, smoke-houses, kitchens, shops, offices, or other outhouses, if they are within the curtilage, and the cellar and all rooms of a dwelling-house are regarded as parts of the dwelling-house, so that it is burglary to break and enter the same with felonious intent, although there may be no entry into the dwelling-house itself, or into those rooms of the dwelling-house in which the occupants sleep; and an outhouse is within the curtilage, so as to

South Carolina.—State *v.* Sampson, 12 S. C. 567, 32 Am. Rep. 513.

England.— Rex *v.* Lyons, 2 East P. C. 497, 1 Leach 221; Rex *v.* Martin, R. & R. 80; 4 Bl. Comm. 224; 1 Hale P. C. 550, 556.

See 8 Cent. Dig. tit. "Burglary," § 15.

The term dwelling-house in a statute defining and punishing burglary is to be given the same meaning as at common law unless a contrary intent on the part of the legislature appears. *Ex p.* Vincent, 26 Ala. 145, 62 Am. Dec. 714; Pitcher *v.* People, 16 Mich. 142; Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87.

84. The cabin of a vessel may be a dwelling-house. Rex *v.* Humphrey, 1 Root (Conn.) 63.

A log house, described in an indictment as being without flue or fireplace, and with its only window boarded up, built for the use of wood-choppers when working near by, and in which several persons are temporarily staying with the consent of the owner, sleeping and eating there, is a dwelling-house. State *v.* Weber, 156 Mo. 257, 56 S. W. 893.

Tent or booth.— It has been said, however, that a tent or booth erected at a market or fair is not the subject of burglary at common law, although the owner may lodge therein, "for the law regards thus highly nothing but permanent edifices; . . . and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances." 4 Bl. Comm. 226.

85. *Alabama.*—Fuller *v.* State, 48 Ala. 273.

Illinois.— Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809.

Mississippi.— Scott *v.* State, 62 Miss. 781.

Missouri.—State *v.* Meerchouse, 34 Mo. 344, 86 Am. Dec. 109; State *v.* Williams, 12 Mo. App. 591.

North Carolina.—State *v.* Jenkins, 50 N. C. 430.

England.— Thompson's Case, 2 East P. C. 498, 2 Leach 893; Harris' Case, 2 East P. C. 498; 2 Leach 701; Rex *v.* Lyons, 2 East P. C. 497, 1 Leach 221; Rex *v.* Fuller, 1 Leach 222, note *a*; Rex *v.* Martin, R. & R. 80; 4 Bl. Comm. 225.

See 8 Cent. Dig. tit. "Burglary," § 19.

House prepared, but not yet resided in.— In a Pennsylvania case it was held that a house in which the owner had put his furniture, intending to reside there, and which he visited occasionally, was a dwelling-house, and the subject of burglary, although he had never resided there. Com. *v.* Brown, 3 Rawle (Pa.) 207. But the weight of authority is to the contrary. Thompson's Case, 2 East P. C. 498, 2 Leach 893; Rex *v.* Harris, 2 East P. C. 498, 2 Leach 808. And see Scott *v.* State, 62 Miss. 781; State *v.* Jenkins, 50 N. C. 430.

Taking meals in a house does not make it a dwelling-house, so as to be the subject of burglary. Rex *v.* Martin, R. & R. 80.

86. *Alabama.*— *Ex p.* Vincent, 26 Ala. 145, 62 Am. Dec. 714.

Georgia.— Harrison *v.* State, 74 Ga. 801.

Illinois.— Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809.

Missouri.—State *v.* Meerchouse, 34 Mo. 344, 86 Am. Dec. 109.

Pennsylvania.— Com. *v.* Brown, 3 Rawle (Pa.) 207.

West Virginia.— State *v.* Williams, 40 W. Va. 268, 21 S. E. 721.

England.— 4 Bl. Comm. 225; 1 Hale P. C. 556; 1 Hawkins P. C. c. 38, § 18 [*citing* Anonymous, Moore, 660, pl. 903].

87. Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809; Scott *v.* State, 62 Miss. 781; State *v.* Meerchouse, 34 Mo. 344, 86 Am. Dec. 109; Rex *v.* Flannagan, R. & R. 140.

88. Occasional occupancy.— A house visited about once or twice a year by its owner to eat and sleep in for about a week, and which is unoccupied during the rest of the year, is not a dwelling-house while unoccupied. Scott *v.* State, 62 Miss. 781. See also State *v.* Jenkins, 50 N. C. 430. *Compare* Com. *v.* Brown, 3 Rawle (Pa.) 207.

89. See State *v.* Dan, 18 Nev. 345, 4 Pac. 336. State *v.* Williams, 40 W. Va. 268, 21 S. E. 721.

come within this rule, if it is parcel of or appurtenant to the dwelling and connected therewith by being under the same roof or within the same inclosure,[90] or if it is situated and used as such outhouses usually are, whether there is any actual common inclosure or not.[91] And it makes no difference that there is no direct communication between the dwelling and the place entered.[92] The rule, however, does not apply to outhouses which are not within the curtilage, and an outhouse is not within the curtilage if it is separated from the dwelling by a public highway, or if it is otherwise beyond the common inclosure or cluster of buildings.[93] The term "dwelling-house" in a statute, since it is to be given the same meaning as at common law, includes outhouses within the curtilage.[94] In statutes defining and punishing burglary, the words "buildings within the curti-

90. *Alabama.*— Wait *v.* State, 99 Ala. 164, 13 So. 584; Fuller *v.* State, 48 Ala. 273; Fisher *v.* State, 43 Ala. 17; State *v.* McCall, 4 Ala. 643, 39 Am. Dec. 314.

Kentucky.— Price *v.* Com., 15 Ky. L. Rep. 837, 25 S. W. 1062; Mitchell *v.* Com., 88 Ky. 349, 10 Ky. L. Rep. 910, 11 S. W. 209.

Maine.— State *v.* Shaw, 31 Me. 523.

Michigan.— People *v.* Aplin, 86 Mich. 393, 49 N. W. 148; Pitcher *v.* People, 16 Mich. 142.

Missouri.— State *v.* Hecox, 83 Mo. 531.

Nebraska.— Hahn *v.* State, 60 Nebr. 487, 83 N. W. 674.

New Jersey.— Edwards *v.* Derrickson, 28 N. J. L. 39.

New York.— See Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87.

North Carolina.— State *v.* Mordecai, 68 N. C. 207; State *v.* Whit, 49 N. C. 349; State *v.* Wilson, 2 N. C. 242; State *v.* Twitty, 2 N. C. 102.

South Carolina.— State *v.* Johnson, 45 S. C. 483, 23 S. E. 619; State *v.* Sampson, 12 S. C. 567, 32 Am. Rep. 513.

Tennessee.— Fletcher *v.* State, 10 Lea (Tenn.) 338.

England.— Rex *v.* Gibson, 2 East P. C. 508, 1 Leach 357; Brown's Case, 2 East P. C. 487, 2 Leach 1016 note; Rex *v.* Clayburn, R. & R. 268; Rex *v.* Lithgo, R. & R. 265; Rex *v.* Chalking, R. & R. 248; Rex *v.* Hancock, R. & R. 127; 4 Bl. Comm. 225; 1 Hale P. C. 558; 1 Hawkins P. C. c. 38, § 12.

New South Wales.— Reg. *v.* Nichol, 1 Legge (New South Wales) 233, holding a communicating office a part of a dwelling-house.

See 8 Cent. Dig. tit. "Burglary," § 16.

"A dwelling house is the apartment, building, or cluster of buildings, in which a man with his family resides." Fuller *v.* State, 48 Ala. 273. "The capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall." 4 Bl. Comm. 225.

A cellar or basement hallway under a dwelling-house, if it is under the control of the occupants of the house, is a part of the dwelling-house, so as to make it burglary to break and enter the same, and it makes no difference that there is no internal communication, and the entry is from the outside. Mitchell *v.* Com., 88 Ky. 349, 10 Ky. L. Rep. 910, 11 S. W. 209; Hahn *v.* State, 60 Nebr. 487, 83 N. W. 674. But this is not true of an underground basement or cellar which is used merely for storage of goods, and which is neither connected internally with the house nor under the control of the occupant of the house. State *v.* Clark, 89 Mo. 423, 1 S. W. 332.

91. State *v.* Wilson, 2 N. C. 242; State *v.* Twitty, 2 N. C. 102; Rex *v.* Brown, 2 East P. C. 493. *Compare* State *v.* Jake, 60 N. C. 80.

92. Direct communication with dwelling not necessary.— Mitchell *v.* Com., 88 Ky. 349, 10 Ky. L. Rep. 910, 11 S. W. 209; Hahn *v.* State, 60 Nebr. 487, 83 N. W. 674; Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87; Rex *v.* Gibson, 2 East P. C. 508, 1 Leach 357. Although the only communication between a store and the dwelling rooms of the occupant over it was through a fenced yard and by stairs on the outside, the store was held a part of the dwelling-house under a statute providing that no building should be deemed a dwelling-house or any part of a dwelling-house, unless it should be joined to, immediately connected with, and a part of the dwelling-house. Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87.

93. *Michigan.*— Curkendall *v.* People, 36 Mich. 309.

New York.— People *v.* Parker, 4 Johns. (N. Y.) 424.

North Carolina.— State *v.* Jake, 60 N. C. 80; State *v.* Jenkins, 50 N. C. 430; State *v.* Langford, 12 N. C. 253.

South Carolina.— State *v.* Anderson, 24 S. C. 109; State *v.* Sampson, 12 S. C. 567, 32 Am. Rep. 513; State *v.* Ginns, 1 Nott & M. (S. C.) 583.

Tennessee.— Palmer *v.* State, 7 Coldw. (Tenn.) 82; Armour *v.* State, 3 Humphr. (Tenn.) 378.

England.— Rex *v.* Westwood, R. & R. 368; 4 Bl. Comm. 225.

Entering the back of an outhouse may be burglary if the front of the same is within the common inclosure or curtilage, although the back of it, into which the entry is made, may be outside of the inclosure. Fisher *v.* State, 43 Ala. 17; State *v.* Whit, 49 N. C. 349.

94. Pitcher *v.* People, 16 Mich. 142, and cases cited in the preceding notes. See also Palmer *v.* State, 7 Coldw. (Tenn.) 82, where it was held that the term "house" in a statute punishing "breaking open the house of

lage," or "outhouses within the curtilage," etc., are to be given the same meaning as at common law.[95] In some states the statutes expressly define what outhouses shall be deemed part and parcel of the dwelling-house for the purposes of burglary.[96]

c. Occupancy in Part For Other Purposes. If a house is used by the occupant or a member of his family as a dwelling, it is the subject of burglary, notwithstanding it may also be used for other purposes, as for a shop, warehouse, store, or office; and in such a case the breaking and entering of any part of the house is a breaking and entering of the dwelling-house, although the occupant may not sleep in the particular room broken and entered.[97] The fact that there is no direct internal communication between the room in which the occupant sleeps and the room broken and entered is immaterial.[98] The building, however, must be used habitually, and not merely occasionally as a place to sleep.[99]

d. Occupancy of Servants. If a person habitually sleeps in a house, it is none the less a dwelling-house within the definition of burglary because he is merely a servant of the owner or occupant.[1] And this is true, by the weight of

another," means the same as "dwelling-house" at common law, and does not include an outhouse unless it is within the curtilage.

95. Wait *v.* State, 99 Ala. 164, 13 So. 584; Fisher *v.* State, 43 Ala. 17.

The section of the Kentucky statute punishing the breaking and entering of any dwelling-house or "any outhouse belonging to or used with any dwelling-house," applies to such outhouses as are used in connection with a dwelling-house. It does not include a barn in a field, at a distance of one hundred yards or more from the dwelling-house, and used for the purpose of storing tobacco, corn, wheat, or other product of the farm. Whalen *v.* Com., 17 Ky. L. Rep. 921, 32 S. W. 1095; White *v.* Com., 87 Ky. 454, 10 Ky. L. Rep. 422, 9 S. W. 303. But see McHatton *v.* Com., 7 Ky. L. Rep. 47. It includes, however, a chicken-house on the same lot as the dwelling-house, and owned and used by the same person. Price *v.* Com., 15 Ky. L. Rep. 837, 25 S. W. 1062.

96. A statute punishing the breaking and entering of a dwelling-house or any "houses, outhouses, buildings, sheds and erections, which are within two hundred yards of it, and are appurtenant to it" does not apply to a mill in which no one sleeps, seventy-five yards from the owner's dwelling-house, and separated from it by a public highway, unless it is proved to be appurtenant to the dwelling-house. State *v.* Sampson, 12 S. C. 567, 32 Am. Rep. 513.

97. *Alabama.*—*Ex p.* Vincent, 26 Ala. 145, 62 Am. Dec. 714.

Michigan.— People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046; People *v.* Griffin, 77 Mich. 585, 43 N. W. 1061; Moore *v.* People, 47 Mich. 639, 11 N. W. 415.

Missouri.— State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34.

New York.— Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87; People *v.* Snyder, 2 Park. Crim. (N. Y.) 23; Robertson's Case, 4 City Hall Rec. (N. Y.) 63. *Compare In re* Mills, 3 City Hall Rec. (N. Y.) 192; *In re* Jones, 1 City Hall Rec. (N. Y.) 183.

North Carolina.— State *v.* Pressley, 90 N. C. 730; State *v.* Williams, 90 N. C. 724, 47 Am. Rep. 541; State *v.* Potts, 75 N. C. 129; State *v.* Outlaw, 72 N. C. 598; State *v.* Mordecai, 68 N. C. 207.

United States.— U. S. *v.* Johnson, 2 Cranch C. C. (U. S.) 21, 26 Fed. Cas. No. 15,485.

England.— Turner's Case, 2 East P. C. 492, 1 Leach 342; Rex *v.* Stock, 2 Leach 1015, R. & R. 138, 2 Taunt. 339, 11 Rev. Rep. 605.

Stores, etc., occupied also as dwellings.— A two-story building, the front room of the down-stairs portion of which is used as a store, and the back room of the same story as a sleeping apartment by the proprietor, and the up-stairs rooms of which are used as sleeping-rooms for the clerks in the store, all the occupants of which are single men, who take their meals out, and have their washing done out, is a dwelling-house, both at common law and under a statute punishing the breaking and entering of a dwelling-house. *Ex p.* Vincent, 26 Ala. 145, 62 Am. Dec. 714. See also Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87. Breaking and entering a store-room, off of which opens an occupied sleeping apartment, the door between being open, is within a statute making it burglary in the first degree when the offense is committed "in a dwelling-house or in a room used as a sleeping apartment in any building," while actually occupied. State *v.* Foster, 130 N. C. 666, 40 S. E. 209.

98. State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34; Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87; People *v.* Snyder, 2 Park. Crim. (N. Y.) 23; Robertson's Case, 4 City Hall Rec. (N. Y.) 63. *Compare* People *v.* Van Dam, 107 Mich. 425, 65 N. W. 277; State *v.* Clark, 89 Mo. 423, 1 S. W. 332.

99. State *v.* Jenkins, 50 N. C. 430; Rex *v.* Davis, 2 East P. C. 499, 2 Leach 876.

1. State *v.* Pressley, 90 N. C. 730; State *v.* Williams, 90 N. C. 724, 47 Am. Rep. 541; State *v.* Potts, 75 N. C. 129; State *v.* Outlaw, 72 N. C. 598; State *v.* Jake, 60 N. C. 80; U. S. *v.* Johnson, 2 Cranch C. C. (U. S.) 21, 26 Fed. Cas. No. 15,485; Turner's Case, 2 East P. C. 492, 1 Leach 342; Rex *v.* Stock, 2 Leach 1015, R. & R. 138, 2 Taunt. 339, 11 Rev. Rep. 605; Rex *v.* Westwood, R. & R. 368; Rex *v.* Gibbons, R. & R. 328.

authority, although he may sleep there merely as a watchman and for the purpose of protecting the property.[2] He must sleep there habitually, however, and not merely occasionally.[3]

e. Apartment or Tenement Houses. In an apartment or tenement house each apartment or suite of rooms is the dwelling-house of the occupant, within the definition of burglary.[4] The same was true under the English common law of the chambers in an inn of court or a college.[5] And the occupant of one apartment may be guilty of burglary in breaking and entering another.[6]

f. Hotels, Boarding-Houses, and Lodgings. Hotels and boarding-houses, and houses in which rooms are let to lodgers, are undoubtedly dwelling-houses, so as to make it burglary to break and enter an outer door with felonious intent, or to enter an open outer door, and break and enter an inner door with such intent.[7]

3. Shops, Stores, Warehouses, and Other Buildings and Structures — a. In General. A shop, store, warehouse, office, or other building or structure, used for business purposes or otherwise, is not the subject of burglary in the absence of a statute making it so,[8] unless it is also occupied as a dwelling, so as to be a dwelling-house,[9] or unless it is within the curtilage of a dwelling-house, so as to constitute a part thereof,[10] as explained in preceding sections.

b. Under the Statutes — (I) *In General.* Perhaps in all jurisdictions, however, the offense of burglary has been extended by express statutory provisions, so as to include the breaking and entering, or the entering without breaking, with intent to steal, or to commit any other felony, of buildings or structures which are not dwelling-houses, nor in any way connected with a dwelling-house. These statutes are to be strictly construed, and extend to such structures only as come clearly and strictly within their meaning.[11] Under a statute punishing the

The fact that the servant sleeping habitually in a storehouse does not take his meals or board with the owner of the store is immaterial. State *v.* Pressley, 90 N. C. 730.

As to whether the ownership must be alleged in the master or the servant see *infra*, IV, D, 11, c, (III).

2. State *v.* Williams, 90 N. C. 724, 47 Am. Rep. 541; State *v.* Outlaw, 72 N. C. 598; U. S. *v.* Johnson, 2 Cranch C. C. (U. S.) 21, 26 Fed. Cas. No. 15,485; Rex *v.* Gibbons, R. & R. 328.

Contra.— State *v.* Potts, 75 N. C. 129; Rex *v.* Davis, 2 East P. C. 499, 2 Leach 876; Rex *v.* Flannagan, R. & R. 140.

3. State *v.* Jenkins, 50 N. C. 430; Rex *v.* Davis, 2 East P. C. 499, 2 Leach 876.

4. Mason *v.* People, 26 N. Y. 200; People *v.* Bush, 3 Park. Crim. (N. Y.) 552; Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405; Turner's Case, 2 East P. C. 492, 1 Leach 342.

5. 4 Bl. Comm. 225; 1 Hale P. C. 556.

6. See *supra*, II, B, 2, e.

7. *California.*— People *v.* St. Clair, 38 Cal. 137.

Georgia.— Colbert *v.* State, 91 Ga. 705, 17 S. E. 840; Jones *v.* State, 75 Ga. 825.

Texas.— Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405.

Vermont.— State *v.* Clark, 42 Vt. 629.

Washington.— State *v.* Burton, (Wash. 1902) 67 Pac. 1097.

England.— Rogers's Case, 2 East P. C. 506, 1 Leach 89; Carrell's Case, 2 East P. C. 506, 1 Leach 272; Turner's Case, 2 East P. C. 492, 1 Leach 342.

As to whether the ownership should be alleged in the innkeeper or proprietor, or in the guest or lodger, as the case may be, see *infra*, IV, D, 11.

8. *New Jersey.*— Conners *v.* State, 45 N. J. L. 340.

New York.— People *v.* Parker, 4 Johns. (N. Y.) 424; *In re* Mills, 3 City Hall Rec. (N. Y.) 192; *In re* Jones, 1 City Hall Rec. (N. Y.) 183.

North Carolina.— State *v.* Dozier, 73 N. C. 117; State *v.* Jenkins, 50 N. C. 430; State *v.* Langford, 12 N. C. 253.

Pennsylvania.— Hollister *v.* Com., 60 Pa. St. 103.

South Carolina.— State *v.* Anderson, 24 S. C. 109; State *v.* Ginns, 1 Nott & M. (S. C.) 583.

Tennessee.— Mathis *v.* State, 3 Heisk. (Tenn.) 127; Armour *v.* State, 3 Humphr. (Tenn.) 378.

England.—Rex *v.* Eggington, 2 B. & P. 508, 2 East P. C. 494, 666, 2 Leach 913, 5 Rev. Rep. 689; Rex *v.* Martin, R. & R. 80.

See 8 Cent. Dig. tit. "Burglary," § 17; and *supra*, II, E, 2, a.

9. See *supra*, II, E, 2, c.

10. See *supra*, II, E, 2, b.

11. Where the only statute on the subject punishes any person who, with intent to commit a felony, "shall in the night time enter without breaking, or in the day time break and enter," any warehouse, storehouse, etc., an indictment for burglary will not lie for breaking and entering a warehouse or storehouse in the night-time. Com. *v.* Carrol, 8 Mass. 490.

breaking and entering of a shop, store, or other building with intent to steal, the building need not be within the curtilage of a dwelling-house, unless the statute so provides.[12] Sometimes there are express provisions on this point in the statutes.[13]

(11) "*Shop*," "*Store*," "*Storehouse*," "*Warehouse*," *Etc.*, *Defined.* The statutes very generally punish the breaking and entering, or entering without breaking, of any shop, store, storehouse, warehouse, office, etc. These terms in a statute are to be given their ordinary meaning in determining whether the statute applies to a particular structure, in accordance with the general rule of construction,[14] but the rule seems to have been ignored in some cases.[15] In the notes below decisions are referred to in which the courts have construed and applied the terms "shop,"[16] "store" or "storehouse,"[17] "warehouse,"[18]

Building not known when statute was enacted.— A building may be within a statute defining and punishing burglary, although no such building was known at the time the statute was enacted. State *v.* Bishop, 51 Vt. 287, 31 Am. Rep. 690.

12. Building need not be within the curtilage.— On the trial of an indictment, under a statute making it burglary to enter any building "within the curtilage of a dwelling-house," or "other building" in which any valuable thing is kept, etc., with intent to steal, it is immaterial whether a granary from which valuables are alleged to have been stolen was within the curtilage or not. State *v.* Hecox, 83 Mo. 531.

13. See Devoe *v.* Com., 3 Metc. (Mass.) 316; People *v.* Van Dam, 107 Mich. 425, 65 N. W. 277; People *v.* Calderwood, 66 Mich. 92, 33 N. W. 23. And see *infra*, II, E, 3, b, (VI).

14. Metz *v.* State, 46 Nebr. 547, 65 N. W. 190; State *v.* Wilson, 47 N. H. 101; State *v.* Bishop, 51 Vt. 287, 31 Am. Rep. 690; and cases cited *infra*, note 15 *et seq.* The fact that a particular kind of structure was not known at the time of the enactment of a statute defining burglaries does not prevent it from falling within the words "store," "office," "warehouse," or other general terms used in the statute. State *v.* Bishop, 51 Vt. 287, 31 Am. Rep. 690.

15. State *v.* Carrier, 5 Day (Conn.) 131; Rex *v.* Humphrey, 1 Root (Conn.) 63; Cool *v.* Com., 94 Va. 799, 26 S. E. 411.

Banking-house.— In Connecticut a banking-house was held to be within a statute using the words "store, shop, or warehouse." Wilson *v.* State, 24 Conn. 57.

16. The term "shop" has been held to include the cabin of a vessel. State *v.* Carrier, 5 Day (Conn.) 131; Rex *v.* Humphrey, 1 Root (Conn.) 63. But it has been held not to include a mill-house. Cool *v.* Com., 94 Va. 799, 26 S. E. 411. In Reg. v. Sanders, 9 C. & P. 79, 38 E. C. L. 58, Baron Alderson held that the term "shop" in a statute punishing the breaking and entering of "any shop, warehouse, or counting-house" meant a shop for the sale of articles, and did not include a mere workshop, as a blacksmith's shop. But the contrary was held by Lord Denman in Reg. *v.* Carter, 1 C. & K. 173, 47 E. C. L. 173.

17. The term "storehouse" has been held to include the following: A building erected on a farm for the storing of husked corn and other farm produce. Metz *v.* State, 46 Nebr. 547, 65 N. W. 190. A livery-stable in which bridles, buggies, and farming implements are kept. Webb *v.* Com., 18 Ky. L. Rep. 220, 35 S. W. 1038. A meat-house in which meat is kept. Benton *v.* Com., 91 Va. 782, 21 S. E. 495. A room occupied as a news depot, in which papers, pamphlets, and the like are kept for sale. Bauer *v.* State, 25 Ohio St. 70. A room occupied by two men in a storehouse belonging to one of them is a "storehouse" within the meaning of the Kentucky statute punishing as burglary breaking into a warehouse, storehouse, or room in a steam, wharf, or other boat, whether such place is used as a depositary for goods or not. Johnson *v.* Com., 22 Ky. L. Rep. 282, 57 S. W. 255. It was held that a mill-house was not within a statute punishing the breaking and entering, with intent to steal, of "any office, shop, storehouse, warehouse, or banking house." Cool *v.* Com., 94 Va. 799, 26 S. E. 411. A small room, forming part of a cellar, and in which a few jugs of wine are kept for family use, is not a "storehouse." Mason *v.* Com., 101 Ky. 397, 19 Ky. L. Rep. 622, 41 S. W. 305.

The term "store" has been held to include a building including a kitchen, two dining-rooms, a bedroom, and a saloon, in which the occupant sold cigars, beer, and oysters, and maintained a bar in the front room, the entry being into the kitchen, which was the back room. Com. *v.* Whalen, 131 Mass. 419. But a charge of breaking into a store in which goods were kept for use, sale, or deposit is not sustained by proof of entering an inner room of a building which was not a store, but a mere business office of a board of underwriters, and in which were kept merely furniture, office supplies, etc. People *v.* Marks, 4 Park. Crim. (N. Y.) 153.

18. The term "warehouse" has been held to include the following places: A railroad depot used for receiving, depositing, and discharging freight. State *v.* Bishop, 51 Vt. 287, 31 Am. Rep. 690. A granary used for keeping and preserving farming utensils, etc Ray *v.* Com., 12 Bush (Ky.) 397. A building erected on a farm for the storage of husked corn or other farm produce. Metz *v.* State,

"granary," [19] "barn," [20] "factory," [21] "outhouse," [22] "room," [23] "office," [24] and "booth." [25]

(III) "*House.*" Under some statutes punishing the breaking and entering of the "house" of another, it has been held that the term "house" should be given the same meaning as "dwelling-house" at common law, so as to include a dwelling-house and outhouses within the curtilage, but not so as to include houses not occupied as a dwelling-house, or outhouses not within the curtilage.[26] In other statutes, however, the term is used in a broader sense, and includes any structure which falls within the ordinary meaning of the term "house," whether it is a dwelling-house or connected with a dwelling-house or not.[27] And in like

46 Nebr. 547, 65 N. W. 190. A livery-stable in which bridles, buggies, and farming implements are kept. Webb *v.* Com., 18 Ky. L. Rep. 220, 35 S. W. 1038. A covered structure used for storing cotton bales, one side and end of which are planked up, and the others left open, so that wagons can drive under to load and unload, and which, with two acres of land connected with it, is inclosed by a plank fence nine feet high, the gates of which are kept locked. Hagan *v.* State, 52 Ala. 373; Bennett *v.* State, 52 Ala. 370. An opera-house used for storage of the stage properties between the times when they are used for entertainments. Hunter *v.* Com., 20 Ky. L. Rep. 1165, 48 S. W. 1077. But it has been held that the term "warehouse" does not include a building, twenty-one by fifteen feet, placed on a market garden and used for storing agricultural implements, and for storing grain and seed to be sown, fertilizers, etc. State *v.* Wilson, 47 N. H. 101. And a mill-house was held not to be within a statute punishing the breaking and entering of "any office, shop, storehouse, warehouse, or banking house," with intent to steal. Cool *v.* Com., 94 Va. 799, 26 S. E. 411. A statute punishing as burglary breaking and entering, with intent to steal, any shop, store, tent, booth, warehouse, or other building in which any goods are kept, etc., was held to apply where the room broken and entered was in the basement of a court-house occupied by a corporation for storing beer, by consent of those having supervision of the building, being separated from other rooms in the basement by partition walls with doors which were kept locked, the keys to which were in the possession of the corporation's agents, and where the defendant entered the basement through an open window into a hall occupied for public purposes, and thence entered the room by breaking through a door. People *v.* McCloskey, 5 Park. Crim. (N. Y.) 57.

19. "Granary."—It has been held that the term "granary" does not include a building, twenty-one by fifteen feet, placed on a market garden, and used for storing tools and agricultural implements, grain and seed to be sown, fertilizers, etc. State *v.* Wilson, 47 N. H. 101.

20. The term "barn" in a statute defining burglary includes a tobacco-house, erected upon a farm and used for the purpose of storing and drying tobacco. Ratekin *v.* State, 26 Ohio St. 420. And it includes a building built for a dwelling-house, but used for the purpose of storing grain on the owner's farm. Barnett *v.* State, 38 Ohio St. 7.

21. Factory.—An inclosed building commonly called an "ashery," and used "for the purpose of depositing ashes therein and converting the same into potash," is a "factory" within a statute defining burglary. Blackford *v.* State, 11 Ohio St. 327.

22. "Outhouse."—A barn not connected with a mansion-house, but standing alone several rods distant therefrom, is an "outhouse" within a statute punishing the breaking and entering of "the store, shop, warehouse or outhouse of another, whether parcel of any mansion-house or not, wherein goods, wares, or merchandise are deposited. State *v.* Brooks, 4 Conn. 446. A district school-house is not an "outhouse" within such a statute. State *v.* Bailey, 10 Conn. 144.

23. Room.—A partition in a building eight or nine feet high, although not reaching to the ceiling, is sufficient to constitute the inclosed place a "room" in which burglary may be committed. People *v.* Young, 65 Cal. 225, 3 Pac. 813.

24. The term "office" does not include the passenger room of a railroad station, having within it a separate inclosed room where the books are kept and the tickets sold. Com. *v.* White, 6 Cush. (Mass.) 181.

25. The term "booth" includes a structure five feet high and five feet long, having a window and door, and erected as a fruit stand against other premises. People *v.* Hagan, 14 N. Y. Suppl. 233, 37 N. Y. St. 660.

26. Mathis *v.* State, 3 Heisk. (Tenn.) 127; Palmer *v.* State, 7 Coldw. (Tenn.) 82.

27. A statute punishing the breaking and entering of "any dwelling-house, or any other house whatever" is broad enough to include buildings of any kind, and used for any purpose. It includes a chicken-house. People *v.* Stickman, 34 Cal. 242. See also State *v.* Dan, 18 Nev. 345, 4 Pac. 336.

Wire bird-house.—A structure eight feet high, stationary, inclosed with wire and covered with shingles, and used for the safe-keeping of birds and fowls, is a house. Williams *v.* State, 105 Ga. 814, 32 S. E. 129, 70 Am. St. Rep. 82.

The Texas statute, using the term "house" in defining burglary, expressly declares the term to mean "any building or structure erected for public or private use, . . . of whatever material it may be constructed." Tex. Pen. Code, art. 843.

A tent or structure seven feet high, made

manner in this broader sense the term has been held to include a building of any kind whether it is occupied or not.[28]

(IV) "*Building.*" The term "building" in a statute is broad enough to include any structure which is of such a character as to fall within the ordinary acceptation of that term, and which is capable of sheltering man or animals or property,[29] whether its construction is entirely finished or not.[30] Occupancy of the building is not necessary unless required by the statute.[31]

(V) "*Other Building,*" "*Erection,*" *or* "*Structure.*" Under some of the statutes defining and punishing burglary, which specifically enumerate certain buildings or structures as the subject of the offense, and follow such enumeration with the words "or other building," or the words "or other erection or

by placing two forked poles in the ground, with a ridge-pole thereon, and stretching over this a wagon sheet, the ends of which are brought down to the ground and nailed on each side to planks nailed to stakes in the ground, both ends being closed up, is a house within this statute. Favro *v.* State, 39 Tex. Crim. 452, 46 S. W. 932, 73 Am. St. Rep. 950.

Fruit stand.— This statute also includes a fruit stand built in the shape of a piano box, but large enough for the proprietor to stand in while making sales. Willis *v.* State, 33 Tex. Crim. 168, 25 S. W. 1119.

An office built in the corner of a warehouse was held to be a "house" within the Texas statute. Anderson *v.* State, 17 Tex. App. 305.

Sheriff's office.— The statute also includes a sheriff's office. Bigham *v.* State, 31 Tex. Crim. 244, 20 S. W. 577.

Portable "header-box."— But it does not include a portable header-box, fourteen feet long, six feet wide, four feet high on one side, and eighteen inches on the other, such as is commonly used with a grain harvester, although it has four sides and is covered over, for it has no permanency of location or fixedness of place, and is not used or intended to be used for any purpose for which houses are ordinarily used. Williamson *v.* State, 39 Tex. Crim. 60, 44 S. W. 1107, 73 Am. St. Rep. 901.

28. State *v.* Dan, 18 Nev. 345, 4 Pac. 336.

29. People *v.* Stickman, 34 Cal. 242; Clark *v.* State, 69 Wis. 203, 33 N. W. 436, 2 Am. St. Rep. 732; Rex *v.* Worrall, 7 C. & P. 516, 32 E. C. L. 736.

The term "building" has been held to include a chicken-house (People *v.* Stickman, 34 Cal. 242; Gillock *v.* People, 171 Ill. 307, 49 N. E. 712; [but see State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842]), a stable (Orrell *v.* People, 94 Ill. 456, 34 Am. Rep. 241; Clark *v.* State, 69 Wis. 203, 33 N. W. 436, 2 Am. St. Rep. 732), a buggy-house (State *v.* Garrison, 52 Kan. 180, 34 Pac. 751), a court-house (State *v.* Rogers, 54 Kan. 683, 39 Pac. 219), a saloon (State *v.* Comstock, 20 Kan. 650), a railroad depot (State *v.* Edwards, 109 Mo. 315, 19 S. W. 91), and an unfinished structure intended as a cart-shed, boarded up on its sides, having a door with a lock to it, and the frame of a roof with loose gorse thrown upon it, but not thatched (Rex *v.* Worrall, 7 C. & P. 516, 32 E. C. L. 736).

A "corn-crib" is not necessarily a "building" (Wood *v.* State, 18 Fla. 967, holding an indictment defective for failure to allege that a structure described as a "corn-crib" was a building); but it may be of such a character as to come within this term (State *v.* Gibson, 97 Iowa 416, 66 N. W. 742, holding that a corn-crib one hundred and fifty feet long and twelve feet wide, having a roof, the only opening for entrance to which was a place where a board had been left off near the roof, and which was constructed on posts sunk in the ground, on which joists were nailed to support the floor, the sides being constructed by nailing fencing boards to the posts, the boards near the bottom being close together, and the others about one and a half inches apart, was a building within the Iowa statute). See also Roberts *v.* State, 55 Miss. 421.

An "engine-room" of a railroad company is not necessarily a "building" within the Illinois statute. Kincaid *v.* People, 139 Ill. 213, 28 N. E. 1060.

A burial vault is not a building within the New York statute. People *v.* Richards, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373 [*reversing* 44 Hun (N. Y.) 278].

A canal-boat grounded and frozen fast and occupied by the captain as a dwelling was held not to be a building within a statute punishing the breaking and entering of any dwelling-house or other building. State *v.* Green, 6 N. J. L. J. 123.

To enter a yard with intent to steal is not within a statute punishing any person who shall break and enter any dwelling-house or other building, or wilfully and maliciously enter without breaking, with intent to commit any felony. Com. *v.* Taggert, 3 Brewst. (Pa.) 340.

30. An unfinished building in the course of construction, and which is capable of holding tools or other articles of personal property, is within a statute punishing the breaking and entering, with intent to commit larceny or other felony, of any office, shop, "or any other building." Clark *v.* State, 69 Wis. 203, 33 N. W. 436, 2 Am. St. Rep. 732. See also Grimes *v.* State, 77 Ga. 762, 4 Am. St. Rep. 112; Reg. *v.* Manning, L. R. 1 C. C. 338, 12 Cox C. C. 106, 41 L. J. M. C. 11, 25 L. T. Rep. N. S. 573, 20 Wkly. Rep. 102; Rex *v.* Worrall, 7 C. & P. 516, 32 E. C. L. 736.

31. State *v.* Dan, 18 Nev. 345, 4 Pac. 336.

inclosure," etc., the courts, applying the general rule of statutory construction, have held that the general words are limited to such buildings or erections as are of the same kind as those specifically enumerated.[32] This rule of construction, however, is only applied for the purpose of ascertaining the intention of the legislature, and the words "other building," etc., will be construed as including any building, of whatever character, and not merely such buildings as are like those specifically enumerated, if such appears to have been the intention of the legislature.[33]

(VI) *Buildings Not Adjoining To, or Occupied With, a Dwelling-House.* In some states the statute after punishing burglary of a dwelling-house, punishes as a separate offense the breaking and entry of a store or other building "not adjoining to or occupied with a dwelling-house," and to sustain an indictment under the latter section of such a statute it must be shown that the building was within its terms in this respect.[34]

(VII) *Buildings in Which Valuable Goods, Etc., Are Kept.* In some states the statute punishing the breaking and entering, with intent to steal, of any shop, store, warehouse, etc., or other building, expressly requires that the building

32. See State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842 [*overruling* State *v.* Hecox, 83 Mo. 531], holding that a statute punishing the breaking and entering of "any shop, store, booth, tent, warehouse, or other building," did not include a chicken-house. And see State *v.* South, 136 Mo. 673, 38 S. W. 716, holding that the statute did not include a barn. But this statute has been held to include a railroad depot. State *v.* Edwards, 109 Mo. 315, 19 S. W. 91. See also People *v.* Richards, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373, where it was held that a stone vault intended and used for burial of the dead was not within a statute punishing as burglary the breaking and entering of any "building" and declaring that the term building should include "a railway car, vessel, booth, tent, shop, or other erection or inclosure."

33. State *v.* Johnson, 64 Ohio St. 270, 60 N. E. 219; Clark *v.* State, 69 Wis. 203, 33 N. W. 436, 2 Am. St. Rep. 732.

Under the Illinois statute punishing the breaking and entering of "any dwelling house, kitchen, office, shop, storehouse, warehouse, malt-house, stilling-house, mill, pottery, factory, wharf-boat, steamboat, or other water-craft," with intent to commit larceny, it was held that the words "or other building" were not limited to other buildings of the same kind as those enumerated, and that an indictment might be maintained for breaking and entering a "chicken-house." Gillock *v.* People, 171 Ill. 307, 49 N. E. 712. A stable is a building within the Illinois statute. Orrell *v.* People, 94 Ill. 456, 34 Am. Rep. 241. But an "engine-room" of a railroad company is not necessarily so. Kincaid *v.* People, 139 Ill. 213, 28 N. E. 1060.

The Kansas statute punishing as burglary the breaking and entering of "any shop, store, booth, tent, warehouse, or other building, or any boat or vessel, in which there shall be at the time some human being, or any goods, wares, or merchandise, or other valuable thing, kept or deposited, with intent," etc., applies to a buggy house (by the term other building) in which goods, wares, merchandise, or any other valuable thing is kept or deposited. State *v.* Garrison, 52 Kan. 180, 34 Pac. 751. It also applies to a building occupied as a court-house, in which records belonging to the county are kept. State *v.* Rogers, 54 Kan. 683, 39 Pac. 219. A saloon is a building within the meaning of this statute. State *v.* Comstock, 20 Kan. 650.

34. Where one statute or section punishes breaking and entering a dwelling-house, etc., and another punishes breaking and entering a shop, etc., "not adjoining to or occupied with a dwelling-house," etc., the latter includes all buildings not so joined to a dwelling-house as to be within the curtilage, or parts of the messuage, at common law, and such buildings only, and the former punishes the breaking and entry of buildings which are within the curtilage. Devoe *v.* Com., 3 Metc. (Mass.) 316. A statute punishing the breaking and entering any office, shop, store, saloon, etc., "not adjoining to or occupied with a dwelling-house," applies to an office, shop, store, saloon, etc., which is under a separate roof from the dwelling-house of the owner, or which, although under the same roof, is not connected with the dwelling. People *v.* Van Dam, 107 Mich. 425, 65 N. W. 277; People *v.* McGra, 1 Mich. N. P. 27. But it does not apply where it is under the same roof and connected with the living rooms by doors and stairways, or where it is under a different roof but connected by a passageway. People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046; People *v.* Griffin, 77 Mich. 585, 43 N. W. 1061; People *v.* Calderwood, 66 Mich. 92, 33 N. W. 23. A description of the building as a store "not adjoining to or occupied with a dwelling-house" is not sustained by proof that the store was the first floor of a building leased by the proprietors as partners, and that one of them occupied the upper part as a dwelling-house and the other lodged with him. Moore *v.* People, 47 Mich. 639, 11 N. W. 415.

shall be one in which goods, wares, merchandise, or other valuable thing is kept, or is kept for use, sale, or deposit;[35] and the statute does not apply unless the condition or use of the premises broken and entered are such as to bring them strictly within its terms in this respect.[36] Under a statute making it burglary to break and enter a building in which valuable goods are stored the ownership of the goods is immaterial.[37]

(VIII) "*Other Place of Business*," *Etc.* In Georgia, and it may be in other states, the statute punishes as burglary "the breaking and entering into the dwelling, mansion, or storehouse, or other place of business of another, where valuable goods, wares, produce, or any other article of value are contained or stored, with intent to commit a felony or larceny."[38] The statute includes any house or building which is the place of business of another, and in which valuable goods, etc., are contained or stored;[39] but it does not include a building which is not a place of business.[40]

4. Railroad Cars. To break into a railroad car with intent to commit larceny is not burglary at common law, but in many jurisdictions it is made so by statute.[41]

5. Churches. It was burglary at common law to break and enter a church in the night-time with intent to commit a felony therein;[42] but it is now generally punished by statute. In England a statute punishes for felony any person who "shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit any felony therein, or being in any church, chapel, meeting-house, or other place of divine worship shall commit any felony therein and break out of the same;" or who "shall break and enter any . . . church, chapel, meeting-house or other place of divine worship, . . . with intent to commit any felony therein."[43] There have been somewhat similar statutes in this

35. **The Alabama statute** making it burglary to break and enter, with intent to steal or commit a felony, "a dwelling-house, . . . or into any shop, . . . in which any goods, merchandise or other valuable thing, is kept for use, sale or deposit," is construed as containing two distinct clauses, one of which makes it burglary to break and enter a shop in which any goods, etc., may be kept, and the other of which makes it burglary to break and enter a dwelling-house, whether any goods, etc., are kept therein or not. Potter *v.* State, 92 Ala. 37, 9 So. 402.

The Maine statute punishing breaking into any dwelling-house, or breaking into any office, bank, shop, etc., in which valuable things are kept, does not require that valuable things shall be kept in a dwelling-house. State *v.* Neddo, 92 Me. 71, 42 Atl. 253.

Under the Washington statute defining burglary as an entry, with felonious intent, of any "office, shop, store, warehouse, . . . or any building in which any goods, merchandise, or valuable things are kept for use, sale or deposit," burglary may be committed in any of the places specifically enumerated, although no goods, etc., may be kept therein. State *v.* Sufferin, 6 Wash. 107, 32 Pac. 1021.

36. Rowland *v.* State, 55 Ala. 210; Kelly *v.* State, 82 Ga. 441, 9 S. E. 171.

As to the indictment see *infra*, IV, D, 8.

The produce of a farm lying in a barn not connected with the mansion-house, and standing alone several rods therefrom, are "goods, wares and merchandise deposited" in an outhouse within a statute punishing burglary. State *v.* Brooks, 4 Conn. 446.

37. Stokes *v.* State, 84 Ga. 258, 10 S. E. 740.

38. Ga. Crim. Code (1895), § 149.

39. Bethune *v.* State, 48 Ga. 505, holding that under this statute, breaking into a shop in which the owner does wood-working, and in which are stored buggies and grain, with intent to commit larceny, is burglary.

An incomplete house, protected by outer doors and canvas window frames, in which the carpenters' tools are stored, is within the statute. Grimes *v.* State, 77 Ga. 762, 4 Am. St. Rep. 112.

40. Thus it has been held that the statute does not apply to a barn in which corn is stored. Bearden *v.* State, 95 Ga. 459, 20 S. E. 212.

41. Where a general railroad corporation law makes it burglary to break and enter any car of a corporation formed under the act, it does not make it burglary to break and enter a car of a railroad company incorporated under a previous act; nor is the offense so extended by a subsequent act conferring upon all companies incorporated before the passage of such general law all the powers, "privileges," and exemptions granted thereby. Territory *v.* Stokes, 2 N. M. 161.

42. Reg. *v.* Baker, 3 Cox C. C. 581; Anonymous, 1 Dyer 99*a*; 1 Hale P. C. 556; 1 Hawkins P. C. c. 38, § 17; 3 Inst. 64. And see People *v.* Richards, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373.

43. **English statutes.**— 24 & 25 Vict. c. 96, §§ 50, 57. Former statutes which have been repealed were 1 Edw. VI, c. 12; 23 Hen. VIII, c. 1; 7 & 8 Geo. IV, c. 29, § 16, and 7

country, but generally the breaking and entry of a church is punishable under the general statute punishing the breaking and entering of buildings.

F. The Ownership of the Premises. Burglary at common law is the breaking and entering of the dwelling-house "of another," and the same is true under statutes punishing the breaking and entry of dwelling-houses and other buildings; and the offense is not committed by one who breaks and enters his own dwelling-house or other building, although with felonious intent.[44] But the test, both for the purpose of determining whether the offense has been committed and for the purpose of alleging ownership in the indictment, is not title but occupancy. For the purposes of the offense the occupant of the premises is the owner, so that the lessor of a house may be guilty of burglary in breaking and entering the house while it is occupied by the lessee.[45] The question of ownership will be further considered in treating of the indictment.[46]

G. The Intent and Execution Thereof — 1. Necessity For Felonious Intent. To constitute burglary at common law, and generally under the statutes also, both the breaking and the entry must be with a felonious intent, that is, with intent to commit a felony in the house.[47] It is not burglary, unless it is made so by statute, if the intent is to commit a mere misdemeanor, as an assault and battery,

Wm. IV & 1 Vict. c. 90, § 2. It was held that these statutes did not apply to other churches, chapels, meeting-houses, etc., than those of the church of England. Rex *v.* Richardson, 6 C. & P. 335, 25 E. C. L. 461; Rex *v.* Warren, 6 C. & P. 335, note *a*, 25 E. C. L. 461 (holding that the statute of 7 & 8 Geo. IV did not apply to a dissenting meeting-house); Rex *v.* Nixon, 7 C. & P. 442, 32 E. C. L. 698 (holding that it did not apply to a Wesleyan chapel).

A church tower, having a separate roof, but no outer door, and only accessible from the body of the church, from which it is not separated by any partition, is a part of the church. Rex *v.* Wheeler, 3 C. & P. 585, 14 E. C. L. 728.

A vestry is a part of the church, where it is formed out of what was before a porch of the church, and the door thereto can only be unlocked from the inside. Reg. *v.* Evans, C. & M. 298, 41 E. C. L. 166.

Goods, etc., within the statutes.— Such a statute is not confined to goods within the church used for divine worship, but extends also to tools and articles kept in the church to keep it in repair. Rex *v.* Rourke, R. & R. 287. The statute only applies to stealing of chattels. It does not cover stealing of fixtures. Reg. *v.* Baker, 3 Cox C. C. 581. But a box in the church containing money, and temporarily annexed to the building, is not a part of the realty. Reg. *v.* Wortley, 2 C. & K. 283, 2 Cox C. C. 32, 1 Den. C. C. 162, 61 E. C. L. 283.

44. State *v.* Trapp, 17 S. C. 467, 43 Am. Rep. 614; Clarke *v.* Com., 25 Gratt. (Va.) 908.

45. Smith *v.* People, 115 Ill. 17, 3 N. E. 733; Rex *v.* Jarvis, 1 Moody 7.

46. See *infra*, IV, D, 11.

47. *Alabama.*—Barber *v.* State, 78 Ala. 19; State *v.* Chambers, 6 Ala. 855.

Arkansas.— Harvey *v.* State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229; Harvick *v.* State, 49 Ark. 514, 6 S. W. 19.

California.— People *v.* Shaber, 32 Cal. 36; People *v.* Garnett, 29 Cal. 622; People *v.* Murray, 8 Cal. 519.

Delaware.— State *v.* Snow, (Del. 1901) 51 Atl. 607; State *v.* Eaton, 3 Harr. (Del.) 554.

Florida.— Wood *v.* State, 18 Fla. 967.

Illinois.— Price *v.* People, 109 Ill. 109.

Iowa.— State *v.* Bell, 29 Iowa 316.

Maryland.— Robinson *v.* State, 53 Md. 151, 36 Am. Rep. 399.

Massachusetts.— Com. *v.* Newell, 7 Mass. 245.

Nebraska.— Ashford *v.* State, 36 Nebr. 38, 53 N. W. 1036.

Nevada.— State *v.* Ryan, 12 Nev. 401, 28 Am. Rep. 802.

New Jersey.— State *v.* Bullitt, 64 N. J. L. 379, 45 Atl. 773.

New York.— McCourt *v.* People, 64 N. Y. 583.

Ohio.— State *v.* Beal, 37 Ohio St. 108, 41 Am. Rep. 490; State *v.* Lymus, 26 Ohio St. 400, 20 Am. Rep. 772.

Texas.— Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258; Harris *v.* State, 20 Tex. App. 652; Wilson *v.* State, 18 Tex. App. 270, 51 Am. Rep. 309; Allen *v.* State, 18 Tex. App. 120.

Vermont.— State *v.* Cooper, 16 Vt. 551.

West Virginia.— State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

England.— Dobbs' Case, 2 East P. C. 513; Rex *v.* Knight, 2 East P. C. 510; Rex *v.* Dannelly, 2 Marsh. 571, R. & R. 230; 4 Bl. Comm. 227; 1 Hale P. C. 559; 1 Hawkins P. C. c. 38, § 18.

See 8 Cent. Dig. tit. "Burglary," § 24.

Where two persons break and enter a house, one with an innocent purpose, the other with intent to commit felony, the latter is guilty of burglary. Gale *v.* State, 13 Lea (Tenn.) 489.

Statutory felonies.— An intent to commit an offense which is made a felony by statute is sufficient. State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555; Dobbs' Case, 2 East P. C. 513; 4 Bl. Comm. 228; 1 Hawkins P. C. c. 38, § 19.

Coercion of wife by husband.— See Reg. *v.*

or mayhem not amounting to felony;[48] or to take property which is not the subject of larceny,[49] or which is not of sufficient value to make the taking thereof a felony;[50] or to take property without the *animus furandi* necessary to larceny and robbery;[51] or to have intercourse with a woman with her consent, if it can be obtained, and not otherwise;[52] or to commit adultery where it is not made a felony by statute;[53] or for a person to break and enter as a pretended accomplice of another for the purpose of detecting and apprehending him.[54]

Bolton, 11 Vict. L. R. 776. And see, generally, CRIMINAL LAW.

48. Intent to commit assault and battery or mayhem.— Com. *v.* Newell, 7 Mass. 245; 1 Hawkins P. C. c. 38, § 18. As to whether mayhem is a felony see MAYHEM. An instruction that defendant is guilty if he broke and entered to assault a person therein with intent to murder her is not erroneous. Stinnett *v.* State, 32 Tex. Crim. 526, 24 S. W. 908.

49. Intent to take property not the subject of larceny.— State *v.* Bullitt, 64 N. J. L. 379, 45 Atl. 773; State *v.* Lymus, 26 Ohio St. 400, 20 Am. Rep. 772.

Intent to steal dogs.— In State *v.* Lymus, 26 Ohio St. 400, 20 Am. Rep. 772, it was held that an indictment for burglary with intent to steal a dog could not be sustained, as a dog was not the subject of larceny. In some states, however, a dog is expressly made the subject of larceny by statute, or is held to be property and the subject of larceny because it is taxed. See, generally, LARCENY. And in such a case a breaking and entry with intent to steal a dog is burglary. State *v.* Langford, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746. And see State *v.* Yates, 10 Ohio Dec. (Reprint) 182, 19 Cinc. L. Bul. 150.

Intent to steal gambling instruments.— It has been held that intent to take and carry away a kit of gambling tools did not make a breaking and entry burglary, on the ground that the property was not the subject of larceny. State *v.* Wilmore, 9 Ohio Dec. (Reprint) 61, 10 Cinc. L. Bul. 321. But this is erroneous, for on a prosecution for larceny it is no defense that the property stolen was acquired or possessed unlawfully or criminally, as in the case of property used for gaming. Bales *v.* State, 3 W. Va. 685. See, generally, LARCENY.

Intent to carry away fixtures.— It is not burglary at common law to break and enter with intent to sever and immediately carry away fixtures, as this is not larceny at common law. State *v.* Hall, 5 Harr. (Del.) 492; 1 Hale P. C. 510. See, generally, LARCENY. But in Texas it was held burglary to break and enter a house and remove the doors and windows with intent to steal, since in that state the severance converted the doors and windows into personal property, and made them the subject of larceny, although the severance and removal were parts of the same transaction. Alvia *v.* State, (Tex. Crim. 1901) 60 S. W. 551.

50. Petit larceny.— *Arkansas.*— Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679; Harvick *v.* State, 49 Ark. 514, 6 S. W. 19.

California.— People *v.* Murray, 8 Cal. 519.

Florida.—Wood *v.* State, 18 Fla. 967.

Montana.— Territory *v.* Duncan, 5 Mont. 478, 6 Pac. 353.

Texas.— Philbrick *v.* State, 2 Tex. App. 517.

Compare, however, Stevenson *v.* State, 5 Baxt. (Tenn.) 681. It may be otherwise under particular statutory provisions. See *infra*, II, G, 2.

51. Intent to take property without animus furandi.— It is not burglary, but a mere trespass, to break and enter a house with intent to take property under a *bona fide* claim of right, although the claim may be unfounded, or otherwise without the felonious intent, which is an essential element of larceny or robbery. McCourt *v.* People, 64 N. Y. 583; State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875. It is not burglary to break and enter with intent to take property for a temporary use and then return it to the owner or leave it where he will get it. Therefore, where the testimony showed that the defendants broke into a tool-house of a railroad company, took from it a hand-car, put it on the track and rode in it for twelve miles, and then left it on the side of the track, it was held that a conviction could not be sustained, as the evidence did not show an intent to steal the car. State *v.* Ryan, 12 Nev. 401, 28 Am. Rep. 802. And see State *v.* Bullitt, 64 N. J. L. 379, 45 Atl. 773; Wilson *v.* State, 18 Tex. App. 270, 51 Am. Rep. 309. Breaking and entering with intent to destroy property out of revenge, and not to steal, is not burglary. State *v.* Wilmore, 9 Ohio Dec. (Reprint) 61, 10 Cinc. L. Bul. 321.

52. Intent to have intercourse with woman.— McNair *v.* State, 53 Ala. 453; Robinson *v.* State, 53 Md. 151, 36 Am. Rep. 399; Com. *v.* Doherty, 10 Cush. (Mass.) 52; Mitchell *v.* State, 32 Tex. Crim. 479, 24 S. W. 280, 33 Tex. Crim. 575, 28 S. W. 475. And see *infra*, VI, C, 5. A person who breaks and enters a house with intent to have sexual intercourse with a woman while she is asleep, and without her conscious consent, is guilty of burglary, if such an act constitutes rape. Harvey *v.* State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229. In some jurisdictions, however, it is held that the intercourse under such circumstances is not rape. See, generally, RAPE.

53. Intent to commit adultery.— State *v.* Cooper, 16 Vt. 551. It may be otherwise under particular statutes. State *v.* Corliss, 85 Iowa 18, 51 N. W. 1154. See *infra*, II, G, 2.

54. Price *v.* People, 109 Ill. 109; Rex *v.* Dannelly, 2 Marsh. 571, R. & R. 230.

2. Intent Under Statutes. The statutes defining burglary generally require that the intent shall be to commit a felony, as at common law,[55] but this is not always the case. There are some statutes which punish as burglary breaking and entering with intent to commit larceny, although the larceny intended is merely a misdemeanor,[56] or with intent to commit any crime, or "any public offense."[57] And the statute sometimes punishes the breaking and entering of a house and commission of an offense therein, without regard to the intent accompanying the breaking and entry.[58]

3. Time of Forming Intent. To constitute burglary the felonious intent must exist at the time of the breaking and entry, and it is not enough if it is formed after the entry, or even before the entry, if after the breaking.[59]

4. Entry to Effect a Further Entry. If the only entry made was by an instrument, the instrument must have been inserted for the purpose of committing a felony, and not merely for the purpose of a further breaking in order to admit the body,[60] but if the hand or any other part of the body entered, it is sufficient if the ultimate intent was to commit a felony, although the immediate intent may have been to make a further opening for the body.[61]

5. Commission of the Offense After Entry. To constitute burglary it is not necessary that the intended felony shall be committed, but the offense is complete as soon as the premises are broken and entered with the necessary felonious intent.[62] And it is no defense, therefore, to an indictment for burglary, that the

55. See *supra*, II, G, 1.

56. **Petit larceny, although a misdemeanor only.**— Under statutes making it burglary to break and enter "with intent to commit murder, robbery, mayhem, larceny, or other felony," it has been held that the term "larceny" therein included both grand and petit larceny. People *v.* Stapleton, 2 Ida. 49, 3 Pac. 6; State *v.* Keyser, 56 Vt. 622; Pooler *v.* State, 97 Wis. 627, 73 N. W. 336; Hall *v.* State, 48 Wis. 688, 4 N. W. 1068. Under a statute making it burglary to break into and enter a building "with intent to steal, or to commit a felony," the intent to steal is equivalent to an intent to commit a felony, although the value of the thing intended to be stolen was so small as to make the larceny thereof a misdemeanor only. Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1. And a statute punishing a breaking and entry "with intent to commit a felony or the crime of theft," applies where the intent is to commit any theft. Conoly *v.* State, 2 Tex. App. 412; Simms *v.* State, 2 Tex. App. 110.

57. **Intent to commit "any public offense" — Adultery.**— Under the Iowa statute making it burglary to break and enter with intent to commit "any public offense," and statutes making adultery an indictable offense, a breaking and entering with intent to commit is burglary. State *v.* Corliss, 85 Iowa 18, 51 N. W. 1154.

Intent to aid prisoner's escape.— State *v.* Abbott, 16 N. H. 507.

58. **Intent immaterial.**— Under a statute punishing any person who shall break and enter a mansion-house, in the night-time, in which any person shall reside or dwell, and commit or attempt to commit any personal violence or abuse, the intent with which the entry is made forms no part of the offense. Forsythe *v.* State, 6 Ohio 19.

59. Lowder *v.* State, 63 Ala. 143, 35 Am. Rep. 9; Colbert *v.* State, 91 Ga. 705, 17 S. E. 840; State *v.* Moore, 12 N. H. 42; Harris *v.* State, 20 Tex. App. 652.

60. **Entry of instrument only.**— Walker *v.* State, 63 Ala. 49, 35 Am. Rep. 1; Roberts' Case, Car. C. L. 293, 2 East P. C. 487; Rex *v.* Hughes, 2 East P. C. 491, 1 Leach 452; Rex *v.* Rust, 1 Moody 183. And see *supra*, II, C, 2, b.

61. **Entry of part of body.**—Fisher *v.* State, 43 Ala. 17; Com. *v.* Glover, 111 Mass. 395; Harrison *v.* State, 20 Tex. App. 387, 54 Am. Rep. 529; Rex *v.* Perkes, 1 C. & P. 300, 12 E. C. L. 180; Rex *v.* Davis, R. & R. 371. And see *supra*, II, C, 2, a. Entry of the fore part of the finger in breaking a pane of glass is sufficient, where the intent is to enter and commit a felony. Rex *v.* Davis, R. & R. 371. And so is the entry of the arm for the purpose of opening an inner blind, after breaking the window pane. Rex *v.* Perkes, 1 C. & P. 300, 12 E. C. L. 180.

62. *Arkansas.*— Harvick *v.* State, 49 Ark. 514, 6 S. W. 19; Dodd *v.* State, 33 Ark. 517; Bradley *v.* State, 32 Ark. 704.

Connecticut.— Wilson *v.* State, 24 Conn. 57.

Georgia.— Lanier *v.* State, 76 Ga. 304; Bush *v.* State, 65 Ga. 658.

Kentucky.— Olive *v.* Com., 5 Bush (Ky.) 376.

North Carolina.— State *v.* McDaniel, 60 N. C. 245; State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555.

Ohio.— State *v.* Beal, 37 Ohio St. 108, 41 Am. Rep. 490.

Texas.— Wilburn *v.* State, 41 Tex. 237.

England.— 3 Inst. 63, where a burglar is defined, in substance, as one who breaks and enters with intent to commit a felony, "whether his felonious intent be executed or

intent was abandoned after the entry.[63] Sometimes, however, a statute punishes as a single and distinct offense the breaking and entering of a house and committing larceny or other offenses therein, and in such a case commission of the offense after the entry is necessary to constitute the crime. Such an offense is something more than burglary.[64]

6. Inability to Commit the Intended Offense. If a person breaks and enters a house with intent to commit a felony therein, as larceny, for example, it is no defense, on a prosecution for burglary, that it was impossible for him to commit the intended felony, because of the absence of property or other circumstances not known to him at the time.[65]

III. Attempt to Commit Burglary.

A person is liable to indictment for the misdemeanor of attempt to commit burglary, if, with intent to break and enter a house under such circumstances that the breaking and entering would amount to burglary, he does any act toward the accomplishment of his purpose, which goes beyond mere preparation, as the turning of a knob with intent to open a door and enter, or the breaking of a window without entering, etc.[66] To constitute an attempt there must be an overt act, and not merely an intent,[67] and the act must be something more than mere preparation.[68]

not." And see 4 Bl. Comm. 227, 228; 1 Hale P. C. 561, 562; 1 Hawkins P. C. c. 38, § 1.

See 8 Cent. Dig. tit. "Burglary," § 25.

63. State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555, a case of entry with intent to rape.

64. Burglary and larceny.— Thus in Kentucky a statute punishes any one who shall feloniously break into any dwelling-house, and feloniously take away anything of value, and the offense is not committed unless something of value is taken away. Duncan *v.* Com., 85 Ky. 614, 9 Ky. L. Rep. 142, 4 S. W. 321. The extent of the value of the thing taken is immaterial. Duncan *v.* Com., 85 Ky. 614, 9 Ky. L. Rep. 142, 4 S. W. 321. Where a dwelling-house was broken and entered and goods were taken from a trunk and packed in a basket, with intent to steal them, although they were not taken from the house, it was held that they were "taken away" within the meaning of this statute. Loving *v.* Com., 21 Ky. L. Rep. 1379, 55 S. W. 434.

Commission of personal violence or abuse.— There have also been statutes punishing any person who shall break and enter a dwelling-house and commit or attempt to commit any personal violence or abuse. Under such a statute the intent with which the entry was made forms no part of the offense. Forsythe *v.* State, 6 Ohio 19.

65. Harvick *v.* State, 49 Ark. 514, 6 S. W. 19; State *v.* Beal, 37 Ohio St. 108, 41 Am. Rep. 490. *Compare* Reg. *v.* McPherson, 7 Cox C. C. 281, Dears. & B. 197, 3 Jur. N. S. 523, 26 L. J. M. C. 134, 5 Wkly. Rep. 525.

66. *Georgia.*— Griffin *v.* State, 26 Ga. 493.

Michigan.— People *v.* Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108; Harris *v.* People, 44 Mich. 305, 6 N. W. 677.

New York.— People *v.* Lawton, 56 Barb. (N. Y.) 126.

North Carolina.— State *v.* Jordan, 75 N. C. 27.

Pennsylvania.— Com. *v.* Smith, 6 Phila. (Pa.) 305, 24 Leg. Int. (Pa.) 157.

England.— Reg. *v.* Spanner, 12 Cox C. C. 155.

See 8 Cent. Dig. tit. "Burglary," § 4; and, generally, Criminal Law.

Inability to commit offense.— It has been held that on an indictment for breaking and entering a dwelling-house and stealing certain articles therein, there can be no conviction of an attempt to commit the felony charged, where the articles specified in the indictment were not in the house, on the ground that the defendant's attempt, if it had been carried out, could not constitute the crime charged. Reg. *v.* McPherson, 7 Cox C. C. 281, Dears. & B. 197, 3 Jur. N. S. 523, 26 L. J. M. C. 134, 5 Wkly. Rep. 525. This, however, is contrary to the well settled doctrine in most jurisdictions. See Com. *v.* McDonald, 5 Cush. (Mass.) 365; People *v.* Moran, 123 N. Y. 254, 25 N. E. 412, 33 N. Y. St. 397, 20 Am. St. Rep. 732, 10 L. R. A. 109. And see Criminal Law.

As to the conviction of an accessory as a principal see Reg. *v.* Esmonde, 26 U. C. Q. B. 152.

67. State *v.* Colvin, 90 N. C. 717; Reg. *v.* McCann, 28 U. C. Q. B. 514.

68. Sufficiency of overt acts to constitute attempt.— People *v.* Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108; Reg. *v.* McCann, 28 U. C. Q. B. 514. In a Georgia case it was held that one who takes the impression of a key which unlocks the door of a house, for the purpose of making or procuring a false key, with intent to enter the house and steal, or procure another to do so, is guilty of an attempt to break and enter. Griffin *v.* State, 26 Ga. 493. And in a New York case it was held that entering into an agreement with another to commit a burglary at a particular time and place, and coming to the ap-

IV. INDICTMENT OR INFORMATION.[69]

A. In General. An indictment or information for burglary, whether at common law or under a statute, must allege every fact and circumstance which is

pointed place at the appointed time, with burglar's tools, was an attempt, although the accused was prevented from carrying out his purpose because an alarm was raised while he had gone to a blacksmith shop to get a crow-bar with which to break the door of the house. People *v.* Lawton, 56 Barb. (N. Y.) 126. And entering in the night-time a gate adjoining a dwelling-house, with intent to break and enter the house with felonious intent, was held an attempt to commit burglary. Com. *v.* Smith, 6 Phila. (Pa.) 305, 24 Leg. Int. (Pa.) 157. The soundness of these decisions admits of doubt. See Reg. *v.* McCann, 28 U. C. Q. B. 514. In a late Michigan case it was held that one who agreed with another to break and enter a dwelling, met him at a saloon at the time fixed upon, with a revolver and slippers to be used in the house, and went into a drug store to purchase some chloroform to use, being arrested when he came out, was not guilty of an attempt to commit burglary, as his acts did not go beyond mere preparation. People *v.* Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108.

69. See, generally, INDICTMENTS AND INFORMATIONS.

For forms of indictments or informations for burglary at common law and under particular statutes see the following cases:

Breaking and entering a dwelling-house with intent to commit larceny.

Alabama.— Bowen *v.* State, 106 Ala. 178, 17 So. 335.

Illinois.— Watson *v.* People, 134 Ill. 374, 25 N. E. 567.

Missouri.— State *v.* Yandle, 166 Mo. 589, 66 S. W. 532.

Pennsylvania.— Com. *v.* Carson, 166 Pa. St. 179, 30 Atl. 985.

Texas.— Ross *v.* State, 16 Tex. App. 554; Lawson *v.* State, 13 Tex. App. 264.

Breaking and entering a dwelling-house in the night-time with intent to commit larceny.

California.— People *v.* Taggart, 43 Cal. 81; People *v.* Burgess, 35 Cal. 115; People *v.* Shaber, 32 Cal. 36.

Massachusetts.— Tully *v.* Com., 4 Metc. (Mass.) 357.

Missouri.— State *v.* Tutt, 63 Mo. 595; State *v.* Alexander, 56 Mo. 131.

New Hampshire.— State *v.* Squires, 11 N. H. 37.

Ohio.—Hartshorn *v.* State, 29 Ohio St. 635.

Vermont.— State *v.* Clark, 42 Vt. 629.

Virginia.— Johnson *v.* Com., 29 Gratt. (Va.) 796.

West Virginia.— State *v.* McClung, 35 W. Va. 280, 13 S. E. 654; State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

Breaking and entering a dwelling-house in the daytime with intent to commit larceny. Harris *v.* People, 59 N. Y. 599; State *v.* Miller, 3 Wash. 131, 28 Pac. 375.

Breaking and entering a dwelling-house in the night-time with intent to rape. Bradley *v.* State, 32 Ark. 704; Com. *v.* Doherty, 10 Cush. (Mass.) 52; State *v.* McDaniel, 60 N. C. 245; State *v.* Ryan, 15 Oreg. 572, 16 Pac. 417.

Breaking and entering a dwelling-house in the night-time with intent to commit an assault. Watts *v.* State, 5 W. Va. 532. See also State *v.* Phipps, 95 Iowa 487, 64 N. W. 410.

Breaking and entering a dwelling-house with intent to murder. State *v.* Johnston, 119 N. C. 883, 26 S. E. 163.

Burglary in the night-time by discharging fire-arms into a house with intent to murder a person therein. Garner *v.* State, 31 Tex. Crim. 22, 19 S. W. 333.

Breaking and entering in the night-time a dwelling-house, in which there is at the time a human being, with intent to commit larceny (State *v.* Tutt, 63 Mo. 595; State *v.* Alexander, 56 Mo. 131); or the same, with intent to rape (State *v.* Ryan, 15 Oreg. 572, 16 Pac. 417).

Breaking and entering a dwelling-house and taking away something of value. Polin *v.* Com., 19 Ky. L. Rep. 453, 40 S. W. 927.

Breaking and entering a building with intent to commit arson. People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

Breaking and entering a house with intent to commit larceny. Reed *v.* State, 66 Ark. 110, 49 S. W. 350.

Entering a dwelling-house without breaking with intent to commit larceny. People *v.* Hall, 94 Cal. 595, 30 Pac. 7; Watson *v.* People, 134 Ill. 374, 25 N. E. 567.

Entering a dwelling-house in the night-time without breaking with intent to commit larceny. State *v.* Hughes, 86 N. C. 662; Shepherd *v.* State, 42 Tex. 501.

Breaking and entering a shop, store, storehouse, warehouse, etc., with intent to commit larceny.

Connecticut.— Wilson *v.* State, 24 Conn. 57.

Georgia.— Williams *v.* State, 46 Ga. 212.

Indiana.— Edwards *v.* State, 62 Ind. 34.

Iowa.— State *v.* Ridley, 48 Iowa 370; State *v.* Hayden, 45 Iowa 11.

Louisiana.— State *v.* Curtis, 30 La. Ann. 814.

Massachusetts.—Com. *v.* Darling, 129 Mass. 112.

Missouri.— State *v.* Watson, 141 Mo. 338, 42 S. W. 726.

Ohio.— Spencer *v.* State, 13 Ohio 401.

Virginia.— Vaughan *v.* Com., 17 Gratt. (Va.) 576.

necessary to constitute the offense, and with sufficient certainty as to time, place, and intent, to inform the accused of the particular crime with which he is charged.[70] An indictment will not be rendered bad merely because it is not properly punctuated or is otherwise ungrammatical, if the meaning is clear,[71] but it may be bad by reason of errors in spelling or inadvertent omission of words.[72] An indictment which would be insufficient at common law may be good under a

Washington.— State *v.* Dolson, 22 Wash. 259, 60 Pac. 653.

Wisconsin.— Martin *v.* State, 79 Wis. 165, 48 N. W. 119.

Breaking and entering in the night-time a shop adjoining a dwelling-house, with intent to commit larceny. Josslyn *v.* Com., 6 Metc. (Mass.) 236.

Breaking and entering in the night-time, with intent to commit larceny, a shop, store, etc., not adjoining a dwelling-house. Cole *v.* People, 37 Mich. 544; People *v.* Nolan, 22 Mich. 229.

Breaking and entering an outhouse, not adjoining to or occupied with a dwelling-house, with intent to commit larceny. Speers *v.* Com., 17 Gratt. (Va.) 570; State *v.* Betsall, 11 W. Va. 703.

Breaking and entering an office in the night-time with intent to commit larceny. Larned *v.* Com., 12 Metc. (Mass.) 240.

Breaking and entering a city hall in the night-time and stealing therein. Com. *v.* Williams, 2 Cush. (Mass.) 582.

Breaking and entering a sheriff's office in the daytime, by force or fraud, with intent to commit larceny. Bigham *v.* State, 31 Tex. Crim. 244, 20 S. W. 577.

Breaking and entering a stable in the night-time, with intent to commit larceny. Dodd *v.* State, 33 Ark. 517; Blackburn *v.* State, 50 Ohio St. 428, 36 N. E. 18.

Breaking and entering, with intent to steal, a building in which goods, merchandise, or other valuable thing is kept for use, sale, or deposit.

Alabama.— Hurt *v.* State, 55 Ala. 214.

Iowa.— State *v.* Haney, 110 Iowa 26, 81 N. W. 151; State *v.* Franks, 64 Iowa 39, 19 N. W. 832.

Missouri.— State *v.* Watson, 141 Mo. 338, 42 S. W. 726; State *v.* South, 136 Mo. 673, 38 S. W. 716; State *v.* Taylor, 136 Mo. 66, 37 S. W. 907; State *v.* Henley, 30 Mo. 509.

South Dakota.— State *v.* Lewis, 13 S. D. 166, 82 N. W. 406.

Washington.— State *v.* Dolson, 22 Wash. 259, 60 Pac. 653.

Under the Oregon statute see State *v.* Wright, 19 Oreg. 258, 24 Pac. 229.

Breaking and entering, with intent to steal, a house which is the place of business of another, where valuable goods, wares, produce, or any other articles of value are contained or stored. Bethune *v.* State, 48 Ga. 505. See also Williams *v.* State, 46 Ga. 212.

Breaking and entering a railroad car with intent to commit larceny. Lyons *v.* People, 68 Ill. 271; State *v.* McIntire, 59 Iowa 264, 13 N. W. 286; State *v.* Davis, 138 Mo. 107, 39 S. W. 460.

Indictment against an aider and abettor. Hartshorn *v.* State, 29 Ohio St. 635; Watts *v.* State, 5 W. Va. 532.

Indictment for burglary also charging previous convictions for burglary or other offenses, under statutes relating to habitual criminals. Watson *v.* People, 134 Ill. 374, 25 N. E. 567; Blackburn *v.* State, 50 Ohio St. 428, 36 N. E. 18.

70. "Every fact and modification of a fact which is legally essential to a *prima facie* case of guilt, must be stated. In order that a party accused may know what a thing is, it must be charged expressly, and nothing left to intendment. All that is to be proved must be alleged. . . . And the law proceeding in that beneficent spirit which presumes innocence until guilt be established, will presume that what the indictment does not charge does not exist." State *v.* Dale, 141 Mo. 284, 42 S. W. 722, 64 Am. St. Rep. 513.

The sufficiency of an indictment or information for burglary was passed upon in the following cases, in addition to those hereinabove and hereinafter more specifically cited:

Alabama.— Graves *v.* State, 63 Ala. 134; Pairo *v.* State, 49 Ala. 25.

Indiana.— Edwards *v.* State, 62 Ind. 34.

Kentucky.— Hays *v.* Com., 17 Ky. L. Rep. 1147, 33 S. W. 1104; Com. *v.* Wicker, 9 Ky. L. Rep. 474, 5 S. W. 428.

Missouri.— State *v.* Dooly, 64 Mo. 146.

New York.— People *v.* Bosworth, 64 Hun (N. Y.) 72, 19 N. Y. Suppl. 114, 45 N. Y. St. 512.

Oregon.— State *v.* Mack, 20 Oreg. 234, 25 Pac. 639.

Pennsylvania.— Hackett *v.* Com., 15 Pa. St. 95.

South Dakota.— State *v.* La Croix, 8 S. D. 369, 66 N. W. 944.

Texas.— State *v.* Robertson, 32 Tex. 159.

Wisconsin.—Bell *v.* State, 20 Wis. 599 [*citing* Rex *v.* Pearce, 2 Leach 1946, R. & R. 130].

See 8 Cent. Dig. tit. "Burglary," § 31.

71. Erroneous punctuation and other grammatical errors.— Pond *v.* State, 55 Ala. 196; Ward *v.* State, 50 Ala. 120; St. Louis *v.* State, (Tex. Crim. 1900) 59 S. W. 889.

72. Wrong spelling.— An indictment for burglary was held insufficient because it alleged an intent to commit "larcey" instead of larceny. People *v.* St. Clair, 56 Cal. 406. And so it was held of an indictment alleging that the defendant broke and entered the "dwell-house" of another, instead of "dwelling-house." Parker *v.* State, 114 Ala. 690, 22 So. 791. But in a late Texas case it was held that an indictment was not bad because, in setting out the theft, the word "fraudulently" was written "frausulently." St.

statute declaring indictments sufficient if the offense is charged with such certainty as to enable a person of common understanding to know what is intended, and other statutes making technical defects immaterial.[73]

B. Following the Language of the Statute. In drawing an indictment under a statute it is always safer to follow the language of the statute, if it states all the essentials of the offense, and thus avoid the danger of omitting to state an essential element;[74] but failure to follow the precise language of the statute will not render the indictment bad, if all the essential elements of the offense are otherwise stated. Equivalent terms may be used.[75] Words in a statute which are not descriptive of the offense need not be followed.[76] An indictment which follows the language of the statute is sufficient if all the facts necessary to constitute the offense are thereby stated, and stated with sufficient certainty.[77] But it is otherwise if the statute does not state all the elements of the offense, but leaves some of them, as the intent, for example, or the ownership of the premises, to be implied by construing the statute in the light of the common law; or if, by merely following the language of the statute, the offense is not thereby alleged with the certainty required in an indictment.[78]

C. The Breaking and Entry — 1. In General. At common law, and under

Louis *v.* State, (Tex. Crim. 1900) 59 S. W. 889.

Omission of words.— An indictment alleging that the defendant "then and there, by force break and enter," etc., omitting the word "did," was held insufficient. Jester *v.* State, 26 Tex. App. 369, 9 S. W. 616.

73. Statutes obviating objection for technical defects.— Under a statute providing that an indictment shall be deemed sufficient if it can be understood therefrom that the act charged as the offense is stated with such certainty as to enable a person of common understanding to know what is intended, an indictment charging defendants with burglary, "for at and within the said county, in the night-time unlawfully, feloniously, burglariously did break and enter the dwelling-house of," etc., was sustained against an objection that it did not refer to defendants as the persons who committed the crime. State *v.* Ryan, 113 Iowa 536, 85 N. W. 812.

74. See Graves *v.* State, 63 Ala. 134; Rex *v.* Compton, 7 C. & P. 139, 32 E. C. L. 540.

75. *Arkansas.*—Shotwell *v.* State, 43 Ark. 345.

Georgia.— Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238.

Kentucky.— Cunningham *v.* Com., 11 Ky. L. Rep. 783, 13 S. W. 104.

Massachusetts.— Josslyn *v.* Com., 6 Metc. (Mass.) 236.

Mississippi.— Roberts *v.* State, 55 Miss. 421.

North Carolina.— State *v.* Tytus, 98 N. C. 705, 4 S. E. 29.

Pennsylvania.— Com. *v.* Carson, 166 Pa. St. 179, 30 Atl. 985.

See also, generally, INDICTMENTS AND INFORMATIONS.

76. Words not descriptive of the offense.— Under a statute making it a felony to "break and enter, or shall break with intent to enter, in the night-time, any house, the breaking and entering of which would not constitute burglary," the indictment need not allege that the house was not one, the breaking and entering of which would not constitute burglary, as such clause of the statute is not descriptive of the offense. State *v.* Bouknight, 55 S. C. 353, 33 S. E. 451, 74 Am. St. Rep. 751.

77. *Alabama.*— Mason *v.* State, 42 Ala. 543.

California.— People *v.* Hall, 94 Cal. 595, 30 Pac. 7; People *v.* Rogers, 81 Cal. 209, 22 Pac. 592; People *v.* Murray, 67 Cal. 103, 7 Pac. 178; People *v.* Lewis, 61 Cal. 366, 367.

Iowa.— State *v.* Short, 54 Iowa 392, 6 N. W. 584.

Kentucky.— Mitchell *v.* Com., 88 Ky. 349, 10 Ky. L. Rep. 910, 11 S. W. 209; McRae *v.* Com., 20 Ky. L. Rep. 1199, 49 S. W. 22; Com. *v.* Wicker, 9 Ky. L. Rep. 474, 5 S. W. 428; Lee *v.* Com., 3 Ky. L. Rep. 250.

Louisiana.— State *v.* Scott, 48 La. Ann. 293, 19 So. 141; State *v.* Jordan, 39 La. Ann. 340, 1 So. 655.

Missouri.— State *v.* Higgins, 16 Mo. App. 559.

Nebraska.— Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6.

78. Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258. An indictment alleging a breaking and entry "with the felonious intent then and there a felony to do and commit" is bad for uncertainty, although in the language of the statute, because it fails to describe the felony intended. Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258. See also *infra*, IV, E, 2. An indictment alleging that the defendant "broke into and entered a shop, store, warehouse, or other building, the property of A, in which goods, merchandise, 'or other valuable thing,' was kept for use, sale, or deposit, with intent to steal," was held bad for uncertainty, although in the language of the statute, because it failed to specify the valuable thing kept in the building, and because it was in the alternative. Danner *v.* State, 54 Ala. 127, 25 Am. Rep. 662. And see Davis *v.* State, 54 Ala. 88.

statutes which require a breaking as well as an entry, the indictment must expressly allege both a breaking of the premises and an entry. If it alleges a breaking without alleging an entry,[79] or an entry without alleging a breaking,[80] it is fatally defective. And when a statute requires that the breaking shall be effected in a particular way or by a particular means, making this an element of the offense, the indictment, by using the language of the statute or equivalent words, must charge the offense in such a way as to bring it within the statute in this respect.[81] But it need not in terms allege that the breaking and entering were by "force," although the statute may use such terms, for the term "break" implies force.[82] Of course, if the statute does not require a breaking or an entry or either, as the case may be, they need not be alleged.[83]

2. ENTRY WITHOUT BREAKING AND BREAKING OUT. An indictment under a statute for entering a house without breaking, with intent to commit a felony, and breaking out, must so charge the offense.[84]

3. NON-CONSENT OF OWNER OR OCCUPANT. An indictment for burglary, alleging a breaking and entry, or entry by force, need not allege affirmatively that the breaking and entry, or the entry, were without the consent of the owner or occupant of the building; but consent of the owner or occupant must be negatived in an indictment under a statute punishing an entry without such consent, where no breaking or force is alleged.[85]

79. Pines *v.* State, 50 Ala. 153; State *v.* Whitby, 15 Kan. 402, in both of which cases it was held that to allege that the defendant "broke into" a house is not sufficient as an allegation that he entered.

80. Webb *v.* Com., 87 Ky. 129, 9 Ky. L. Rep. 1007, 7 S. W. 899; Winston *v.* Com., 9 Ky. L. Rep. 1004, 7 S. W. 900. An allegation that the defendant, in the night-time, entered, feloniously, burglariously, and with force and arms, was held equivalent to an allegation that he feloniously and burglariously broke and entered. People *v.* Long, 43 Cal. 444.

81. Conner *v.* State, 14 Mo. 561; People *v.* Bosworth, 64 Hun (N. Y.) 72, 19 N. Y. Suppl. 114, 45 N. Y. St. 512; People *v.* Van Gaasbeck, 9 Abb. Pr. N. S. (N. Y.) 328; Fellinger *v.* People, 15 Abb. Pr. (N. Y.) 128; People *v.* Burt, 3 Alb. L. J. 96.

"Force and arms."— Under the Texas statute defining burglary at night as an entry "by force, threats, or fraud," an indictment alleging merely that the entry was "with force and arms" is insufficient. Brown *v.* State, 7 Tex. App. 619.

Entry by "fraud."— An entry by "fraud," within the Texas statute, is not charged by an allegation that defendant "feloniously, fraudulently, and burglariously did break and enter." Sullivan *v.* State, 13 Tex. App. 462.

82. Shotwell *v.* State, 43 Ark. 345; Cunningham *v.* Com., 11 Ky. L. Rep. 783, 13 S. W. 104; Ducher *v.* State, 18 Ohio 308; Mathews *v.* State, 36 Tex. 675. A charge that the defendant "feloniously, willfully, and burglariously did break and enter," is equivalent to a charge in the language of the statute, that he "willfully and maliciously and with force did break and enter." Shotwell *v.* State, 43 Ark. 345.

Under the Texas statute, which makes it burglary to enter a house by force, threats, or fraud, at night, with intent to commit felony or the crime of theft, or to enter a house in the daytime, by breaking, with such intent, and declaring that an entry need not be effected by an actual breaking, except when it is made in the daytime, an indictment alleging that the defendant did, by force, break and enter the house, etc., sufficiently alleges the breaking, whether it was at night or in the daytime. Strange *v.* State, 33 Tex. Crim. 315, 26 S. W. 406; Buchanan *v.* State, 24 Tex. App. 195, 5 S. W. 847; Martin *v.* State, 21 Tex. App. 1, 17 S. W. 430; Carr *v.* State, 19 Tex. App. 635, 53 Am. Rep. 395.

83. Garner *v.* State, 31 Tex. Crim. 22, 19 S. W. 333, holding that under the Texas statute declaring that in burglary an actual breaking is unnecessary except when entry is in the daytime, and that entry may be constituted by the discharge of fire-arms into the house with intent to injure a person therein, an indictment for such a burglary need not allege that the defendant broke and entered, but it is sufficient to follow the statute.

84. There can be no conviction of such offense under an indictment charging in the ordinary form a breaking and entry with intent to commit a felony. People *v.* Arnold, 6 Park. Crim. (N. Y.) 638; State *v.* McPherson, 70 N. C. 239, 16 Am. Rep. 769. An indictment alleging in one count that the defendant "did break to get out," and in another that he did break and get out was held sufficient under a statute using the words "break out." Rex *v.* Compton, 7 C. & P. 139, 32 E. C. L. 540.

85. Negativing consent of owner or occupant.— The Texas statute defines burglary as "entering a house by force, threats or fraud at night, or in like manner by entering a house during the day and remaining concealed therein until night, with the intent in either case to commit felony or the crime of theft"; and as entering a house in the daytime, by breaking, with such intent. And it

4. Time of Breaking and Entry. By the weight of authority, both at common law, and under statutes which do not change the common-law offense with respect to the time of the breaking and entering, the indictment must not only allege the day on which the offense was committed, as in the case of other offenses,[86] but it must also allege in express terms, or otherwise show on its face, that the breaking and entering were in the night-time.[87] It has generally been held that when a statute punishes burglary at night and in the daytime as separate offenses, or different degrees of the offense, an indictment for burglary in the night-time must allege that it was in the night-time;[88] but by the weight of authority, an indictment for burglary in the daytime is good without expressly alleging that it

is provided that the "entry" into a house, within the meaning of the statute, "includes every kind of entry but one made by the free consent of the occupant, or of one authorized to give such consent." Tex. Pen. Code, arts. 838–840. Under this statute an indictment alleging a breaking and entry need not allege want of the owner's or occupant's consent. Sampson *v.* State, (Tex. Crim. 1892) 20 S. W. 708; Smith *v.* State, 22 Tex. App. 350, 3 S. W. 238; Reed *v.* State, 14 Tex. App. 662; Sullivan *v.* State, 13 Tex. App. 462 [*overruling* Brown *v.* State, 7 Tex. App. 619]. An indictment alleging that the entry was accomplished by force need not allege that the owner or occupant of the premises did not consent. Langford *v.* State, 17 Tex. App. 445; Buntain *v.* State, 15 Tex. App. 485; Summers *v.* State, 9 Tex. App. 396. An indictment charging a burglarious entry without the consent of the occupant of the premises need not further allege that it was without the consent of any one authorized to give consent. Reed *v.* State, 14 Tex. App. 662; Mace *v.* State, 9 Tex. App. 110. Want of consent of a firm consisting of K and L, to the entry of a building, is sufficiently alleged by an averment that the entry was "without the consent of the said K, and without the consent of the said L, or either of them." Smith *v.* State, (Tex. Crim. 1898) 44 S. W. 521.

86. State *v.* Brown, 24 S. C. 224; Cool *v.* Com., 94 Va. 799, 26 S. E. 411. And see, generally, Indictments and Informations.

Failure of an indictment to allege the time may be cured by amendment or verdict. State *v.* Blaisdell, 49 N. H. 81.

87. *Connecticut.*— Lewis *v.* State, 16 Conn. 32.

Pennsylvania.— Com. *v.* Kaas, 3 Brewst. (Pa.) 422.

Tennessee.—Davis *v.* State, 3 Coldw. (Tenn.) 77.

Vermont.— State *v.* Mather, N. Chipm. (Vt.) 32.

Virginia.— Com. *v.* Weldon, 4 Leigh (Va.) 652.

England.—Waddington's Case, 2 East P. C. 513. *Contra,* Reg. *v.* Thompson, 2 Cox C. C. 377, 445, holding it sufficient to allege that the offense was committed burglariously, without stating the time of its commission, or even that it was committed in the night-time.

See 8 Cent. Dig. tit. "Burglary," § 34.

An averment that the acts were committed on a specified day "about the hour of twelve in the night of the same day" is sufficient. State *v.* Seymour, 36 Me. 225; Methard *v.* State, 19 Ohio St. 363; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355.

Statement of the hour.— Some authorities hold that the indictment must state the hour, so as to show that it was what the law regards as the night-time, or state that it was between certain hours, specifying them. State *v.* Bancroft, 10 N. H. 105; State *v.* G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; 2 East P. C. 513; 2 Hale P. C. 179. "The reason for this seems to have been, that one might with a felonious intent have broken and entered a building, at a time properly called in popular language 'night-time,' and yet not have committed the crime of burglary; the time in which that offense can be committed being not so far extended as to embrace the night-time, in the ordinary use of that word, but a period when the light of day had so far disappeared, that the face of a person was not discernible by the light of the sun or twilight." Com. *v.* Williams, 2 Cush. (Mass.) 582, 589. Some courts, however, have held that the hour of the night need not be alleged. People *v.* Burgess, 35 Cal. 115; State *v.* Ruby, 61 Iowa 86, 15 N. W. 848; State *v.* Woods, 31 La. Ann. 267; Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6; State *v.* Robinson, 35 N. J. L. 71. The hour need not be alleged where the night-time is defined by statute. Com. *v.* Williams, 2 Cush. (Mass.) 582, where it is said that "whenever 'night-time' is now used in an indictment, as descriptive of the time of the commission of an offense, it is to be understood of the night-time as defined by this statute."

88. Jones *v.* State, 63 Ga. 141; Hall *v.* People, 43 Mich. 417, 5 N. W. 449; Davis *v.* State, 3 Coldw. (Tenn.) 77. But it has been held that a conviction will not be reversed, or judgment arrested, for failure of the indictment to state whether the offense was by day or night, where the statute makes burglary by night burglary in the first degree, and burglary in the daytime burglary in the second degree, and the defendant has been convicted of burglary in the second degree only. People *v.* Barnhart, 59 Cal. 381; Jones *v.* State, 63 Ga. 141. See also State *v.* Blaisdell, 49 N. H. 81. An averment that the offense was committed "on the second day of February, A. D., 1881, and in the night-time of said day," charges a burglary in the night-

was in the daytime.[89] The time need not be alleged where the statute makes no distinction between burglary in the night-time and in the daytime, even though a greater punishment may be imposed for burglary in the night-time.[90]

D. Character, Occupancy, Location, and Ownership of Premises — 1. In General. An indictment for burglary, whether at common law or under a statute, must distinctly allege the character and occupancy of the premises, in

time and not in the daytime of the day specified. State *v.* Ruby, 61 Iowa 86, 15 N. W. 848.

Under the California statute declaring a breaking and entry in the night-time to be burglary in the first degree, and a breaking and entering in the daytime to be burglary in the second degree, it is held that the indictment need not allege whether the offense was committed at night or in the daytime, that an indictment charging the offense generally, and without stating the time of the breaking and entry, embraces both degrees, and will sustain a conviction of either, according to the evidence. People *v.* Barnhart, 59 Cal. 381. And see People *v.* Jefferson, 52 Cal. 452.

89. State *v.* Neddo, 92 Me. 71, 42 Atl. 253; Butler *v.* People, 4 Den. (N. Y.) 68; Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870. *Compare* Jones *v.* State, 63 Ga. 141.

In Tennessee, however, it was held that an indictment charging the breaking and entering of a dwelling-house with the intent to commit a felony, without specifying the time of the act, does not state an offense, either under the section of the statute punishing such breaking and entry in the night-time, or the section punishing such breaking and entering in the daytime, as time is of the essence of the offense in each case. Davis *v.* State, 3 Coldw. (Tenn.) 77.

90. People *v.* Smith, 136 Cal. 207, 68 Pac. 702; Lassiter *v.* State, 67 Ga. 739; Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809.

Under the Illinois statute which defines burglary without regard to whether it is committed in the day or night, and fixes the punishment at from one to twenty years' imprisonment, with a proviso that where the offense is committed in a dwelling-house in the night-time it shall be punished by not less than five, nor more than twenty, years' imprisonment, it is held that the fact that a burglary was committed at night is mere aggravation of the offense, and need not be alleged, and that there may be a conviction of burglary in a dwelling-house in the night-time under an indictment which does not state whether the offense was committed in the day or night. Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809.

Louisiana.— An indictment charging a burglarious breaking and entry need not state whether it was in the night or daytime under the Louisiana statute punishing any one who with intent to steal "shall, in the night time enter without breaking, or in the day time break or enter any dwelling house," etc. State *v.* Anselm, 43 La. Ann. 195, 8 So. 583; State *v.* Allen, (La. Ann. 1888) 5 So. 531.

In Missouri the indictment need not state whether the offense was committed in the night-time or in the daytime, for the statute makes no distinction, and a statute declares it unnecessary for an indictment to state the time when the offense was committed, when time is not of the essence. Stats *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34.

In Pennsylvania, under the statute punishing any person who shall wilfully and maliciously enter a dwelling-house with felonious intent, "either by day or by night, with or without breaking," it is not necessary, where a breaking and entering with felonious intent is charged, to state whether it was in the night-time or in the daytime. Com. *v.* Carson, 166 Pa. St. 179, 30 Atl. 985.

Under the Texas statute, which makes it burglary to enter a house by force, threats, or fraud, at night, or in like manner to enter a house during the day, and remain concealed therein until night, with intent, in either case, to commit felony or the crime of theft, or to enter a house in the daytime, by breaking, with intent to commit a felony or theft, and declaring that an entry need not be effected by an actual breaking, except when it is made in the daytime, it is not necessary, where an indictment alleges a breaking by force, or actual breaking, to state whether it was in the night-time or daytime. Shaffer *v.* State, (Tex. Crim. 1901) 65 S. W. 1072; Wilks *v.* State, (Tex. Crim. 1899) 51 S. W. 902; Combs *v.* State, (Tex. Crim. 1899) 49 S. W. 585; Strange *v.* State, 33 Tex. Crim. 315, 26 S. W. 406; Sampson *v.* State, (Tex. Crim. 1892) 20 S. W. 708; Martin *v.* State, 21 Tex. App. 1, 17 S. W. 430; Finlan *v.* State, (Tex. App. 1890) 13 S. W. 866; Buchanan *v.* State, 24 Tex. App. 195, 5 S. W. 847; Bravo *v.* State, 20 Tex. App. 188; Carr *v.* State, 19 Tex. App. 635, 53 Am. Rep. 395.

Under the Washington statute making it burglary to unlawfully enter in the night-time, or unlawfully break and enter in the daytime, any dwelling-house, etc., with intent, etc., an indictment charging that the defendant unlawfully broke and entered a dwelling-house "about the hour of four o'clock in the forenoon" of a certain day, was held sufficient, whether the breaking was or was not averred to have been in the night-time. State *v.* Miller, 3 Wash. 131, 28 Pac. 375.

Under the Wisconsin statute punishing any person who shall enter in the night-time without breaking, or shall break and enter in the daytime, any railroad car, etc., it was held that an indictment charging a breaking and entering of a railroad car, without stating whether it was by night or by day, in effect charged a breaking and entering in the day-

such a way as to show on its face that they were the subject of burglary.[91] In some states the statutes expressly allow an indictment to charge the offense in the disjunctive,[92] but such pleading is bad for uncertainty at common law.[93]

2. DWELLING-HOUSES. If the indictment is for burglary at common law or under a statute punishing the breaking and entering of a dwelling-house, it must affirmatively allege that the house was a dwelling-house.[94] If it alleges that the house was the "dwelling-house" of the prosecutor, the allegation is sufficient, for this means that it was his place of residence and was so occupied by him.[95] It is not necessary to allege that any person was in the house at the time.[96]

3. BUILDINGS WITHIN THE CURTILAGE OF A DWELLING-HOUSE, ETC. An indictment at common law, or under statutes punishing the breaking and entering of a dwelling-house, for breaking and entering an outhouse within the curtilage, may describe the premises simply as a dwelling-house, for such outhouses are a part of the dwelling-house.[97] But under a statute specifically punishing burglary of any building "within the curtilage of a dwelling-house," or within a certain distance thereof, the indictment must describe the premises in the terms of the statute or in equivalent words, as they are descriptive of the offense.[98]

4. BUILDINGS NOT ADJOINING TO, OR OCCUPIED WITH, A DWELLING-HOUSE. Under some of the statutes punishing the breaking and entering of a building, or of a shop, office, warehouse, etc., "not adjoining to or occupied with a dwelling-house," the courts have held an indictment fatally defective for failure to describe the place broken and entered as not adjoining to or occupied with a dwelling-house,

time. Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870.

91. Wood *v.* State, 18 Fla. 967; Koster *v.* People, 8 Mich. 431; State *v.* South, 136 Mo. 673, 38 S. W. 716; State *v.* Evans, 18 S. C. 137, and cases cited *infra*, note 92 *et seq.*

92. Disjunctive.— It is so in Alabama. Ward *v.* State, 50 Ala. 120, holding an indictment good where it alleged the house broken and entered, in the disjunctive, to have been "a building within the curtilage of a dwelling-house, or a shop, storehouse, warehouse, or other building of" a certain person.

93. See INDICTMENTS AND INFORMATIONS.

94. Thomas *v.* State, 97 Ala. 3, 12 So. 409; State *v.* Miller, 3 Wash. 131, 28 Pac. 375; State *v.* Atkinson, 88 Wis. 1, 58 N. W. 1034.

"Dwell-house" of another, instead of "dwelling-house," was held to render the indictment fatally defective. Parker *v.* State, 114 Ala. 690, 22 So. 791.

"Mansion-house" is sufficient for "dwelling-house." Com. *v.* Pennock, 3 Serg. & R. (Pa.) 199.

A description of the premises as a "lodging house, and the same being then and there the dwelling house of" a person named, is sufficient, as the description of the premises as a lodging-house may be rejected as surplusage. State *v.* Miller, 3 Wash. 131, 28 Pac. 375.

"Sample room" in hotel.— Under a statute punishing burglary of a dwelling-house, an indictment describing the premises merely as "a sample room in the Arlington Hotel a building in" a certain city, is insufficient, as a hotel, or a sample room therein, is not necessarily a dwelling-house. Thomas *v.* State, 97 Ala. 3, 12 So. 409.

The term "house" instead of "dwelling-house" has been held to be sufficient, on the ground that the word "house," in its common and primary acceptation, means a dwelling-house. Thompson *v.* People, 3 Park. Crim. (N. Y.) 208.

"Private residence" under Texas statute.— Formerly the Texas statute defined burglary as the breaking and entering or entering of a "house," making no distinction between dwelling-houses and other houses; but by an amendment in 1899, burglary of a "private residence" at night was made a separate and distinct offense. Tex. Acts (1899), p. 318. See *supra*, II, E, 1. An indictment under this amendment is bad, and will not sustain a conviction, unless it alleges that the premises were a private residence. Williams *v.* State, (Tex. Crim. 1901) 62 S. W. 1057; Fonville *v.* State, (Tex. Crim. 1901) 62 S. W. 573; Cleland *v.* State, (Tex. Crim. 1901) 61 S. W. 492; Harvey *v.* State, (Tex. Crim. 1901) 61 S. W. 492; Osborn *v.* State, (Tex. Crim. 1901) 61 S. W. 491. But an indictment will not be quashed because it fails to allege that the premises were a private residence, as it may charge burglary under the other provisions of the statute relating to burglary. Shaffer *v.* State, (Tex. Crim. 1901) 65 S. W. 1072.

95. State *v.* Reid, 20 Iowa 413; Bell *v.* State, 20 Wis. 599. And see *infra*, IV, D, 7.

96. State *v.* Reid, 20 Iowa 413.

97. Fletcher *v.* State, 10 Lea (Tenn.) 338. *Compare* Draughn *v.* State, 76 Miss. 574, 25 So. 153. See *supra*, II, E, 2, b.

98. State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842. And see State *v.* South, 136 Mo. 673, 38 S. W. 716. A description of premises as "a gin-house, situate within the curtilage of the dwelling-house," etc., is not sufficient under a statute punishing burglary in a building within two hun-

or expressly allege this fact.[99] But under other statutes such an allegation has been held unnecessary.[1]

5. Shops, Stores, Warehouses, and Other Buildings. In an indictment under a statute punishing the breaking and entering of other buildings than a dwelling-house, the building must be described so as to show that it is within the statute and so as to identify it.[2] It is generally sufficient to describe the building broken and entered, in the language of the statute, as the "booth,"[3] "storehouse,"[4] "warehouse,"[5] "shop," or "store,"[6] etc. Where a statute punishes the breaking and entering of any shop, store, etc., or other building, an indictment must name and describe the building broken and entered. It is not enough to allege the breaking and entering of a "building," without alleging the kind of building.[7] Under a statute punishing the breaking and entering of any "building" or any "house," it has generally been held that the indictment, if it describe the prem-

dred yards of a dwelling-house. State *v.* Evans, 18 S. C. 137. An indictment for breaking and entering a "gear-house within the curtilage and protection" of a dwelling-house is sufficient under a statute declaring all outhouses within the curtilage or protection of the dwelling-house to be parts of the same. Bryant *v.* State, 60 Ga. 358.

99. Bickford *v.* People, 39 Mich. 209; Byrnes *v.* People, 37 Mich. 515; Koster *v.* People, 8 Mich. 431. Under a statute punishing the breaking and entering of "any building within the curtilage of a dwelling house, but not forming a part thereof," an indictment charging the breaking and entering of a barn is bad, where it does not show that it was within the curtilage of a dwelling-house, but not forming a part thereof. State *v.* South, 136 Mo. 673, 38 S. W. 716. An allegation that defendant entered the building of a certain person, which was situate within the curtilage of such person's dwelling, but did not form a part thereof, sufficiently describes the building to bring it within such a statute. State *v.* Burdett, 145 Mo. 674, 47 S. W. 796.

1. Rimes *v.* State, 36 Fla. 90, 18 So. 114; Larned *v.* Com., 12 Metc. (Mass.) 240; Phillips *v.* Com., 3 Metc. (Mass.) 588; Evans *v.* Com., 3 Metc. (Mass.) 453; Devoe *v.* Com., 3 Metc. (Mass.) 316 [but see *contra*, Com. *v.* Tuck, 20 Pick. (Mass.) 356]; Gundy *v.* State, 72 Wis. 1, 38 N. W. 328; State *v.* Kane, 63 Wis. 260, 23 N. W. 488.

2. Thomas *v.* State, 97 Ala. 3, 12 So. 409; Kincaid *v.* People, 139 Ill. 213, 28 N. E. 1060; State *v.* Fleming, 107 N. C. 905, 12 S. E. 131; Bigham *v.* State, 31 Tex. Crim. 244, 20 S. W. 577.

Sufficient description.— Since one who enters a room of a house with burglarious intent enters the house with such intent, an allegation that defendant so broke and entered "the building, to wit, the ticket office of" a certain railroad company is sufficient. People *v.* Young, 65 Cal. 225, 3 Pac. 813.

3. People *v.* Hagan, 14 N. Y. Suppl. 233, 37 N. Y. St. 660.

4. Hale *v.* Com., 98 Ky. 353, 17 Ky. L. Rep. 947, 33 S. W. 91. To describe the premises as a "store-room" was held insufficient under a statute using the term "storehouse." Hagar *v.* State, 35 Ohio St. 268. Description of the premises as "a certain building, to-wit, a certain store room," etc., was held sufficient under the Ohio statute. State *v.* Johnson, 64 Ohio St. 270, 60 N. E. 219.

5. Spencer *v.* State, 13 Ohio 401. An indictment under a statute for breaking and entering a warehouse is not defective in describing it as a "warehouse building." State *v.* Dolson, 22 Wash. 259, 60 Pac. 653. An indictment charging breaking and entry of "the granary warehouse and building" of a certain person, "a building in which divers goods, merchandise and valuable things were then and there kept," was held good as an indictment for burglary in a warehouse, on the ground that the word "granary" was used as an adjective, or that, if used as a noun, it might be rejected as surplusage. State *v.* Watson, 141 Mo. 338, 42 S. W. 726.

6. Description of the premises as "a certain building, to wit, the shop" of a person named, is good. Com. *v.* Bowden, 14 Gray (Mass.) 103. Some courts have held "shop" and "store" to be synonymous, so as to permit of their being used interchangeably. State *v.* Smith, 5 La. Ann. 340. But the better opinion is to the contrary. Com. *v.* McMonagle, 1 Mass. 517; State *v.* Canney, 19 N. H. 135. In State *v.* Canney, 19 N. H. 135, an indictment alleging that defendant broke and entered the "store" of a certain person, and certain goods being then and there in the "shop aforesaid" did steal, etc., was held bad.

7. State *v.* Dale, 141 Mo. 284, 289, 42 S. W. 722, 64 Am. St. Rep. 513. In this case it was said: "The indictment must charge that the building is a shop, store, tent, etc., giving its correct designation, because in a case of statutory breaking, the indictment must employ the statutory word as shop, store, office, etc. And if to such place the statute adds a descriptive phrase, it must be covered by allegation." *Compare*, however, Com. *v.* Johnston, 19 Pa. Super. Ct. 241.

It is sufficient to describe the premises as a "building, to wit, the ticket office" of a certain person or corporation (People *v.* Young, 65 Cal. 225, 3 Pac. 813); or as a certain building in a city named, "to wit, the office building" of a certain corporation (Com. *v.* Moriarty, 135 Mass. 540). An allegation that the defendant, in the state and county

ises by a term which does not necessarily imply a building or house, must go further and allege that they were a building or house.[8] But this is not necessary where the term used necessarily implies that the premises were a building or house.[9]

6. "OTHER PLACES OF BUSINESS." Under a statute punishing the breaking and entering of certain buildings, enumerating them, or "other place of business" of another, an indictment describing the premises by a term which does not bring them within the terms specifically used in the statute must allege that they were the place of business of another, unless this is necessarily implied from the description.[10]

7. OCCUPANCY OF PREMISES. An indictment for burglary in a dwelling-house sufficiently shows its occupancy as such by describing it as a dwelling-house, and it need not allege that any person was in it at the time,[11] unless a statute makes this an essential element of the offense. Nor need an indictment under a statute for breaking and entering a store allege its actual occupancy at the time, if this is not an essential element under the statute.[12] But when the indictment is under a statute punishing the breaking and entering of a dwelling-house or other building when it is in the actual occupancy of another, or when a person is lawfully in the same, an allegation that it was actually occupied or that a person was in the house is essential.[13]

aforesaid, broke and entered "a certain house there situated, and being used and possessed by one John Head," etc., was held sufficient as a description of the house, under a statute making it burglary to break and enter, "a house, tenement, railway car, or other building," etc. Reed *v.* State, 66 Ark. 110, 49 S. W. 350.

8. See Wood *v.* State, 18 Fla. 967, where it was held that an indictment for breaking and entering premises described as a "corn-crib" was defective in not alleging that the corn-crib was a building, as a corn-crib may not be a building. *Compare*, however, Roberts *v.* State, 55 Miss. 421. See also Kincaid *v.* People, 139 Ill. 213, 28 N. E. 1060, holding an indictment for breaking and entering the "engine-room" of a railroad company defective on the ground that an engine-room was not necessarily within the terms "other building" in the Illinois statute.

It is not sufficient to describe the premises as certain "stove-works," without alleging them to have been a building, or a room, or a part of a building, as required in the statute. People *v.* Haight, 54 Hun (N. Y.) 8, 7 N. Y. Suppl. 89, 26 N. Y. St. 33. Where a statute used the word "building," an indictment for breaking and entering a "store" was held bad for failure to allege that it was a building. Com. *v.* McMonagle, 1 Mass. 517.

9. Under a statute punishing breaking and entry of certain enumerated structures "or other buildings," it was held that an indictment alleging the breaking and entering of a "stable" was not defective, on the ground that it did not allege or show that the stable was a building within the statute. Orrell *v.* People, 94 Ill. 456, 34 Am. Rep. 241. See also State *v.* Edwards, 109 Mo. 315, 19 S. W. 91, railroad "depot."

Sufficient descriptions.— An indictment charging a breaking and entering of a "weather-house," shows that the house is one the breaking and entering of which would not constitute burglary, so as to render an allegation to this effect unnecessary. State *v.* Bouknight, 55 S. C. 353, 33 S. E. 451, 74 Am. St. Rep. 751. An indictment alleging the breaking and entering into the sheriff's office, and also into a vault therein, is sufficient under a statute punishing breaking and entering a "house," without expressly alleging the sheriff's office to have been a house. Bigham *v.* State, 31 Tex. Crim. 244, 20 S. W. 577. An indictment alleging that the defendant broke and entered "the certain planing mill of one J. A. Murphy, . . in which said mill there was then and there kept for use and deposit by the said J. A. Murphy, goods, wares, and valuable things," sufficiently alleges breaking and entering a "building," within a statute, without alleging expressly that the mill was a building. State *v.* Haney, 110 Iowa 26, 81 N. W. 151.

10. McElreath *v.* State, 55 Ga. 562, holding an indictment describing the premises merely as "a mill-house" insufficient.

11. State *v.* Reid, 20 Iowa 413; Bell *v.* State, 20 Wis. 599. See also State *v.* Frank, 41 La. Ann. 596, 7 So. 131; Harris *v.* People, 44 Mich. 305, 6 N. W. 677.

12. If an indictment alleges that the building was owned by a certain person it need not further allege that it was occupied by him, or was under his charge. Wilson *v.* State, (Tex. Crim. 1897) 42 S. W. 290.

13. *Louisiana.*— State *v.* Frank, 41 La. Ann. 596, 7 So. 131, holding that a charge of breaking and entering a storehouse, used as a dwelling-house, in which a person was at the time residing, is equivalent to an allegation that such person was lawfully in the house at the time.

North Carolina.— State *v.* Fleming, 107 N. C. 905, 12 S. E. 131.

Ohio.— Forsythe *v.* State, 6 Ohio 19.

8. Averments as to Property in the Building. An indictment for burglary with intent to steal need not allege that there was any property in the building, unless this is made an element of the offense by the statute.[14] But under statutes punishing as burglary the breaking and entering of a shop, store, warehouse, or other building in which goods, merchandise, or other valuable thing is kept for use, sale, or deposit, the indictment, after describing the building, must allege that goods, merchandise, or some other valuable thing was kept therein for use, sale, or deposit, as this is one of the elements of the offense.[15] It is not enough to allege that "a valuable thing" was kept in the building, but the thing must be specified, and the allegation must not be in the alternative.[16] It must expressly allege that the thing or things kept in the building were of value, unless the description necessarily implies value.[17] But the value in dollars or cents need not be stated.[18] And it is sufficient to allege that the goods, etc., were "then and there" kept in the building or place, for use, etc., without alleging when they were deposited there, or otherwise when they were kept there.[19]

Oregon.— State *v.* Mack, 20 Oreg. 234, 25 Pac. 639.

Wisconsin.— Bell *v.* State, 20 Wis. 599.

14. Charles *v.* State, 36 Fla. 691, 18 So. 369; State *v.* Emmons, 72 Iowa 265, 33 N. W. 672; Hale *v.* Com., 98 Ky. 353, 17 Ky. L. Rep. 947, 33 S. W. 91; State *v.* Sufferin, 6 Wash. 107, 32 Pac. 1021. *Compare*, however, Winslow *v.* State, 26 Nebr. 308, 41 N. W. 1116.

15. Thomas *v.* State, 97 Ala. 3, 12 So. 409; Rowland *v.* State, 55 Ala. 210; Crawford *v.* State, 44 Ala. 382; Lee *v.* State, 56 Ga. 477. As to the sufficiency of the indictment in this respect see State *v.* Johns, 15 Oreg. 27, 13 Pac. 647.

Illustrations.— Under a statute punishing the breaking and entering of any shop, warehouse, or other structure in which any goods, merchandise, or other valuable thing is kept for use, sale, or deposit, an indictment describing the premises merely as "a sample room in the 'Arlington Hotel' a building in" a certain city, is insufficient. Thomas *v.* State, 97 Ala. 3, 12 So. 409. A description of the premises as a certain store in which goods, etc., things of value, "were" kept for use, etc., sufficiently shows that things of value were kept therein at the time of the offense. Williams *v.* State, 67 Ala. 183. Under a statute punishing breaking and entering any building "in which any goods . . . shall be kept for use, sale or deposit, with intent to steal therein," an indictment alleging the breaking and entering of a building where goods were kept "for use and safety," with intent to take, steal, etc., is sufficient, as the words used are equivalent to those in the statute. Roberts *v.* State, 55 Miss. 421. Where an indictment for burglary alleged that a certain person owned the building, that goods and chattels were "then and there in said building found"; that these belonged to him; and that the breaking and entering was with intent to steal, it was held that it might be inferred that the goods were kept in the building "for use, sale, or deposit," as required by the statute. State *v.* Burns, 109 Iowa 436, 80 N. W. 545.

16. Under a statute punishing the breaking and entering of a house or building in which any goods, merchandise, "or other valuable thing," is kept for use, sale, or deposit, with intent to steal, an indictment must specify the valuable thing, and must not be made in the alternative. For both reasons, an indictment alleging, in the language of the statute, that the defendant broke and entered a place "in which goods, merchandise, or other valuable thing, was kept for use, sale, or deposit, with intent to steal," was held bad. Danner *v.* State, 54 Ala. 127, 25 Am. Rep. 662. And see Davis *v.* State, 54 Ala. 88, and cases cited *infra*, note 17.

17. Allegation as to value, etc.— Under a statute punishing the breaking and entering of a building "in which any goods, merchandise, or other valuable thing is kept for use, sale, or deposit," with intent to steal, etc., an indictment is bad if it merely alleges generally that some "other valuable thing" was kept in the building. It must describe the particular thing, and must allege that it was of value, unless value is necessarily implied from the description. Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72; Pickett *v.* State, 60 Ala. 77; Rowland *v.* State, 55 Ala. 210; Danner *v.* State, 54 Ala. 127, 25 Am. Rep. 662; Davis *v.* State, 54 Ala. 88; Neal *v.* State, 53 Ala. 465; Robinson *v.* State, 52 Ala. 587; Webb *v.* State, 52 Ala. 422; Norris *v.* State, 50 Ala. 126. It is sufficient to allege that "goods" or "merchandise," or "property" were kept in the building, without expressly alleging that they were of value, as these words import value. Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72; Pickett *v.* State, 60 Ala. 77; Webb *v.* State, 52 Ala. 422; Norris *v.* State, 50 Ala. 126; Wicks *v.* State, 44 Ala. 398. See also Boose *v.* State, 10 Ohio St. 575. But "cotton," "cotton in the seed," or "lint cotton" do not necessarily import value, and an allegation of value is necessary. Robinson *v.* State, 52 Ala. 587; Webb *v.* State, 52 Ala. 422; Norris *v.* State, 50 Ala. 126. See also Rowland *v.* State, 55 Ala. 210.

18. Matthews *v.* State, 55 Ala. 65. See also Pickett *v.* State, 60 Ala. 77; Hurt *v.* State, 55 Ala. 214.

19. State *v.* Turner, 106 Mo. 272, 17 S. W. 304.

9. Railroad and Express Cars. An indictment under a statute for breaking and entering a railroad or express car with intent to commit larceny must so describe the car and its condition as to bring it within the terms of the statute.[20] Under a statute punishing the breaking and entering of a car in which goods are kept "for transportation as freight," an indictment alleging merely that the goods in the car were kept "for transportation," is bad.[21]

10. Location of Premises. At common law it was required that an indictment for burglary should not only state the county in which the offense was committed, but also the particular parish, vill, hamlet, or other place within the county, in which the premises were situated, and this still seems to be the rule in England.[22] In the United States, however, it has repeatedly been held that it is only necessary to give the county, as in the case of other offenses.[23]

11. Ownership of the Premises — a. Necessity to State Ownership. Except in so far as the rule may be changed by statute, an indictment for burglary, whether at common law or under a statute, must allege the ownership of the dwelling-house or other building broken and entered, if it is known, or it will be fatally defective, and it must do so accurately, so that there will be no variance between the allegation and the proof.[24] If the ownership is not known it need

20. Graves *v.* State, 63 Ala. 134. See Hamilton *v.* State, 26 Tex. App. 206, 9 S. W. 687.

Illustrations.— The words "box car" in an information for burglary are equivalent to the words "rail car" in a statute defining burglary. State *v.* Green, 15 Mont. 424, 39 Pac. 322. The indictment need not state whether the car was a box, closed, flat, or open car, unless this is rendered material by the terms of the statute. Aguillar *v.* State, (Tex. Crim. 1894) 26 S. W. 405. The words "freight and express car of the American Express Company" sufficiently describe a "railroad freight car or passenger car." Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870. Where a statute punished the wilful and malicious entering of a railroad car "without force, (the doors and windows being open,) . . . with intent to commit" larceny, the court held an indictment alleging the entering of a railroad car, "then and there being open," sufficient after trial and conviction, but expressed no opinion as to whether it would have been sufficient on demurrer or motion to quash. Brennan *v.* People, 110 Ill. 535.

21. Graves *v.* State, 63 Ala. 134.

22. Reg. *v.* Brookes, C. & M. 544, 41 E. C. L. 296; Reg. *v.* St. John, 9 C. & P. 40, 38 E. C. L. 36; Rex *v.* Bullock, 1 Moody 324, note *a*; 1 Chit. Crim. L. 196.

Applications of common-law rule.— An indictment alleging that the defendant "late of the parish of Pontypool, in the county of Monmouth, . . . at the parish aforesaid, in the county aforesaid, the dwelling-house of the guardians of the Pontypool Union, there situate," feloniously did break and enter, etc., sufficiently gives the location of the house in the parish named. Reg. *v.* Frowen, 4 Cox C. C. 266. It is sufficient to allege that the burglary was committed at a certain place, naming it, as "at Norton-juxta-Kempsey, in the county aforesaid," without describing the place as a parish, town, village, or the like. Reg. *v.* Brookes, C. & M. 544, 41 E. C. L. 296. Under the English rule, it was held that if a house was partly in one parish and partly in another it was properly described as in that parish in which the part broken and entered was situated. Reg. *v.* Howell, 1 Cox C. C. 190.

23. *Arkansas.*—Reed *v.* State, 66 Ark. 110, 49 S. W. 350.

Colorado.— Hamilton *v.* People, 24 Colo. 301, 51 Pac. 425.

Iowa.— State *v.* Reid, 20 Iowa 413.

Kentucky.— Hale *v.* Com., 98 Ky. 353, 17 Ky. L. Rep. 947, 33 S. W. 91.

Missouri.— State *v.* Burdette, 145 Mo. 674, 47 S. W. 796.

Ohio.— Spencer *v.* State, 13 Ohio 401.

Sufficient designations of location.— Where an indictment alleged: "The grand jury of the county of Dubuque, in the name and by the authority of the State of Iowa, accuse" the defendant of entering "the dwelling house of William L. Bradley, there situate," etc., it was held that the words "there situate" referred to the county of D, and that the venue was sufficiently stated. State *v.* Reid, 20 Iowa 413. To give the location as in a certain city has been held sufficient. Com. *v.* Moriarty, 135 Mass. 540.

24. *Alabama.*—Thomas *v.* State, 97 Ala. 3, 12 So. 409; Beall *v.* State, 53 Ala. 460; Ward *v.* State, 50 Ala. 120.

California.— People *v.* Parker, 91 Cal. 91, 27 Pac. 537.

Connecticut.— State *v.* Keena, 63 Conn. 329, 28 Atl. 522.

Florida.— Pells *v.* State, 20 Fla. 774.

Iowa.— State *v.* Morrissey, 22 Iowa 158.

Kansas.— State *v.* Fockler, 22 Kan. 542.

Massachusetts.— Com. *v.* Perris, 108 Mass. 1; Com. *v.* Hartnett, 3 Gray (Mass.) 450.

Mississippi.— James *v.* State, 77 Miss. 370, 29 So. 929, 78 Am. St. Rep. 527.

Nebraska.— Winslow *v.* State, 26 Nebr. 308, 41 N. W. 1116.

not be stated,[25] but in such a case that it is not known must be alleged.[26] In some states the statutes defining burglary are such that the courts have held that the question of ownership is not material, and that an indictment alleging the ownership in such a way as to enable the prosecution to identify the building is sufficient, although the allegation might not be sufficient at common law, and in a few states the allegation of ownership is rendered unnecessary by statute.[27]

b. Mode of Stating Ownership. In alleging ownership no particular form of words is necessary.[28] It is sufficient to describe the premises as "belonging to" a person or corporation named,[29] or as the dwelling-house, shop, office, building, etc., "of" a certain person,[30] or as "the property of" a certain person.[31] In some states it is sufficient to allege that the premises were "occupied" by a person named.[32]

c. In Whom the Ownership Should Be Laid — (1) *GENERALLY.* The test, for the purpose of determining in whom the ownership of the premises should be laid in an indictment for burglary, is not the title, but the occupancy or posses-

New York.— Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464; Smith's Case, 5 City Hall Rec. (N. Y.) 167.

Ohio.— Wilson *v.* State, 34 Ohio St. 199.

South Carolina.— State *v.* Trapp, 17 S. C. 467, 43 Am. Rep. 614.

West Virginia.— State *v.* Hupp, 31 W. Va. 355, 6 S. E. 919; State *v.* Reece, 27 W. Va. 375.

Wisconsin.— Jackson *v.* State, 55 Wis. 589, 13 N. W. 448.

England.— Rex *v.* Rawlins, 7 C. & P. 150, 32 E. C. L. 546; White's Case, 2 East P. C. 513, 780, 1 Leach 252; Rogers' Case, 2 East P. C. 506, 1 Leach 89; Rex *v.* Stock, 2 Leach 1015, R. & R. 138, 2 Taunt. 339, 11 Rev. Rep. 605; Rex *v.* Woodward, 1 Leach 287 note; Rex *v.* Belstead, R. & R. 304; 2 Hale P. C. 244.

See 8 Cent. Dig. tit. "Burglary," § 55.

Reasons for statement of ownership.— "There are only two reasons for requiring the ownership of the house to be stated in an indictment for burglary: 1st. For the purpose of showing on the record that the house alleged to have been broken into was not the dwelling house of the accused, inasmuch as one cannot commit the offence of burglary by breaking into his own house. 2d. For the purpose of so identifying the offence, as to protect the accused from a second prosecution for the same offence." State *v.* Trapp, 17 S. C. 467, 470, 43 Am. Rep. 614.

25. Jackson *v.* State, 102 Ala. 167, 15 So. 344; State *v.* Clifton, 30 La. Ann. 951.

26. State *v.* Morrissey, 22 Iowa 158.

27. State *v.* Wright, 19 Oreg. 258, 24 Pac. 229. And see State *v.* Emmons, 72 Iowa 265, 33 N. W. 672.

28. State *v.* Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. Rep. 425; State *v.* Tyrrell, 98 Mo. 354, 11 S. W. 734. A description of the premises as "a certain mill-house not adjoining to or occupied with the dwelling-house of F.," was held a sufficient allegation of F's ownership of the mill-house. Webster *v.* Com., 80 Va. 598. And see Butler *v.* Com., 81 Va. 159. *Contra,* State *v.* Hupp, 31 W. Va. 355, 6 S. E. 919. A description of premises as "the St. Bridget's Church and meeting house" is not a sufficient allegation of ownership, as these words are merely descriptive of the church. Wilson *v.* State, 34 Ohio St. 199.

29. State *v.* Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. Rep. 425.

30. State *v.* Tyrrell, 98 Mo. 354, 11 S. W. 734, where it is held that an allegation of breaking and entering a certain building "of" a certain person, naming him, "the same being used and occupied by the said" person, naming him, "as a saloon," is a sufficient allegation of ownership. See also State *v.* Watson, 102 Iowa 651, 72 N. W. 283; Butler *v.* Com., 81 Va. 159; Webster *v.* Com., 80 Va. 598. Describing a building as "the city hall of the city of Charlestown," is sufficient. Com. *v.* Williams, 2 Cush. (Mass.) 582.

31. State *v.* Johnson, 64 Ohio St. 270, 60 N. E. 219.

32. In California, under a statute declaring it sufficient for an indictment to state the acts constituting the offense in ordinary and concise language, it is held that an allegation that the building was occupied by a certain person is sufficient without stating that it was owned by him. People *v.* Rogers, 81 Cal. 209, 22 Pac. 592. And in Texas, description of a house as one "then and there occupied and controlled" by a certain person is sufficient. Sullivan *v.* State, 13 Tex. App. 462. An allegation that the defendant broke and entered into a certain room occupied by a certain company in a certain building is sufficient, without alleging the ownership of the building. State *v.* Simas, 25 Nev. 432, 62 Pac. 242. An allegation that the building was owned by a certain person implies that it was occupied by him. Price *v.* State, (Tex. Crim. 1900) 58 S. W. 83.

Ownership of land on which house stands. — In charging burglary it is not necessary to allege that the occupant of the house owned the land on which the house stood. Favro *v.* State, 39 Tex. Crim. 452, 46 S. W. 932, 73 Am. St. Rep. 950.

Omission of words.—An indictment describing the house as "occupied S.," leaving out the word "by," is fatally defective. Scroggins *v.* State, 36 Tex. Crim. 117, 35 S. W. 968.

sion at the time the offense was committed. The general rule is that the ownership should be laid in the occupant at the time the offense was committed, unless he was a mere servant,[33] and not in the holder of the legal title, who was not in possession.[34] The ownership is properly laid in the actual occupant, although his possession may have been wrongful as against the holder of the legal title.[35]

(II) *Landlord and Tenant.* If premises are in the possession and occupancy of a tenant at the time of a burglary, the ownership may be laid in the tenant, and at common law it must be so laid, or there will be a fatal variance.[36] This is true of a tenant at will.[37] The rule does not apply where the house is burglariously broken and entered after the tenant has surrendered the possession.[38] And if part of a house is let to a tenant and the rest is reserved by the owner for other purposes, the part reserved cannot be described as the dwelling-house of the tenant.[39] In some states the ownership may be laid either in the tenant or in the landlord.[40]

(III) *Master and Servant, and Principal and Agent.* As a general rule, when a house or room is occupied by a servant as the house of his master, and in the course of his master's employment, and not as a tenant, an indictment for burglary should lay the ownership in the master, and not in the servant, for

33. See *infra*, IV, D, 11, c, (III).

34. *Alabama.*— Hale *v.* State, 122 Ala. 85, 26 So. 236; Thomas *v.* State, 97 Ala. 3, 12 So. 409.

California.— People *v.* Rogers, 81 Cal. 209, 22 Pac. 592.

Georgia.— Houston *v.* State, 38 Ga. 165.

Indiana.— McCrillis *v.* State, 69 Ind. 159.

Iowa.— State *v.* Burns, 109 Iowa 436, 80 N. W. 545; State *v.* Rivers, 68 Iowa 611, 27 N. W. 781.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

Texas.— Favro *v.* State, 39 Tex. Crim. 452, 46 S. W. 932, 73 Am. St. Rep. 950; Sullivan *v.* State, 13 Tex. App. 462.

England.—Reg. *v.* Bridges, 1 Cox C. C. 261; Rex *v.* Wallis, 1 Moody 344; Rex *v.* Collett, R. & R. 371.

Sufficient allegation.— An allegation that the building was the office of a certain railroad company is sustained by proof that it was occupied by the company. State *v.* Watson, 102 Iowa 651, 72 N. W. 283.

35. Houston *v.* State, 38 Ga. 165; Rex *v.* Wallis, 1 Moody 344.

36. *Alabama.*— Hale *v.* State, 122 Ala. 85, 26 So. 236; Thomas *v.* State, 97 Ala. 3, 12 So. 409; Johnson *v.* State, 73 Ala. 483; Matthews *v.* State, 55 Ala. 65; Webb *v.* State, 52 Ala. 422.

Florida.— Leslie *v.* State, 35 Fla. 171, 17 So. 555.

Illinois.— Smith *v.* People, 115 Ill. 17, 3 N. E. 733.

Indiana.— Kennedy *v.* State, 81 Ind. 379; McCrillis *v.* State, 69 Ind. 159.

Iowa.— State *v.* Lee, 95 Iowa 427, 64 N. W. 284; State *v.* Rivers, 68 Iowa 611, 27 N. W. 781; State *v.* Golden, 49 Iowa 48.

Massachusetts.— Com. *v.* Bowden, 14 Gray (Mass.) 103.

Nebraska.—Winslow *v.* State, 26 Nebr. 308, 41 N. W. 1116.

New Hampshire.— State *v.* Rand, 33 N. H. 216.

New York.—Mason *v.* People, 26 N. Y. 200.

Ohio.— State *v.* Buechler, 57 Ohio St. 95, 48 N. E. 507.

West Virginia.—State *v.* Betsall, 11 W. Va. 703.

England.— Rex *v.* Collett, R. & R. 371.

See 8 Cent. Dig. tit. "Burglary," § 58.

One of several compartments of a building under a continuous roof, entirely separated from the others, and being in the exclusive possession of a tenant of the owner of the whole building as a poultry-house, is properly described as the tenant's poultry-house. State *v.* Buechler, 57 Ohio St. 95, 48 N. E. 507.

Possession by sheriff.— Ownership of a house may be laid in one who held the goods therein as sheriff, under a writ of attachment, and occupied the house under a rental contract, paying the rent out of the proceeds of the goods sold; and it is not necessary to allege that he held the goods and occupied the house as sheriff. Linhart *v.* State, 33 Tex. Crim. 504, 27 S. W. 260.

37. Rex *v.* Collett, R. & R. 371. But it was held that the ownership of a corn-crib was properly laid in the actual owner, although he had permitted another to store his corn therein. Painter *v.* State, 26 Tex. App. 454, 9 S. W. 774.

38. Harrison *v.* State, 74 Ga. 801, holding that where the owner of a house temporarily leaves it in possession of a tenant, leaving his household goods therein, and intending to return, and it is broken and entered, and his goods stolen before his return, but after the tenant has given up possession, the ownership is properly laid in him.

39. Rex *v.* Wilson, R. & R. 86. And see Reed *v.* State, 34 Tex. Crim. 597, 31 S. W. 404; Rex *v.* Jenkins, R. & R. 182. *Compare* Rex *v.* Witt, 1 Moody 248.

40. Kennedy *v.* State, 81 Ind. 379. In Com. *v.* Ballard, 18 Ky. L. Rep. 782, 38 S. W. 678, it was held that an indictment for breaking into the warehouse of an ice company was supported by evidence that the defendant broke into an apartment in the warehouse,

the master occupies it by the servant, and this is true whether the master is present or absent at the time of the offense, and whether he lives under the same roof or not.[41] It has been held, however, that where a servant lives with his family in a separate house, of which he has the exclusive occupation, the ownership may be laid in him, although the house is on the same premises as that of the master,[42] or it seems it may be laid in the master.[43] And if a servant lives in a house of his master as a tenant at a yearly rent, the ownership must be laid in the servant, and not in the master.[44] In some states it is held that when a person occupies premises as the mere agent of another person or a corporation, the ownership must be laid in the principal.[45] But in other states it is held that the agent, if he has entire control, has such special ownership and possession that the ownership may be laid in him.[46]

(IV) *Occupants of Apartments.* Each apartment in a tenement or apartment house is the dwelling-house of the occupant, and in an indictment for

the use of which was leased by the ice company to a brewing company.

41. *Alabama.*— Aldridge *v.* State, 88 Ala. 113, 7 So. 48, 16 Am. St. Rep. 23.

New York.— Rodgers *v.* People, 86 N. Y. 360, 40 Am. Rep. 548.

North Carolina.— State *v.* Davis, 77 N. C. 490; State *v.* Outlaw, 72 N. C. 598.

Texas.— Daggett *v.* State, 39 Tex. Crim. 5, 44 S. W. 148, 842; Buchanan *v.* State, 24 Tex. App. 195, 5 S. W. 847.

United States.— U. S. *v.* Johnson, 2 Cranch C. C. (U. S.) 21, 26 Fed. Cas. No. 15,485.

England.— Reg. *v.* Ashley, 1 C. & K. 198, 47 E. C. L. 198; Rex *v.* Rawlins, 7 C. & P. 150, 32 E. C. L. 546; Reg. *v.* Courtenay, 5 Cox C. C. 218; 1 East P. C. 500.

Partnership.— A house owned by a partnership may be deserihed as the dwelling-house of the partners, if their servant lives there merely in the course of his employment. State *v.* Davis, 77 N. C. 490.

42. Ashton *v.* State, 68 Ga. 25; Rodgers *v.* People, 86 N. Y. 360, 40 Am. Rep. 548; Rex *v.* Rees, 7 C. & P. 568, 32 E. C. L. 762 (where a gardener lived with his family in a cottage distinct from his master's house, although on his premises); Rex *v.* Witt, 1 Moody 248; Rex *v.* Camfield, 1 Moody 42; Rex *v.* Johling, R. & R. 391. Where an indictment described the premises as the dwelling-house of A, and it appeared that A was foreman of the plantation on which the house was, and occupied one room therein most of the time, it was held that the whole house might be regarded as his dwelling-house, although the owner of the plantation frequently occupied a room there, and when there was master. Ashton *v.* State, 68 Ga. 25.

43. Rex *v.* Rees, 7 C. & P. 568, 32 E. C. L. 762. But where an employee had exclusive possession and control of a chicken-house and its contents, situated eight miles from the owner's residence, and an interest in the increase of the fowls, it was held that the proof did not sustain an indictment for burglary laying the ownership and possession in the owner. Daggett *v.* State, 39 Tex. Crim. 5, 44 S. W. 148, 842.

44. This is true although the house is situated on the premises where the master's business is carried on, and the servant has it because of his services. Rex *v.* Jarvis, 1 Moody 7. And see Turner's Case, 2 East P. C. 492, 1 Leach 342. It has been held, however, that if a servant has part of a house only and the rest is reserved by the master for other purposes, the part so reserved cannot be described as the servant's, for it is not a part of his dwelling-house. Rex *v.* Wilson, R. & R. 86. And see Rex *v.* Jenkins, R. & R. 182. *Contra*, Rex *v.* Witt, 1 Moody 248.

45. Aldridge *v.* State, 88 Ala. 113, 7 So. 48, 16 Am. St. Rep. 23, holding that the ownership of premises belonging to a corporation, and occupied for it by its business manager, must be laid in the corporation and not in the manager.

46. Hahn *v.* State, 60 Nebr. 487, 83 N. W. 674; People *v.* Smith, 1 Park. Crim. (N. Y.) 329.

In Texas it is held that the ownership of premises may be laid in one who has the possession and entire control of the same, although merely as agent of another, on the ground that he has sufficient special property to support the allegation. Alvia *v.* State, (Tex. Crim. 1901) 60 S. W. 551; McAnally *v.* State, (Tex. Crim. 1900) 57 S. W. 832; Ricks *v.* State, 41 Tex. Crim. 676, 56 S. W. 928; Daggett *v.* State, 39 Tex. Crim. 5, 44 S. W. 148, 842; Smith *v.* State, 34 Tex. Crim. 124, 29 S. W. 775.

It was held that there was no variance where an indictment alleged that the building was owned by S, and the proof showed that it was owned by a corporation of which S was the manager, but that he was in the actual possession, and had control of the clerks employed there, as the possession of S created a special ownership in him. Ricks *v.* State, 41 Tex. Crim. 676, 56 S. W. 928. And see McAnally *v.* State, (Tex. Crim. 1900) 57 S. W. 832.

A deputy sheriff placed in charge of premises to watch the property is not such a special owner that the ownership may be laid in him. Linhart *v.* State, 33 Tex. Crim. 504, 27 S. W. 260.

Ownership of a building may be laid in a person having possession and control for nonresident owners. Hahn *v.* State, 60 Nebr. 487, 83 N. W. 674.

breaking and entering an apartment, therefore, the ownership should be laid in the occupant, and not in the owner of the building,[47] although he may also live in the building.[48]

(v) *Innkeepers and Guests.* As a rule, an indictment for burglary in breaking and entering the room of a guest at an inn must lay the ownership in the innkeeper and not in the guest.[49] But it has been held that this rule does not apply where a person rents a room in a hotel by the week, so as to acquire an interest therein, as he is not then a mere guest.[50] And in some states, by statute, the ownership may be laid in the guest.[51]

(vi) *Lodgers.* If an entire building is let to lodgers the separate door to each room or apartment is to be deemed the outer door of the occupant's dwelling-house within the definition of burglary, and for the purpose of alleging ownership.[52] But if the owner of a house lets to lodgers some of his rooms, retaining for his own inhabitation the residue, the whole is to be considered the dwelling-house of the owner,[53] unless the rule is changed by statute.[54]

(vii) *Joint Owners or Tenants.* Unless it is otherwise provided by statute, where premises are owned or leased and occupied by two persons as joint tenants, the ownership must be laid in both jointly, according to the fact, and an indictment laying the ownership in one of them only is defective.[55] In some states, however, the statutes allow the ownership to be laid in any one or more of

47. Smith *v.* People, 115 Ill. 17, 3 N. E. 733; Mason *v.* People, 26 N. Y. 200; People *v.* Bush, 3 Park. Crim. (N. Y.) 552; Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405; Rex *v.* Bailey, 1 Moody 23.

48. Smith *v.* People, 115 Ill. 17, 3 N. E. 733, where it is held that this is true where the owner of an ordinary house lets one of the floors to another, and lives on the floor above.

49. Rodgers *v.* People, 86 N. Y. 360, 40 Am. Rep. 548; State *v.* Clark, 42 Vt. 629; State *v.* Burton, (Wash. 1902) 67 Pac. 1097; Prosser's Case, 2 East P. C. 502; 1 East P. C. 500; 1 Hale P. C. 557. This is true although the innkeeper may reside with his family in a house separate from the inn. Rodgers *v.* People, 86 N. Y. 360, 40 Am. Rep. 548.

50. State *v.* Burton, (Wash. 1902) 67 Pac. 1097 (holding that an information charging burglary of certain rooms in a hotel is sufficient if it describes the rooms simply as the dwelling-house of the occupants, without expressly alleging the leasing of the rooms for any definite period); State *v.* Johnson, 4 Wash. 593, 30 Pac. 672.

51. Jones *v.* State, 75 Ga. 825. And see People *v.* St. Clair, 38 Cal. 137.

Under the Georgia statute declaring "a hired room or apartment in a public tavern, inn or boarding-house" to be the dwelling-house of "the person or persons occupying or hiring the same," a room in a hotel occupied by one of the servants or waiters is his dwelling-house; and it may be so described in an indictment, notwithstanding another occupies it with him. Jones *v.* State, 75 Ga. 825.

52. Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405; Turner's Case, 2 East P. C. 492, 1 Leach 342; Rex *v.* Bailey, 1 Moody 23.

Lofts over stables and coach-houses converted into lodging rooms, and leased to servants of the owners at an annual rental, are the dwelling-houses of the lodgers, if there is an outer door. Turner's Case, 2 East P. C. 492, 1 Leach 342.

A garret used as a workshop, and let by the week with a sleeping-room to a lodger and used by him, is the dwelling-house of the lodger, if the owner sleeps elsewhere. Carrell's Case, 2 East P. C. 506, 1 Leach 272.

53. Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405; Trapshaw's Case, 2 East P. C. 506, 780, 1 Leach 427; Rogers' Case, 2 East P. C. 506, 1 Leach 89.

Ownership of a house is properly laid in the person having possession and control, although some of the rooms are let to lodgers, and some are used for other purposes. Hahn *v.* State, 60 Nebr. 487, 83 N. W. 674.

54. Under the statute in California it was held that the ownership of a room in a house occupied by a lodger might be laid in him, although the lodging-house keeper lived in the house and had general supervision and control. People *v.* St. Clair, 38 Cal. 137.

55. Webb *v.* State, 52 Ala. 422; Saxton's Case, 2 Harr. (Del.) 533; Rex *v.* Jenkins, R. & R. 182. *Contra*, Com. *v.* Thompson, 9 Gray (Mass.) 108. If a house is let to A, who resides there, and a warehouse under the same roof, and with an internal communication with the house, is let to A and B, the warehouse cannot be described as the dwelling-house of A. Rex *v.* Jenkins, R. & R. 182. An allegation that the premises were occupied by A and B was held sufficient, without alleging that they were partners or that they owned the building. People *v.* Rogers, 81 Cal. 209, 22 Pac. 592. The mere fact that the owner and occupant of premises permits another to partly occupy the same with him does not make it necessary to lay the ownership in both. State *v.* Betsall, 11 W. Va. 703. See Painter *v.* State, 26 Tex. App. 454, 9 S. W. 774. A room is properly described as the premises of a person occupying it and having exclusive use and control at the

several joint owners or occupants.[56] And in other states, although there is no such provision, the statutes are such as to render a variance in this respect immaterial.[57]

(VIII) *Corporations.* If the premises alleged to have been broken and entered were owned or occupied by a corporation, the ownership should be laid in the corporation, describing it by its corporate name.[58] In most jurisdictions there will be a fatal variance if the ownership is laid in the officer, agent, or servant having possession or control as the representative of the corporation, either individually, or as officer, agent, or servant,[59] or if the ownership is laid in the members of the corporation individually.[60] It has been held in some states that it is necessary, in addition to describing the corporation by its corporate name, to allege its incorporation, but the weight of authority is to the contrary.[61]

time of the burglary, although another person occupied it in common with him at other times during the day. Bauer *v.* State, 25 Ohio St. 70.

56. White *v.* State, 72 Ala. 195; Jones *v.* State, 75 Ga. 825.

In Texas, where a statute provides that where property is owned in common or jointly by two or more persons, ownership may be alleged in all or either of them, an indictment laying the ownership of a house in one person is sustained by proof that it was occupied by him and another as tenants in common, although the ownership was in a third person. Cogshall *v.* State, (Tex. Crim. 1900) 58 S. W. 1011; Tidwell *v.* State, (Tex. Crim. 1898) 45 S. W. 1015.

57. Thus it has been held that a variance in this respect is immaterial under a statute providing that a variance in respect to the description of any matter is not ground for acquittal, unless material or prejudicial. Mulrooney *v.* State, 26 Ohio St. 326. Or under a statute providing that an erroneous allegation as to the person injured is not material. People *v.* Bitancourt, 74 Cal. 188, 15 Pac. 744; People *v.* Edwards, 59 Cal. 359; State *v.* Jelinek, 95 Iowa 420, 64 N. W. 259.

58. *Alabama.*— Aldridge *v.* State, 88 Ala. 113, 7 So. 48, 16 Am. St. Rep. 23; Emmonds *v.* State, 87 Ala. 12, 6 So. 54.

Georgia.— Hatfield *v.* State, 76 Ga. 499; Crawford *v.* State, 68 Ga. 822.

Massachusetts.— Com. *v.* Moriarty, 135 Mass. 540.

Mississippi.— James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527.

New Jersey.— Fisher *v.* State, 40 N. J. L. 169.

England.—Hawkins' Case, 2 East P. C. 501; Maynard's Case, 2 East P. C. 501; Picket's Case, 2 East P. C. 501. *Compare* People *v.* Henry, 77 Cal. 445, 19 Pac. 830.

See 8 Cent. Dig. tit. "Burglary," § 60.

Sufficiency of allegations.— An indictment laying the ownership in a corporation by name need not give the names of its officers or its domicile. State *v.* Smith, 104 La. 464, 29 So. 20. It need not be stated whether the corporation is a foreign or domestic corporation. Nor need it be alleged that the defendant was not a stock-holder. Bailey *v.* State, 116 Ala. 437, 22 So. 918.

A dwelling-house owned by a corporation and occupied by its servant as his dwelling is properly described as the house of a corporation, "though an aggregate corporate body cannot be said to inhabit anywhere, yet they may have a mansion-house for the habitation of their servants." Hawkins' Case, 2 East P. C. 501.

Workhouse of poor-law union.— In Reg. *v.* Frowen, 4 Cox C. C. 266, it was held that in an indictment for burglary in the workhouse of the poor law union, the workhouse might be described as the dwelling-house of the guardians of the poor of the union. It was intimated that it could not be described as the dwelling-house of the master of the workhouse.

A railroad depot in the exclusive possession and control of two railroad companies is properly alleged to have been the depot of such two corporations. State *v.* Scripture, 42 N. H. 485.

59. Where an indictment for breaking and entering a storehouse belonging to a corporation laid the ownership in "B, business manager of" the corporation, and it appeared that B was merely in charge of the store as a salaried agent of the company, it was held that the variance was fatal. Aldridge *v.* State, 88 Ala. 113, 7 So. 48, 16 Am. St. Rep. 23. *Compare supra*, IV, D, 11, c, (VIII). It has been held, however, that a house occupied by an agent of a company as a residence may be described as his, although the company pays the rent and holds the lease. Rex *v.* Margetts, 2 Leach 930. And see Rex *v.* Witt, 1 Moody 248.

60. See Rex *v.* Patrick, 2 East P. C. 1059, 1 Leach 287.

61. *Alabama.*— Bailey *v.* State, 116 Ala. 437, 22 So. 918.

California.— People *v.* Henry, 77 Cal. 445, 19 Pac. 830.

Georgia.— Hatfield *v.* State, 76 Ga. 499; Crawford *v.* State, 68 Ga. 822.

Iowa.— State *v.* Watson, 102 Iowa 651, 72 N. W. 283.

Missouri.— State *v.* Shields, 89 Mo. 259, 1 S. W. 336.

New Jersey.— Fisher *v.* State, 40 N. J. L. 169.

Compare Emmonds *v.* State, 87 Ala. 12, 6 So. 54, where it was held that in an indictment for burglary in breaking and entering a building described as the storehouse of the Perry Mason Shoe Company, it was necessary either to allege that the said company was a

It is not necessary to allege the capacity of the corporation to own the premises alleged to have been broken and entered.[62]

(IX) *PARTNERSHIPS.* Where a building is occupied by a partnership for business, and either one or both of the partners also live in it, or their servant lives in it in the course of his employment, an indictment for burglary should lay the ownership in all the partners.[63] Stores, warehouses, etc., occupied by a partnership, whether owned or merely leased by the partnership, may and must be described as the premises of the partners.[64] An indictment laying the ownership of premises in a partnership by simply giving the firm name is bad. It should name the individual partners, showing that the defendant was not one of them.[65] In some states, by statute, the ownership may be laid in one only of several partners;[66] and in other states the statute is such as to make a variance in this respect immaterial.[67]

(X) *HUSBAND AND WIFE.* The ownership of a dwelling-house and outhouses should be laid in the husband, although the title may be in the wife, where they are living together in the house.[68] And this is true at common law, even when a wife is living separate from her husband in a leased house for which she pays the rent out of her equitable separate estate.[69] But under the statutes

corporation, or, if it was a partnership, to allege such fact and name the partners, showing that the defendant was not one of them.

Under a statute declaring an indictment sufficient if it clearly and distinctly sets forth the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, it has been held that an indictment for burglary laying the ownership in a certain company by name need not allege that the company was either a corporation or a partnership. State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

62. Bailey *v.* State, 116 Ala. 437, 22 So. 918.

63. Quinn *v.* People, 71 N. Y. 561, 27 Am. Rep. 87; State *v.* Davis, 77 N. C. 490; Saxton's Case, 2 Harr. (Del.) 533; Hawkins' Case, Foster 38; Rex *v.* Stock, 2 Leach 1015, R. & R. 138, 2 Taunt. 339, 11 Rev. Rep. 605; Rex *v.* Athea, 1 Moody 329; Rex *v.* Jenkins, R. & R. 182. *Compare* Jones' Case, 2 East P. C. 504, where parts of the premises were separately occupied by partners. And see Reg. *v.* Nichol, 1 Legge (New South Wales) 233. An indictment laying the ownership of a dwelling-house in two persons as partners is sustained by proof that one of them furnished a certain sum as capital and the other furnished the house and labor, in pursuance of a partnership agreement. State *v.* Davis, 77 N. C. 490.

64. State *v.* Rivers, 68 Iowa 611, 27 N. W. 781.

65. Emmonds *v.* State, 87 Ala. 12, 6 So. 54, where the indictment described the premises as the storehouse of the Perry Mason Shoe Company. See also Davis *v.* State, 54 Ala. 88.

Contra.—Under the California statute making it sufficient for an indictment to state the acts constituting the offense in ordinary and concise language. People *v.* Henry, 77 Cal. 445, 19 Pac. 830. See also Hatfield *v.* State, 76 Ga. 499; Fisher *v.* State, 40 N. J. L. 169.

66. White *v.* State, 72 Ala. 195; Coates *v.* State, 31 Tex. Crim. 257, 20 S. W. 585. And *supra*, IV, D, 11, i.

67. People *v.* Bitancourt, 74 Cal. 188, 15 Pac. 744; People *v.* Edwards, 59 Cal. 359; State *v.* Jelinek, 95 Iowa 420, 64 N. W. 259; Mulrooney *v.* State, 26 Ohio St. 326. And see *supra*, IV, D, 11, c, (IX).

68. **Title in wife.**— Richardson *v.* State, 115 Ala. 113, 22 So. 558 [see also Jackson *v.* State, 102 Ala. 167, 15 So. 344]; Young *v.* State, 100 Ala. 126, 14 So. 872; Yarborough *v.* State, 86 Ga. 396, 12 S. E. 650; Harrison *v.* State, 74 Ga. 801; State *v.* Short, 54 Iowa 392, 6 N. W. 584; Rex *v.* Smyth, 5 C. & P. 201, 24 E. C. L. 526. An indictment for burglary in a smoke-house used in connection with a dwelling-house occupied by husband and wife may lay the ownership in the husband, although the title to the whole premises is in the wife, where the smoke-house is subject to the ordinary family uses, and the husband carries the key thereto, and owns the meat therein. Richardson *v.* State, 115 Ala. 113, 22 So. 558. The fact that a wife has inchoate dower and homestead rights in a house does not make it improper to lay the ownership in the husband alone. State *v.* Wincroft, 76 N. C. 38.

Title in husband.— Where a man owns or leases a house and lives in it with his family, the ownership cannot be laid in his wife. Jackson *v.* State, 102 Ala. 167, 15 So. 344; Morgan *v.* State, 63 Ga. 307.

69. **Wife living separate.**— Rex *v.* French, R. & R. 365. See also Rex *v.* Smyth, 5 C. & P. 201, 24 E. C. L. 526. In Rex *v.* Wilford, R. & R. 385, it was held that the house of a husband, in which he allowed his wife to live separate from him, was properly described as the house of the husband, although the wife lived there in adultery with another man, who paid the housekeeping expenses, and although the husband suspected the criminal intercourse. But in Tilly *v.* State, 21 Fla. 242, it was held that ownership of a dwelling-house might be laid in a married woman, where

removing the disability of married women it has been held that ownership of a dwelling-house or other premises may be laid in a married woman living separate from her husband, and having the occupancy and control.[70] And it has been held in some states that where a married woman, who has a separate estate under the married women's act, leases a dwelling-house and pays the rent, or owns the same, the ownership may be laid in her, although her husband also lives in the house.[71]

(xi) *Executors and Estates of Deceased Persons.* It has been said at common law that if one die in a house, and his executors put servants in it and keep them there at board wages, an indictment for burglary may lay ownership in the executors.[72] An indictment alleging that the building was "the property of the estate of" a person who had owned the same, but had died before the offense was committed, does not sufficiently allege the ownership,[73] except, perhaps, in those states in which there are statutes allowing less strictness in this respect than was allowed at common law.[74]

(xii) *Railroad Cars.* An indictment under a statute for breaking and entering a railroad or express car must allege the ownership of the car,[75] but the ownership may be laid in the company having at the time the possession and control, although the car may have been actually owned by another company.[76]

E. The Intent — 1. In General. It is essential that an indictment for burglary shall allege that the house was broken and entered with intent to commit a felony therein, whether the indictment is for burglary at common law or under a statute,[77] unless it is under a statute which does not require such an intent to

she had possession and control and lived therein separate from her husband, although the title was in him.

70. Under married women's acts.— Ducher *v.* State, 18 Ohio 308. The ownership of a store is properly laid in a married woman where she is separated from her husband, and owns and is conducting the business herself. State *v.* Perkins, 1 Ohio Dec. (Reprint) 55, 1 West. L. J. 394.

71. State *v.* Trapp, 17 S. C. 467, 43 Am. Rep. 614; State *v.* Peach, 70 Vt. 283, 40 Atl. 732.

72. 3 Chit. Crim. Law 1102; 2 East P. C. 499.

73. Beall *v.* State, 53 Ala. 460 [*overruling* Murray *v.* State, 48 Ala. 675; Anderson *v.* State, 48 Ala. 665, 17 Am. Rep. 36].

74. See State *v.* Franks, 64 Iowa 39, 19 N. W. 832, where such an allegation of ownership was sustained.

75. Johnson *v.* State, 73 Ala. 483; Darter *v.* Com., 9 Ky. L. Rep. 277, 5 S. W. 48; James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527; State *v.* Davis, 138 Mo. 107, 39 S. W. 460. See Pyland *v.* State, 33 Tex. Crim. 382, 26 S. W. 621.

Insufficient allegation.— To allege that a car was "on the Glasgow branch of the Louisville & Nashville road, at the depot near the town of Glasgow," is not sufficient as an allegation of ownership of the car. Darter *v.* Com., 9 Ky. L. Rep. 277, 5 S. W. 48.

As to averments of ownership in corporations see *supra*, IV, D, 11, c, (VIII).

76. State *v.* McIntire, 59 Iowa 264, 13 N. W. 286; State *v.* Parker, 16 Nev. 79; Smith *v.* State, 34 Tex. Crim. 124, 29 S. W. 775.

An averment that the car was in the "possession, care, control, and custody" of a certain railroad company is sufficient. State *v.* McIntire, 59 Iowa 264, 13 N. W. 286.

Ownership of an express car is properly laid in an express company having exclusive occupancy and control thereof. Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870.

The ownership may be laid in the real owner, although it may have been in the possession of another at the time of the offense. Johnson *v.* State, 73 Ala. 483.

77. *Alabama.*—Barber *v.* State, 78 Ala. 19; Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40; Murray *v.* State, 48 Ala. 675.

Arkansas.— Reed *v.* State, 66 Ark. 110, 49 S. W. 350; Shotwell *v.* State, 43 Ark. 345.

California.— People *v.* Nelson, 58 Cal. 104.

Delaware.— State *v.* Eaton, 3 Harr. (Del.) 554.

Georgia.— State *v.* Lockhart, 24 Ga. 420.

Louisiana.— State *v.* Gay, 25 La. Ann. 472.

Michigan.— People *v.* Stewart, 44 Mich. 484, 7 N. W. 71.

Mississippi.— State *v.* Buchanan, 75 Miss. 349, 22 So. 875.

Nebraska.—Winslow *v.* State, 26 Nebr. 308, 41 N. W. 1116.

New Hampshire.— Jones *v.* State, 11 N. H. 269.

Texas.— State *v.* Robertson, 32 Tex. 159; Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258; Rodriguez *v.* State, 12 Tex. App. 552; Webster *v.* State, 9 Tex. App. 75; Reeves *v.* State, 7 Tex. App. 276.

Vermont.— State *v.* Brady, 14 Vt. 353.

England.— Rex *v.* Vandercomb, 2 East P. C. 514, 517, 2 Leach 708; Dobbs' Case, 2 East P. C. 513.

See 8 Cent. Dig. tit. "Burglary," § 40 *et seq.*

Failure to demur to an indictment for bur-

constitute the offense charged, in which case the intent required by the statute must be charged,[78] or unless there is a statute in the particular jurisdiction rendering it unnecessary to allege the intent.[79] In most jurisdictions, however, it is held that an allegation of a breaking and entry and actual commission of a felony is a sufficient allegation of a breaking and entry with intent to commit a felony, on the ground that the commission of the felony is evidence of an intent to commit it.[80] In some states this rule is not recognized.[81]

2. DESCRIPTION OF THE FELONY OR OTHER OFFENSE INTENDED. It is not enough to allege generally an intent to commit "a felony" or "an offense," but it is necessary, in order that the charge may be certain, to state the particular felony or other offense intended.[82] In a few states the indictment must go further and

glary does not waive the objection that it does not allege the intent to commit a felony. People *v.* Nelson, 58 Cal. 104.

"Then and there."—An indictment for burglary is not bad for failure to use the words "then and there" in alleging the intent, where the charge as to the intent is connected with the charge of breaking, etc., by the word "and." Smith *v.* State, 36 Tex. Crim. 442, 37 S. W. 743.

78. An indictment alleging the breaking and entering of a jail, described as the dwelling-house of the jailer, etc., with an "intent the county jail to break open, and to set free the said Chase therein confined, so that he might escape therefrom," etc., sufficiently charges an intent to aid in C's escape. State *v.* Abbott, 16 N. H. 507.

79. Under the Washington statute, which, in a prosecution for burglary, casts the burden of proving innocence of entry on the defendant, it is held unnecessary for an information for burglary to state the particular offense which the defendant intended to commit. State *v.* Wilson, 9 Wash. 218, 37 Pac. 424; Linbeck *v.* State, 1 Wash. St. 336, 25 Pac. 452.

80. *Alabama.*—Barber *v.* State, 78 Ala. 19. But see Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40.

Delaware.— Saxton's Case, 2 Harr. (Del.) 533.

Kentucky.— Olive *v.* Com., 5 Bush (Ky.) 376.

Maine.— State *v.* Neddo, 92 Me. 71, 42 Atl. 253.

Massachusetts.— Com. *v.* Hersey, 2 Allen (Mass.) 173; Com. *v.* Hope, 22 Pick. (Mass.) 1.

Missouri.— State *v.* Taylor, 136 Mo. 66, 37 S. W. 907.

New Hampshire.— Jones *v.* State, 11 N. H. 269.

North Carolina.— State *v.* Johnston, 119 N. C. 883, 26 S. E. 163.

Pennsylvania.— Com. *v.* Brown, 3 Rawle (Pa.) 207.

Tennessee.—Pardue *v.* State, 4 Baxt. (Tenn.) 10; Davis *v.* State, 3 Coldw. (Tenn.) 77.

England.— Dobbs' Case, 2 East P. C. 513; Rex *v.* Furnival, R. & R. 331.

See 8 Cent. Dig. tit. "Burglary," § 42.

81. In Texas it is held that the indictment must specifically allege the intent to commit a felony or the crime of theft, which the statute makes an essential element of burglary, and that an allegation of the actual commission of a felony or the crime of theft is not sufficient. Hammons *v.* State, 29 Tex. App. 445, 16 S. W. 99; Reeves *v.* State, 7 Tex. App. 276. *Compare* State *v.* Robertson, 32 Tex. 159. It was held, therefore, in Hammons *v.* State, 29 Tex. App. 445, 16 S. W. 99, that an indictment alleging that the defendant broke and entered, "and did, with malice aforethought, make an assault upon said R. A. Anderson, . . . with the intent then and there to murder," etc., did not charge burglary.

And in Alabama it was held that an indictment charged grand larceny only, and not burglary, where it merely alleged that the defendant "broke into and entered" a certain building, and "feloniously took and carried away" certain property "of the value of more than one hundred dollars," without alleging that the breaking and entry were "with intent to steal or to commit a felony" therein. Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40. *Compare,* however, Barber *v.* State, 78 Ala. 19.

82. *California.*— People *v.* Nelson, 58 Cal. 104.

Delaware.— State *v.* Eaton, 3 Harr. (Del.) 554.

Georgia.— State *v.* Lockhart, 24 Ga. 420.

Kentucky.— Kyle *v.* Com., 23 Ky. L. Rep. 708, 63 S. W. 782 [*overruling* Slaughter *v.* Com., 15 Ky. L. Rep. 569, 24 S. W. 622].

Mississippi.— State *v.* Buchanan, 75 Miss. 349, 22 So. 875.

New York.— Mason *v.* People, 26 N. Y. 200.

Tennessee.— State *v.* Williamson, 3 Heisk. (Tenn.) 483.

Texas.— Wilburn *v.* State, 41 Tex. 237; Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258.

England.— See Rex *v.* Vandercomb, 2 East P. C. 514, 517, 2 Leach 708.

See 8 Cent. Dig. tit. "Burglary," § 43.

It is not sufficient to allege a breaking and entry "with the felonious intent then and there a felony to do and commit." Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258.

Intended offense unknown.— An indictment charging the breaking and entering of a dwelling-house "with the wilful, felonious and burglarious intent then and there to commit some crime to the jurors aforesaid unknown," is fatally defective for failure to state the crime intended. State *v.* Buchanan, 75 Miss. 349, 22 So. 875.

set forth the elements of the intended felony, as would be necessary in an indictment for such felony, so that the court can say whether the offense intended was a felony or not.[83] In most states, however, this is not necessary, but it is enough to state the intended offense generally, as by alleging an intent to steal, to rape, to commit arson, etc.[84] As a rule an indictment or information for burglary with

Failure to demur to an indictment alleging generally intent to commit a felony does not waive the objection that it fails to state the particular felony intended. People *v.* Nelson, 58 Cal. 104.

83. This is the rule in Indiana.— Thus it is there held that an allegation of intent to steal, without alleging to "feloniously steal," etc., is bad. Smith *v.* State, 93 Ind. 67; Scudder *v.* State, 62 Ind. 13. An indictment for burglary with intent to commit larceny, alleging a felonious and burglarious breaking and entering of the barn of a certain person, with intent feloniously and burglariously to take, steal, and carry away certain pieces of meat, etc., was held defective in not alleging that the meat was owned by another than the accused, which would have been essential to larceny. Barnhart *v.* State, 154 Ind. 177, 56 N. E. 212.

In Mississippi an indictment alleging a breaking and entry of a dwelling-house, with intent to commit the crime of larceny therein, was held insufficient for failure to allege an intent feloniously and burglariously to take and carry away the goods and chattels in said house. Draughn *v.* State, 76 Miss. 574, 25 So. 153.

In Texas the facts necessary to constitute the intended felony must be stated. Wilburn *v.* State, 41 Tex. 237; Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258; Taylor *v.* State, 23 Tex. App. 639, 5 S. W. 141; Treadwell *v.* State, 16 Tex. App. 643; Reed *v.* State, 14 Tex. App. 662; White *v.* State, 1 Tex. App. 211. An allegation of breaking and entering "with intent then and there to commit the crime of rape" is insufficient for failure to set out the elements of rape. State *v.* Williams, 41 Tex. 98; Allen *v.* State, 18 Tex. App. 120. But an allegation of "intent then and there unlawfully, feloniously and burglariously, and against the will and consent of A, her, the said A, to ravish and carnally know," etc., is sufficient. Burke *v.* State, 5 Tex. App. 74. As to the sufficiency of allegations to charge intent to commit theft under the Texas statute see West *v.* State, 35 Tex. 89; Williams *v.* State, 24 Tex. App. 69, 5 S. W. 838; Webster *v.* State, 9 Tex. App. 75. In Texas an indictment for burglary with intent to commit theft must negative the consent of the owner of the property intended to be stolen. Taylor *v.* State, 23 Tex. App. 639, 5 S. W. 141; Treadwell *v.* State, 16 Tex. App. 643. If it is alleged that the intent was to steal the property of two or more owners, the indictment must negative the consent of such owners, not conjointly, but of either of them. An indictment alleging intent to take the property of A and B without their consent is bad. Taylor *v.* State, 23 Tex. App. 639, 5 S. W. 141. And see Jones *v.* State, (Tex. Crim. 1892) 20 S. W. 395. In an indictment charging burglary and the taking of property belonging to two owners, with intent to take the property from the possession of such owners or either of them, and without their consent, the word "their" refers to the owners collectively, and the indictment is bad because it does not charge a burglary with intent to take the property without the consent of either of them. Young *v.* State, (Tex. Crim. 1900) 59 S. W. 890. An indictment for burglary in the premises of a partnership alleging want of consent of each member of the firm is sufficient. Mixon *v.* State, (Tex. Crim. 1895) 31 S. W. 408. An indictment for burglary with intent to commit theft is fatally defective if it fails to allege that the entry was with the fraudulent intent to take the property from the possession of the owner, and if, in charging the theft, it fails to allege that it was taken from the possession of the owner. O'Brien *v.* State, 27 Tex. App. 448, 11 S. W. 459. Where an indictment for burglary also sufficiently charges the actual theft of particular articles, setting forth all the elements of theft in such charge, an allegation that the breaking and entry were "with intent to commit theft" is sufficient without setting out with the allegation of intent the essential elements of theft. Bigham *v.* State, 31 Tex. Crim. 244, 20 S. W. 577; Williams *v.* State, 24 Tex. App. 69, 5 S. W. 838. The words "malice aforethought" are unnecessary in Texas in charging burglary by firing a pistol into a house with intent to murder, and if used may be rejected as surplusage. Garner *v.* State, 31 Tex. Crim. 22, 19 S. W. 333. If such words be regarded as necessary, an allegation that the defendant discharged a pistol into a house with intent to commit a felony, to wit, he, with malice aforethought, discharged the pistol into the house with intent to murder certain persons therein, sufficiently applies these words to the intent in shooting into the house. Garner *v.* State, 31 Tex. Crim. 22, 19 S. W. 333.

84. *Arkansas.*— Shotwell *v.* State, 43 Ark. 345.

California.— People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074; People *v.* Burns, 63 Cal. 614.

Georgia.— Houser *v.* State, 58 Ga. 78.

Iowa.— State *v.* Watson, 102 Iowa 651, 72 N. W. 283; State *v.* Mecum, 95 Iowa 433, 64 N. W. 286.

Kansas.— State *v.* Powell, 61 Kan. 81, 58 Pac. 968.

Kentucky.— McRae *v.* Com., 20 Ky. L. Rep. 1199, 49 S. W. 22; Miller *v.* Com., 14 Ky. L. Rep. 225, 20 S. W. 198.

Louisiana.— State *v.* Gay, 25 La. Ann. 472.

Massachusetts.— Com. *v.* Doherty, 10 Cush. (Mass.) 52.

intent to commit larceny need not describe the particular goods which the defendant intended to steal, or allege their value or ownership;[85] but there may be something in the particular statute under which an indictment is drawn to render

Missouri.— State *v.* Carr, 146 Mo. 1, 47 S. W. 790.

Tennessee.— State *v.* Shelton, 90 Tenn. 539, 18 S. W. 253.

Intent to commit larceny.— Thus it has been held sufficient to allege an intent to steal certain property, without setting out the elements of larceny. Houser *v.* State, 58 Ga. 78; State *v.* Powell, 61 Kan. 81, 58 Pac. 968; McRae *v.* Com., 20 Ky. L. Rep. 1199, 49 S. W. 22; Miller *v.* Com., 14 Ky. L. Rep. 225, 20 S. W. 198; State *v.* Carr, 146 Mo. 1, 47 S. W. 790. Under a statute making it burglary to break and enter "with intent to commit grand or petit larceny, or any felony," an indictment for burglary with intent to commit larceny need not state the degree of larceny intended. People *v.* Smith, 86 Cal. 238, 24 Pac. 988. As to sufficiency of allegation of intent to commit larceny see also State *v.* Taylor, 136 Mo. 66, 37 S. W. 907; State *v.* McGraw, 87 Mo. 161; State *v.* Henley, 30 Mo. 509; State *v.* Shelton, 90 Tenn. 539, 18 S. W. 253.

Intent to commit arson.— An allegation of intent "then and there to commit arson," is sufficient. Shotwell *v.* State, 43 Ark. 345; People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074. But an allegation that the breaking and entry were "with intent to set fire to or burn," etc., without averring that the intent was "wilfully to set fire to," etc., is bad. Pairo *v.* State, 49 Ala. 25.

Intent to commit "public offense" — Iowa statute.— An indictment under the Iowa statute, charging a burglarious entry "with intent to commit a public offense, to wit, adultery," need not state the facts necessary in an indictment for adultery. State *v.* Mecum, 95 Iowa 433, 64 N. W. 286.

Intent to kill.— An indictment alleging a breaking and entry with intent to kill is sufficient without setting forth the name of the person whom it was intended to kill, and without negativing an "assault" or "being armed." State *v.* Newton, 30 La. Ann. 1253.

Intent to rape.— An indictment for burglary with intent to rape need not state the elements of the crime of rape. State *v.* Gay, 25 La. Ann. 472; Com. *v.* Doherty, 10 Cush. (Mass.) 52. An information alleging an intent to commit rape is not defective for failure to state under which set of circumstances specified in the statute defining rape the defendant intended to commit it. People *v.* Burns, 63 Cal. 614.

85. *Alabama.*— Bowen *v.* State, 106 Ala. 178, 17 So. 335; Kelly *v.* State, 72 Ala. 244; Matthews *v.* State, 55 Ala. 65.

California.— People *v.* Shaber, 32 Cal. 36; People *v.* Ah Ye, 31 Cal. 451. *Compare* People *v.* Murray, 8 Cal. 519.

Florida.— Jones *v.* State, 18 Fla. 889.

Georgia.— Stokes *v.* State, 84 Ga. 258, 10 S. E. 740; Lanier *v.* State, 76 Ga. 304; Houser *v.* State, 58 Ga. 78.

Idaho.— People *v.* Stapleton, 2 Ida. 49, 3 Pac. 6.

Indiana.— Short *v.* State, 63 Ind. 376; Hunter *v.* State, 29 Ind. 80.

Iowa.—State *v.* Ray, 79 Iowa 765, 44 N. W. 800; State *v.* Jennings, 79 Iowa 513, 44 N. W. 799; State *v.* Morrissey, 22 Iowa 158; State *v.* Jones, 10 Iowa 206.

Massachusetts.— Com. *v.* Williams, 2 Cush. (Mass.) 582; Larned *v.* Com., 12 Metc. (Mass.) 240.

Mississippi.— James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527; Brown *v.* State, 72 Miss. 990, 18 So. 431; Harris *v.* State, 61 Miss. 304.

Missouri.— State *v.* Yandle, 166 Mo. 589, 66 S. W. 532; State *v.* Tyrrell, 98 Mo. 354, 11 S. W. 734; State *v.* Beckworth, 68 Mo. 82.

Ohio.— State *v.* Beal, 37 Ohio St. 108, 41 Am. Rep. 490; Spears *v.* State, 2 Ohio St. 583; Spencer *v.* State, 13 Ohio 401.

South Carolina.— State *v.* Langford, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746.

Tennessee.—Womack *v.* State, 6 Lea (Tenn.) 146.

Texas.— Hamilton *v.* State, (Tex. Crim. 1893) 24 S. W. 32; Davis *v.* State, (Tex. Crim. 1893) 23 S. W. 687; Bigham *v.* State, 31 Tex. Crim. 244, 20 S. W. 577; Neiderluck *v.* State, 23 Tex. App. 38, 3 S. W. 573; Green *v.* State, 21 Tex. App. 64, 17 S. W. 262; Collins *v.* State, 20 Tex. App. 197; Washington *v.* State, 17 Tex. App. 197; Summers *v.* State, 9 Tex. App. 396; Coleman *v.* State, 2 Tex. App. 512; Martin *v.* State, 1 Tex. App. 525.

Vermont.— State *v.* Clark, 42 Vt. 629.

Virginia.— Wright *v.* Com., 82 Va. 183.

Wisconsin.— State *v.* Kane, 63 Wis. 260, 23 N. W. 488; Hall *v.* State, 48 Wis. 688, 4 N. W. 1068.

England.— Reg. *v.* Clarke, 1 C. & K. 421, 47 E. C. L. 421; Reg. *v.* Lawes, 1 C. & K. 62, 47 E. C. L. 62; Reg. *v.* Nicholas, 1 Cox C. C. 218. *Compare* Reg. *v.* Andrews, C. & M. 121, 41 E. C. L. 72.

See 8 Cent. Dig. tit. "Burglary," § 47.

An allegation of intent to steal the "goods and chattels" is sufficient without using the word "personal." Choen *v.* State, 85 Ind. 209. An allegation of intent to steal the goods, chattels, "and property" of a certain person is not bad for uncertainty, on the ground that the word "property" includes both real and personal property. Sims *v.* State, 136 Ind. 358, 36 N. E. 278.

Where the indictment also charges larceny, it is not good as to that offense unless it alleges the ownership and value of the property and otherwise describes it, as is necessary in an indictment for larceny alone. State *v.* Hill, 1 Houst. Crim. Cas. (Del.) 421; Wimbish *v.* State, 89 Ga. 294, 15 S. E. 325; Com. *v.* Williams, 2 Cush. (Mass.) 582; People *v.* Stewart, 44 Mich. 484, 7 N. W. 71. See, generally, LARCENY.

such description or allegation necessary in order to state the offense charged.[86] Misspelling and clerical errors or omissions in charging the intent may render the indictment defective, but will not necessarily have such effect.[87] It is not necessary to use the language of the statute if equivalent words are used.[88]

3. Allegations in the Alternative. In the absence of a statute, an indictment for burglary is bad for uncertainty if it alleges the intent in the same count in the alternative, as by alleging that the breaking and entry were with intent to steal "or" rape,[89] but in some jurisdictions such an allegation is permitted by statute.[90]

4. "Feloniously." At common law an indictment for burglary, like other indictments for felony, must allege that the accused broke and entered "feloniously,"[91] but by statute in some jurisdictions the use of this technical term is no longer necessary.[92]

5. "Burglariously." It is also necessary at common law that an indictment for burglary shall allege that the breaking and entering was done "burglariously," the form of allegation being that the accused "feloniously and burglariously did break and enter," etc.[93] But the use of the term "burglariously" is not neces-

86. Kelly *v.* State, 72 Ala. 244; Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72; Williams *v.* State, 67 Ala. 183; Territory *v.* Duncan, 5 Mont. 478, 6 Pac. 353. See *supra*, II, E, 3, b, (VII).

Value of property.—Where by statute petit larceny is a misdemeanor, and breaking and entering with intent to commit petit larceny is not burglary, an indictment alleging an intent to commit larceny must allege the value of the goods to show that the intent was to commit grand larceny. Territory *v.* Duncan, 5 Mont. 478, 6 Pac. 353. See also People *v.* Murray, 8 Cal. 519; Philbrick *v.* State, 2 Tex. App. 517. It is otherwise where by statute it is burglary to break and enter with intent to commit either grand or petit larceny. Hall *v.* State, 48 Wis. 688, 4 N. W. 1068. Where a statute divides larceny into grand and petit, and the former only is a felony, and a statute defines all larceny as "the felonious stealing . . . the personal property of another," an indictment for burglary with intent to commit larceny (an intent to commit a felony being essential to burglary) must show intent to commit grand larceny, and an indictment alleging a breaking and entry, "with the felonious and burglarious intent, the personal property of the said John Head, being in said house, feloniously and burglariously to steal," was held insufficient. Reed *v.* State, 66 Ark. 110, 49 S. W. 350.

Ownership of property.— When it is necessary to state the ownership of the property intended to be stolen, the ownership may be laid either in the general or special owner. Wimbish *v.* State, 89 Ga. 294, 15 S. E. 325; Lamater *v.* State, 38 Tex. Crim. 249, 42 S. W. 304; Humphrey *v.* State, (Tex. Crim. 1897) 40 S. W. 489; Smith *v.* State, 34 Tex. Crim. 124, 29 S. W. 775. A charge of intent to steal the goods of a certain person is sustained by proof that they were owned by such person and another, who was his dormant partner. Spradling *v.* State, 17 Ala. 440. An allegation of burglary with intent to steal the property of a certain person is sustained by proof that the property was that of the county, but was in such person's possession as county treasurer. Huling *v.* State, 17 Ohio St. 583. An indictment for burglary with intent to steal the separate property of a married woman under the control of her husband may lay the ownership in the husband. Combs *v.* State, (Tex. Crim. 1899) 49 S. W. 585.

87. In People *v.* St. Clair, 56 Cal. 406, it was held that an allegation of intent to commit "larcey," instead of "larceny," was insufficient. But in St. Louis *v.* State, (Tex. Crim. 1900) 59 S. W. 889, it was held that an indictment for burglary was not bad because in setting out the theft the word "fraudulently" was written "frausulently," as the meaning was clear. See also *supra*, IV, A.

88. An allegation that the intent was to feloniously "steal, take, and carry away the goods and chattels of," etc., was held sufficient, although the statute used the words "with intent to commit the crime of larceny." Josslyn *v.* Com., 6 Metc. (Mass.) 236. And an indictment charging intent to commit "larceny" is sufficient, though the statute uses the words, "with intent to commit a felony or other infamous crime." State *v.* Tytus, 98 N. C. 705, 4 S. E. 29. On this point see *supra*, IV, B.

89. See Indictments and Informations.

90. Dismukes *v.* State, 83 Ala. 287, 3 So. 671.

91. State *v.* Curtis, 30 La. Ann. 814; State *v.* McDonald, 9 W. Va. 456. And see Indictments and Informations.

92. People *v.* Rogers, 81 Cal. 209, 22 Pac. 592; Tilly *v.* State, 21 Fla. 242; State *v.* Lewis, 13 S. D. 166, 82 N. W. 406; Reed *v.* State, 14 Tex. App. 662. And see Indictments and Informations.

93. State *v.* Curtis, 30 La. Ann. 814; Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258; State *v.* Cottrell, 45 W. Va. 837, 32 S. E. 162; State *v.* McClung, 35 W. Va. 280, 13 S. E. 654; State *v.* Meadows, 22 W. Va. 766; State *v.* McDonald, 9 W. Va. 456; 2 Hale P. C. 172, 184; 2 Hawkins P. C. c. 25, § 55.

sary in an indictment under a statute which describes the offense by enumerating the acts necessary to constitute it. In such a case it is sufficient if the indictment follows the language of the statute.[94]

6. "MALICIOUSLY." Under a statute punishing any person who should "willfully and maliciously and with force break and enter," etc., it was held that the word "maliciously" did not add anything to the offense as known to the common law, and that an indictment alleging that the accused "feloniously, willfully, and burglariously did break and enter," etc., was sufficient.[95]

7. ALLEGING SEVERAL INTENTS. An indictment for burglary may lay the offense with several intents, as with intent to steal and intent to murder or rape, either by alleging the several intents conjunctively in the same count,[96] or by alleging them in separate counts.[97]

F. Commission of Offense After Entry. Ordinarily, it is not necessary that an indictment for burglary shall allege the actual commission of the intended offense after the entry, as this is not necessary to constitute the offense;[98] but it is otherwise under a statute which makes the actual commission of an offense after the entry an essential element of the offense punished.[99]

G. Aggravating Circumstances. Under a statute imposing increased punishment for burglary when it is accompanied by certain aggravating circumstances, the aggravating circumstances must, as a rule, be alleged in the indictment, in order that the increased punishment may be imposed.[1] This is true under statutes imposing increased punishment for a second or third offense.[2] But

And see Reg. *v.* Cass, 3 C. A. (New Zealand) 53. As to the rejection of this term as surplusage see Reg. *v.* Cass, 3 C. A. (New Zealand) 53.

94. *California.*— People *v.* Rogers, 81 Cal. 209, 22 Pac. 592.

Florida.— Tilly *v.* State, 21 Fla. 242.

Illinois.— Lyons *v.* People, 68 Ill. 271.

Iowa.— State *v.* Short, 54 Iowa 392, 6 N. W. 584.

Louisiana.— State *v.* Jordan, 39 La. Ann. 340, 1 So. 655; State *v.* Newton, 30 La. Ann. 1253; State *v.* Curtis, 30 La. Ann. 814.

Massachusetts.— Tully *v.* Com., 4 Metc. (Mass.) 357.

South Dakota.— State *v.* Lewis, 13 S. D. 166, 82 N. W. 406.

Texas.— State *v.* Robertson, 32 Tex. 159; Jones *v.* State, (Tex. Crim. 1900) 55 S. W. 491; Reed *v.* State, 14 Tex. App. 662; Sullivan *v.* State, 13 Tex. App. 462.

West Virginia.— State *v.* McDonald, 9 W. Va. 456. And see State *v.* Meadows, 22 W. Va. 766.

See 8 Cent. Dig. tit. "Burglary," § 35.

95. Shotwell *v.* State, 43 Ark. 345 [*citing* Tully *v.* Com., 4 Metc. (Mass.) 357]; Lyons *v.* People, 68 Ill. 271. The offense of "willfully and maliciously" entering a dwelling with felonious intent, punished by the Pennsylvania statute, is sufficiently charged by an indictment using the word "feloniously" in the place of "maliciously." Com. *v.* Carson, 166 Pa. St. 179, 30 Atl. 985.

96. State *v.* Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. Rep. 425; State *v.* Christmas, 101 N. C. 749, 8 S. E. 361.

97. Rex *v.* Thompson, 2 East P. C. 515, 2 Leach 1015 note.

98. Bradley *v.* State, 32 Ark. 704; Clark *v.* State, (Tex. Crim. 1894) 26 S. W. 68. And see *supra*, II, G, 5.

99. An indictment under a statute for burglary and striking must charge both the burglary and the striking, and must charge the striking according to the fact. Reg. *v.* Parfitt, 8 C. & P. 288, 34 E. C. L. 739.

Under the Kentucky statute punishing any person who shall feloniously break into any dwelling-house, and "feloniously take away anything of value," the indictment must allege that the thing taken was "of value." Duncan *v.* Com., 85 Ky. 614, 9 Ky. L. Rep. 142, 4 S. W. 321; Polin *v.* Com., 19 Ky. L. Rep. 453, 40 S. W. 927. But the extent of the value is immaterial. Duncan *v.* Com., 85 Ky. 614, 9 Ky. L. Rep. 142, 4 S. W. 321. An indictment in the language of this statute is not defective because it does not further allege that the taking was with the felonious intent to deprive the owner permanently of his property and convert it to the taker's use without the owner's consent. Mitchell *v.* Com., 88 Ky. 349, 10 Ky. L. Rep. 910, 11 S. W. 209; McRae *v.* Com., 20 Ky. L. Rep. 1199, 49 S. W. 22.

1. Hobbs *v.* State, 44 Tex. 353. And see INDICTMENTS AND INFORMATIONS. The increased punishment fixed by a statute for use of violence or other aggravating circumstances in effecting a burglary cannot be imposed unless the violence or other aggravating circumstances is alleged in the indictment. Wilcox *v.* State, 45 Tex. 146; Hobbs *v.* State, 44 Tex. 353.

2. Second or third offense.— Under a statute prescribing punishment by imprisonment for life on a second conviction of burglary it is necessary, in order that such punishment may be imposed, that the record shall show that the defendant received judgment of imprisonment at hard labor, etc., for his first offense. A mere statement in the indictment that the defendant was convicted on the

an indictment for a less offense need not negative the aggravating circumstances necessary to the higher offense.[3]

H. Degrees of Offense. An indictment for burglary need not state the degree of the offense.[4] But there can be no conviction of a particular degree of burglary unless the indictment states the facts required by the statute to bring the offense within the particular degree.[5] An indictment for a lesser degree need not negative the facts necessary to constitute a higher degree.[6]

I. Duplicity — 1. In General. An indictment which charges more than one offense in a single count is bad for duplicity on motion to quash or demurrer, and under some circumstances on motion in arrest of judgment or appeal,[7] and an indictment for burglary is subject to this objection if it charges in a single count two distinct offenses, described in two distinct sections of a statute.[8] But an indictment is not double because it charges the breaking and entering and the intent,[9] or because it describes the premises by a number of terms used in a single section of the statute describing a single offense,[10] or because it alleges several felonious intents in breaking and entering.[11]

2. Charging Intent to Commit Offense and Actual Commission. It is held in most jurisdictions that an indictment is not bad for duplicity because it charges a breaking and entry with intent to commit a felony or other offense and its

former indictment and that "the court gave judgment" is insufficient. Smith *v.* Com., 14 Serg. & R. (Pa.) 69. See also Indictments and Informations.

3. State *v.* Neddo, 92 Me. 71, 42 Atl. 253.

4. People *v.* Shaver, 107 Mich. 562, 65 N. W. 538; State *v.* La Croix, 8 S. D. 369, 66 N. W. 944.

5. An indictment for burglary should allege the manner in which the offense was committed where, as in New York, the offense is by statute divided into degrees, and punished differently according to the circumstances under which it was committed. People *v.* Van Gaasbeck, 9 Abb. Pr. N. S. (N. Y.) 328. And see People *v.* Bosworth, 64 Hun (N. Y.) 72, 19 N. Y. Suppl. 114, 45 N. Y. St. 512. In a Michigan case, however, it was held that an indictment for burglary may charge the offense generally as at common law, without referring to the special facts so as to bring it within one of the statutory degrees of punishment provided for burglary. People *v.* Shaver, 107 Mich. 562, 65 N. W. 538.

6. Under a statute grading the punishment for burglary according to whether a person is lawfully in the dwelling and put in fear, an indictment for the lesser offense need not negative the existence of such aggravating circumstances. State *v.* Neddo, 92 Me. 71, 42 Atl. 253.

7. See, generally, Indictments and Informations.

If the offenses are similar in kind and do not require distinct punishments, the objection cannot be raised for the first time after verdict. State *v.* Nagel, 136 Mo. 45, 37 S. W. 821. And see Indictments and Informations.

Under a statute punishing any person who shall break and enter, or who shall be found by night in, any building, with intent to commit a felony or other infamous crime therein, an indictment alleging in the same count both a breaking and entry, and being found by night in a building, etc., is good after verdict against an objection on the ground of duplicity. State *v.* Tytus, 98 N. C. 705, 4 S. E. 29.

8. Where one section of a statute punished breaking and entering a dwelling-house with intent to commit a felony, and another section punished breaking and entering any warehouse containing goods or other valuables, etc., with intent to steal or commit a felony, an indictment charging that the defendant broke and entered a dwelling-house, etc., said dwelling-house being then and there occupied as a warehouse, etc., was held bad for duplicity. State *v.* Huffman, 136 Mo. 58, 37 S. W. 797.

9. It is clearly not duplicity to charge in one count breaking and entering with intent to commit larceny (People *v.* Smith, 86 Cal. 238, 24 Pac. 988; People *v.* Henry, 77 Cal. 445, 19 Pac. 830), or breaking and entering with felonious intent to set fire to and burn, etc. (State *v.* Ely, 35 La. Ann. 895).

10. Thus it was held that an indictment alleging that the defendant broke and entered "the house, room, apartment, tenement, shop, warehouse, store, and building of" the S. Company, "with the intent then and there to commit larceny" therein, did not charge more than one offense. People *v.* Henry, 77 Cal. 445, 19 Pac. 830.

11. State *v.* Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. Rep. 425. Under a statute punishing as burglary a breaking and entering "with intent to commit grand or petit larceny, or any felony," an indictment alleging intent "to commit grand and petit larceny" does not charge more than one offense. People *v.* Hall, 94 Cal. 595, 30 Pac. 7. An indictment alleging in the same count an intent to steal the goods of A, and also an intent to steal the goods of B, is not objectionable on the ground of duplicity. State *v.* Christmas, 101 N. C. 749, 8 S. E. 361.

actual commission. This rule has generally been applied to a charge of burglary with intent to commit larceny and actual larceny,[12] but it has also been applied in other cases.[13] Some of the courts regard the allegation of larceny (or other offense) in addition to burglary merely as a way of alleging the intent, and treat the indictment as charging burglary only.[14] Others hold that both burglary

12. *Alabama.*— Bailey *v.* State, 116 Ala. 437, 22 So. 918; Walker *v.* State, 97 Ala. 85, 12 So. 83; Barber *v.* State, 78 Ala. 19; Gordon *v.* State, 71 Ala. 315; Adams *v.* State, 55 Ala. 143; Snow *v.* State, 54 Ala. 138; Wolf *v.* State, 49 Ala. 359; Murray *v.* State, 48 Ala. 675.

Iowa.— State *v.* Shaffer, 59 Iowa 290, 13 N. W. 306; State *v.* Hayden, 45 Iowa 11.

Kansas.— State *v.* Brandon, 7 Kan. 106.

Kentucky.—Farris *v.* Com., 90 Ky. 637, 12 Ky. L. Rep. 592, 14 S. W. 681; Maden *v.* Com., 4 Ky. L. Rep. 45.

Louisiana.— State *v.* Morgan, 39 La. Ann. 214, 1 So. 456; State *v.* Nicholls, 37 La. Ann. 779; State *v.* King, 37 La. Ann. 662; State *v.* Johnson, 34 La. Ann. 48; State *v.* Christian, 30 La. Ann. 367.

Maine.— State *v.* Neddo, 92 Me. 71, 42 Atl. 253.

Massachusetts.— Jennings *v.* Com., 105 Mass. 586; Josslyn *v.* Com., 6 Metc. (Mass.) 236; Devoe *v.* Com., 3 Metc. (Mass.) 316; Com. *v.* Hope, 22 Pick. (Mass.) 1; Com. *v.* Tuck, 20 Pick. (Mass.) 356.

Mississippi.—Harris *v.* State, 61 Miss. 304; Roberts *v.* State, 55 Miss. 421.

Missouri.— In this state there is an express statutory provision allowing both burglary and larceny to be charged and a conviction had of either or both. State *v.* Woods, 137 Mo. 6, 38 S. W. 722; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Kennedy, 88 Mo. 341; State *v.* Owens, 79 Mo. 619; State *v.* Kelsoe, 76 Mo. 505; State *v.* Davis, 73 Mo. 129; State *v.* Dooly, 64 Mo. 146; State *v.* Alexander, 56 Mo. 131; State *v.* Henley, 30 Mo. 509; State *v.* Smith, 16 Mo. 550; State *v.* McCoy, 12 Mo. App. 589.

Nebraska.— Cunningham *v.* State, 56 Nebr. 691, 77 N. W. 60; Lawhead *v.* State, 46 Nebr. 607, 65 N. W. 779; Aiken *v.* State, 41 Nebr. 263, 59 N. W. 888.

Nevada.— State *v.* Ah Sam, 7 Nev. 127.

New Hampshire.— State *v.* Ayer, 23 N. H. 301; State *v.* Moore, 12 N. H. 42; Jones *v.* State, 11 N. H. 269; State *v.* Squires, 11 N. H. 37.

Ohio.— Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340.

Pennsylvania.—Becker *v.* Com., (Pa. 1887) 9 Atl. 510; Stoops *v.* Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482.

Rhode Island.— State *v.* Colter, 6 R. I. 195.

South Carolina.— State *v.* Crawford, 38 S. C. 330, 17 S. E. 36.

Tennessee.—Davis *v.* State, 3 Coldw. (Tenn.) 77.

Texas.— Hobbs *v.* State, 44 Tex. 353; Shepherd *v.* State, 42 Tex. 501; West *v.* State, 35 Tex. 89; Wilcox *v.* State, 31 Tex. 586; Turner *v.* State, 22 Tex. App. 42, 2 S. W. 619; Dunham *v.* State, 9 Tex. App. 330.

Vermont.— State *v.* Brady, 14 Vt. 353.

Virginia.— Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Butler *v.* Com., 81 Va. 159; Vaughan *v.* Com., 17 Gratt. (Va.) 576; Speers *v.* Com., 17 Gratt. (Va.) 570.

West Virginia.— State *v.* Flanagan, 48 W. Va. 115, 35 S. E. 862; State *v.* Williams, 40 W. Va. 268, 21 S. E. 721; State *v.* McClung, 35 W. Va. 280, 13 S. E. 654.

Wyoming.— Ackerman *v.* State, 7 Wyo. 504, 54 Pac. 228.

England.— Rex *v.* Withal, 1 Leach 102; Rex *v.* Butterworth, R. & R. 387; 2 East P. C. 515, 516; 1 Hale P. C. 547, 560.

The contrary has been held under statutes providing that an indictment shall not charge more than one offense. Williams *v.* State, 60 Ga. 88; Territory *v.* Fox, 3 Mont. 440; State *v.* Smith, 2 N. D. 515, 52 N. W. 320.

Carrying stolen property into another county.— Where a statute provides that when property taken in one county by burglary has been brought into another county the jurisdiction of the offense is in either, an indictment for burglary charging a breaking and entry and larceny in one county, and that the defendant brought the stolen property to another county in which the venue is laid is not bad as charging both burglary and larceny. People *v.* Jochinsky, 106 Cal. 638, 39 Pac. 1077.

Forms of indictments or informations charging burglary and larceny in the same count see the following cases:

Alabama.— Bowen *v.* State, 106 Ala. 178, 17 So. 335.

Iowa.— State *v.* Ridley, 48 Iowa 370; State *v.* Hayden, 45 Iowa 11.

Missouri.— State *v.* Yandle, 166 Mo. 589, 66 S. W. 532; State *v.* Davis, 138 Mo. 107, 39 S. W. 460; State *v.* Taylor, 136 Mo. 66, 37 S. W. 907.

Pennsylvania.— Com. *v.* Carson, 166 Pa. St. 179, 30 Atl. 985.

Texas.— Shepherd *v.* State, 42 Tex. 501.

Virginia.— Johnson *v.* Com., 29 Gratt. (Va.) 796; Vaughan *v.* Com., 17 Gratt. (Va.) 576; Speers *v.* Com., 17 Gratt. (Va.) 570.

West Virginia.— State *v.* McClung, 35 W. Va. 280, 13 S. E. 654; State *v.* Betsall, 11 W. Va. 703.

13. **Burglary and assault,** or assault to murder or rape. State *v.* Phipps, 95 Iowa 487, 64 N. W. 410; Smith *v.* State, 57 Miss. 822; State *v.* Johnston, 119 N. C. 883, 26 S. E. 163.

Burglary and rape.— State *v.* Ryan, 15 Oreg. 572, 16 Pac. 417.

14. State *v.* Shaffer, 59 Iowa 290, 13 N. W. 306; State *v.* Hayden, 45 Iowa 11; Farris *v.* Com., 90 Ky. 637, 12 Ky. L. Rep. 592, 14 S. W. 681; Stoops *v.* Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482; State *v.* Crawford, 38 S. C.

and larceny are charged, that this is not improper, and that there may be a conviction of either according to the evidence.[15] In some states there may be a conviction of either or both.[16]

J. Joinder of Counts. An indictment for burglary may charge the burglary in different ways in different counts to meet the evidence and avoid a variance, as by charging in separate counts a different intent,[17] or a different ownership of the premises,[18] or of the goods stolen or intended to be stolen,[19] or by describing the premises differently,[20] or by charging breaking and entering at night in one count and breaking and entering in the daytime in another,[21] or a breaking and entering in one count and a breaking without entering in another;[22] and in such cases as a rule the court will not require the state to elect.[23] Further than this, in the absence of a statute, and subject to the general rules governing the joinder of offenses in different counts,[24] an indictment may contain counts charging different offenses arising out of the same transaction, as burglary and larceny,[25] burglary,

330, 17 S. E. 36. So also of an indictment charging burglary and assault with intent to murder or rape (State *v.* Phipps, 95 Iowa 487, 64 N. W. 410; Smith *v.* State, 57 Miss. 822); or charging burglary and rape (State *v.* Ryan, 15 Oreg. 572, 16 Pac. 417).

15. *Alabama.*— Gordon *v.* State, 71 Ala. 315.

Kansas.— State *v.* Brandon, 7 Kan. 106.

Louisiana.— State *v.* Morgan, 39 La. Ann. 214, 1 So. 456; State *v.* Christian, 30 La. Ann. 367. There can be no conviction of petit larceny under such an indictment. State *v.* Robertson, 48 La. Ann. 1024, 1026, 20 So. 166, 167; State *v.* Ford, 30 La. Ann. 311.

Maine.— State *v.* Neddo, 92 Me. 71, 42 Atl. 253.

Massachusetts.— Jennings *v.* Com., 105 Mass. 586; Com. *v.* Hope, 22 Pick. (Mass.) 1.

Nebraska.— Aiken *v.* State, 41 Nebr. 263, 59 N. W. 888.

New Hampshire.— State *v.* Squires, 11 N. H. 37.

Ohio.— Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340.

Texas.— Shepherd *v.* State, 42 Tex. 501; Dunham *v.* State, 9 Tex. App. 330.

Virginia.— Benton *v.* Com., 91 Va. 782, 21 S. E. 495.

West Virginia.— State *v.* McClung, 35 W. Va. 280, 13 S. E. 654.

Wyoming.— Ackerman *v.* State, 7 Wyo. 504, 54 Pac. 228.

England.— Rex *v.* Withal, 1 Leach 102.

16. See Harris *v.* State, 61 Miss. 304.

In Missouri a statute expressly allows both burglary and larceny to be charged, and the defendant to be convicted of either or both. See Missouri cases cited *supra*, note 12.

17. Charging different intents.— Rex *v.* Thompson, 2 East P. C. 515, 2 Leach 1015 note. Different intents may be charged in the same count. See *supra*, IV, I, 1. An indictment for burglary may charge in separate counts the offense of breaking and entering with intent to steal and rob and that of breaking and entering with intent to kill and murder, punished by the same statute. State *v.* Conway, 35 La. Ann. 350.

18. Charging different ownership of premises.— People *v.* Thompson, 28 Cal. 214. And see INDICTMENTS AND INFORMATIONS. Where an indictment contains two counts, in both of which the venue or place and the house entered are the same in name, it will be presumed that they are the same in fact. People *v.* Thompson, 28 Cal. 214.

19. Charging different ownership of goods stolen.— People *v.* Thompson, 28 Cal. 214; State *v.* Hill, 1 Houst. Crim. Cas. (Del.) 421.

20. Description of premises.— An indictment in two counts, one for breaking into the dwelling-house of a person, and the other for breaking into his storehouse, is good, where it is evident on its face that the two counts relate to the same transaction and are made to meet the proof that the dwelling-house and storehouse are in the same building. State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

21. Night-time and daytime.— Willis *v.* State, (Tex. Crim. 1900) 55 S. W. 829; Green *v.* State, 21 Tex. App. 64, 17 S. W. 262. *Compare* People *v.* Taggart, 43 Cal. 81; State *v.* Bouknight, 55 S. C. 353, 33 S. E. 451, 74 Am. St. Rep. 751.

22. Breaking and entering and breaking without entry.—State *v.* Flanagan, 48 W. Va. 115, 35 S. E. 862.

23. Election.— Willis *v.* State, (Tex. Crim. 1900) 55 S. W. 829; Green *v.* State, 21 Tex. App. 64, 17 S. W. 262. It has been held, however, that where the indictment in different counts charges the burglary to have been committed in different ways or at different times, so as to charge offenses under different sections of the statute, the court may in its discretion require the state to elect upon which count it will go to the jury. State *v.* Bouknight, 55 S. C. 353, 33 S. E. 451, 74 Am. St. Rep. 751.

24. See, generally, INDICTMENTS AND INFORMATIONS.

25. Burglary and larceny.— *Alabama.*— Rose *v.* State, 117 Ala. 77, 23 So. 638.

Arkansas.— Toliver *v.* State, 35 Ark. 395; Dodd *v.* State, 33 Ark. 517. *Contra*, by statute, Crook *v.* State, 59 Ark. 326, 27 S. W. 229.

Colorado.— Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

Illinois.— Love *v.* People, 160 Ill. 501, 43

larceny, and receiving stolen goods,[26] burglary with intent to kill and stabbing with intent to kill, etc.,[27] or burglary and conspiracy to commit a burglary.[28] In some states joinder of counts charging different offenses, although in the same transaction, is prevented by statute.[29]

K. Attempt to Commit Burglary. An indictment for an attempt to commit burglary must not only allege the attempt and intent but it is essential that it also allege the overt acts relied upon as constituting the attempt.[30]

N. E. 710, 32 L. R. A. 139; Lyons *v.* People, 68 Ill. 271.

Indiana.— Reed *v.* State, 147 Ind. 41, 46 N. E. 135; McCollough *v.* State, 132 Ind. 427, 31 N. E. 1116.

Louisiana.— State *v.* Huey, 48 La. Ann. 1382, 20 So. 915; State *v.* Depass, 31 La. Ann. 487.

Massachusetts.— Josslyn *v.* Com., 6 Metc. (Mass.) 236.

Missouri.— It is so by express statutory provision. State *v.* Turner, 63 Mo. 436; State *v.* Smith, 16 Mo. 550.

Nebraska.— Cunningham *v.* State, 56 Nebr. 691, 77 N. W. 60.

New York.— People *v.* Wilson, 151 N. Y. 403, 45 N. E. 862; People *v.* Rose, 15 N. Y. Suppl. 815, 39 N. Y. St. 291.

Pennsylvania.— Com. *v.* Birdsall, 69 Pa. St. 482, 8 Am. Rep. 283; Com. *v.* Church, 17 Pa. Super. Ct. 39.

South Carolina.— State *v.* Crawford, 38 S. C. 330, 17 S. E. 36.

Virginia.— Speers *v.* Com., 17 Gratt. (Va.) 570.

West Virginia.— State *v.* Flanagan, 48 W. Va. 115, 35 S. E. 862.

United States.— *Ex p.* Peters, 2 McCrary (U. S.) 403, 12 Fed. 461.

Forms.— Joinder of counts generally see Watson *v.* People, 134 Ill. 374, 25 N. E. 567; Martin *v.* State, 79 Wis. 165, 48 N. W. 119. Joinder of counts for burglary and larceny see Dodd *v.* State, 33 Ark. 517; Josslyn *v.* Com., 6 Metc. (Mass.) 236.

Petit larceny.— But where counts for felony and misdemeanor cannot be joined (see INDICTMENTS AND INFORMATIONS), an indictment for burglary cannot join a count for petit larceny, if objection is properly raised. Adams *v.* State, 55 Ala. 143. *Compare* State *v.* Nelson, 14 Rich. (S. C.) 169, 94 Am. Dec. 130.

Under a statute allowing an indictment for larceny to contain a count charging burglary, the count for burglary need not describe the goods intended to be stolen as the same goods described in the count for larceny. Reed *v.* State, 147 Ind. 41, 46 N. E. 135.

26. Burglary, larceny, and receiving stolen goods.— People *v.* Wilson, 151 N. Y. 403, 45 N. E. 862. This rule is not changed by the provisions of the New York statute that an indictment must charge but one crime, except that when the acts complained of may constitute different crimes such crimes may be charged in different counts. People *v.* Wilson, 151 N. Y. 403, 45 N. E. 862.

Form.— Joinder of counts for burglary, larceny, and receiving or aiding in concealment of stolen goods see Com. *v.* Darling, 129 Mass. 112.

27. Burglary and assault.— In State *v.* Scott, 48 La. Ann. 293, 19 So. 141, it was held that a count for entering a dwelling with intent to kill and a count for stabbing a person therein with intent to kill might be joined in the same indictment. But in State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766, it was held that burglary and assault with intent to rape, since they are not cognate offenses, could not be joined in separate counts in the same indictment, although both offenses arose out of the same transaction. On this point see also INDICTMENTS AND INFORMATIONS.

28. Burglary and conspiracy.—Dill *v.* State, 35 Tex. Crim. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

29. *Arkansas.*— Crook *v.* State, 59 Ark. 326, 27 S. W. 229.

California.— People *v.* Taggart, 43 Cal. 81; People *v.* Garnett, 29 Cal. 622.

Iowa.— State *v.* McFarland, 49 Iowa 99.

Montana.— Territory *v.* Fox, 3 Mont. 440.

North Dakota.— State *v.* Smith, 2 N. D. 515, 52 N. W. 320.

30. State *v.* Colvin, 90 N. C. 717; Fonville *v.* State, (Tex. Crim. 1901) 62 S. W. 573.

Sufficient allegations.— An allegation that the defendant feloniously with intent, "feloniously and burglariously to break and enter" a certain dwelling-house, "did insert between the upper and under sash of an outside window of said dwelling house a certain instrument, to wit, a knife," etc., sufficiently charges an attempt. Harris *v.* People, 44 Mich. 305, 6 N. W. 677. An indictment for attempt to commit burglary is sufficient where it alleges that the defendant "in the nighttime, feloniously did attempt to break and enter, with intent the goods and chattels in said building, then and there being found, then and there feloniously to steal, take, and carry away, and in such attempt" did certain acts, "but was then and there intercepted and prevented in the execution of said offence." Com. *v.* Shedd, 140 Mass. 451, 5 N. E. 254. As to the sufficiency of an indictment for attempt to commit burglary under the Illinois statute see White *v.* People, 179 Ill. 356, 53 N. E. 570.

Forms.— Attempt to break and enter a dwelling-house in the night-time with intent to commit larceny see Com. *v.* Shedd, 140 Mass. 451, 5 N. E. 254. See also White *v.* People, 179 Ill. 356, 53 N. E. 570; State *v.* Jordan, 75 N. C. 27; Hackett *v.* Com., 15 Pa. St. 95.

Attempt to break and enter a house with

L. Variance Between Complaint and Information. An information charging burglary with intent to commit rape is not bad on the ground of variance, because the complaint at the preliminary examination of the defendant charged burglary with intent to steal, for both charge the same offense — burglary — notwithstanding the difference as to the intent.[31]

V. VARIANCE BETWEEN THE ALLEGATIONS AND THE PROOF.

A. Effect in General. On the trial of an indictment for burglary, the allegations must be sustained by the proof. In the absence of a statute changing the common-law rule, a material variance between an essential allegation of the indictment and the proof will entitle the defendant to an acquittal.[32] And the same is true with respect to an allegation which, although it may have been unnecessary, is descriptive of the offense.[33] But a variance between the proof and an unnecessary allegation which is not descriptive of the offense, and which may be rejected as surplusage, is immaterial.[34]

B. Particular Allegations — 1. Description of the Premises. There can be no conviction under an indictment at common law or under a statute for breaking and entering a dwelling-house, unless the proof shows that the premises were a dwelling-house or a part thereof,[35] or unless the description as a dwelling-house is mere surplusage.[36] And an indictment under a statute for breaking and entering a shop, store, warehouse, or other building is not sustained unless the proof brings the building within the description.[37] An immaterial variance, however,

intent to rape see Fonville *v.* State, (Tex. Crim. 1901) 62 S. W. 573.

31. Alderman *v.* State, 24 Nebr. 97, 38 N. W. 36.

32. People *v.* Barnes, 48 Cal. 551; Draughn *v.* State, 76 Miss. 574, 25 So. 153; Reg. *v.* Parfitt, 8 C. & P. 288, 34 E. C. L. 739. And see the other cases cited specifically *infra*, notes 33 *et seq.*

33. Gilmore *v.* State, 99 Ala. 154, 13 So. 536; Spradling *v.* State, 17 Ala. 440; State *v.* Dale, 141 Mo. 284, 42 S. W. 722, 64 Am. St. Rep. 513. See, generally, INDICTMENTS AND INFORMATIONS.

34. *Georgia.*— McCrary *v.* State, 96 Ga. 348, 23 S. E. 409.

Kentucky.— Duncan *v.* Com., 85 Ky. 614, 9 Ky. L. Rep. 142, 4 S. W. 321.

Massachusetts.— Com. *v.* Reynolds, 122 Mass. 454.

Michigan.— Harris *v.* People, 44 Mich. 305, 6 N. W. 677.

Mississippi.—Brown *v.* State, 72 Miss. 990, 18 So. 431.

Missouri.— State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34.

Texas.—Collins *v.* State, 20 Tex. App. 197; Burke *v.* State, 5 Tex. App. 74.

England.— Reg. *v.* Clarke, 1 C. & K. 421, 47 E. C. L. 421.

See 8 Cent. Dig. tit. "Burglary," § 67; and, generally, INDICTMENTS AND INFORMATIONS.

35. Fuller *v.* State, 48 Ala. 273; Draughn *v.* State, 76 Miss. 574, 25 So. 153. As to what is sufficient proof to show that premises were a dwelling-house see *supra*, II, E, 2.

Outhouses.— Proof of breaking and entering a smoke-house or other outhouse within the curtilage of a dwelling-house and appurtenant thereto sustains an indictment for breaking and entering the dwelling-house. Fletcher *v.* State, 10 Lea (Tenn.) 338. *Compare* Draughn *v.* State, 76 Miss. 574, 25 So. 153.

"Private residence" — Texas statute.— Since the Texas act of 1899, p. 318, adding sections 839*a* and 845*a* to the Penal Code, and punishing as a distinct offense burglary of a "private residence" (see *supra*, II, E, 1; IV, D, 2), there can be no conviction of burglary of a private residence without such a description of the premises in the indictment, although the proof may show that the premises were a private residence. Williams *v.* State, (Tex. Crim. 1901) 61 S. W. 395, 62 S. W. 1057; Fonville *v.* State, (Tex. Crim. 1901) 62 S. W. 573; Cleland *v.* State, (Tex. Crim. 1901) 61 S. W. 492; Harvey *v.* State, (Tex. Crim. 1901) 61 S. W. 492; Osborn *v.* State, (Tex. Crim. 1901) 61 S. W. 491.

36. Surplusage.— An indictment for breaking and entering "a certain building, to wit, the dwelling-house" of A, is sustained by proof of breaking and entering an unoccupied house of A, the indictment being under a statute, for breaking and entering a building, and not for breaking and entering a dwelling-house. Com. *v.* Reynolds, 122 Mass. 454.

37. *Alabama.*— Wait *v.* State, 99 Ala. 164, 13 So. 584.

Arkansas.— Green *v.* State, 56 Ark. 386, 19 S. W. 1055.

California.— People *v.* Barnes, 48 Cal. 551.

Florida.— Givens *v.* State, 40 Fla. 200, 23 So. 850.

Michigan.— Moore *v.* People, 47 Mich. 639, 11 N. W. 415.

Ohio.— Thalls *v.* State, 21 Ohio St. 233.

See 8 Cent. Dig. tit. "Burglary," § 71; and *supra*, II, E, 3, b; IV, D, 4–6.

between the allegations in an indictment for burglary and the proof may be disregarded.[38]

2. Location of the Premises. Where the location of the premises is necessarily stated in the indictment a material variance between the allegation and the proof will be fatal,[39] but in this country the location need not be stated further than by giving the county.[40] It must appear that the offense was committed in the county, as alleged.[41]

3. Ownership of the Premises. A material variance between the allegation and the proof with respect to the ownership of the premises is fatal, and entitles the defendant to an acquittal,[42] unless as is sometimes the case, a statute makes an unprejudicial variance in this respect immaterial, and the variance is not

Material variance.— An indictment for breaking and entering a "building, to-wit: A store-house, the property of one Mrs. Pons," is not sustained by proof of breaking and entering a gin-house of A, a building separate and distinct from his store-house. Givens *v.* State, 40 Fla. 200, 23 So. 850. A description of the premises as a "still-house" is not sustained by proof that they had been a still-house, but had been abandoned as such and thereafter used for other purposes. Thalls *v.* State, 21 Ohio St. 233.

Stores.—Proof of breaking into a counting-room merely does not sustain an indictment describing the premises as a store where goods were kept for use, sale, or deposit. People *v.* Marks, 4 Park. Crim. (N. Y.) 153.

"Shop" and "store."— It has been held that an indictment for breaking and entering a "shop" is sustained by proof of breaking and entering a "store," and *vice versa*. State *v.* Smith, 5 La. Ann. 340. *Contra*, Com. *v.* McMonagle, 1 Mass. 517; State *v.* Canney, 19 N. H. 135.

Different room.— An indictment for breaking and entering a particular room is not sustained by proof of breaking and entering a different room. People *v.* Barnes, 48 Cal. 551. But it was held that an indictment for breaking and entering a building used as a printing-office with intent to steal was sustained by proof that the defendant broke and entered the printing-office, and passed through a partition door into a post-office, for which the building was also used, and stole money and stamps therein. State *v.* Burns, 109 Iowa 436, 80 N. W. 545. There is no variance between an allegation of entry into a "basement room" of a certain building and proof of entry into a "cellar" of the building. People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

"House."— A description of the premises as a "house" is sustained by proof that they were a building with walls, roof, and door, used as a smoke-house. Albritton *v.* State, (Tex. Crim. 1894) 26 S. W. 398. See *supra*, II, E, 3, b, (III).

38. Immaterial variance.— There is no material variance between an allegation that the building was a two-story building and proof that it was three stories. State *v.* Porter, 97 Iowa 450, 66 N. W. 745. Where an indictment for burglary unnecessarily alleged that there were goods of value in the house, it was held that the allegation must be proved, as the averment was descriptive of the house. Gilmore *v.* State, 99 Ala. 154, 13 So. 536.

39. Reg. *v.* St. John, 9 C. & P. 40, 38 E. C. L. 36; Rex *v.* Bullock, 1 Moody 324, note *a*.

40. See *supra*, IV, D, 10. Where the building is otherwise identified, proof that it was situated over a mile from S, but within the county, whereas it was alleged to have been situated at S, is not a fatal variance. People *v.* Geiger, 116 Cal. 440, 48 Pac. 389.

41. An indictment for burglary alleging the offense to have been committed in A county is not sustained by proof that the burglary was committed in B county and the stolen goods carried into A county, although by statute either county has jurisdiction. People *v.* Scott, 74 Cal. 94, 15 Pac. 384.

42. *Alabama.*— Jackson *v.* State, 102 Ala. 167, 15 So. 344; Aldridge *v.* State, 88 Ala. 113, 7 So. 48, 16 Am. St. Rep. 23; Johnson *v.* State, 73 Ala. 483.

Delaware.— Saxton's Case, 2 Harr. (Del.) 533.

Georgia.— Berry *v.* State, 92 Ga. 47, 17 S. E. 1006; Morgan *v.* State, 63 Ga. 307.

Indiana.— Doan *v.* State, 26 Ind. 495.

Mississippi.— James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527.

New York.— Rodgers *v.* People, 86 N. Y. 360, 40 Am. Rep. 548.

Rhode Island.— State *v.* McCarthy, 17 R. I. 370, 22 Atl. 282.

England.— Rex *v.* Rawlins, 7 C. & P. 150, 32 E. C. L. 546.

See 8 Cent. Dig. tit. "Burglary," § 72.

As to the proper person in whom to lay the ownership see *supra*, IV, D, 11.

Ownership alleged in "John Doe."— Where an indictment charges a burglarious entry of a house, described by number, etc., "belonging to John Doe, whose real name is unknown," proof that the house belonged to a woman does not constitute a fatal variance. People *v.* White, 116 Cal. 17, 47 Pac. 771.

"Second" and "junior."— There is no variance between a description of the owner as "William Read, the second of that name," and proof of ownership in "William Read, Junior." Com. *v.* Parmenter, 101 Mass. 211.

prejudicial.[43] Allegation of ownership of a car or other premises in a corporation and proof of ownership in a different corporation is a fatal variance.[44] But by the weight of authority failure to prove that the alleged corporation was legally incorporated is not a fatal variance, it being sufficient to show that it was a *de facto* corporation or that it assumed to be a corporation and was so treated.[45]

4. The Breaking and Entering. The allegations in the indictment as to the breaking and entering must be sustained by the proof,[46] except as to immaterial

43. *California.*— People *v.* Edwards, 59 Cal. 359.

Iowa.— State *v.* Porter, 97 Iowa 450, 66 N. W. 645; State *v.* Emmons, 72 Iowa 265, 33 N. W. 672.

Kentucky.— Johnson *v.* Com., 87 Ky. 189, 10 Ky. L. Rep. 100, 7 S. W. 927.

Missouri.— State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34; State *v.* Nelson, 101 Mo. 477, 14 S. W. 718, 10 L. R. A. 39.

New York.— People *v.* Hagan, 14 N. Y. Suppl. 233, 37 N. Y. St. 660.

Ohio.— Mulrooney *v.* State, 26 Ohio St. 326.

Under a statute providing that a variance in respect to the description of any matter is not ground for acquittal unless material and prejudicial, the variance between an indictment laying the ownership in a certain person and proof of ownership in such person and another jointly has been held immaterial. Mulrooney *v.* State, 26 Ohio St. 326. And under statutes providing that an erroneous allegation as to the description of anything in an indictment, or as to the person injured, is not material unless prejudicial, convictions have been sustained notwithstanding an allegation of ownership of the premises in one person and proof of ownership in such person and another as partners or joint tenants. People *v.* Bitancourt, 74 Cal. 188, 15 Pac. 744; People *v.* Edwards, 59 Cal. 359; State *v.* Jelinek, 95 Iowa 420, 64 N. W. 259. Under such a statute variance in the christian name of the person alleged to have been the owner of the building was held immaterial, in the absence of prejudice to the accused. State *v.* Wrand, 108 Iowa 73, 78 N. W. 788. And so it was held of a variance between an indictment charging defendant with breaking and entry of the warehouse of W and evidence that he broke and entered a room occupied by W and R jointly in a warehouse belonging to R. Johnson *v.* Com., 22 Ky. L. Rep. 282, 57 S. W. 255. Under a statute allowing amendment of an indictment for variance in respect to the name or description of anything, if the defendant cannot be thereby prejudiced in his defense on the merits, a slight variance in the name of the owner of the premises may be cured by amendment. People *v.* Hagan, 14 N. Y. Suppl. 233, 37 N. Y. St. 660.

44. State *v.* Hill, 48 W. Va. 132, 35 S. E. 831.

There is no variance between an allegation that the premises belonged to a certain corporation, naming it, and proof that the company was so named by an amendment of its charter before the burglary, although it was originally incorporated by a different name. Brown *v.* State, 115 Ala. 74, 22 So. 458. There is no material variance between an allegation of ownership in the C. S. "Railroad" Co., and proof of ownership in the C. S. "Railway" Co. Davis *v.* State, 105 Ga. 808, 32 S. E. 158. Where a corporation in which the ownership of a car is laid has the title, proof that its stock was owned by another company does not constitute a variance. Johnson *v.* State, 98 Ala. 57, 13 So. 503.

45. *Georgia.*— Berry *v.* State, 92 Ga. 47, 17 S. E. 1006; Crawford *v.* State, 68 Ga. 822.

Indiana.— Norton *v.* State, 74 Ind. 337.

Mississippi.— James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

Ohio.— Hamilton *v.* State, 34 Ohio St. 82; Burke *v.* State, 34 Ohio St. 79.

Compare, however, Johnson *v.* State, 73 Ala. 483.

It is only necessary to show de facto existence of a corporation alleged to be the owner of the premises, where a statute provides that in criminal prosecutions the existence of any corporation may be proved by general reputation, or by the printed statute book, etc., and that it is not necessary to produce a certified copy of the charter or act of incorporation. State *v.* Thompson, 23 Kan. 338, 33 Am. Rep. 165.

46. Reg. *v.* Davis, 6 Cox C. C. 369. See *supra,* II, B.

Breaking out.— Proof of an entry without breaking, and breaking out, although it may be punished by statute as burglary, will not sustain a conviction where the indictment alleges a breaking and entering. People *v.* Arnold, 6 Park. Crim. (N. Y.) 638; State *v.* McPherson, 70 N. C. 239, 16 Am. Rep. 769. See *supra,* II, B, 2, f; IV, C, 2.

Constructive breaking.—As a rule an indictment alleging a breaking and entering is sustained by proof of an entry under such circumstances as to constitute a constructive breaking. Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870. See the cases cited *supra,* II, B, 2, g. But *compare* cases cited *infra,* note 48. In some jurisdictions, by statute, an actual breaking must be proved. See *supra,* II, B, 2, b.

Breaking inner door.— An allegation of breaking and entering a house or other building is sustained by proof of entering an open outer door or window and breaking a closed inner door. People *v.* Young, 65 Cal. 225, 3 Pac. 813; Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238; State *v.* Scripture, 42 N. H. 485. And see *supra,* II, B, 2, e.

averments.[47] And when the mode of effecting the entry is material under a statute it must be proved as alleged.[48]

5. Time of Breaking and Entry. Of course, both at common law and under a statute punishing burglary in the night-time, it must be both alleged and proved that the breaking and entry were in the night-time.[49] And even when a statute punishes as burglary a breaking and entry in the daytime as well as at night, but as distinct offenses, proof of breaking and entering in the daytime will not sustain an indictment for breaking and entering at night, or *vice versa*.[50] It is not necessary to prove that the offense was committed on the precise day named in the indictment.[51]

6. The Intent. The intent must be proved as laid in the indictment. An allegation of breaking and entering with intent to commit a particular felony is not sustained by proof of a breaking and entering with intent to commit some other felony.[52] It is not necessary, however, to prove the whole intent, if enough

47. State *v.* Huntley, 25 Oreg. 349, 35 Pac. 1065, as to which see *infra*, note 48.

48. Breaking and entering by force.—Generally, both at common law and under statutes, an allegation of breaking and entering by "force" is sustained by proof of such force as was sufficient to constitute a breaking at common law. Timmons *v.* State, 34 Ohio St. 426, 32 Am. Rep. 376; State *v.* Huntley, 25 Oreg. 349, 35 Pac. 1065; Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870. And see *supra*, II, B, 2, a. Under an indictment charging a forcible entry by breaking windows, it is sufficient to show that the entry was an unlawful one and made under such circumstances as to show a breaking within the definition of burglary. State *v.* Huntley, 25 Oreg. 349, 35 Pac. 1065.

In Texas where by statute force is made an element of burglary under certain circumstances, the statute punishing an entry "by force, threats, or fraud," an allegation of an entry by force, or an attempt to enter by force, is not supported by evidence of an entry, or attempt to enter, without proof of force. Finlan *v.* State, (Tex. App. 1890) 13 S. W. 866; Ross *v.* State, 16 Tex. App. 554; Buntain *v.* State, 15 Tex. App. 485; Weeks *v.* State, 13 Tex. App. 466. And see *supra*, II, B, 2, g, (v).

49. People *v.* Smith, 136 Cal. 207, 68 Pac. 702; People *v.* Griffin, 19 Cal. 578; Waters *v.* State, 53 Ga. 567. And see *supra*, II, D.

It is not necessary to prove the exact hour of the night even when alleged, but it is enough to prove that the offense was committed at some hour in the night-time. People *v.* Burgess, 35 Cal. 115; State *v.* Tazwell, 30 La. Ann. 884; State *v.* Bancroft, 10 N. H. 105; 2 East P. C. 513; 2 Hale P. C. 179.

50. Bromley *v.* People, 150 Ill. 297, 37 N. E. 209. And see People *v.* Smith, 136 Cal. 207, 68 Pac. 702; Hollister *v.* Com., 60 Pa. St. 103; Guynes *v.* State, 25 Tex. App. 584, 8 S. W. 667; Reg. *v.* Nicholas, 1 Cox C. C. 218. But it has been held that where a statute punishes burglary, whether committed by night or by day, imposing a greater punishment when committed by night, there may be a conviction and punishment for burglary in the daytime under an indictment so charging the offense, although the evidence shows burglary in the night-time. Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809. And see Shaffer *v.* State, (Tex. Crim. 1901) 65 S. W. 1072.

51. Day of offense.— It is sufficient if it is proved that it was committed, in the night-time when this is essential, "on or about" the day alleged, or on any day before the finding of the indictment and within the time limited by statute for the prosecution of such crime. State *v.* Johnson, 35 La. Ann. 842; Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512; State *v.* Dawkins, 32 S. C. 17, 10 S. E. 1072; State *v.* Branham, 13 S. C. 389. And see Indictments and Informations.

52. *Arkansas.*— Starchman *v.* State, 62 Ark. 538, 36 S. W. 940.

California.— People *v.* Crowley, 100 Cal. 478, 35 Pac. 84; People *v.* Mulkey, 65 Cal. 501, 4 Pac. 507; People *v.* Young, 65 Cal. 225, 3 Pac. 813; People *v.* Soto, 53 Cal. 415.

Delaware.— State *v.* Fisher, 1 Pennew. (Del.) 303, 41 Atl. 208; State *v.* Eaton, 3 Harr. (Del.) 554; State *v.* Carpenter, 1 Houst. Crim. Cas. (Del.) 367.

Florida.— Davis *v.* State, 22 Fla. 633.

Iowa.— State *v.* Worthen, 111 Iowa 267, 82 N. W. 910.

Louisiana.— State *v.* Meche, 42 La. Ann. 273, 7 So. 573.

Maryland.— Robinson *v.* State, 53 Md. 151, 36 Am. Rep. 399.

Missouri.— State *v.* Taylor, 136 Mo. 66, 37 S. W. 907.

Montana.— State *v.* Carroll, 13 Mont. 246, 33 Pac. 688.

Nebraska.— Ashford *v.* State, 36 Nebr. 38, 53 N. W. 1036.

Nevada.— State *v.* Cowell, 12 Nev. 337.

New York.— People *v.* Marks, 4 Park. Crim. (N. Y.) 153.

North Carolina.— State *v.* Halford, 104 N. C. 874, 10 S. E. 524.

Texas.— Ford *v.* State, (Tex. Crim. 1899) 54 S. W. 761; Mitchell *v.* State, 32 Tex. Crim. 479, 24 S. W. 280, 33 Tex. Crim. 575, 28 S. W. 475; Walton *v.* State, 29 Tex. App. 163, 15 S. W. 646; Black *v.* State, 18 Tex. App. 124.

Wisconsin.— Neubrandt *v.* State, 53 Wis. 89, 9 N. W. 824.

England.— Jenks' Case, 2 East P. C. 514, 2

is proved to make out the offense.[53] In some states in an indictment for burglary with intent to commit larceny it is necessary to describe the property intended to be stolen, and in such a case it must be proved as alleged.[54] But in most states a description of the property is not necessary and may be rejected as surplusage.[55] When it is necessary to allege the ownership of goods which it is alleged defendant intended to steal, or stole, the ownership must be proved as laid;[56] but according to the better opinion, when such an allegation is unnecessary, and the conviction is for burglary only, and not larceny, the allegation of ownership is surplusage, and a variance is immaterial.[57]

7. COMMISSION OF OFFENSE AFTER ENTRY. On the question of intent, actual commission of the felony alleged to have been intended may be shown, although

Leach 774; Rex *v.* Vandercomb, 2 East P. C. 514, 517, 2 Leach 708; 1 Hale P. C. 561.

See 8 Cent. Dig. tit. "Burglary," § 68.

As to the sufficiency of the evidence to show a particular intent see *infra*, VI, C, 5.

Larceny and robbery.— It has been held, however, that where the indictment alleges intent to commit larceny, and the proof shows intent to commit robbery, there is no material variance, as the intent alleged and that proved is substantially the same. People *v.* Crowley, 100 Cal. 478, 35 Pac. 84; State *v.* Halford, 104 N. C. 874, 10 S. E. 524; State *v.* Cody, 60 N. C. 197.

53. Need not prove whole intent alleged.— Under an indictment alleging an intent to commit "grand and petit larceny," an intent to commit either of which is sufficient under the statute, an intent to commit both need not be shown. People *v.* Hall, 94 Cal. 595, 30 Pac. 7.

54. See *supra*, IV, E, 2. Proof of intent to steal bank-notes and money sustains an allegation of intent to steal goods and chattels, particularly when a statute provides that they shall be considered as personal goods of which larceny may be committed. Garfield *v.* State, 74 Ind. 60.

55. See *supra*, IV, E, 2; State *v.* Dale, 141 Mo. 284, 42 S. W. 722, 64 Am. St. Rep. 513, holding that where there was a conviction for burglary only, and not of larceny, a misdescription of the property which it was alleged was stolen was immaterial. But in State *v.* Carroll, 13 Mont. 246, 33 Pac. 688, it was held that a charge of intent to steal an overcoat must be proved. And in Rush *v.* State, 114 Ga. 113, 39 S. E. 941, it was held that a conviction would not be sustained where there was an allegation of intent to steal a specific article, and there was no evidence that such article was ever in the house, or that defendant had any reason to believe it was.

The value of the property which it is alleged the defendant intended to steal, if unnecessarily alleged, need not be proved. McCrary *v.* State, 96 Ga. 348, 23 S. E. 409; Collins *v.* State, 20 Tex. App. 197. And see Duncan *v.* Com., 85 Ky. 614, 9 Ky. L. Rep. 142, 4 S. W. 321.

56. See *supra*, IV, E, 2.

57. James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527; Brown *v.* State, 72 Miss. 990, 18 So. 431; Harris *v.* State, 61 Miss. 304; State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34; Reg. *v.* Clarke, 1 C. & K. 421, 47 E. C. L. 421.

There are some cases, however, in which it has been held that where the indictment unnecessarily alleges a specific intent to steal the goods of a particular person, not the owner of the building, it must be proved as laid. Spradling *v.* State, 17 Ala. 440; Com. *v.* Moore, 130 Mass. 45; Neubrandt *v.* State, 53 Wis. 89, 9 N. W. 824; Jenks' Case, 2 East P. C. 514, 2 Leach 774. And see State *v.* Lee, 1 Houst. Crim. Cas. (Del.) 335.

Conviction of larceny.—Of course where the conviction is not of burglary merely, but of burglary and larceny, or of larceny only, under an indictment charging burglary and larceny, the larceny must be proved as laid, both with respect to the description of the property and its ownership. State *v.* Lee, 1 Houst. Crim. Cas. (Del.) 335; State *v.* Ellison, 58 N. H. 325. See, generally, LARCENY. An allegation that the property stolen was the property of A and B is not sustained by proof that the property was all in the possession of A, and belonged some to A and some to B. State *v.* Ellison, 58 N. H. 325.

General and special owner.— Even where a variance as to ownership of the property is material there is no variance because the evidence shows that the person named as owner was the general owner and that the property was in the possession of another as bailee; nor, on the other hand, because the evidence shows that the person named as owner was not the general owner, but merely a bailee, for the ownership may properly be laid either in the general or special owner. See *supra*, IV, E, 2; and Wimbish *v.* State, 89 Ga. 294, 15 S. E. 325; Lamater *v.* State, 38 Tex. Crim. 249, 42 S. W. 304; Humphrey *v.* State, (Tex. Crim. 1897) 40 S. W. 489; Smith *v.* State, 34 Tex. Crim. 124, 29 S. W. 775; Neubrandt *v.* State, 53 Wis. 89, 9 N. W. 824.

Husband and wife.— An indictment for burglary which charges larceny of a chattel laid as the property of a husband is not defective because the chattel was the separate property of his wife, where it was used by the family in common, as the husband has a special property as bailee. State *v.* Matthews, 76 N. C. 41; State *v.* Wincroft, 76 N. C. 38. Where an indictment for burglary with intent to commit larceny alleged that the goods were the property of A, who was also alleged

mere intent to commit it is alleged.[58] But actual commission of the offense need not be proved, although alleged,[59] unless it is an essential element of the offense charged, as under a statute punishing as a single crime burglary with intent to commit a particular offense and its actual commission, in which case the offense must be proved as alleged.[60]

C. Attempt. In a prosecution for attempt to commit burglary a variance between the allegations of the indictment and the proof has the same effect as in a prosecution for burglary.[61]

VI. EVIDENCE.

A. Burden of Proof and Presumptions. Since every person under indictment is presumed to be innocent until the contrary is proved beyond a reasonable doubt, the burden of proof is on the state, on the trial of an indictment for burglary, to prove every fact which is alleged in the indictment and is essential to constitute the crime charged, and no essential fact can be presumed.[62] But this does not prevent the inference of facts from the circumstances proved.[63]

B. Admissibility of Evidence — 1. In General. On a trial for burglary the state may introduce evidence of any fact which tends to prove the commission of the offense,[64] the *corpus delicti*,[65] including the various elements of the

to be the owner of the building, and the evidence showed that while he owned the building the title to the goods was in his wife, it was held that there was no variance. Kidd *v.* State, 101 Ga. 528, 28 S. E. 990.

58. Stokes *v.* State, 84 Ga. 258, 10 S. E. 740; Com. *v.* McGorty, 114 Mass. 299; Allen *v.* State, 12 Lea (Tenn.) 424. See *infra*, VI, C, 5.

59. See *supra*, II, G, 5.

60. Where an indictment under a statute for burglary and striking alleges the burglary and the striking of A, and the proof shows the striking of B, the conviction can be for the burglary only. Reg. *v.* Parfitt, 8 C. & P. 288, 34 E. C. L. 739.

Value of property.—Since the extent of the value is immaterial under a statute punishing any person who shall feloniously break into a dwelling-house, and feloniously take away anything of value, an indictment alleging a breaking and taking away of property of the value of five dollars is supported by proof that the thing taken was of less value than five dollars. Duncan *v.* Com., 85 Ky. 614, 9 Ky. L. Rep. 142, 4 S. W. 321.

61. Under the Texas statute an allegation of attempt to enter by force is not sustained by proof of an attempt to enter without proof of force. Weeks *v.* State, 13 Tex. App. 466.

62. People *v.* Barry, 94 Cal. 481, 29 Pac. 1026; People *v.* Marks, 4 Park. Crim. (N. Y.) 153; Jones *v.* State, 25 Tex. App. 226, 7 S. W. 669; and cases cited *infra*, VI, C.

Consent of owner.— But where an indictment for burglary laid ownership of the property intended to be stolen in two persons jointly, but one of them had exclusive possession and control, it was held unnecessary for the state to prove that the other did not consent to the taking, on the ground that if the accused had such consent the burden was on him to prove it. Payne *v.* State, 40 Tex. Crim. 290, 50 S. W. 363.

Intent.— The intent must be affirmatively proved. People *v.* Marks, 4 Park. Crim. (N. Y.) 153; Reg. *v.* Tucker, 1 Cox C. C. 73. And see *infra*, VI, C, 5. Although the intent need not be proved by direct evidence, it is incumbent upon the prosecution to prove facts from which it may be inferred, and therefore it is error to charge the jury that the prosecution is not bound to prove the intent affirmatively. People *v.* Marks, 4 Park. Crim. (N. Y.) 153.

Proof of an attempted larceny while in a store does not make out a *prima facie* case of burglary, so as to cast on the defendant the burden of proving his innocence, and it is error to refuse a request to so charge. People *v.* Barry, 94 Cal. 481, 29 Pac. 1026.

The breaking must be affirmatively proved. A breaking and force are not presumed from the fact of entry. Jones *v.* State, 25 Tex. App. 226, 7 S. W. 669; Reg. *v.* Payne, 13 Vict. L. R. 359. And see *infra*, VI, C, 2.

Time of offense.— It will not be presumed that the breaking and entry were in the nighttime, but facts must be proved from which this fact may be inferred.

California.— People *v.* Griffin, 19 Cal. 578.

Connecticut.— State *v.* Leaden, 35 Conn. 515.

Georgia.— Waters *v.* State, 53 Ga. 567.

Michigan.—People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771.

North Carolina.— State *v.* Whit, 49 N. C. 349.

Ohio.— Adams *v.* State, 31 Ohio St. 462.

England.— Reg. *v.* Nicholas, 1 Cox C. C. 218.

And see *infra*, VI, C, 3.

63. See *infra*, VI, C.

64. See cases cited *infra*, notes 65–76.

65. Order of approving corpus delicti.— The state may prove the *corpus delicti* before showing the defendant's connection with the crime. Therefore, if two of three defendants charged with burglary plead guilty, the fact of the breaking and entering and the larceny

offense, as the breaking and entering,[66] the time of the offense,[67] the character, occupancy, or ownership of the premises or the property which it was intended to steal,[68] the intent,[69] etc., and of any fact which legitimately tends to connect the defendant with its commission,[70] including admissions and declarations of the

of certain goods may be proved by their testimony, although they testify that the crime was committed by themselves, and that the third defendant had no connection with it. State *v.* Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. Rep. 864.

66. Evidence of breaking and entry.— The state may show the condition of the premises before and after the alleged offense. Com. *v.* Hagan, 170 Mass. 571, 49 N. E. 922. It may be shown that the doors were usually kept closed, and that they were closed and latched ten minutes or so before the alleged burglary. People *v.* Bush, 3 Park. Crim. (N. Y.) 552. See also *infra*, VI, C, 2. Evidence having been admitted to show the condition of the doors and windows of the building shortly after the burglary, it is admissible to show the condition of the premises at or just before the time of the burglary. State *v.* Marshall, 105 Iowa 38, 74 N. W. 763. The owner of the premises may testify how the window through which the burglar entered might be opened from without, as tending to show the grade of the offense. State *v.* Moore, 117 Mo. 395, 22 S. W. 1086. A witness, after testifying that he saw defendant open a door and enter the house, may be asked how defendant got in through the door, and it is proper to allow an answer that he does not know, but that he found a key near where the defendant was arrested. Vallereal *v.* State, (Tex. Crim. 1892) 20 S. W. 557. As to the exclusion of testimony of a statement made by the prosecuting witness that he did not know whether he had left his house open or closed at the time of the alleged burglary see Torey *v.* State, 41 Tex. Crim. 543, 56 S. W. 60.

Consent to entry.— On the question of consent to the entry by the defendant, the premises having been in the possession of a tenant, in whom the indictment lays the occupancy, evidence that the owner told defendant to stay away is inadmissible. Trevenio *v.* State, (Tex. Crim. 1897) 42 S. W. 594. The defendant cannot complain of evidence on behalf of the state showing that the entry was not made with the consent of the owner. Buchanan *v.* State, 24 Tex. App. 195, 5 S. W. 847.

67. Time of offense.— An almanac is admissible to show at what time the sun set on the evening in question, although the court might take judicial notice of the fact. State *v.* Morris, 47 Conn. 179.

68. Ownership, occupancy, and character of premises or property.— That the person in whom ownership of the premises is laid had the lawful possession as against the burglars may be shown by parol evidence. Houston *v.* State, 38 Ga. 165. On a trial for burglarizing a railroad car with intent to steal property therein, admission of evidence of the character and ownership of the stolen property is not error. Pyland *v.* State, 33 Tex. Crim. 382, 26 S. W. 621. On the question of the ownership of the property alleged to have been taken it may be shown that the person alleged to have been the owner, and admitted to have been so at one time, was induced to part with the possession by false and fraudulent representations, but for which he would not have parted with the same. Charles *v.* State, 36 Fla. 691, 18 So. 369.

Value of property — Harmless error.— Admission of evidence of the value of the property stolen at the time of the burglary, although unnecessary, is harmless. Farley *v.* State, 127 Ind. 419, 26 N. E. 898.

69. See *infra*, VI, B, 2.

70. Evidence connecting defendant with offense.— It was held competent to prove that defendant was one of a band of runaway slaves encamped in a swamp near where the burglary was committed. State *v.* Bill, 51 N. C. 34. Where the evidence tended to identify with the goods stolen at the time of the burglary certain goods found in an uninhabited house less than a mile from defendant's residence, and showed that similar goods were found in defendant's possession, that the tracks of two men were seen near the burglarized premises the morning after the offense, and that the defendant and another person suspected of being implicated both wore a number nine shoe, the state may show that two pair of men's number nine shoes were found in the uninhabited house. England *v.* State, 89 Ala. 76, 8 So. 146. It cannot be shown by the state that hats, coats, and shoes of the size of those stolen would fit the defendant. Henderson *v.* Com., 16 Ky. L. Rep. 289, 27 S. W. 808.

Tracks, etc.— The state may show that there were tracks near the burglarized house, and that they were such as would have been made by the defendant. McLain *v.* State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934, again cited *infra*, note 73. Where a witness testifies that he saw a man running from the burglarized house, it may be shown by another witness that the defendant's shoes corresponded with tracks found at the place of the burglary, although it is not shown that the tracks were made by the man who was seen running from the house. People *v.* Rowell, 133 Cal. 39, 65 Pac. 127. It may be shown that immediately after the burglary four men were tracked from the house to another house, and that at the latter were found four men, including defendant, and also goods stolen from the house burglarized, and burglarious instruments. State *v.* Harrold, 38 Mo. 496. But where the entry was proved to have been effected by breaking open a window at the back of the house, it was held inadmissible to prove that the defendant's

defendant,[71] subject, of course, to the general rules in relation to the competency of evidence, as the rule excluding secondary evidence,[72] hearsay and opinion evidence,[73] etc. On the other hand, any competent evidence is admissible on the

shoe corresponded with an impression in the front garden not proved to have been made on the night of the alleged burglary. Reg. *v.* Coots, 2 Cox C. C. 188.

Connection with accomplice.— Evidence that on the morning after the burglary the defendant was seen in company with his alleged accomplice is admissible. Lamater *v.* State, 38 Tex. Crim. 249, 42 S. W. 304. Where it appeared that the defendant and another person, previously convicted of the alleged burglary, occupied a rented room together both before and after the offense, and were seen together on the evening of the offense, it was held admissible to show that they were seen together a week before the offense. People *v.* Burns, 67 Mich. 537, 35 N. W. 154. The state may prove interviews the day after the burglary between the defendant and one on whom the stolen goods were found. Langford *v.* State, 17 Tex. App. 445.

Burning of premises after burglary.— It is competent to show that after the burglary the defendant burned the building to conceal the evidence of the breaking. Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Knowledge of property in building, etc.— The state may prove at a trial for burglary with intent to steal a conversation between the defendant and a person living in the house before the burglary, tending to show a belief that there was money in the house. Gilmore *v.* State, 99 Ala. 154, 13 So. 536. See also State *v.* Ward, 103 N. C. 419, 8 S. E. 814. Although the indictment charges intent to commit an assault and battery, yet where there are circumstances tending to show an intent to commit larceny or robbery also, the state may show that defendant knew there was money in the house, as bearing on the question whether he is the person who broke and entered. State *v.* Kepper, 65 Iowa 745, 23 N. W. 304.

Acts in connection with excluded confession.— The state may prove acts of the accused, performed in connection with a confession, not allowed to be proved, made to an officer having him in custody, and who promised to release him if he would show where he got the property found on him. Mountain *v.* State, 40 Ala. 344. And see, generally, CRIMINAL LAW.

Refusal of defendant to allow search.— It cannot be shown that the defendant refused to allow his house to be searched without a warrant, as such an assertion of his constitutional right cannot be construed into a criminative circumstance. Murdock *v.* State, 68 Ala. 567.

71. Admissions and declarations of defendant which constitute part of the *res gestæ*, or which tend to connect him with the commission of the offense, may be proved. Gilmore *v.* State, 99 Ala. 154, 13 So. 536; State *v.* Kepper, 65 Iowa 745, 23 N. W. 304; State *v.* Cowen, 56 Kan. 470, 43 Pac. 687; Langford *v.* State, 17 Tex. App. 445. And see, generally, CRIMINAL LAW. The state may show that the defendant had been in the house before the burglary, that he had inquired as to the weapons in the house, and that he had said he knew there was money there. State *v.* Ward, 103 N. C. 419, 8 S. E. 814. See also Gilmore *v.* State, 99 Ala. 154, 13 So. 536. An admission by the defendant that he went with another to the scene of the burglary and saw him enter and take from the house goods which he afterward bought may be looked to by the jury as a circumstance to be considered in determining whether the defendant is guilty of the burglary, and it is not error to so charge. Kidd *v.* State, 101 Ga. 528, 28 S. E. 390.

72. Best and secondary evidence.— See, generally, CRIMINAL LAW. On trial of an indictment for burglary from freight-cars, waybills accompanying such cars, made out by clerks in the line of their duty, and entries made by them in checking the packages in the cars, are admissible as original evidence to prove that the articles therein mentioned were shipped in such cars; and if they are beyond the jurisdiction of the court parol evidence of their contents is admissible. It is not necessary to produce the clerks who made out the way-bills, or the persons who loaded the cars. Dawson *v.* State, 32 Tex. Crim. 535, 25 S. W. 21, 40 Am. St. Rep. 791. On a trial for burglary and larceny in a railroad depot, a witness may testify from memory, after a personal examination of the goods, what amount of the particular class alleged to have been stolen was shipped and stored in the depot, and what quantity was missing after the burglary, although he has way-bills of the goods in his custody. Davis *v.* State, 105 Ga. 808, 32 S. E. 158.

73. Opinion and hearsay evidence.— See, generally, CRIMINAL LAW. A witness cannot testify that, from a description of the property given to him by the person from whom it was stolen, he recognized property found as his. Reed *v.* State, 66 Ark. 110, 49 S. W. 350. Defendant cannot, to show commission of the offense by another, prove that such other person on the night of the offense applied to the witness for a loan, offering to return the money in corn, which was the article stolen by the burglar, as such testimony is hearsay. State *v.* Clary, 24 S. C. 116.

As to footprints.— It is error to allow a witness to testify that certain footprints, described to him by the owner of the premises in which the alleged burglary was committed, would have been made by certain shoes received by him from the defendant, as the testimony is opinion and hearsay. Bluitt *v.* State, 12 Tex. App. 39, 41 Am. Rep. 666. But a witness may testify that he measured the foot-tracks found at the place of the burglary; that he also examined the shoes that

part of the defendant which tends to show that he did not commit the acts charged.[74] He may show physical incapacity,[75] or that the crime was committed by another person.[76]

2. THE INTENT. As a general rule the state may prove any conduct on the part of the defendant, or other fact or circumstance, by competent evidence, which tends to show that the accused broke and entered with the felonious intent alleged in the indictment, for generally the intent can only be shown by circumstantial evidence.[77] Declarations of the defendant are admissible for this purpose,[78] and under some circumstances evidence of other offenses is admissible.[79] Evidence of actual commission of a felony by the defendant after entry is admissible as tending to show that he intended to commit it at the time of breaking and entering.[80] On the other hand, the defendant may himself testify that his intent was other than that alleged,[81] or prove any circumstance tending to negative the existence of such intent.[82]

the defendant had on just after the burglary; and that upon placing the shoes in the tracks he found that they fitted exactly. McLain *v.* State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934.

74. Defendant's evidence in rebuttal.— Where the defendant claimed that the goods found on him were won by him from the prosecutor in gambling, and that he and the prosecutor were on friendly terms and frequently gambled together, which was denied by the prosecutor's testimony, it was held error to exclude evidence that before and after the alleged burglary the defendant and the prosecutor were seen gambling in the latter's store, and that the prosecutor was seen drunk there both before and after the alleged offense. Grantham *v.* State, 95 Ga. 459, 22 S. E. 281.

75. Drunkenness.— The defendant may show that he was so drunk at the time the burglary was committed that he was not physically able to commit it. Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

76. Commission of offense by another.— But defendant's offer to prove that another person had made a key which would unlock the store alleged to have been entered is properly rejected, where there is no offer to show any overt act by the other toward the commission of the offense. State *v.* Taylor, 136 Mo. 66, 37 S. W. 907.

77. Gilmore *v.* State, 99 Ala. 154, 13 So. 536; State *v.* Woods, 31 La. Ann. 267; People *v.* Marks, 4 Park. Crim. (N. Y.) 153.

Intent to steal or rob.— Evidence of previous preparations to commit a robbery on the owner of the house is admissible on the question of intent to steal alleged in the indictment. State *v.* Cowell, 12 Nev. 337. Where the indictment is for burglary with intent to commit larceny, it may be shown that the defendant knew or believed that there was property in the building. Gilmore *v.* State, 99 Ala. 154, 13 So. 536; State *v.* Worthen, 111 Iowa 267, 82 N. W. 910. In rebuttal of defendant's claim that he entered and took the property in the belief that it was his, the state may introduce the record of an action in replevin brought by defendant for the property and dismissed for want of prosecution. Charles *v.* State, 36 Fla. 691, 18 So. 369.

Intent to rape.— On the question whether the entry was with intent to rape, as alleged, the state may prove the effect of the force used on a woman assaulted in the house. Com. *v.* Doherty, 10 Cush. (Mass.) 52.

Intent to kill.— On a trial for burglary with intent to kill it is error to allow an occupant of the house to testify that she was afraid defendant would kill her, where no threatening acts or words are shown. Trevenio *v.* State, (Tex. Crim. 1897) 42 S. W. 594.

78. People *v.* Marks, 4 Park. Crim. (N. Y.) 153.

Where the evidence is sufficient to identify defendant as the person who broke into the house, evidence of what he said to procure entrance is admissible as part of the *res gestæ*. State *v.* Kepper, 65 Iowa 745, 23 N. W. 304.

79. See *infra*, VI, B, 3.

80. *Georgia.*— Stokes *v.* State, 84 Ga. 258, 10 S. E. 740.

Kentucky.— Maden *v.* Com., 4 Ky. L. Rep. 45.

Louisiana.— State *v.* Woods, 31 La. Ann. 267.

Massachusetts.— Com. *v.* McGorty, 114 Mass. 299.

Pennsylvania.— Com. *v.* Tadrick, 1 Pa. Super. Ct. 555, 38 Wkly. Notes Cas. (Pa.) 215 [*reversing* 1 Lack. Leg. N. (Pa.) 402].

Tennessee.— Allen *v.* State, 12 Lea (Tenn.) 424.

Texas.— Moseley *v.* State, (Tex. Crim. 1902) 67 S. W. 414.

See 8 Cent. Dig. tit. "Burglary," § 84; and *infra*, VI, B, 3, 4.

81. State *v.* Meche, 42 La. Ann. 273, 7 So. 573; People *v.* Griffin, 77 Mich. 585, 43 N. W. 1061. On a charge of breaking and entering a dwelling-house through the cellar with intent to commit a felony, defendant's statement that he fell into the cellar should be considered with the other evidence. People *v.* Griffin, 77 Mich. 585, 43 N. W. 1061.

82. Intent to rape.— On the question whether an entry was with intent to commit rape upon a woman in the house, evidence is admissible on the part of the defendant that

3. OTHER OFFENSES. On a trial for burglary, the state as a general rule cannot prove the commission by the defendant or others of other burglaries, larcenies, or other offenses, not in any way connected with the offense charged in the indictment.[83] But evidence of another burglary than that charged, or of any other offense, is admissible, if both offenses are in reality parts of the same transaction or otherwise connected, or if the evidence shows the whereabouts of the defendant at the time alleged in the indictment, or otherwise tends to connect him with the offense charged.[84] And such evidence is admissible for the purpose of showing a regular system of crime organized and carried on by the defendant, or by

the woman was a lewd woman, and that he had previously had intercourse with her. Robinson *v.* State, 53 Md. 151, 36 Am. Rep. 399.

Intent to steal.— Where the defendant claims to have acted merely as a detective for the purpose of entrapping his co-defendants, he may show that when he was asked by them to join in the offense he went to a justice of the peace and talked with him, and prove the conversation. Price *v.* People, 109 Ill. 109.

Intent to kill.— On an indictment under a statute for burglary with intent to kill, being armed at the time with dangerous weapons, it appearing that defendants entered the house armed with pistols, and when fired upon by the occupant returned the fire, defendants may prove that they were an unlawful organization known as "White Caps," and that they entered the premises with the intent to break up an unlawful cohabitation between the occupant and a woman by whipping the woman, as this tends to rebut the allegation of intent to kill. State *v.* Meche, 42 La. Ann. 273, 7 So. 573.

Drunkenness.— On a prosecution for burglary the defendant may show that he was so drunk that he was incapable of entertaining the necessary felonious intent. Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809; State *v.* Bell, 29 Iowa 316. *Contra,* State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

Evidence held inadmissible.— Where the evidence shows that the defendant entered the house with intent to steal, it is proper to exclude evidence that he possessed large means and was in good financial condition. Coates *v.* State, 31 Tex. Crim. 257, 20 S. W. 585. Where the evidence clearly showed defendant's guilt, it was held not to be error to refuse to allow a witness who saw the defendant and an accomplice at the window of the building after the burglary, to testify to a conversation between them showing that they were trying to close the window. Ezzell *v.* State, (Tex. Crim. 1894) 26 S. W. 204. Evidence as to the character of the defendant's work when acting as a detective on the police force is not admissible, either as tending to show that he was present at the commission of the burglary merely as a detective or as showing his general reputation. State *v.* Coates, 22 Wash. 601, 61 Pac. 726.

83. *California.*—People *v.* McNutt, 64 Cal. 116, 28 Pac. 64.

Florida.— Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Louisiana.— State *v.* Johnson, 38 La. Ann. 686.

Michigan.— People *v.* Henry, (Mich. 1901) 88 N. W. 77.

Missouri.— State *v.* Hale, 156 Mo. 102, 56 S. W. 881.

New York.—People *v.* White, 3 N. Y. Crim. 366.

Pennsylvania.— Swan *v.* Com., 104 Pa. St. 218.

Texas.— Hunt *v.* State, (Tex. Crim. 1901) 60 S. W. 965; Denton *v.* State, (Tex. Crim. 1901) 60 S. W. 670; Long *v.* State, (Tex. Crim. 1898) 47 S. W. 363; Ware *v.* State, 36 Tex. Crim. 597, 38 S. W. 198; Marshall *v.* State, (Tex. Crim. 1893) 22 S. W. 878.

And see, generally, CRIMINAL LAW.

Illustrations.— On a prosecution for breaking into a wheat bin of a certain person and bringing the wheat to a certain city for sale, it was held that the state could not show that shortly before the offense charged the defendant broke into wheat bins of other persons in the neighborhood and brought the wheat to the same city for sale. Long *v.* State, (Tex. Crim. 1898) 47 S. W. 363. Evidence on behalf of the state that search of the stolen goods found in the defendant's possession was instituted under another and different warrant, for another crime in no way connected with the burglary charged, is inadmissible. Roberson *v.* State, 40 Fla. 509, 24 So. 474.

84. *Alabama.*— Ray *v.* State, 126 Ala. 9, 28 So. 634.

California.— People *v.* McGilver, 67 Cal. 55, 7 Pac. 49.

Florida.— Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Indiana.— Frazier *v.* State, 135 Ind. 38, 34 N. E. 817.

Iowa.— State *v.* Wrand, 108 Iowa 73, 78 N. W. 788.

Michigan.— People *v.* Gibson, 58 Mich. 368, 25 N. W. 316; People *v.* Mead, 50 Mich. 228, 15 N. W. 95.

Rhode Island.— State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

South Carolina.— State *v.* Robinson, 35 S. C. 340, 14 S. E. 766.

Texas.— Gass *v.* State, (Tex. Crim. 1900) 56 S. W. 73; Fielder *v.* State, 40 Tex. Crim. 184, 49 S. W. 376; Lega *v.* State, 36 Tex. Crim. 38, 34 S. W. 926, 35 S. W. 381; Hamilton *v.* State, (Tex. Crim. 1893) 24 S. W. 32.

Washington.— State *v.* Norris, (Wash. 1902) 67 Pac. 983.

England.— Reg. *v.* Cobden, 3 F. & F. 833.

the defendant and others.[85] Evidence of other burglaries and larcenies by the defendant in the same house, or in a different house, at about the same time, is admissible on the question of intent.[86] The defendant cannot show that other burglaries were committed at about the same time as that with which he is charged, as the evidence is irrelevant.[87]

4. Possession of Stolen Property and Explanation — a. In General. As tending to connect the defendant with the burglary, it is admissible for the state to prove that he was afterward found in possession of property stolen at the time of the burglary, and to introduce the property itself in evidence,[88] if the breaking

Connecting defendant with offense charged. — On a prosecution for burglary, evidence that at the time defendants were arrested they were attempting another burglary, and that there was found in their possession property stolen at the time of the burglary charged, is admissible to identify the defendants as the persons who committed the burglary charged. People *v.* McGilver, 67 Cal. 55, 7 Pac. 49. Other burglaries on the same night may be proved in connection with proof that one of the tracks at each of the burglarized houses corresponded with tracks made by defendant, to show identity. Frazier *v.* State, 135 Ind. 38, 34 N. E. 817.

Showing whereabouts of defendant. — If the evidence shows that the defendant twice entered the house on the same night within the space of two hours it is not error to refuse to rule that this constituted two separate burglaries and compel the prosecutor to elect upon which he will go to the jury. Even if the breakings were separate and distinct felonies, evidence of the second breaking is competent to show the whereabouts of the defendant during the night in question. State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766. See also State *v.* Norris, (Wash. 1902) 67 Pac. 983.

Conversation of defendant. — The state is not prevented from proving a conversation between the defendants on the night of the alleged burglary in reference to their acts on such night, because of the fact that in such conversation they admitted the commission of other larcenies not connected with the burglary charged. State *v.* Cowen, 56 Kan. 470, 43 Pac. 687.

Burning of premises. — The state may show that the defendant burned the premises after the burglary. Roberson *v.* State, 40 Fla. 509, 24 So. 474.

85. *Alabama.* — Mason *v.* State, 42 Ala. 532.

Kansas. — State *v.* Adams, 20 Kan. 311.

Massachusetts. — Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

Texas. — Dawson *v.* State, 32 Tex. Crim. 535, 25 S. W. 21, 40 Am. St. Rep. 791.

Washington. — State *v.* Norris, (Wash. 1902) 67 Pac. 983.

England. — Reg. *v.* Cohden, 3 F. & F. 833.

In Touchston *v.* State, (Tex. Crim. 1899) 53 S. W. 854, declarations of the defendant as to the commission of other offenses prior to the burglary were held admissible to corroborate the testimony of an alleged accomplice, and to show system in stealing and disposing of stolen goods.

86. *Kentucky.* — Maden *v.* Com., 4 Ky. L. Rep. 45; Thomas *v.* Com., 1 Ky. L. Rep. 122.

Missouri. — State *v.* Franke, 159 Mo. 535, 60 S. W. 1053.

New York. — Osborne *v.* People, 2 Park. Crim. (N. Y.) 583.

Pennsylvania. — Com. *v.* Shepherd, 2 Pa. Dist. 345.

South Carolina. — State *v.* Weldon, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126.

Vermont. — State *v.* Valwell, 66 Vt. 558, 29 Atl. 1018.

Compare, however, People *v.* McNutt, 64 Cal. 116, 28 Pac. 64; State *v.* Johnson, 38 La. Ann. 686; People *v.* Henry, (Mich. 1901) 88 N. W. 77.

Where the defense on an indictment for burglary is intoxication, the state may show in rebuttal that a person was robbed by the defendant in the evening of the day of the burglary. State *v.* Harris, 100 Iowa 188, 69 N. W. 413.

87. State *v.* Smarr, 121 N. C. 669, 28 S. E. 549. The defendant, in whose possession the stolen goods were found shortly after the alleged burglary, cannot prove other burglaries and the finding of other stolen goods in other persons' houses and other arrests of other persons in the same neighborhood at or about the same time. Roberson *v.* State, 40 Fla. 509, 24 So. 474.

88. *Alabama.* — Walker *v.* State, 97 Ala. 85, 12 So. 83.

California. — People *v.* Lowrey, 70 Cal. 193, 11 Pac. 605.

Florida. — Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Georgia. — Moncrief *v.* State, 99 Ga. 295, 25 S. E. 735; Rusher *v.* State, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Stokes *v.* State, 84 Ga. 258, 10 S. E. 740.

Illinois. — Smith *v.* People, 115 Ill. 17, 3 N. E. 733.

Indiana. — Frazier *v.* State, 135 Ind. 38, 34 N. E. 817.

Iowa. — State *v.* Russell, 90 Iowa 493, 58 N. W. 890; State *v.* Shaffer, 59 Iowa 290, 13 N. W. 306; State *v.* Golden, 49 Iowa 48.

Kansas. — State *v.* Conway, 56 Kan. 682, 44 Pac. 627.

Kentucky. — Branson *v.* Com., 92 Ky. 330, 13 Ky. L. Rep. 614, 17 S. W. 1019; Webb *v.* Com., 18 Ky. L. Rep. 220, 35 S. W. 1038.

and entry are proved,[89] and if the property is sufficiently identified;[90] and evidence is admissible for the purpose of such identification.[91] The state may also prove

Massachusetts.— Com. *v.* McGorty, 114 Mass. 299; Com. *v.* Parmenter, 101 Mass. 211.

Michigan.— People *v.* Wood, 99 Mich. 620, 58 N. W. 638; People *v.* Carroll, 54 Mich. 334, 20 N. W. 66; Cummins *v.* People, 42 Mich. 142, 3 N. W. 305; Cole *v.* People, 37 Mich. 544.

Missouri.— State *v.* Harrold, 38 Mo. 496. And see State *v.* Yandle, 166 Mo. 589, 66 S. W. 532.

North Carolina.— State *v.* Graves, 72 N. C. 482.

Oklahoma.— Johnson *v.* Territory, 5 Okla. 695, 50 Pac. 90.

Texas.— Prince *v.* State, 44 Tex. 480; Boersh *v.* State, (Tex. Crim. 1901) 62 S. W. 1060; Dawson *v.* State, 32 Tex. Crim. 535, 25 S. W. 21, 40 Am. St. Rep. 791; Medicus *v.* State, (Tex. Crim. 1893) 22 S. W. 878; Woodruff *v.* State, (Tex. Crim. 1892) 20 S. W. 573; Jackson *v.* State, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. Rep. 839.

Vermont.— State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403; State *v.* Peach, 70 Vt. 283, 40 Atl. 732; State *v.* Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. Rep. 864.

Virginia.—Walker *v.* Com., 28 Gratt. (Va.) 969; Hall's Case, 3 Gratt. (Va.) 565.

Wisconsin.— Neubrandt *v.* State, 53 Wis. 89, 9 N. W. 824.

United States.— Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272.

England.— Reg. *v.* Coots, 2 Cox C. C. 188.

See 8 Cent. Dig. tit. "Burglary," § 91; and *infra*, VI, C, 6.

The proof of the defendant's possession.— The evidence as to the stolen goods cannot be admitted and considered as against the defendant unless they are traced to his possession, Mann *v.* State, 27 Tex. App. 580, 11 S. W. 640; Reg. *v.* Coots, 2 Cox C. C. 188; or to the possession of one who is shown to be an accomplice of the defendant. See *infra*, VI, B, 4, c.

Evidence to prove possession by defendant. — Evidence that defendant claimed clothing in a trunk which was in the room in which he was arrested is admissible to show his possession of stolen property found in the trunk. State *v.* Yandle, 166 Mo. 589, 66 S. W. 532. Evidence that the stolen goods were found in defendant's sleeping-room is admissible to show possession by him. Gass *v.* State, (Tex. Crim. 1900) 56 S. W. 73. Evidence that the stolen goods were found shortly after the burglary in an outhouse on a lot belonging to the defendant's father is admissible. Lamater *v.* State, 38 Tex. Crim. 249, 42 S. W. 304. A witness who testifies that she bought a dress which it appears was stolen at the time of the burglary may describe the person from whom she bought it, and testify as to his declarations at the time, to identify the defendant as that person. Ryan *v.* State, 83 Wis. 486, 53 N. W. 836. On the question whether the defendant owned a trunk found at a certain place, and in which some of the stolen property was secreted, a witness may be asked whether he knew if "defendant had any trunks around" such place. People *v.* Sears, 119 Cal. 267, 51 Pac. 325. Where articles of jewelry, being part of the property stolen at the time of the burglary, were found in the defendant's house, evidence as to whether he is married or unmarried is admissible. Fisher *v.* State, 62 Ga. 174.

The time which elapsed between the burglary and the finding of the stolen goods in the defendant's possession, and the defendant's explanation of his possession, are material for the consideration of the jury. Tarver *v.* State, 95 Ga. 222, 21 S. E. 381.

Property not included in the indictment.— Evidence is admissible to show that an article not included in the property alleged in the indictment to have been stolen at the time of the burglary was stolen with the other property, and was afterward seen in the defendant's possession. Foster *v.* People, 63 N. Y. 619 [*affirming* 3 Hun (N. Y.) 6, 5 Thomps. & C. (N. Y.) 670, 49 How. Pr. (N. Y.) 69]. See also State *v.* Wrand, 108 Iowa 73, 78 N. W. 788. The fact that the indictment alleges intent to steal the goods of A does not render inadmissible evidence that shortly after the burglary other property which belonged to B, and was stolen at the same time from the house, was found in defendant's possession. Neubrandt *v.* State, 53 Wis. 89, 9 N. W. 824.

89. Fuller *v.* State, 48 Ala. 273.

90. **Identity of property.**—Walker *v.* State, 97 Ala. 85, 12 So. 83; King *v.* State, 99 Ga. 686, 26 S. E. 480, 59 Am. St. Rep. 251; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154. Where four ten-dollar gold-pieces were stolen, it was held that evidence that the accused when arrested had on his person a five-dollar gold-piece, and that about that time he handed ten silver dollars to a person with him to hold was admissible in connection with evidence that he also handed a ten-dollar gold-piece with the silver, and had had opportunity to change the pieces. Hicks *v.* State, 99 Ala. 169, 13 So. 375.

91. **Evidence to identify property.**— See State *v.* Russell, 90 Iowa 493, 58 N. W. 890. On indictment for burglary and larceny of watches, the bills for watches which were stolen, giving their numbers, offered by the clerk who had charge of the store, are admissible, in connection with his testimony, on the question of the identity of watches traced to the defendant's possession after the burglary. State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403. A miller, on an indictment for burglary in his mill, may testify that a sample of flour found in defendant's possession is the same as that manufactured at the mill. People *v.* Wood, 99 Mich. 620, 58 N. W. 638. Testimony as to the tabs or labels on goods is admissible on the question of identity, although the witness has to examine the handwriting on the same to recognize them. Cole

the declarations and conduct of the defendant with respect to the property, and may prove the circumstances attending the finding of the property, whether the defendant was present or not.[92] Evidence of the possession of the stolen property is not rendered inadmissible by the fact that the defendant was compelled by those having him in custody, by operating on his fears or hopes, to point out the place where the property was concealed.[93]

b. Explanation of Possession. The defendant may introduce any competent evidence tending to explain his possession.[94]

c. Joint Possession and Possession of Others. The state may show possession of the stolen property by the defendant jointly with another,[95] particularly where they are jointly indicted and tried.[96] And the possession of another than the defendant may be shown if a conspiracy between them is proved, or if there is evidence tending to connect them as accomplices,[97] or if the evidence shows that

v. People, 37 Mich. 544. Goods alleged to have been stolen from the house at the time of the burglary, and afterward found in defendant's possession, are admissible for comparison with other similar goods purchased at the same time with such goods by an inmate of the house, both being of a particular make and patent, with certain numbers stamped thereon. Woodruff *v.* State, (Tex. Crim. 1892) 20 S. W. 573. Bottles of goods bought at the time of the trial from a store alleged to have been burglarized are admissible to identify similar bottles found in defendant's possession. People *v.* Van Dam, 107 Mich. 425, 65 N. W. 277. Where it appeared that when defendant, who occupied rooms with a woman, was arrested, he handed something to a man, and told him to "take it to his wife," it was held admissible to show that on the same evening the woman left five hundred dollars with her employer's cashier and did not return, as tending to show that the money was the article sent by the defendant to his wife. People *v.* Wilson, 7 N. Y. App. Div. 326, 40 N. Y. Suppl. 107. Evidence that the owner of the premises showed to certain persons samples of goods taken therefrom, and that such persons afterward found similar goods on the defendant's premises, was held inadmissible on the question of the identity of the goods found with those stolen. Crane *v.* State, 111 Ala. 45, 20 So. 590.

The value of the property stolen may be shown, although not alleged in the indictment, where the evidence is material in identifying property found in the possession of the defendant. Tarver *v.* State, 95 Ga. 222, 21 S. E. 381.

92. Jackson *v.* State, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. Rep. 839.

It is admissible to show that the defendant on being allowed to go by the officer who arrested him, did not return as he promised to do, and never made claim to the goods seized by the officer, since it tends to show that he did not obtain the goods innocently. People *v.* Ashmead, 118 Cal. 508, 50 Pac. 681.

Offer to dispose of property.— It may be shown that the defendant offered to dispose of the property at less than its value. State *v.* Graves, 72 N. C. 482.

Contradictory statements.— And it may be shown that he made contradictory statements as to how he got the property. State *v.* Graves, 72 N. C. 482.

93. The fact that the defendant, after his arrest for burglary, was compelled by the officer to point out the place where property stolen at the time of the burglary had been concealed by him, by operating on his hopes or fears, but not by use of unlawful violence, does not contravene the constitutional provision that "no person shall be compelled to give testimony tending in any manner to criminate himself," so as to render evidence of the finding of the property and the defendant's acts and declarations in connection therewith inadmissible against him. Rusher *v.* State, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175. See also CRIMINAL LAW; WITNESSES.

94. Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72; Crawford *v.* State, 44 Ala. 45; Roberson *v.* State, 40 Fla. 509, 24 So. 474. And see *infra*, VI, C, 6.

Declarations of defendant.— Where part of the stolen goods were found in the defendant's house shortly after the burglary, and there was some evidence that he was out of the state at the time of the offense, it was held that he could prove that on discovering the property after his return he asked his wife whose it was and how it came there. Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72.

95. Moncrief *v.* State, 99 Ga. 295, 25 S. E. 735.

96. Roberson *v.* State, 40 Fla. 509, 24 So. 474; Terry *v.* State, 39 Tex. Crim. 628, 47 S. W. 654.

97. *Indiana.*— Frazier *v.* State, 135 Ind. 38, 34 N. E. 817.

Iowa.— State *v.* Wrand, 108 Iowa 73, 78 N. W. 788.

Kentucky.— Branson *v.* Com., 92 Ky. 330, 13 Ky. L. Rep. 614, 17 S. W. 1019.

Texas.— Terry *v.* State, 39 Tex. Crim. 628, 47 S. W. 654; Jackson *v.* State, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. Rep. 839.

Vermont.— State *v.* Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. Rep. 864.

Wisconsin.— Murphy *v.* State, 86 Wis. 626, 57 N. W. 367.

It may be shown that property stolen at the time of the burglary was found in the possession of one with whom the defendant frequently associated both before and after

the other could not have come into possession except through the defendant.[98] But such evidence is not admissible unless the other evidence tends to connect the defendant with such other person and the commission of the offense.[99]

d. Possession of Other Property. The state may prove possession by the defendant of property stolen in another burglary or on another occasion, if the offenses are sufficiently connected, or if the evidence is relevant on the question of intent,[1] but not otherwise.[2]

5. Possession or Use of Burglarious Implements. After preliminary proof of a burglary, it is competent for the state to prove that the defendant was found in the possession of burglarious tools or implements shortly after the alleged burglary, and to introduce the tools or implements in evidence.[3] And it may be

the burglary, in connection with other evidence that the defendant was present at the burglary. Frazier *v.* State, 135 Ind. 38, 34 N. E. 817.

On proof of conspiracy.— When a conspiracy between two to commit a burglary is established, evidence of the finding of the fruits of the crime at the house of either of them after the burglary, and of what transpired at the time, is admissible against the other, although neither of them were present when the fruits of the crime were found. Jackson *v.* State, 28 Tex. App. 370, 13 S. W. 370, 19 Am. St. Rep. 839.

98. Riding *v.* State, 40 Tex. Crim. 452, 50 S. W. 698.

99. Jackson *v.* State, 28 Tex. App. 143, 12 S. W. 701.

But it may be shown that the goods were found in the trunk or otherwise in the possession of the defendant's wife, who was living with him at the time of the burglary. Medicus *v.* State, (Tex. Crim. 1893) 22 S. W. 878.

1. People *v.* McGilver, 67 Cal. 55, 7 Pac. 49; State *v.* Robinson, 35 S. C. 340, 14 S. E. 766. And see State *v.* Wrand, 108 Iowa 73, 78 N. W. 788.

Illustrations.— In State *v.* Franke, 159 Mo. 535, 60 S. W. 1053, it was held that evidence that a gun stolen on another occasion was found in the defendant's home was competent on the question of intent. And in Hamilton *v.* State, (Tex. Crim. 1893) 24 S. W. 32, it was held admissible to prove that property found under defendant's house was stolen from other persons in the neighborhood on the night of the burglary, and that on that night the defendant went on a general stealing expedition. Where the defendant had possession of property stolen at the time of the burglary, and also of other stolen property, it is proper to refuse to exclude a witness's testimony as to the latter, on the ground that it shows another and distinct crime, where it is necessary for him to refer to it in order to give a complete account of a transaction between him and defendant as to the other property. Ray *v.* State, 126 Ala. 9, 28 So. 634.

2. Denton *v.* State, (Tex. Crim. 1901) 60 S. W. 670; Marshall *v.* State, (Tex. Crim. 1893) 22 S. W. 878.

3. *California.*— People *v.* Hope, 62 Cal. 291; People *v.* Winters, 29 Cal. 658.

Georgia.— Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154.

Illinois.— Williams *v.* People, 196 Ill. 173, 63 N. E. 681.

Iowa.— State *v.* Franks, 64 Iowa 39, 19 N. W. 832.

Kansas.— State *v.* Wayne, 62 Kan. 636, 64 Pac. 69.

Massachusetts.— Com. *v.* Day, 138 Mass. 186; Com. *v.* Wilson, 2 Cush. (Mass.) 590; Com. *v.* Williams, 2 Cush. (Mass.) 582.

Missouri.— State *v.* Dubois, 49 Mo. 573; State *v.* Harrold, 38 Mo. 496.

New York.— Foster *v.* People, 63 N. Y. 619 [*affirming* 3 Hun (N. Y.) 6, 5 Thomps. & C. (N. Y.) 67, 49 How. Pr. (N. Y.) 69]; People *v.* Larned, 7 N. Y. 445, Seld. Notes (N. Y.) 10; People *v.* Wilson, 7 N. Y. App. Div. 326, 40 N. Y. Suppl. 107; People *v.* Clark, 2 Hun (N. Y.) 520, 5 Thomps. & C. (N. Y.) 33; People *v.* Myers, 2 Hun (N. Y.) 6, 4 Thomps. & C. (N. Y.) 292.

North Dakota.— State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

Texas.— Edmunds *v.* State, (Tex. Crim. 1901) 63 S. W. 871; Miller *v.* State, (Tex. Crim. 1899) 50 S. W. 704.

See 8 Cent. Dig. tit. "Burglary," § 92.

Implements not used.— Such instruments are admissible, although they are new and never have been used, where there is evidence of an admission by defendant that he threw away or concealed the instruments used. Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154. All tools found in defendant's possession are admissible in evidence, although part are not adapted to the commission of the particular offense charged. Com. *v.* Williams, 2 Cush. (Mass.) 582. *Compare*, however, Com. *v.* Wilson, 2 Cush. (Mass.) 590.

Explosives and the like.— On a trial for burglary in entering a bank building and blowing open a safe with explosives, such instruments as percussion caps and the like, adapted to the commission of the crime, although not used exclusively for the purpose, may be shown to have been in defendant's possession several months before the burglary, and may be admitted in evidence. State *v.* Wayne, 62 Kan. 636, 64 Pac. 69. See also Edmunds *v.* State, (Tex. Crim. 1901) 63 S. W. 871.

Chloroform.— Where chloroform was used in committing the burglary, evidence that chloroform was found in the house where

shown that the defendant had used the same or similar tools on other occasions for the purpose of burglary.[4] The proof of possession by defendant may be circumstantial.[5] The state may also show possession of burglarious implements by another than the defendant, where there is evidence tending to connect them in the commission of the burglary.[6] Implements found in or near the burglarized building, which did not belong there, and which might have been used to break in the manner shown by the evidence, are admissible in evidence.[7]

C. Weight and Sufficiency of Evidence — 1. In General. To convict of burglary it is essential, in the first place, that the state shall prove beyond a reasonable doubt the *corpus delicti* — that the offense charged in the indictment has been committed by someone.[8] Every essential element of the offense charged must be proved,[9] and it must be shown beyond a reasonable doubt that the offense was committed by the defendant.[10] The evidence, however, need not

the defendant boarded is admissible, the defendant having admitted bringing it there, but claimed that it was given to him by another. Miller *v.* State, (Tex. Crim. 1899) 50 S. W. 704.

4. Com. *v.* Day, 138 Mass. 186. *Compare*, as to proof of other offenses, *supra*, VI, B, 3.

5. **Circumstantial proof of possession by defendant.**—Tools found near defendant, who was concealed near the place of the burglary shortly after its commission, are admissible in evidence. State *v.* Campbell, 7 N. D. 58, 72 N. W. 935. Where the evidence showed that a safe in the burglarized premises was exploded with powder, and that defendant had a bottle on him when arrested, which was not taken from him, and no bottle was afterward found on him, a bottle of powder found near the route the defendant traveled when taken to jail was held admissible in evidence. Edmunds *v.* State, (Tex. Crim. 1901) 63 S. W. 871.

6. People *v.* Clark, 2 Hun (N. Y.) 520, 5 Thomps. & C. (N. Y.) 33.

Evidence that one of several defendants had burglar's tools in his possession when arrested is admissible, where all of them were arrested while together shortly after the burglary. State *v.* Franks, 64 Iowa 39, 19 N. W. 832.

7. State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

8. Starchman *v.* State, 62 Ark. 538, 36 S. W. 940; Turner *v.* State, 24 Tex. App. 12, 5 S. W. 511; Brooks *v.* State, (Tex. Crim. 1901) 65 S. W. 924 (holding evidence insufficient to prove burglary from a railroad car).

The corpus delicti may be established by circumstantial evidence. State *v.* Munson, 7 Wash. 239, 34 Pac. 932; and cases cited *infra*, note 10 *et seq.*

Calling owner of premises as a witness.—But proof that the building was broken open and goods stolen should be made by the testimony of the person in the immediate possession of the building and goods, or a satisfactory excuse should be given why he is not called as a witness. People *v.* Caniff, 2 Park. Crim. (N. Y.) 586.

9. See the cases specifically cited *infra*, VI, C, 2–6.

10. *Arizona.*— Territory *v.* Booth, (Ariz. 1894) 36 Pac. 38.

Arkansas.— Starchman *v.* State, 62 Ark. 538, 36 S. W. 940.

California.— People *v.* Brady, (Cal. 1901) 65 Pac. 823.

Florida.—Washington *v.* State, 21 Fla. 328.

Georgia.— Gravitt *v.* State, 114 Ga. 841, 40 S. E. 1003; Tarpe *v.* State, 95 Ga. 457, 20 S. E. 217; Kelly *v.* State, 82 Ga. 441, 9 S. E. 171; Phillips *v.* State, 56 Ga. 28; Carter *v.* State, 46 Ga. 637.

Indiana.— Cavender *v.* State, 126 Ind. 47, 25 N. E. 875.

Kentucky.— Henderson *v.* Com., 16 Ky. L. Rep. 289, 27 S. W. 808.

Michigan.— People *v.* Butler, 55 Mich. 408, 21 N. W. 385.

Mississippi.— James *v.* State, 77 Miss. 370, 26 So. 929, 78 Am. St. Rep. 527.

Nebraska.— Wright *v.* State, 21 Nebr. 496, 32 N. W. 576.

New York.— People *v.* Cronk, 40 N. Y. App. Div. 206, 58 N. Y. Suppl. 13.

Pennsylvania.— Swan *v.* Com., 104 Pa. St. 218.

Texas.— Ridge *v.* State, (Tex. Crim. 1902) 66 S. W. 774; Stevens *v.* State, (Tex. Crim. 1902) 66 S. W. 549; Brooks *v.* State, (Tex. Crim. 1901) 65 S. W. 924; Grant *v.* State, (Tex. Crim. 1900) 58 S. W. 1025; Porter *v.* State, (Tex. Crim. 1899) 50 S. W. 380; Munson *v.* State, 34 Tex. Crim. 498, 31 S. W. 387; Kelly *v.* State, (Tex. Crim. 1893) 22 S. W. 588; Coleman *v.* State, 26 Tex. App. 252, 9 S. W. 609; Turner *v.* State, 24 Tex. App. 12, 5 S. W. 511.

Virginia.— Bundick *v.* Com., 97 Va. 783, 34 S. E. 454; Hite *v.* Com., 88 Va. 882, 14 S. E. 696; Prather *v.* Com., 85 Va. 122, 7 S. E. 178; Johnson *v.* Com., 29 Gratt. (Va.) 796.

Corroboration of accomplice see the following cases:

Alabama.— Johnson *v.* State, 92 Ga. 577, 20 S. E. 8.

Kentucky.—Murray *v.* Com., 16 Ky. L. Rep. 389, 28 S. W. 480.

Missouri.— State *v.* Jackson, 106 Mo. 174, 17 S. W. 301.

Texas.— Price *v.* State, (Tex. Crim. 1900) 58 S. W. 83; Rocha *v.* State, 38 Tex. Crim. 69, 41 S. W. 611; Martin *v.* State, 21 Tex. App. 1, 17 S. W. 430.

Washington.— State *v.* Coates, 22 Wash. 601, 61 Pac. 726.

be direct. Circumstantial evidence is sufficient if it excludes, beyond a reasonable doubt, every other hypothesis except that of the defendant's guilt.[11]

2. Breaking and Entry. To prove the *corpus delicti*, the evidence must be sufficient to show affirmatively, and beyond a reasonable doubt, that there was such a breaking and entry as are necessary to constitute burglary.[12] But cir-

And see, generally, Criminal Law.

Confession.—As to evidence of a confession corroborated by the circumstances see Hackett *v.* State, 89 Ga. 418, 15 S. E. 532.

Attempt to commit burglary.— Fonville *v.* State, (Tex. Crim. 1901) 62 S. W. 573; Reg. *v.* McCann, 28 U. C. Q. B. 514. *Compare* cases cited *infra*, note 11.

11. *Arizona.*— Territory *v.* Booth, (Ariz. 1894) 36 Pac. 38.

California.— People *v.* Sears, 119 Cal. 267, 51 Pac. 325; People *v.* Flynn, 73 Cal. 511, 15 Pac. 102.

Georgia.— Holland *v.* State, 112 Ga. 540, 37 S. E. 887; Burks *v.* State, 92 Ga. 461, 17 S. E. 619; Matthews *v.* State, 86 Ga. 782, 804, 13 S. E. 16; Steadman *v.* State, 81 Ga. 736, 8 S. E. 420; Gregory *v.* State, 80 Ga. 269, 7 S. E. 222.

Illinois.— Williams *v.* People, 196 Ill. 173, 63 N. E. 681; White *v.* People, 179 Ill. 356, 53 N. E. 570; Spahn *v.* People, 137 Ill. 538, 27 N. E. 688.

Iowa.— State *v.* Marshall, 105 Iowa 38, 74 N. W. 763; State *v.* Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. Rep. 425.

Kentucky.— Boyer *v.* Com., 14 Ky. L. Rep. 167, 19 S. W. 845; Johnson *v.* Com., 12 Ky. L. Rep. 873, 15 S. W. 671.

Michigan.—People *v.* Hogan, 123 Mich. 233, 81 N. W. 1096.

Minnesota.— Maroney *v.* State, 8 Minn. 218.

Mississippi.— Cook *v.* State, (Miss. 1900) 28 So. 833.

Missouri.— State *v.* Turner, 110 Mo. 196, 19 S. W. 645, 106 Mo. 272, 17 S. W. 304.

Nebraska.— Seling *v.* State, 18 Nebr. 548, 26 N. W. 254.

Nevada.— State *v.* Watkins, 11 Nev. 30.

New Jersey.— State *v.* Wines, 65 N. J. L. 31, 46 Atl. 702.

New York.— People *v.* Lyons, 29 N. Y. App. Div. 174, 51 N. Y. Suppl. 811; People *v.* Noonan, 14 N. Y. Suppl. 519, 38 N. Y. St. 854.

North Carolina.— State *v.* Christmas, 101 N. C. 749, 8 S. E. 361.

Oregon.— State *v.* Tucker, 36 Oreg. 291, 61 Pac. 894, 51 L. R. A. 246.

Pennsylvania.— Swan *v.* Com., 104 Pa. St. 218.

Texas.— Cogshall *v.* State, (Tex. Crim. 1900) 58 S. W. 1011; Harraway *v.* State, (Tex. Crim. 1897) 40 S. W. 262. See also Whitworth *v.* State, (Tex. Crim. 1902) 67 S. W. 1019; King *v.* State, (Tex. Crim. 1902) 67 S. W. 410; Hollengshead *v.* State, (Tex. Crim. 1902) 67 S. W. 114.

Vermont.— State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403.

Washington.— State *v.* Norris, (Wash. 1902) 67 Pac. 983.

Wisconsin.— Hunt *v.* State, 103 Wis. 559, 79 N. W. 751.

New Zealand.— See Reg. *v.* Fowler, 3 L. R. (New Zealand) 64.

Tracks and corroborating circumstances.— Similarity of tracks found at the place of the burglary with tracks of the prisoner made voluntarily in court, slightly corroborated by the fact that these were bits of paper found at the scene of the crime and similar paper was found in defendant's possession, will sustain a finding that the defendant was the person who did the act. Gregory *v.* State, 80 Ga. 269, 7 S. E. 222. And see Burks *v.* State, 92 Ga. 461, 17 S. E. 619. *Compare*, however, Wright *v.* State, 21 Nebr. 496, 32 N. W. 576; Hite *v.* Com., 88 Va. 882, 14 S. E. 696; Prather *v.* Com., 85 Va. 122, 7 S. E. 178.

Attempt to commit burglary.— As to the sufficiency of the evidence to show attempt to commit burglary see People *v.* Lowen, 109 Cal. 381, 42 Pac. 32; White *v.* People, 179 Ill. 356, 53 N. E. 570; Com. *v.* Clark, 10 Pa. Co. Ct. 444; Adams *v.* State, (Tex. Crim. 1901) 62 S. W. 1059. *Compare* Fonville *v.* State, (Tex. Crim. 1901) 62 S. W. 573; Reg. *v.* McCann, 28 U. C. Q. B. 514. Evidence that at three o'clock in the morning the accused and another were seen coming from the immediate vicinity of a store, the door of which was fifteen minutes later found broken open and ajar, whereas half an hour before it had been tried and found closed; that the accused had previously been convicted of burglary on his own confession; and that, on seeing the officers, he fled, was held sufficient to sustain a conviction of an attempt to commit burglary. State *v.* Carr, 146 Mo. 1, 47 S. W. 790.

Burglary or attempt.— A conviction of attempt to commit burglary will not be set aside on the ground that the offense, if any, was burglary, where the evidence shows that the door of the building was found broken open a short time after it is proved to have been closed, and there is no evidence that there was an entry or that anything was stolen. State *v.* Carr, 146 Mo. 1, 47 S. W. 790.

12. *Alabama.*— Lowder *v.* State, 63 Ala. 143, 35 Am. Rep. 9.

Georgia.— Fisher *v.* State, 93 Ga. 309, 20 S. E. 329; Kelly *v.* State, 82 Ga. 441, 9 S. E. 171; Williams *v.* State, 52 Ga. 580.

Kansas.— See State *v.* Moon, 62 Kan. 801, 64 Pac. 609, under Kansas statute.

Michigan.— People *v.* McCord, 76 Mich. 200, 42 N. W. 1106.

Mississippi.— Prescott *v.* State, (Miss. 1895) 18 So. 683.

Nebraska.—McGrath *v.* State, 25 Nebr. 780, 41 N. W. 780.

cumstantial evidence may be sufficient to show both a breaking[13] and an entry.[14]

3. Time of Offense. When the offense is alleged to have been committed in the night-time, and this element is essential, as at common law, the fact that it was committed in the night-time must be affirmatively proved beyond a reasonable doubt.[15] And the same is true when it is sought to convict under a statute

New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

Texas.—Martin *v.* State, (Tex. Crim. 1897) 40 S. W. 270; Williams *v.* State, (Tex. App. 1890) 13 S. W. 609; Jones *v.* State, 25 Tex. App. 226, 7 S. W. 669.

Victoria.— Reg. *v.* Payne, 13 Vict. L. R. 359.

See 8 Cent. Dig. tit. "Burglary," § 97.

It should appear that the doors and windows were shut. Kelly *v.* State, 82 Ga. 441, 9 S. E. 171; Williams *v.* State, 52 Ga. 580; State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216; Reg. *v.* Payne, 13 Vict. L. R. 359, and cases cited *supra*, this note.

As to sufficiency of the evidence on this question see Martin *v.* State, (Tex. Crim. 1897) 40 S. W. 270. A breaking and force under the Texas statute cannot be presumed from the mere fact of entry. Jones *v.* State, 25 Tex. App. 226, 7 S. W. 669.

13. *Georgia.*— Holland *v.* State, 112 Ga. 540, 37 S. E. 887; Pritchett *v.* State, 92 Ga. 33, 18 S. E. 350. *Compare* Ramsey *v.* State, 69 Ga. 771.

Kansas.— State *v.* Cash, 38 Kan. 50, 16 Pac. 144.

Kentucky.— Boyer *v.* Com., 14 Ky. L. Rep. 167, 19 S. W. 845.

Massachusetts.— Com. *v.* Hagan, 170 Mass. 571, 49 N. E. 922; Com. *v.* Merrill, Thach. Crim. Cas. (Mass.) 1.

Michigan.— People *v.* Curley, 99 Mich. 238, 58 N. W. 68; People *v.* Robinson, 86 Mich. 415, 49 N. W. 260.

Missouri.— State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322; State *v.* Kenney, 101 Mo. 160, 14 S. W. 187.

New York.— Foster *v.* People, 63 N. Y. 619 [*affirming* 3 Hun (N. Y.) 6, 5 Thomps. & C. (N. Y.) 670, 49 How. Pr. (N. Y.) 69]; People *v.* Gartland, 30 N. Y. App. Div. 534, 52 N. Y. Suppl. 352; People *v.* Block, 15 N. Y. Suppl. 229, 39 N. Y. St. 477. But it has been held that the fact of breaking should be proved by the direct testimony of the person in the occupancy of the premises, or a satisfactory excuse should be given for not calling him as a witness. People *v.* Caniff, 2 Park. Crim. (N. Y.) 586.

North Carolina.— State *v.* Christmas, 101 N. C. 749, 8 S. E. 361.

South Carolina.— State *v.* Bee, 29 S. C. 81, 6 S. E. 911.

Texas.—Painter *v.* State, 26 Tex. App. 454, 9 S. W. 774.

Washington.— State *v.* Munson, 7 Wash. 239, 34 Pac. 932.

United States.— U. S. *v.* Lantry, 30 Fed. 232.

14. State *v.* Watkins, 11 Nev. 30.

Circumstances of entry — Being armed.— On a prosecution for burglary when so armed as to indicate violent intentions, evidence that the defendant was so armed when he left the house where the offense was committed is sufficient to warrant a finding that he was so armed when he committed the offense. State *v.* Morris, 47 Conn. 179.

Non-consent of owner or occupant.— Circumstantial evidence is not sufficient to show non-consent of the owner of the premises, where he was a witness and could have testified directly. Ridge *v.* State, (Tex. Crim. 1902) 66 S. W. 774. Want of consent by a firm is not shown by the testimony of one of the partners that he did not consent, where the other partner, although a witness, did not testify directly and positively to his want of consent. Wisdom *v.* State, (Tex. Crim. 1901) 61 S. W. 926. Where the state has proved that the entry was without the consent of the owner of the premises, who also had actual control and management, it is not required to further prove want of consent of his servants or assistants, for such consent, if it existed, is matter of defense. Willis *v.* State, 33 Tex. Crim. 168, 25 S. W. 1119; Vallereal *v.* State, (Tex. Crim. 1892) 20 S. W. 557. Nor is it necessary to prove want of consent of one who, although owning an interest in the property stolen, was not in possession of the property in the house. Hurley *v.* State, 35 Tex. Crim. 282, 33 S. W. 354.

15. *California.*— People *v.* Griffin, 19 Cal. 578. See also People *v.* Smith, 136 Cal. 207, 68 Pac. 702.

Georgia.—Waters *v.* State, 53 Ga. 567.

Iowa.— State *v.* Frahm, 73 Iowa 355, 35 N. W. 451.

Michigan.— People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771.

Nebraska.— Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6; Ashford *v.* State, 36 Nebr. 38, 53 N. W. 1036.

Nevada.— State *v.* Gray, 23 Nev. 301, 46 Pac. 801.

North Carolina.— State *v.* Whit, 49 N. C. 349.

Ohio.— Adams *v.* State, 31 Ohio St. 462.

Texas.— Levine *v.* State, 22 Tex. App. 683, 3 S. W. 660.

Utah.— State *v.* Miller, (Utah 1902) 67 Pac. 790.

England.— See Reg. *v.* Nicholas, 1 Cox C. C. 218.

See 8 Cent. Dig. tit. "Burglary," § 98.

A charge of burglary in a barn in the night-time and stealing therefrom a saddle is not sustained by evidence that the saddle was in the barn at six o'clock in the evening, and was gone at seven o'clock in the morning, un-

of burglary in the daytime, where the time is an essential element of the offense.[16] The time of the offense, however, may be proved by circumstantial evidence.[17]

4. Character, Occupancy, and Ownership of Premises. It is also necessary that the evidence shall show beyond a reasonable doubt that the premises were of such a character, and were occupied in such a manner or for such a purpose, as to be the subject of the offense charged.[18] And the ownership of the premises as alleged in the indictment must be sufficiently established by the evidence.[19]

5. The Intent. As the felonious intent alleged in the indictment is an essen-

der a statute defining the night-time as the period between sunset and sunrise. State *v.* Gray, 23 Nev. 301, 46 Pac. 801.

Particular hour at night.— It is sufficient if it appears that the offense was committed at some hour of the night, and the particular hour need not be proved. State *v.* Tazwell, 30 La. Ann. 884.

Accessory before the fact.— To convict one as accessory before the fact to breaking and entering at night with intent to steal, it is not necessary to show that the defendant knew the crime was to be committed at night. Com. *v.* Glover, 111 Mass. 395.

16. See *supra*, IV, C, 4; V, B, 5.

Daytime burglary.— An instruction to the effect that if the proof satisfies the jury that the crime may have been committed either in the day or night, and left them in doubt as to whether it was committed in the day or night, then they should find the defendant guilty of burglary in the daytime, is erroneous. The defendant can only have the benefit of the doubt by an acquittal. Jones *v.* State, 63 Ga. 141. In Iowa, however, where burglary in the daytime is punished as a less offense than burglary in the night-time, it was held that a conviction of burglary in the daytime is proper on an indictment alleging a burglary at night, where the evidence leaves the time of the offense uncertain. State *v.* Jordan, 87 Iowa 86, 54 N. W. 63.

17. *Arizona.*— Taylor *v.* Territory, (Ariz. 1901) 64 Pac. 423.

California.— People *v.* McCarty, 117 Cal. 65, 48 Pac. 984; People *v.* Getty, 49 Cal. 581.

Georgia.— Williams *v.* State, 60 Ga. 445; Brown *v.* State, 59 Ga. 456; Houser *v.* State, 58 Ga. 78.

Louisiana.— State *v.* Taylor, 37 La. Ann. 40.

Michigan.— People *v.* Tracy, 121 Mich. 318, 80 N. W. 21; People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046; People *v.* Taylor, 93 Mich. 638, 53 N. W. 777.

Minnesota.— State *v.* Johnson, 33 Minn. 34, 21 N. W. 843.

New Hampshire.— State *v.* Bancroft, 10 N. H. 105.

New York.— People *v.* Edwards, 1 Wheel. Crim. (N. Y.) 371.

North Carolina.— State *v.* McKnight, 111 N. C. 690, 16 S. E. 319.

18. State *v.* Teeter, 69 Iowa 717, 27 N. W. 485. See *supra*, II, E.

As to the sufficiency of the evidence to show that a building was a "smoke-house," as alleged in the indictment (see Wait *v.* State, 99 Ala. 164, 13 So. 584); to show that the building was a "butcher's shop" (see Green *v.* State, 56 Ark. 386, 19 S. W. 1055).

Dwelling-house.— To sustain a conviction for burglarizing a dwelling-house the evidence must show that some one resided in the house. Fuller *v.* State, 48 Ala. 273. And see *supra*, II, E, 2. Where the owner of a house had left it, and been absent for several months, when it was broken and entered, and some of the household effects had been packed in boxes, and the more valuable articles removed, but the beds, carpets, and curtains had been left in their place, and it did not appear that she established a home elsewhere or intended to do so, but she in fact returned and occupied the house after the entry, it was held that the jury were justified in finding that the house was a dwelling-house. Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809.

Goods in building.— Where the indictment is under a statute for breaking and entering a building in which goods were kept for sale or deposit, etc., with intent to steal, the evidence must show beyond a reasonable doubt that there were valuable goods in the house. Kelly *v.* State, 82 Ga. 441, 9 S. E. 171; Bergeron *v.* State, 53 Nebr. 752, 74 N. W. 253. And see *supra*, II, E, 3, b, (VII).

19. See *supra*, II, F; V, B, 3.

Illustrations.— It was held that an allegation that the building was the dwelling-house of "William Drake" was not sustained by evidence that it was the "Drake House," that it was "a house kept by Mr. Drake," and that "Mr. Drake lives there." Jackson *v.* State, 55 Wis. 589, 13 N. W. 448. But where an indictment laid the ownership of the house in H. Wempe and one G. Wempe testified that his father owned the house, without giving evidence as to his first name, it was held that the jury might presume that the name of witness's father was H. Wempe, and that he was in possession. People *v.* McGilver, 67 Cal. 55, 7 Pac. 49. Evidence that the person alleged in an indictment for burglary to have been the owner of the building supervised its construction, and gave instructions, and that the person having custody and control was his agent and acted under his instructions is sufficient to support the allegation of ownership. Runnels *v.* State, (Tex. Crim. 1898) 47 S. W. 470. Where an indictment laid the ownership of the premises in A B and C D, partners, doing business in the firm name of B & D, it was held that proof of ownership in the firm name of B & D, without any proof of the christian names of the partners, was not sufficient to sustain a conviction. Doan *v.* State, 26 Ind. 495. As

tial element of the offense, it must be affirmatively established by the evidence beyond a reasonable doubt,[20] unless there is a statute allowing presumption of intent from the breaking and entry.[21] The intent, however, may and generally must be proved by circumstantial evidence, for as a rule it is not susceptible of direct proof.[22] The existence at the time of the breaking and entering of an

to the sufficiency of the evidence to prove ownership of a store in certain persons as a firm, as alleged in the indictment see Henderson *v.* Com., 98 Va. 794, 34 S. E. 881.

20. *Arkansas.*— Starchman *v.* State, 62 Ark. 538, 36 S. W. 940.

California.— People *v.* Crowley, 100 Cal. 478, 35 Pac. 84; People *v.* Mulkey, 65 Cal. 501, 4 Pac. 507; People *v.* Young, 65 Cal. 225, 3 Pac. 813.

Delaware.—State *v.* Fisher, 1 Pennew. (Del.) 303, 41 Atl. 208; State *v.* Carter, 1 Houst. Crim. Cas. (Del.) 402; State *v.* Carpenter, 1 Houst. Crim. Cas. (Del.) 367; State *v.* Eaton, 3 Harr. (Del.) 554.

Florida.— Davis *v.* State, 22 Fla. 633.

Georgia.— Rush *v.* State, 114 Ga. 113, 39 S. E. 941.

Illinois.— Price *v.* People, 109 Ill. 109.

Iowa.— State *v.* Bell, 29 Iowa 316.

Massachusetts.— Com. *v.* Doherty, 10 Cush. (Mass.) 52.

Minnesota.— State *v.* Riggs, 74 Minn. 460, 77 N. W. 302.

Montana.— State *v.* Carroll, 13 Mont. 246, 33 Pac. 688.

Nebraska.— Ashford *v.* State, 36 Nebr. 38, 53 N. W. 1036.

New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

New York.—People *v.* Marks, 4 Park. Crim. (N. Y.) 153.

Texas.— Ford *v.* State, (Tex. Crim. 1899) 54 S. W. 761; Moore *v.* State, (Tex. Crim. 1896) 37 S. W. 747; Mitchell *v.* State, 32 Tex. Crim. 479, 24 S. W. 280, 33 Tex. Crim. 575, 28 S. W. 475; Walton *v.* State, 29 Tex. App. 163, 15 S. W. 646; Coleman *v.* State, 26 Tex. App. 252, 9 S. W. 609; Black *v.* State, 18 Tex. App. 124; Allen *v.* State, 18 Tex. App. 120; Hamilton *v.* State, 11 Tex. App. 116. See also King *v.* State, (Tex. Crim. 1902) 67 S. W. 410; Dickson *v.* State, (Tex. Crim. 1901) 64 S. W. 1043.

See 8 Cent. Dig. tit. "Burglary," § 96.

Intent to rape.— To sustain an indictment for intent to rape, it must appear beyond a reasonable doubt that the defendant intended to use force. Com. *v.* Doherty, 10 Cush. (Mass.) 52; McNair *v.* State, 53 Ala. 453; Mitchell *v.* State, 32 Tex. Crim. 479, 24 S. W. 280, 33 Tex. Crim. 575, 28 S. W. 475; Robinson *v.* State, 53 Md. 151, 36 Am. Rep. 399. And see *supra*, II, G. On a trial for burglary with intent to rape, a charge authorizing a conviction if the defendant broke and entered "with intent upon his part to gratify his passion upon the person of the female, either by force or by surprise, and against her consent," is error, as it authorizes a conviction, although there may have been no intent to commit rape, for which force, actual or constructive, is essential. McNair *v.* State, 53 Ala. 453.

Proof of intent to commit robbery will sustain an indictment alleging intent to steal. People *v.* Crowley, 100 Cal. 478, 35 Pac. 84; State *v.* Halford, 104 N. C. 874, 10 S. E. 524; State *v.* Cody, 60 N. C. 197.

Value of property.— Ordinarily it is not necessary to prove the value of the property which it is alleged that the defendant intended to steal. McCrary *v.* State, 96 Ga. 348, 23 S. E. 409; Collins *v.* State, 20 Tex. App. 197. But a statute may render the question of value material. See *supra*, II, E, 3, b, (VII). Under a statute punishing the breaking and entering of a building in which there is valuable property, with intent to steal, it is necessary to prove that the property was of some value. Bergeron *v.* State, 53 Nebr. 752, 74 N. W. 253. On an indictment for breaking and entering a corn-crib and stealing corn, the jury may infer that the corn was of value from proof that it was used for feeding stock. Miller *v.* State, 77 Ala. 41. The fact that a witness, on a trial for burglary, did not place any particular value on the goods taken is immaterial, where the goods were produced at the trial and submitted to examination by the jury. State *v.* Peach, 70 Vt. 283, 40 Atl. 732.

21. State *v.* Wilson, 9 Wash. 218, 37 Pac. 424; Linbeck *v.* State, 1 Wash. 336, 25 Pac. 452.

22. *California.*— People *v.* Winters, 93 Cal. 277, 28 Pac. 946; People *v.* Soto, 53 Cal. 415.

Florida.— Clifton *v.* State, 26 Fla. 523, 7 So. 863.

Georgia.— Steadman *v.* State, 81 Ga. 736, 8 S. E. 420; Woodward *v.* State, 54 Ga. 106.

Illinois.— Feister *v.* People, 125 Ill. 348, 17 N. E. 748.

Indiana.— Burrows *v.* State, 84 Ind. 529.

Iowa.— State *v.* Worthen, 111 Iowa 267, 82 N. W. 910; State *v.* Mecum, 95 Iowa 433, 64 N. W. 286; State *v.* Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. Rep. 425; State *v.* Teeter, 69 Iowa 717, 27 N. W. 485; State *v.* Maxwell, 42 Iowa 208.

Kansas.— State *v.* Moon, 62 Kan. 801, 64 Pac. 609; State *v.* Cash, 38 Kan. 50, 16 Pac. 144.

Kentucky.— Hill *v.* Com., 12 Ky. L. Rep. 914, 15 S. W. 870.

Louisiana.— State *v.* Woods, 31 La. Ann. 267.

Massachusetts.— Com. *v.* Shedd, 140 Mass. 451, 5 N. E. 254; Com. *v.* Hope, 22 Pick. (Mass.) 1.

Michigan.— People *v.* Curley, 99 Mich. 238, 58 N. W. 68.

New Hampshire.— State *v.* Moore, 12 N. H. 42.

intent to commit larceny, rape, murder, or other felony may be inferred as a fact from proof that the felony was actually committed or attempted after the entry.[23] And even where the felony was not actually committed, an intent to commit the same may be inferred from the time and manner at and in which the entry was made, or the conduct of the accused after the entry, or both.[24]

New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

New York.—*In re* Corcoran, 34 Misc. (N. Y.) 332, 69 N. Y. Suppl. 569, 15 N. Y. Crim. 392; People *v.* Calvert, 22 N. Y. Suppl. 220, 51 N. Y. St. 186; People *v.* Marks, 4 Park. Crim. (N. Y.) 153.

North Carolina.— State *v.* Christmas, 101 N. C. 749, 8 S. E. 361; State *v.* McBryde, 97 N. C. 393, 1 S. E. 925; State *v.* Powell, 94 N. C. 965; State *v.* McDaniel, 60 N. C. 245; State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555.

Texas.—Franco *v.* State, 42 Tex. 276; Dickson *v.* State, (Tex. Crim. 1901) 64 S. W. 1043; Mullens *v.* State, 35 Tex. Crim. 149, 32 S. W. 691; Alexander *v.* State, 31 Tex. Crim. 359, 20 S. W. 756.

Utah.— People *v.* Morton, 4 Utah 407, 11 Pac. 512.

Washington.— State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

West Virginia.— State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

23. *Delaware.*— State *v.* Manluff, 1 Houst. Crim. Cas. (Del.) 208.

Florida.— Clifton *v.* State, 26 Fla. 523, 7 So. 863.

Iowa.— State *v.* Maxwell, 42 Iowa 208.

Kansas.— State *v.* Cash, 38 Kan. 50, 16 Pac. 144.

Louisiana.— State *v.* Woods, 31 La. Ann. 267.

Massachusetts.— Com. *v.* Hope, 22 Pick. (Mass.) 1.

Michigan.— People *v.* Curley, 99 Mich. 238, 58 N. W. 68.

New Hampshire.— State *v.* Moore, 12 N. H. 42; Jones *v.* State, 11 N. H. 269.

New Jersey.— State *v.* Wilson, 1 N. J. L. 502, 1 Am. Dec. 216.

Texas.— State *v.* Robertson, 32 Tex. 159.

West Virginia.—State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

24. In a late Iowa case, where an intent to commit larceny was alleged, it was said: "One who breaks into the dwelling-house of another in the night-time, in the absence of any explanation of the act, will be presumed to have intended to commit a public offense. His silence as to his intent is evidence that it was to commit a crime. The character of the house entered,— a dwelling; the time of entering — at night; and the absence of explanation of the act,— raise a presumption of an intent to commit a public offense." State *v.* Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. Rep. 425. And see other cases cited *infra*, this note.

Intent to steal.— Thus an intent to commit larceny may be inferred from the fact that there were valuables in the house, particularly where defendant knew of this fact, and that the defendant, having no reason for entering, broke and entered at a late hour of the night. For cases in which circumstantial evidence of this character has been held sufficient to convict see the following:

California.— People *v.* Winters, 93 Cal. 277, 28 Pac. 946; People *v.* Soto, 53 Cal. 415.

Florida.— Clifton *v.* State, 26 Fla. 523, 7 So. 863.

Georgia.— Steadman *v.* State, 81 Ga. 736, 8 S. E. 420; Woodward *v.* State, 54 Ga. 106. *Compare* Rush *v.* State, 114 Ga. 113, 39 S. E. 941.

Illinois.— Feister *v.* People, 125 Ill. 348, 17 N. E. 748.

Indiana.— Burrows *v.* State, 84 Ind. 529.

Iowa.— State *v.* Worthen, 111 Iowa 267, 82 N. W. 910; State *v.* Teeter, 69 Iowa 717, 27 N. W. 485.

Kansas.— State *v.* Cash, 38 Kan. 50, 16 Pac. 144.

Kentucky.— Hill *v.* Com., 12 Ky. L. Rep. 914, 15 S. W. 870.

Massachusetts.— Com. *v.* Shedd, 140 Mass. 451, 5 N. E. 254.

Michigan.— People *v.* Curley, 99 Mich. 238, 58 N. W. 68.

New York.— People *v.* Calvert, 22 N. Y. Suppl. 220, 51 N. Y. St. 186; People *v.* Marks, 4 Park. Crim. (N. Y.) 153. See also *In re* Corcoran, 34 Misc. (N. Y.) 332, 69 N. Y. Suppl. 569, 15 N. Y. Crim. 392.

North Carolina.— State *v.* Christmas, 101 N. C. 749, 8 S. E. 361; State *v.* McBryde, 97 N. C. 393, 1 S. E. 925.

Texas.— Franco *v.* State, 42 Tex. 276; Pilot *v.* State, 38 Tex. Crim. 515, 43 S. W. 112, 1024; Mullens *v.* State, 35 Tex. Crim. 149, 32 S. W. 691; Alexander *v.* State, 31 Tex. Crim. 359, 20 S. W. 756.

Utah.— People *v.* Morton, 4 Utah 407, 11 Pac. 512.

Washington.— State *v.* Dolson, 22 Wash. 259, 60 Pac. 653; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

West Virginia.—State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

For cases in which circumstantial evidence has been held insufficient to establish an intent to steal see Rush *v.* State, 114 Ga. 113, 39 S. E. 941; Price *v.* People, 109 Ill. 109; Ford *v.* State, (Tex. Crim. 1899) 54 S. W. 761. See also State *v.* Riggs, 74 Minn. 460, 77 N. W. 302, where the evidence showed that the defendant was drunk, and there were other circumstances tending to rebut the inference of intent to steal.

Intent to rape.— An intent to rape may be inferred, in the absence of evidence to the contrary, from the fact that the defendant broke and entered through the window of the sleeping-room of a girl, put his hand upon her person, and, upon her awakening, left hurriedly without any explanation, or from

6. Possession of Stolen Goods. Proof of possession by the defendant shortly after the burglary of goods stolen at the time of the burglary is to be considered by the jury, and if unexplained, and if breaking and entry by someone is shown, will be sufficient, when accompanied by other circumstances tending to connect him with the commission of the offense, to warrant a conviction, although the other evidence might not alone be sufficient.[25] Some of the courts, but not all,

other circumstances of a similar character. State *v.* Boon, 35 N. C. 244, 57 Am. Dec. 555. See also Harvey *v.* State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229; State *v.* Moon, 62 Kan. 801, 64 Pac. 609; State *v.* McBryde, 97 N. C. 393, 1 S. E. 925; State *v.* Powell, 94 N. C. 965; Dickson *v.* State, (Tex. Crim. 1901) 64 S. W. 1043; Ford *v.* State, (Tex. Crim. 1899) 54 S. W. 761.

For cases in which the evidence has been held insufficient to show intent to rape see State *v.* Fisher, 1 Pennew. (Del.) 303, 41 Atl. 208; Davis *v.* State, 22 Fla. 633; Mitchell *v.* State, 32 Tex. Crim. 479, 24 S. W. 280, 33 Tex. Crim. 575, 28 S. W. 475; Walton *v.* State, 29 Tex. App. 163, 15 S. W. 646; Coleman *v.* State, 26 Tex. App. 252, 9 S. W. 609; Allen *v.* State, 18 Tex. App. 120; Hamilton *v.* State, 11 Tex. App. 116.

Intent to rape and to steal.—An indictment for burglary with intent to rape and to steal is not sustained by evidence that two women were sleeping up-stairs in the house, and had some personal property there, and that defendant climbed a post to the outside gallery of the second story, and fled when discovered, where it appears that the house had only been occupied a few days, and defendant testifies that he thought it was vacant, and climbed to the gallery to sleep. Moore *v.* State, (Tex. Crim. 1896) 37 S. W. 747.

Intent to rape or to steal.— Proof that the defendant entered the sleeping-room of two girls and placed his hands on their persons, and fled on their making an outcry, does not raise a presumption of an intent to rape or assault, but whether his intent was to rape or to steal is to be determined from all the circumstances of the case. State *v.* Worthen, 111 Iowa 267, 82 N. W. 910. Where the evidence showed that defendant entered a bedroom through a window late at night, after the lamps were extinguished, seized a woman by the throat, threw himself across the bed, and fled upon her making an outcry, it was held sufficient to warrant a finding that the intent was to steal, although the woman testified that she believed the purpose was to have sexual intercourse. People *v.* Soto, 53 Cal. 415. See also Davis *v.* State, 22 Fla. 633. *Compare* Ford *v.* State, (Tex. Crim. 1899) 54 S. W. 761.

An intent to rob, rather than to commit a simple larceny, may be inferred from the fact that the defendant broke and entered the house noisily. Lowe *v.* State, 14 Lea (Tenn.) 204.

Intent to commit adultery may be inferred from the fact that the defendant was found in bed with the wife of the owner of the house, both being undressed. State *v.* Mecum, 95 Iowa 433, 64 N. W. 286.

25. For cases in which evidence of possession of stolen property with other circumstances has been held sufficient to sustain a conviction see the following:

Arkansas.— Dodd *v.* State, 33 Ark. 517.

California.— People *v.* Joy, (Cal. 1901) 66 Pac. 964; People *v.* Brady, (Cal. 1901) 65 Pac. 823; People *v.* Sears, 119 Cal. 267, 51 Pac. 325; People *v.* Jochinsky, 106 Cal. 638, 39 Pac. 1077; People *v.* Abbott, 101 Cal. 645, 36 Pac. 129; People *v.* Arthur, 93 Cal. 536, 29 Pac. 126; People *v.* Getty, 49 Cal. 581.

Georgia.— Holland *v.* State, 112 Ga. 540, 37 S. E. 887; Jones *v.* State, 105 Ga. 649, 31 S. E. 574; Moncrief *v.* State, 99 Ga. 295, 25 S. E. 735; Rusher *v.* State, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175; Boswell *v.* State, 92 Ga. 581, 17 S. E. 805; Murks *v.* State, 92 Ga. 449, 17 S. E. 266; Miller *v.* State, 91 Ga. 186, 16 S. E. 985; Wright *v.* State, 91 Ga. 80, 16 S. E. 259; Gaines *v.* State, 89 Ga. 366, 15 S. E. 477; Matthews *v.* State, 86 Ga. 782, 804, 13 S. E. 16; Harris *v.* State, 84 Ga. 269, 10 S. E. 742; Eubanks *v.* State, 82 Ga. 62, 9 S. E. 424; Grimes *v.* State, 77 Ga. 762, 4 Am. St. Rep. 112; Wilkerson *v.* State, 73 Ga. 799; Smith *v.* State, 62 Ga. 663; Bryan *v.* State, 62 Ga. 179; Bilinglea *v.* State, 56 Ga. 686; Wilson *v.* State, 55 Ga. 324.

Illinois.— Magee *v.* People, 139 Ill. 138, 28 N. E. 1077; Langford *v.* People, 134 Ill. 444, 25 N. E. 1009. See also Williams *v.* People, 196 Ill. 173, 63 N. E. 681.

Indiana.— Dawson *v.* State, 65 Ind. 442.

Iowa.— State *v.* Marshall, 105 Iowa 38, 74 N. W. 763.

Kansas.— State *v.* Powell, 61 Kan. 81, 58 Pac. 968; State *v.* Conway, 56 Kan. 682, 44 Pac. 627.

Kentucky.— Anderson *v.* Com., 18 Ky. L. Rep. 99, 35 S. W. 542; Johnson *v.* Com., 12 Ky. L. Rep. 873, 15 S. W. 671.

Michigan.—People *v.* Hogan, 123 Mich. 233, 81 N. W. 1096; People *v.* Wood, 99 Mich. 620, 58 N. W. 638; People *v.* Burns, 67 Mich. 537, 35 N. W. 154.

Mississippi.— Cook *v.* State, (Miss. 1900) 28 So. 833; Frank *v.* State, 39 Miss. 705.

Missouri.— State *v.* Bryant, 134 Mo. 246, 35 S. W. 597.

Nevada.— State *v.* Jones, 19 Nev. 365, 11 Pac. 317; State *v.* Watkins, 11 Nev. 30.

New York.— Knickerbocker *v.* People, 43 N. Y. 177 [*affirming* 57 Barb. (N. Y.) 365]; People *v.* Lyons, 29 N. Y. App. Div. 174, 51 N. Y. Suppl. 811; People *v.* Hagan, 14 N. Y. Suppl. 233, 37 N. Y. St. 660; Jones *v.* People, 6 Park. Crim. (N. Y.) 126.

Texas.— Prince *v.* State, 44 Tex. 480; Rogers *v.* State, 43 Tex. 406; McGee *v.* State, (Tex. Crim. 1898) 46 S. W. 930; Jackson *v.* State, 28 Tex. App. 370, 13 S. W. 451, 19

go further than this and hold that such proof is alone *prima facie* proof of burglary by the defendant, as it is of larceny,[26] if a breaking and entry is proved, and if the possession is not explained at all, or the explanation given by the defendant is unreasonable or shown to be false.[27] Proof of defendant's unexplained pos-

Am. St. Rep. 839; Langford *v.* State, 17 Tex. App. 445.

Vermont.— State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403; State *v.* Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. Rep. 864.

Virginia.— Gravely *v.* Com., 86 Va. 396, 10 S. E. 431; Wright *v.* Com., 82 Va. 183.

Washington.— State *v.* Norris, (Wash. 1902) 67 Pac. 983.

Wisconsin.— Murphy *v.* State, 86 Wis. 626, 57 N. W. 367; Ryan *v.* State, 83 Wis. 486, 53 N. W. 836; Neubrandt *v.* State, 53 Wis. 89, 9 N. W. 824; Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

United States.— Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272.

See 8 Cent. Dig. tit. "Burglary," § 104.

Corroboration of accomplice.—Possession of the stolen property by the defendant, if not reasonably explained, is sufficient to corroborate the testimony of an accomplice to defendant's guilt. Boswell *v.* State, 92 Ga. 581, 17 S. E. 805.

26. See LARCENY.

27. *Alabama.*—Randolph *v.* State, 100 Ala. 139, 14 So. 792; Cooper *v.* State, 87 Ala. 135, 6 So. 303; Ross *v.* State, 82 Ala. 65, 2 So. 139; Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72; Neal *v.* State, 53 Ala. 465; Crawford *v.* State, 44 Ala. 45.

Florida.— Roberson *v.* State, 40 Fla. 509, 24 So. 474; Tilly *v.* State, 21 Fla. 242.

Georgia.— Davidson *v.* State, 104 Ga. 761, 30 S. E. 946; Brooks *v.* State, 96 Ga. 353, 23 S. E. 413; Fletcher *v.* State, 93 Ga. 180, 18 S. E. 555; Gaines *v.* State, 89 Ga. 366, 15 S. E. 477; Mangham *v.* State, 87 Ga. 549, 13 S. E. 558; Falvey *v.* State, 85 Ga. 157, 11 S. E. 607; Wynn *v.* State, 81 Ga. 744, 7 S. E. 689; Grimes *v.* State, 77 Ga. 762, 4 Am. St. Rep. 112; Davis *v.* State, 76 Ga. 16; Harrison *v.* State, 74 Ga. 801; Wilkerson *v.* State, 73 Ga. 799; Lundy *v.* State, 71 Ga. 360; Brown *v.* State, 61 Ga. 311; Houser *v.* State, 58 Ga. 78.

Illinois.— Magee *v.* People, 139 Ill. 138, 28 N. E. 1077; Langford *v.* People, 134 Ill. 444, 25 N. E. 1009; Smith *v.* People, 115 Ill. 17, 3 N. E. 733. See also Williams *v.* People, 196 Ill. 173, 63 N. E. 681.

Massachusetts.— Com. *v.* McGorty, 114 Mass. 299; Com. *v.* Millard, 1 Mass. 6. See also Com. *v.* Parmenter, 101 Mass. 211.

Mississippi.— Cook *v.* State, (Miss. 1900) 28 So. 833; Harris *v.* State, 61 Miss. 304.

Missouri.— State *v.* Yandle, 166 Mo. 589, 66 S. W. 532; State *v.* Dale, 141 Mo. 284, 42 S. W. 722, 64 Am. St. Rep. 513; State *v.* Wilson, 137 Mo. 592, 39 S. W. 80; State *v.* Belcher, 136 Mo. 135, 37 S. W. 800; State *v.* Blue, 136 Mo. 41, 37 S. W. 796; State *v.* Bryant, 134 Mo. 246, 35 S. W. 597; State *v.* Moore, 117 Mo. 395, 22 S. W. 1086; State *v.* Owsley, 111 Mo. 450, 20 S. W. 194; State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322; State *v.* Owens, 79 Mo. 619; State *v.* Wheeler, 79 Mo. 366; State *v.* Babb, 76 Mo. 501; State *v.* Butterfield, 75 Mo. 297.

New York.— Knickerbocker *v.* People, 43 N. Y. 177 [*affirming* 57 Barb. (N. Y.) 365 and *distinguishing* and *limiting* Jones *v.* People, 6 Park. Crim. (N. Y.) 126; Davis *v.* People, 1 Park. Crim. (N. Y.) 447; People *v.* Frazier, 2 Wheel. Crim. (N. Y.) 55]. See also People *v.* Wilson, 7 N. Y. App. Div. 326, 40 N. Y. Suppl. 107. *Compare* People *v.* White, 3 N. Y. Crim. 366.

North Carolina.— State *v.* Graves, 72 N. C. 482.

Pennsylvania.— Com. *v.* Frew, 3 Pa. Co. Ct. 492.

Texas.— Binyon *v.* State, (Tex. Crim. 1900) 56 S. W. 339; Willis *v.* State, (Tex. Crim. 1900) 55 S. W. 829; Favro *v.* State, 39 Tex. Crim. 452, 46 S. W. 932, 73 Am. St. Rep. 950; McGee *v.* State, (Tex. Crim. 1898) 46 S. W. 930; Glover *v.* State, (Tex. Crim. 1898) 46 S. W. 824; McDaniel *v.* State, (Tex. Crim. 1896) 37 S. W. 324; Dawson *v.* State, 32 Tex. Crim. 535, 25 S. W. 21, 40 Am. St. Rep. 791; McKinney *v.* State, (Tex. Crim. 1895) 29 S. W. 271; Lightfoot *v.* State, (Tex. Crim. 1894) 24 S. W. 650; Thomas *v.* State, (Tex. Crim. 1893) 22 S. W. 144; Christian *v.* State, (Tex. Crim. 1893) 21 S. W. 252; Trent *v.* State, 31 Tex. Crim. 251, 20 S. W. 547; Jackson *v.* State, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. Rep. 839; Morgan *v.* State, 25 Tex. App. 513, 8 S. W. 487; Payne *v.* State, 21 Tex. App. 184, 17 S. W. 463.

England.— See Reg. *v.* Coots, 2 Cox C. C. 188; Reg. *v.* Exall, 4 F. & F. 922.

Some courts hold that proof of unexplained possession by the defendant shortly after the burglary is not *prima facie* proof that he committed the burglary, but that it is alone sufficient to authorize the jury to convict if they are convinced of his guilt beyond a reasonable doubt under all the circumstances.

Iowa.— State *v.* Jennings, 79 Iowa 513, 44 N. W. 799; State *v.* Shaffer, 59 Iowa 290, 13 N. W. 306. And see State *v.* Ham, 98 Iowa 60, 66 N. W. 1038; State *v.* La Grange, 94 Iowa 60, 62 N. W. 664; State *v.* Dimmitt, 88 Iowa 551, 55 N. W. 531; State *v.* Yobe, 87 Iowa 33, 53 N. W. 1088; State *v.* Ray, 79 Iowa 765, 44 N. W. 800; State *v.* Frahm, 73 Iowa 355, 35 N. W. 451; State *v.* Rivers, 68 Iowa 611, 27 N. W. 781; State *v.* Walker, 41 Iowa 217; State *v.* Reid, 20 Iowa 413. Evidence of possession of property stolen at the time of the burglary has been held sufficient to support a conviction, notwithstanding the testimony of a person that defendant was in his company at the time and did not go near the place of the crime, where the witness was shown to be a man of bad moral character. State *v.* Dimmitt, 88 Iowa 551, 55

session, however, does not raise a presumption of guilt as a matter of law — a legal presumption — but is merely evidence from which the jury may convict. By the weight of authority, the question of guilt on such evidence is for the jury under all the circumstances.[28] Such evidence is not sufficient if the possession of the defendant is otherwise reasonably explained by him, unless the explanation is shown to be false.[29] The evidence must clearly show possession by the defend-

N. W. 531. See also Gaines *v.* State, 89 Ga. 366, 15 S. E. 477.

Kentucky.— See Branson *v.* Com., 92 Ky. 330, 13 Ky. L. Rep. 614, 17 S. W. 1019; Hunter *v.* Com., 20 Ky. L. Rep. 1165, 48 S. W. 1077; Anderson *v.* Com., 18 Ky. L. Rep. 99, 35 S. W. 542; Cox *v.* Com., 10 Ky. L. Rep. 597, 9 S. W. 804.

Nebraska.— Metz *v.* State, 46 Nebr. 547, 65 N. W. 190 [*overruling* Whitman *v.* State, 42 Nebr. 841, 60 N. W. 1025].

New Hampshire.— See State *v.* Hodge, 50 N. H. 510.

Virginia.— Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352; Gravely *v.* Com., 86 Va. 396, 10 S. E. 431; Taliaferro *v.* Com., 77 Va. 411.

Other courts hold that such evidence is *prima facie* proof of the burglary by the defendant, if the jury find that the goods were stolen at the time of the burglary and by the same person, but not otherwise. People *v.* Wood, 99 Mich. 620, 58 N. W. 638; Stuart *v.* People, 42 Mich. 255, 3 N. W. 863; People *v.* Gordon, 40 Mich. 716.

And still other courts have held that such evidence alone is not only not *prima facie* evidence that the defendant is guilty of burglary, but that it is not sufficient to sustain a conviction.

California.—People *v.* Hannon, 85 Cal. 374, 24 Pac. 706; People *v.* Flynn, 73 Cal. 511, 15 Pac. 102; People *v.* Beaver, 49 Cal. 57.

Kansas.— State *v.* Powell, 61 Kan. 81, 58 Pac. 968; State *v.* Conway, 56 Kan. 682, 44 Pac. 627.

Nevada.— See State *v.* Jones, 19 Nev. 365, 11 Pac. 317.

Utah.— People *v.* Hart, 10 Utah 204, 37 Pac. 330.

Wisconsin.— Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

Statutory provision as to failure to testify. — In Utah, under a statute providing that a defendant's refusal to testify shall in no manner prejudice him, it is held that a defendant's failure to explain his possession of property stolen at the time of a recent burglary can raise no presumption against him. People *v.* Hart, 10 Utah 204, 37 Pac. 330.

28. *Alabama.*— Crawford *v.* State, 44 Ala. 45.

California.—People *v.* Hannon, 85 Cal. 374, 24 Pac. 706.

Georgia.— Falvey *v.* State, 85 Ga. 157, 11 S. E. 607; Lundy *v.* State, 71 Ga. 360; Houser *v.* State, 58 Ga. 78.

Illinois.— Smith *v.* People, 115 Ill. 17, 3 N. E. 733.

Iowa.— State *v.* Rivers, 68 Iowa 611, 27 N. W. 781; State *v.* Walker, 41 Iowa 217; State *v.* Reid, 20 Iowa 413.

Kansas.— State *v.* Gillespie, 62 Kan. 469, 63 Pac. 742, 84 Am. St. Rep. 411.

Massachusetts.— Com. *v.* McGorty, 114 Mass. 299.

Michigan.— People *v.* Wood, 99 Mich. 620, 58 N. W. 638; People *v.* Gordon, 40 Mich. 716. See also People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771.

Mississippi.— See Stokes *v.* State, 58 Miss. 677, 680.

Nebraska.— Metz *v.* State, 46 Nebr. 547, 65 N. W. 190.

New Hampshire.—State *v.* Hodge, 50 N. H. 510.

New York.— People *v.* White, 3 N. Y. Crim. 366.

North Carolina.— State *v.* Graves, 72 N. C. 482.

Ohio.— Methard *v.* State, 19 Ohio St. 363.

Oklahoma.— Johnson *v.* Territory, 5 Okla. 695, 50 Pac. 90.

Pennsylvania.— Com. *v.* Frew, 3 Pa. Co. Ct. 492.

Texas.— Prince *v.* State, 44 Tex. 480.

Virginia.— Taliaferro *v.* Com., 77 Va. 411; Walker *v.* Com., 28 Gratt. (Va.) 969. See also Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352; Gravely *v.* Com., 86 Va. 396, 10 S. E. 431.

Wisconsin.— Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785. See also Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

29. *Alabama.*—Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72; Crawford *v.* State, 44 Ala. 45.

Florida.— Leslie *v.* State, 35 Fla. 171, 17 So. 555.

Georgia.— King *v.* State, 99 Ga. 686, 26 S. E. 480, 59 Am. St. Rep. 251; Phillips *v.* State, 56 Ga. 28.

Kansas.— State *v.* Gillespie, 62 Kan. 469, 63 Pac. 742, 84 Am. St. Rep. 411.

Missouri.— State *v.* Dashman, 153 Mo. 454, 55 S. W. 69.

Nebraska.— Metz *v.* State, 46 Nebr. 547, 65 N. W. 190.

Texas.—Knight *v.* State, (Tex. Crim. 1901) 65 S. W. 88; Alvia *v.* State, (Tex. Crim. 1901) 60 S. W. 551; Williams *v.* State, (Tex. Crim. 1897) 38 S. W. 989; Jackson *v.* State, 28 Tex. App. 143, 12 S. W. 701; Morgan *v.* State, 25 Tex. App. 498, 8 S. W. 488; Field *v.* State, 24 Tex. App. 422, 6 S. W. 200; Ross *v.* State, 16 Tex. App. 554.

England.— Reg. *v.* Exall, 4 F. & F. 922.

See 8 Cent. Dig. tit. "Burglary," § 107.

Unreasonable or contradictory explanation by the defendant, or an explanation contradicted by other evidence, need not be believed by the jury, and will not as a matter of law prevent a conviction.

ant,[30] and the possession must have been personal and exclusive, or if joint with another, there must be something else in the evidence to connect the defendant with the offense.[31] The defendant's possession must not be too remote in point of time.[32] And of course the property must be sufficiently identified as that stolen at the time of the burglary.[33] Evidence of the possession of the stolen

California.— People *v.* Sears, 119 Cal. 267, 51 Pac. 325.

Georgia.— Fletcher *v.* State, 93 Ga. 180, 18 S. E. 555.

Illinois.— Williams *v.* People, 196 Ill. 173, 63 N. E. 681; Magee *v.* People, 139 Ill. 138, 28 N. E. 1077.

Iowa.— State *v.* Marshall, 105 Iowa 38, 74 N. W. 763.

Texas.— Whitworth *v.* State, (Tex. Crim. 1902) 67 S. W. 1019; Binyon *v.* State, (Tex. Crim. 1900) 56 S. W. 339; Lightfoot *v.* State, (Tex. Crim. 1894) 24 S. W. 650; Thomas *v.* State, (Tex. Crim. 1893) 22 S. W. 144; Payne *v.* State, 21 Tex. App. 184, 17 S. W. 463.

Washington.— Mooney *v.* State, 2 Wash. 487, 28 Pac. 363.

30. The proof of possession by the defendant.— Reg. *v.* Coots, 2 Cox C. C. 188; Mann *v.* State, 27 Tex. App. 580, 11 S. W. 640. That the stolen property was found in a place near a new house into which the accused was moving does not show possession by him of the property, and does not of itself warrant conviction. Washington *v.* State, 21 Fla. 328. Evidence tending to prove that articles resembling those stolen were seen in a room not occupied by the accused, although in the same house in which he lived, is not sufficient to convict. Carter *v.* State, 46 Ga. 637. Proof that the goods were found in a room occupied by the defendant and another is not conclusive that they were in the possession of either. Shropshire *v.* State, 69 Ga. 273. Possession of the stolen property by the wife of the defendant a year after the burglary, and when the defendant is in jail on another charge, is evidence to go to the jury, it further appearing that on a search of the house just prior to the defendant's arrest none of the stolen property was found. Randolph *v.* State, 100 Ala. 139, 14 So. 792. Testimony of a gunsmith, in whose possession a pistol stolen at the time of the burglary was shortly afterward found, that it was brought to him by the defendant for repairs, is sufficient to sustain a conviction, although contradicted by the testimony of the defendant. Richardson *v.* State, (Tex. Crim. 1897) 42 S. W. 996. If the circumstances render it reasonably certain that the defendant placed the goods where they were found it need not be shown by positive testimony that he was in actual possession of them. McDaniel *v.* State, (Tex. Crim. 1896) 37 S. W. 324.

31. *Georgia.*— Sparks *v.* State, 111 Ga. 830, 35 S. E. 654; Shropshire *v.* State, 69 Ga. 273.

Iowa.— State *v.* Tilton, 63 Iowa 117, 18 N. W. 716.

Missouri.— State *v.* Belcher, 136 Mo. 135, 37 S. W. 800; State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322.

Nevada.— State *v.* Jones, 19 Nev. 365, 11 Pac. 317.

New York.—People *v.* Wilson, 7 N. Y. App. Div. 326, 40 N. Y. Suppl. 107.

Texas.— Jackson *v.* State, 28 Tex. App. 143, 370, 12 S. W. 701.

Virginia.— Taliaferro *v.* Com., 77 Va. 411. *Compare* Com. *v.* Parmenter, 101 Mass. 211.

Although defendant's possession may have been jointly with others, it may be considered by the jury in connection with other evidence tending to connect him with the offense. Moncrief *v.* State, 99 Ga. 295, 25 S. E. 735. See also Cogshall *v.* State, (Tex. Crim. 1900) 58 S. W. 1011.

Possession of others may be sufficient if a conspiracy is shown. Murphy *v.* State, 86 Wis. 626, 57 N. W. 367. And see State *v.* Norris, (Wash. 1902) 67 Pac. 983.

On a prosecution of a man and his wife for burglary, it was held that evidence that some of the stolen property was found thirteen months after the burglary in the wife's possession, the husband then being in jail on another charge, was sufficient to go to the jury, it further appearing that on a search of the house just prior to the husband's arrest, none of the stolen property was found. Randolph *v.* State, 100 Ala. 139, 14 So. 792.

32. *Alabama.*—White *v.* State, 72 Ala. 195.

Georgia.— Brooks *v.* State, 96 Ga. 353, 23 S. E. 413; Turver *v.* State, 95 Ga. 222, 21 S. E. 381.

Iowa.— State *v.* Tilton, 63 Iowa 117, 18 N. W. 716; State *v.* Walker, 41 Iowa 217.

Missouri.— State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322.

Nebraska.— Metz *v.* State, 46 Nebr. 547, 65 N. W. 190.

North Carolina.—State *v.* Graves, 72 N. C. 482.

As to remoteness of possession see Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272.

Circumstance for jury.— But remote possession by the defendant of the stolen property is a circumstance to be considered by the jury. Randolph *v.* State, 100 Ala. 139, 14 So. 792; Bryan *v.* State, 62 Ga. 179; Com. *v.* Parmenter, 101 Mass. 211.

Where, on the trial of two persons for burglary and larceny, the evidence tended to show that the defendant and another had joint possession of the stolen property, but it appeared that such possession did not commence until five or six weeks after the larceny, it was held too remote to raise a presumption that either of the defendants were guilty of burglary. State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322.

33. *Georgia.*— King *v.* State, 99 Ga. 686, 26 S. E. 480, 59 Am. St. Rep. 251; Brooks *v.* State, 96 Ga. 353, 23 S. E. 413; Rusher *v.*

goods by the defendant will not support a conviction for burglary unless the breaking and entering are clearly shown.[34]

7. Necessity to Trace Goods to Defendant. It is not necessary to a conviction of burglary with intent to commit larceny to trace the stolen property to the possession of the defendant if there is sufficient evidence without this to connect him with the offense.[35]

VII. TRIAL.

A. In General. In most respects the trial of an indictment for burglary is governed by the same principles of law as any other criminal prosecution.[36]

B. Questions of Law and Fact. It is for the court to determine and instruct the jury, as a question of law, what is necessary to constitute a breaking and entry, what must be the character of the premises to render them the subject of the offense, what is night-time, what intent is necessary, and as to the other elements which are necessary in law to constitute the offense; but it is for the jury to determine, as a question of fact, whether the evidence brings the case within the definition of the offense as given by the court, and whether the offense was committed by the defendant.[37]

State, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175; Carter *v.* State, 46 Ga. 637.

Michigan.—People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771.

Nebraska.— Wright *v.* State, 21 Nebr. 496, 32 N. W. 576.

Texas.—Stevens *v.* State, (Tex. Crim. 1902) 66 S. W. 549; Green *v.* State, (Tex. Crim. 1895) 31 S. W. 386; Morgan *v.* State, 25 Tex. App. 498, 8 S. W. 488.

Virginia.— Bundick *v.* Com., 97 Va. 783, 34 S. E. 454.

Sufficiency of identification.— See Branson *v.* Com., 92 Ky. 330, 13 Ky. L. Rep. 614, 17 S. W. 1019; People *v.* Boujet, 2 Park. Crim. (N. Y.) 11. Identification of money see Rusher *v.* State, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175. Evidence of similarity may be sufficient. Langford *v.* People, 134 Ill. 444, 25 N. E. 1009; State *v.* Babb, 76 Mo. 501; Gravely *v.* Com., 86 Va. 396, 10 S. E. 431. *Compare* Green *v.* State, (Tex. Crim. 1895) 31 S. W. 386. Unexplained possession by the defendant shortly after the burglary of certain tobacco similar to that stolen is sufficient to support a conviction, without positive proof that it was part of the tobacco stolen. State *v.* Dale, 141 Mo. 284, 42 S. W. 722, 64 Am. St. Rep. 513. Property found in the defendant's possession is sufficiently identified as that stolen, where the owner testifies that he believes them to be the same, and positively identifies a key to his store found in defendant's possession. State *v.* Babb, 76 Mo. 501. The fact that flour alleged to have been stolen from a mill at the time of a burglary was found in sacks labeled with the name of the mill and the grade tends to show that it was of the quality stolen. People *v.* Wood, 99 Mich. 620, 58 N. W. 638. The mere fact that there is some conflict in the evidence as to the identity of the goods found in defendant's possession with those stolen does not necessarily entitle the defendant to an acquittal. Branson *v.* Com., 92 Ky. 330, 13 Ky. L. Rep. 614, 17 S. W. 1019. *Compare*, however, People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771.

34. *Alabama.*—Fuller *v.* State, 48 Ala. 273.

Georgia.— Lester *v.* State, 106 Ga. 371, 32 S. E. 335; Mangham *v.* State, 87 Ga. 549, 13 S. E. 558.

Michigan.—People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771; People *v.* Gordon, 40 Mich. 716.

Nebraska.— Metz *v.* State, 46 Nebr. 547, 65 N. W. 190.

New York.—People *v.* Caniff, 2 Park. Crim. (N. Y.) 586. And see Dawson *v.* State, 32 Tex. Crim. 535, 25 S. W. 21, 40 Am. St. Rep. 791.

35. Garrity *v.* People, 107 Ill. 162.

36. This is true of principles governing the reception of evidence, arguments of counsel, instructions, verdict, etc. See, generally, Criminal Law. In this section it is intended to refer to those cases only in which the application of the general rules has reference more peculiarly to the subject of burglary.

37. **Breaking and entry.**—The court should tell the jury what acts constitute a breaking, as that is a question of law. Rose *v.* Com., 19 Ky. L. Rep. 272, 40 S. W. 245. Under the Texas statute, providing that there is a breaking within the meaning of the statute, where the entry is at a chimney or other "unusual place," what constitutes an unusual place, so as to bring a case within the statute, is a question of fact for the jury. Green *v.* State, (Tex. Crim. 1900) 58 S. W. 99.

Owner's consent to the entry.— Whether a person who left the door of his place unlocked, in order that one who had planned to commit a burglary might enter by simply lifting the latch, and be arrested, consented to the entry, was held a proper question for the jury. State *v.* Jansen, 22 Kan. 498.

Character and occupancy of the premises.— Whether the thing or place broken and entered was a part of the house, or so connected with it as to render the breaking and entry burglary, is a question of law for the court.

C. Instructions — 1. In General. In the charge to the jury the court must define the offense,[38] and must instruct the jury clearly as to every essential element,[39] as the breaking and entry,[40] the time of the offense,[41] the felonious

Com. *v.* Bruce, 79 Ky. 560. Whether a store alleged to have been broken and entered adjoined a dwelling-house, or was occupied as such, is a question of fact for the jury. People *v.* Smith, 92 Mich. 10, 52 N. W. 67; People *v.* Shaughnessy, 89 Mich. 130, 50 N. W. 645. It is a question for the jury whether the owner of a residence had left the same without any intention of returning. Schwabacher *v.* People, 165 Ill. 618, 46 N. W. 809. Whether a corn-house and its fastenings were such as to be the subject of burglary is for the jury. It is error for the court to instruct that they were as a matter of law; it should merely instruct as to principles, and leave the question for the jury. State *v.* Williamson, 42 Conn. 261. It is for the jury to pass upon the credibility of evidence as to the family's presence in the house at the time of the entry, so as to determine whether the offense was burglary in the first degree. State *v.* Alston, 113 N. C. 666, 18 S. E. 692.

Night-time.— It is for the court to instruct the jury, as a question of law, what is the night-time at common law, or under a statute, but it is for the jury to apply the definition and say, as a question of fact, whether the offense was committed in the night-time.

California.— People *v.* McCarty, 117 Cal. 65, 48 Pac. 984.

Connecticut.— State *v.* Leaden, 35 Conn. 515.

Georgia.— Waters *v.* State, 53 Ga. 567.

Louisiana.— State *v.* Taylor, 37 La. Ann. 40.

Michigan.— People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046; People *v.* Taylor, 93 Mich. 638, 53 N. W. 777.

The identity of money or property found in the defendant's possession with that stolen is a question of fact for the jury. Com. *v.* Chilson, 2 Cush. (Mass.) 15.

Intent.— Whether a person found drunk in the house of another was in a condition to be capable of a felonious intent in breaking and entering is a question for the jury. State *v.* Bell, 29 Iowa 316.

38. State *v.* Clary, 24 S. C. 116.

39. *Arkansas.*— Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679.

California.— People *v.* Jenkins, 16 Cal. 431.

Iowa.— State *v.* Yohe, 87 Iowa 33, 53 N. W. 1088.

Michigan.—People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771.

Montana.— State *v.* Green, 15 Mont. 424, 39 Pac. 322.

Nebraska.—Bergeron *v.* State, 53 Nebr. 752, 74 N. W. 253.

Texas.— Castenada *v.* State, 11 Tex. App. 390.

West Virginia.—State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

See 8 Cent. Dig. tit. "Burglary," § 111.

40. **Breaking and entry.**— As to the propriety and sufficiency of instructions in this respect see State *v.* Yohe, 87 Iowa 33, 53 N. W. 1088; State *v.* Fleming, 107 N. C. 905, 12 S. E. 131; Peryda *v.* State, (Tex. Crim. 1896) 35 S. W. 981. It is error for the court to refuse a defendant's request to instruct, where the evidence warrants the instruction, that "the fact that a person attempts to steal while in a building is not sufficient, without other circumstances proved, to cast on him the burden of proving himself not guilty of burglary." People *v.* Barry, 94 Cal. 481, 29 Pac. 1026. Where the defendant's evidence clearly shows that the door of the house was open, he is entitled to a special charge to acquit if the jury have a reasonable doubt whether the door was closed, and refusal of his request for such a charge is not cured by the fact that the general charge instructed the jury to convict if they believed beyond a reasonable doubt that the defendant broke and entered the house by force without the owner's consent. Duke *v.* State, (Tex. Crim. 1900) 57 S. W. 652. Failure to define the degree of force necessary to constitute a breaking further than to say that it must be by force is not error, where the evidence shows that the entry must have been made by breaking the lock. Young *v.* State, (Tex. Crim. 1898) 44 S. W. 835. In instructing as to the degree of force necessary to constitute a burglary in the daytime under the Texas statute, it is not error to use the statutory illustrations, although there is no evidence that the particular character of the force mentioned in the illustrations was used. Sparks *v.* State, 34 Tex. Crim. 86, 29 S. W. 264. Where the evidence for the state was such as to make it impossible for the jury not to conclude that the window through which defendant entered was an outside window, it was held unnecessary for the court to specially instruct the jury that they could not convict unless they found this fact. State *v.* Butterfield, 75 Mo. 297.

41. **Time of offense — "Night-time."**— An instruction or charge purporting to state all the elements of the offense is fatally defective if it fails to state that the breaking and entry must have been in the night-time, when this is essential. People *v.* Bielfus, 59 Mich. 576, 26 N. W. 771; Bergeron *v.* State, 53 Nebr. 752, 74 N. W. 253. But on a prosecution for burglary by breaking into a house with intent to steal, it is not necessary for the court to define night-time, where by statute, as in Texas, it is equally burglary, where an actual breaking is charged, whether the offense is committed by night or by day. Lane *v.* State, (Tex. Crim. 1894) 28 S. W. 468. And see Smith *v.* State, 34 Tex. Crim. 124, 29 S. W. 775. Where the indictment charges a breaking and entering in the night-time, an instruction to convict if the jury find that the defendant broke and entered as charged in the indictment refers to the whole indictment, and is not erroneous in not charging more

intent,[42] etc. When the indictment is based upon a statute, it is proper and sufficient to define the offense in the language of the statute, if the statute states all the essential elements of the offense.[43] The charge of the court must conform to and be limited by the specific offense charged in the indictment.[44] A charge given is erroneous, and a request to charge is properly refused, if it is merely argumentative,[45] if it is in conflict with the evidence,[46] if there is no evidence in the case

specifically that the breaking and entry must have been in the night-time. Clifton *v.* State, 26 Fla. 523, 7 So. 863. As to the definition of night-time see *supra*, II, D, 2. When night-time is defined by statute an instruction defining night-time in the language of the statute is sufficient. Jackson *v.* State, (Tex. Crim. 1897) 38 S. W. 990.

42. **The felonious intent.**—Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679; State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098. On an indictment for entering a car with intent to steal, it is error to charge that a "mere entering is sufficient," without expressly charging that the entry must have been made with such intent. State *v.* Green, 15 Mont. 424, 39 Pac. 322. An instruction to convict if the jury find from the evidence that the defendant entered the premises in the night-time and took therefrom sundry goods and chattels is erroneous, because it ignores the character of the entry and the intent in entering. People *v.* Jenkins, 16 Cal. 431. A charge that the breaking and entry must have been "for the purpose" of committing theft, instead of with "intent" to commit theft, is not objectionable. Phillips *v.* State, (Tex. Crim. 1898) 45 S. W. 709. An instruction is not erroneous in defining burglary as a breaking, etc., "with a view" to commit a felony, instead of using the words "with intent to," as the meaning is the same. State *v.* Clary, 24 S. C. 116.

Intent to commit larceny.— On a trial for burglary with intent to commit larceny it is necessary to instruct the jury on the law of larceny. State *v.* Yobe, 87 Iowa 33, 53 N. W. 1088; Castenada *v.* State, 11 Tex. App. 390. As to the propriety and sufficiency of instructions on intent to steal see Charles *v.* State, 36 Fla. 691, 13 So. 369. An instruction defining burglary is not erroneous because it uses the words, "intention of stealing," instead of "intention of committing grand or petit larceny." People *v.* Urquidas, 96 Cal. 239, 31 Pac. 52.

Intent to commit rape.— On indictment for burglary with intent to commit rape, which intent must be proved, the court must instruct the jury as to what is necessary to constitute rape. Mitchell *v.* State, 32 Tex. Crim. 479, 24 S. W. 280, 33 Tex. Crim. 575, 28 S. W. 475; Walton *v.* State, 29 Tex. App. 163, 15 S. W. 646.

Intent to murder.— On a prosecution for burglary with intent to murder the court need not define the degrees of murder. Stinnett *v.* State, 32 Tex. Crim. 526, 24 S. W. 908.

Intent not alleged.— An instruction or request to charge is erroneous if it authorizes a conviction on proof of a different intent than that charged. See *infra*, note 44.

Time of existence of intent.— It is proper to refuse to charge that the intent to steal (or to commit the other felony that may be alleged) must have existed "before and not after" the defendant entered the house, as it is sufficient if the intent exists at the time of the entry, and further, if it exists at the time, it is immaterial whether or not it exists afterward. Jackson *v.* State, 102 Ala. 167, 15 So. 344.

43. People *v.* Young, 65 Cal. 225, 3 Pac. 813; State *v.* Willis, 43 La. Ann. 407, 9 So. 11; State *v.* Huntley, 25 Oreg. 349, 35 Pac. 1065.

A charge defining night-time in the language of the statute is sufficient on this point. Jackson *v.* State, (Tex. Crim. 1897) 38 S. W. 990.

44. Lott *v.* State, 17 Tex. App. 598.

Intent.—Where the indictment charges burglary with intent to commit larceny only, it is error to charge that the defendant may be convicted if he intended to commit any felony, for the intent must be proved as alleged. People *v.* Mulkey, 65 Cal. 501, 4 Pac. 507; People *v.* Young, 65 Cal. 225, 3 Pac. 813; State *v.* Taylor, 136 Mo. 66, 37 S. W. 907. And see *supra*, V, B, 6. It is therefore proper to refuse to charge, on such an indictment, that defendant cannot be convicted unless he broke and entered "with intent to commit some felony," as this would imply that he could be convicted if he intended to commit any felony. People *v.* Young, 65 Cal. 225, 3 Pac. 813.

45. See, generally, CRIMINAL LAW.

It is proper to refuse as merely argumentative a request to instruct the jury that they may look to the fact that defendant worked for the owner of the house after the alleged offense, to see whether it shows guilty conscience on his part, and if they think it tends to show innocence they should consider it and give defendant the benefit of all proper inferences. Riley *v.* State, 88 Ala. 188, 7 So. 104.

46. **Instruction in conflict with evidence.**— Where a breaking is shown it is proper to refuse to instruct as to larceny from the house. Tarver *v.* State, 95 Ga. 222, 21 S. E. 381. And see, generally, CRIMINAL LAW. Where, on an indictment for burglary, the uncontradicted evidence shows a breaking and burglary, it is not error to refuse to submit to the jury the statute punishing as a misdemeanor entry of a building under circumstances not amounting to burglary. People *v.* Meegan, 104 N. Y. 529, 11 N. E. 48. Under an indictment charging burglary by force,

on which to base it, although it may be correct in the abstract,[47] if it singles out particular evidence or facts and authorizes a conviction or a particular finding thereon, or tells the jury that they cannot convict thereon, ignoring other evidence or facts which might authorize a different conclusion.[48] When the evidence is circumstantial the court must instruct the jury as to the law applicable to circumstantial evidence.[49] And where the indictment charges both burglary and larceny, the court should instruct the jury as to their authority to convict or acquit with respect to both offenses.[50] Where the evidence shows that the offense if any was as charged in one only of several counts, the jury are properly limited to that count.[51] Inaccurate or erroneous instructions to the jury are no ground for reversing a judgment of conviction, if the defendant could not have been prejudiced thereby.[52] The charge of the court and charges given at the request of the defendant and the state must be considered together, as a whole, in determining whether they are correct.[53]

2. Invading Province of Jury. On a trial for burglary, as in other cases, an instruction is erroneous, and will generally be ground for setting aside a conviction, if it invades the province of the jury as the judges of the facts,[54] as by expressing an opinion or commenting on the weight of the evidence or credibility

threats, and fraud, under the Texas statute, an instruction as to an entry effected by each of such means is reversible error, where the evidence conclusively shows that it was accomplished by force alone. Miller *v.* State, 28 Tex. App. 445, 13 S. W. 646.

47. *California.*— People *v.* Abbott, 107 Cal. 645, 36 Pac. 129.

Iowa.— State *v.* Worthen, 111 Iowa 267, 82 N. W. 910.

Nebraska.— Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512.

New York.— Knickerbocker *v.* People, 43 N. Y. 177.

Texas.—Riding *v.* State, 40 Tex. Crim. 452, 50 S. W. 698; Vallereal *v.* State, (Tex. Crim. 1892) 20 S. W. 557; Neiderluck *v.* State, 23 Tex. App. 38, 3 S. W. 573; Levine *v.* State, 22 Tex. App. 683, 3 S. W. 660; Lott *v.* State, 17 Tex. App. 598. See also King *v.* State, (Tex. Crim. 1902) 67 S. W. 410.

48. *Alabama.*— Cooper *v.* State, 88 Ala. 107, 7 So. 47.

California.— People *v.* Jenkins, 16 Cal. 431.

Missouri.— State *v.* Edwards, 109 Mo. 315, 19 S. W. 91; State *v.* North, 95 Mo. 615, 8 S. W. 799.

Nebraska.— Bergeron *v.* State, 53 Nebr. 752, 74 N. W. 253.

New Jersey.— State *v.* Bullitt, 64 N. J. L. 379, 45 Atl. 773.

North Carolina.— State *v.* Christmas, 101 N. C. 749, 8 S. E. 361.

Vermont.— State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403.

And see, generally, Criminal Law.

An instruction that to constitute a "breaking" there need not have been an entrance of the whole body, but that "breaking of an outside shutter and a pane of glass, and the introduction of an arm into the house," is sufficient, is not objectionable as calling attention to a particular part of the testimony, although the definition so given fits the testimony. Kelley *v.* Com., 21 Ky. L. Rep. 1306, 54 S. W. 949.

49. Robertson *v.* State, (Tex. Crim. 1894) 26 S. W. 728. And see, generally, Criminal Law.

50. On an indictment charging both burglary and larceny, under a statute allowing a conviction of both offenses, the court should instruct the jury that they may convict of burglary and acquit of larceny, or convict of larceny and convict of burglary, or convict or acquit of both. State *v.* Brinkley, 146 Mo. 37, 47 S. W. 793. See *supra*, IV, I, J.

51. Coates *v.* State, 31 Tex. Crim. 257, 20 S. W. 585, holding that where the indictment contains two counts, one charging burglary at night and the other charging burglary in the daytime, and the evidence shows that the offense was committed at night, it is proper for the court, by instruction, to limit the jury to a consideration of the first count.

52. Pritchett *v.* State, 92 Ga. 33, 18 S. E. 350; Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809; Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512; Hehn *v.* State, (Tex. Crim. 1899) 51 S. W. 1118. And see, generally, Criminal Law. Where an indictment charged burglary with intent to commit larceny, and the evidence showed that larceny was committed, but the jury found defendant guilty as charged in the indictment, it was held that it would not be presumed that they intended to find him guilty of the larceny, so as to render misleading an instruction which told the jury that defendant was charged with having broken into a certain store with intent to commit a felony, and that he was charged, further, with having committed larceny after breaking and entering. People *v.* Marks, 90 Mich. 555, 51 N. W. 638.

53. People *v.* Flynn, 73 Cal. 511, 15 Pac. 102; Clifton *v.* State, 26 Fla. 523, 7 So. 863. And see, generally, Criminal Law.

54. See, generally, Criminal Law.

It is proper to refuse an instruction that the jury may consider the fact that defendant voluntarily tried his feet in tracks said

of the witnesses, etc.,[55] or upon the inferences or presumptions of fact to be drawn therefrom,[56] or by assuming as proven facts upon which the evidence is conflicting or is for the jury.[57]

3. As to Possession of Stolen Property. The court must properly instruct the jury as to the effect as evidence of the defendant's possession of property stolen at the time of the burglary, when there is such evidence before them,[58]

to be his as a circumstance in his favor. Potter *v.* State, 92 Ala. 37, 9 So. 402.

55. *California.*—People *v.* Ah Sing, 59 Cal. 400.

Connecticut.—State *v.* Williamson, 42 Conn. 261; State *v.* Leaden, 35 Conn. 515.

Michigan.—People *v.* McCord, 76 Mich. 200, 42 N. W. 1106.

North Carolina.—State *v.* Alston, 113 N. C. 666, 18 S. E. 692.

Texas.— Hines *v.* State, (Tex. Crim. 1897) 42 S. W. 299; Scott *v.* State, (Tex. Crim. 1896) 36 S. W. 276; Searcy *v.* State, 1 Tex. App. 440.

And see, generally, Criminal Law; and *infra*, VII, C, 3.

But it was held that an instruction that certain evidence, if true, established a breaking and entry, and the commission of a crime, was not objectionable, where the court added, in conclusion, that those questions were for the jury to determine. People *v.* Hagan, 14 N. Y. Suppl. 233, 37 N. Y. St. 660.

Undisputed evidence.— Where the evidence shows beyond dispute that the burglary, if committed at all, was committed in the nighttime, and was therefore burglary in the first degree, an instruction that if the defendant is guilty he is guilty of burglary in the first degree is not error. People *v.* Kruger, 100 Cal. 523, 35 Pac. 88. Where the undisputed evidence shows the place broken and entered to have been a house as alleged in the indictment and required by the statute it is not error to charge that it was a house. Willis *v.* State, 33 Tex. Crim. 168, 25 S. W. 1119.

56. State *v.* Leaden, 35 Conn. 515.

57. *Michigan.*— People *v.* McCord, 76 Mich. 200, 42 N. W. 1106.

Missouri.— State *v.* Wheeler, 79 Mo. 366.

Nebraska.— Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512; Metz *v.* State, 46 Nebr. 547, 65 N. W. 190.

North Carolina.—State *v.* Alston, 113 N. C. 666, 18 S. E. 692.

Texas.— Hines *v.* State, (Tex. Crim. 1897) 42 S. W. 299; Searcy *v.* State, 1 Tex. App. 440.

On an indictment for burglary of a dwelling-house an instruction stating in effect that the state charges that the defendant did enter the chicken-house, the same being within the curtilage or protection of the dwelling-house, is not erroneous as assuming such fact, where the evidence shows that the house entered was in fact a chicken-house within the inclosure and under the protection of the dwelling-house, and a statute declares that all outhouses contiguous to or within the curtilage or protection of the dwelling-house shall be considered as parts of the same. King *v.* State, 99 Ga. 686, 26 S. E. 480, 59 Am. St. Rep. 251.

On an indictment for breaking and entering a "warehouse," where the evidence shows that the house was an opera-house, but that it was a warehouse within the meaning of the statute, an instruction that if the defendant broke and entered the "opera-house," etc., he is guilty is not erroneous. Hunter *v.* Com., 20 Ky. L. Rep. 1165, 48 S. W. 1077.

58. As to the sufficiency and propriety of such instructions and of requests to charge see the following cases:

Alabama.— Hale *v.* State, 122 Ala. 85, 26 So. 236; Hicks *v.* State, 99 Ala. 169, 13 So. 375; Dodson *v.* State, 86 Ala. 60, 5 So. 485; Crawford *v.* State, 44 Ala. 45.

California.— People *v.* Brady, (Cal. 1901) 65 Pac. 823; People *v.* Abbott, 101 Cal. 645, 36 Pac. 129; People *v.* Hannon, 85 Cal. 374, 24 Pac. 706.

Georgia.— Davidson *v.* State, 104 Ga. 761, 30 S. E. 946; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Falvey *v.* State, 85 Ga. 157, 11 S. E. 607.

Iowa.— State *v.* Ryan, 113 Iowa 536, 85 N. W. 812.

Kentucky.— Johnson *v.* Com., 12 Ky. L. Rep. 873, 15 S. W. 671.

Michigan.— Stuart *v.* People, 42 Mich. 255, 3 N. W. 863.

Mississippi.— Harris *v.* State, 61 Miss. 304.

Missouri.— State *v.* Owsley, 111 Mo. 450, 20 S. W. 194; State *v.* Scott, 109 Mo. 226, 19 S. W. 89. See also State *v.* Dashman, 153 Mo. 454, 55 S. W. 69.

Nebraska.— Metz *v.* State, 46 Nebr. 547, 65 N. W. 190; Whitman *v.* State, 42 Nebr. 841, 60 N. W. 1025.

New York.— Knickerbocker *v.* People, 43 N. Y. 177; People *v.* White, 3 N. Y. Crim. 366; Jones *v.* People, 6 Park. Crim. (N. Y.) 126.

North Carolina.— State *v.* Graves, 72 N. C. 482.

Texas.— Torres *v.* State, (Tex. Crim. 1900) 55 S. W. 828; Scott *v.* State, (Tex. Crim. 1896) 36 S. W. 276; Franks *v.* State, 36 Tex. Crim. 149, 35 S. W. 977; Hayes *v.* State, 36 Tex. Crim. 146, 35 S. W. 983; Williams *v.* State, (Tex. Crim. 1895) 33 S. W. 371; Threadgill *v.* State, 32 Tex. Crim. 451, 24 S. W. 511; Marshall *v.* State, (Tex. Crim. 1893) 24 S. W. 25; Jackson *v.* State, 28 Tex. App. 143, 12 S. W. 701; Ayres *v.* State, 21 Tex. App. 399, 17 S. W. 253; Payne *v.* State, 21 Tex. App. 184, 17 S. W. 463; Eley *v.* State, (Tex. App. 1890) 13 S. W. 998.

Virginia.— Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352.

but such instruction must be warranted by and in accordance with the evidence,[59] and the court must also submit to the jury any explanation of such possession given by the defendant or arising out of the other evidence.[60] In giving such instructions the court must not invade the province of the jury,[61] as by charging on the weight of the evidence,[62] or assuming that a burglary has been committed,[63] etc. And it is error to single out the fact of possession of the stolen property, when there is other evidence in the case, and authorize a conviction thereon.[64]

United States.—Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272.

And see cases cited *supra*, VI, C, 6; and 8 Cent. Dig. tit. "Burglary," § 118.

It is error to charge that the jury must be satisfied that the defendant did not get possession of the stolen goods found in his possession by any burglary or larceny, but that he got possession in an honest way, for he may have gotten possession in a dishonest way and yet not be guilty of the burglary. Falvey *v.* State, 85 Ga. 157, 11 S. E. 607. And see Cornwall *v.* State, 91 Ga. 279, 18 S. E. 154; State *v.* Dashman, 153 Mo. 454, 55 S. W. 69.

It is proper to refuse an instruction to acquit the defendant, although he was found in possession of the stolen goods, if the jury have a reasonable doubt as to whether he stole them, or as to whether he broke and entered with intent to steal, as requiring an acquittal of burglary on a reasonable doubt of the actual stealing. Hale *v.* State, 122 Ala. 85, 26 So. 236.

Instruction as to circumstantial evidence. — Where the only evidence of defendant's guilt is proof that five days after the burglary he pawned property stolen from the house at the time of the burglary, it is error for the court to fail to instruct the jury as to the law applicable to circumstantial evidence. Robertson *v.* State, (Tex. Crim. 1894) 26 S. W. 728.

Harmless error.— An instruction as to the effect of proof of defendant's possession of the stolen property, although verbally incorrect, will not be ground for reversal of a conviction, if the defendant was not prejudiced thereby. Pritchett *v.* State, 92 Ga. 33, 18 S. E. 350.

59. Accord with the evidence.— People *v.* Abbott, 101 Cal. 645, 36 Pac. 129; Goldsmith *v.* State, 32 Tex. Crim. 112, 22 S. W. 405. Where the defendant has denied possession by him of the stolen property, testified to by another witness, failure to charge the jury on the effect of possession of recently stolen property is not error. Richardson *v.* State, (Tex. Crim. 1897) 42 S. W. 996. It is proper to refuse an instruction as to the effect of mere possession by the defendant of property stolen at the time of the burglary, without other evidence of guilt, where there is other evidence tending to show guilt. Hicks *v.* State, 99 Ala. 169, 13 So. 375. An instruction on the hypothesis that the defendant had individual and exclusive possession of stolen goods is not warranted by evidence that they were found in his mother's house, where he, being a minor, resided as a member of the family. Sparks *v.* State, 111 Ga. 830, 35 S. E. 654.

60. Failure to do so will generally constitute reversible error. Knight *v.* State, (Tex. Crim. 1901) 65 S. W. 88; Alvia *v.* State, (Tex. Crim. 1901) 60 S. W. 551; Williams *v.* State, (Tex. Crim. 1897) 38 S. W. 989; Hays *v.* State, 30 Tex. App. 472, 17 S. W. 1063; Shuler *v.* State, 23 Tex. App. 182, 4 S. W. 581. See Lamater *v.* State, 38 Tex. Crim. 249, 42 S. W. 304, holding a charge sufficient on this point.

And see *supra*, VI, C, 6.

61. See *supra*, VII, B, C, 2; Crawford *v.* State, 44 Ala. 45. The identity of money or property found on the defendant with that stolen is a question for the jury. Com. *v.* Chilson, 2 Cush. (Mass.) 15.

62. Crawford *v.* State, 44 Ala. 45; People *v.* Ah Sing, 59 Cal. 400; Scott *v.* State, (Tex. Crim. 1896) 36 S. W. 276.

For instructions held not to be objectionable as being on the weight of the evidence see Marshall *v.* State, (Tex. Crim. 1893) 24 S. W. 25; Payne *v.* State, 21 Tex. App. 184, 17 S. W. 463.

It is not reversible error to charge that the unexplained possession of stolen property by the defendant is a "guilty circumstance," and that defendant is bound to explain such possession, in order to remove its effect as a circumstance to be considered with other suspicious facts disclosed by the evidence, instead of saying that it is "a circumstance tending to show guilt." People *v.* Abbott, 101 Cal. 645, 34 Pac. 500, 36 Pac. 129.

63. In Metz *v.* State, 46 Nebr. 547, 65 N. W. 190, an instruction in the words: "If you believe from the evidence, beyond a reasonable doubt, that soon after the burglary of the storehouse," etc., the stolen property was in the defendant's possession, etc., was held erroneous as assuming commission of the alleged burglary.

64. Singling out fact of possession.—Franks *v.* State, 36 Tex. Crim. 149, 35 S. W. 977. An instruction as to the inference of guilt from unexplained possession of property stolen at the time of the burglary must be comprehensive enough to include the effect of proof of an alibi, of which there is evidence, to rebut such inference. State *v.* Edwards, 109 Mo. 315, 19 S. W. 91; State *v.* North, 95 Mo. 615, 8 S. W. 799. An instruction authorizing conviction on evidence of defendant's unexplained possession of goods stolen at the time of the burglary is erroneous, where it fails to call attention to evidence of defendant's good

D. Verdict. On the trial of an indictment for burglary, a general verdict of guilty is sufficient, in the absence of a special statutory provision to the contrary, and is a conviction of the highest offense charged in the indictment.[65] In some states, however, it is provided by statute that whenever a crime is distinguished in degrees the jury, if they convict the defendant, must find the degree of the crime of which he is guilty, and where burglary is divided into degrees, a general verdict of guilty, without specifying the degree, is insufficient.[66] The verdict must be responsive to the indictment,[67] and must be intelligible.[68] Where the jury are authorized or required to fix the punishment, a verdict fixing a punishment not authorized by law is void.[69] In most jurisdictions, on an indictment for burglary, the jury may convict of attempt to commit burglary,[70] and on an indictment for burglary in the first degree they may convict of burglary in a less degree, or other included offense.[71] In some jurisdictions, where the indictment charges both burglary and larceny, there may be a conviction of either or both.[72]

character and submit that also to the jury. State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403.

65. Mountain *v.* State, 40 Ala. 344. And see, generally, CRIMINAL LAW.

A general verdict of guilty of burglary is not vitiated by the addition of the words, "and find that the offense was committed since the first day of June 1866 by agreement of counsel," such day being the day when the new penal code went into operation. Mountain *v.* State, 40 Ala. 344. A general verdict is sufficient under an indictment having several counts charging the ownership of the premises and the goods stolen in different persons, where all the counts manifestly relate to the same burglary. Towns *v.* State, 111 Ala. 1, 20 So. 598. A verdict finding the defendant guilty of breaking and entering the store of a certain firm, without setting forth the names of the individuals composing it, as alleged in the indictment, is sufficient. Henderson *v.* Com., 98 Va. 794, 34 S. E. 881.

66. See, generally, CRIMINAL LAW.

Degrees of offense.— Under an indictment charging attempt to commit burglary, but not stating the time of the offense nor specifying the degree, a general verdict of "guilty as charged" is insufficient, where a statute makes every burglary in the night-time burglary in the first degree, and every burglary in the daytime burglary in the second degree, and a general statute provides that whenever a crime is distinguished into degrees the jury, if they convict the defendant, must find the degree of the crime of which he is guilty. People *v.* Travers, 73 Cal. 580, 15 Pac. 293.

67. A verdict of "guilty of breaking" is not responsive to an indictment charging burglary. State *v.* Evans, 49 La. Ann. 329, 21 So. 546. An indictment for burglary will not support a verdict of "guilty of stealing from the dwelling house." State *v.* Maloney, R. M. Charlt. (Ga.) 84; State *v.* Thompson, R. M. Charlt. (Ga.) 80.

68. On indictment for burglary a verdict of guilty of "Burgerally & Theft as charged in the indictment," is so unintelligible as to be void. Haney *v.* State, 2 Tex. App. 504. And see, generally, CRIMINAL LAW.

69. Murphy *v.* State, 7 Coldw. (Tenn.) 516. And see *infra*, VIII.

70. Donaldson *v.* State, 10 Ohio Cir. Ct. 613. And see, generally, INDICTMENTS AND INFORMATIONS.

71. Com. *v.* Hurd, 22 Ky. L. Rep. 509, 58 S. W. 369; State *v.* Fleming, 107 N. C. 905, 12 S. E. 131; Rex *v.* Compton, 3 C. & P. 418, 14 E. C. L. 640; Hungerford's Case, 2 East P. C. 518, 1 Leach 88; Rex *v.* Withal, 2 East P. C. 515, 517, 1 Leach 88. And see, generally, CRIMINAL LAW.

Conviction of less degree or included offense. — In Iowa where a statute provides that on an indictment for an offense consisting of different degrees the jury may find the defendant not guilty of the offense charged but guilty of some inferior degree, there may be a conviction of breaking and entering in the daytime, under an indictment charging a breaking and entering in the night-time. State *v.* Jordan, 87 Iowa 86, 54 N. W. 63. *Contra*, in Nebraska, *In re* McVey, 50 Nebr. 481, 70 N. W. 51. On an indictment for burglary in the first degree by breaking and entering a house actually occupied at the time, the jury may convict of burglary in the second degree by breaking and entering an unoccupied house. State *v.* Fleming, 107 N. C. 905, 12 S. E. 131. A statute providing that when the indictment charges burglary in the first degree, the jury may render a verdict in the second degree, if they deem it proper to do so, does not authorize a verdict in the second degree, where the evidence shows that the offense was in the first degree. State *v.* Johnston, 119 N. C. 883, 26 S. E. 163; State *v.* Alston, 113 N. C. 666, 18 S. E. 692; State *v.* Fleming, 107 N. C. 905, 12 S. E. 131.

72. State *v.* Sprague, 149 Mo. 409, 50 S. W. 901. See *supra*, IV, I, J.

Indictment charging burglary and larceny. — In a prosecution for burglary and larceny charged in the same count as permitted by a statute, a verdict of "guilty in manner and form as charged in the indictment," and assessing the punishment, is sufficient, although it does not say of which of said offenses the defendant is guilty. State *v.* Butterfield, 75 Mo. 297. The accused may be convicted of burglary without also being convicted of larceny, although the indictment charges and the evidence shows both burglary and larceny.

VIII. PUNISHMENT.

At common law burglary was a felony and punishable by death, but within the benefit of clergy. Early statutes, however, took away the benefit of clergy and made the offense punishable in all cases by death.[73] In all jurisdictions, no doubt, the punishment is now fixed by statute at imprisonment in the state prison for a certain term, or within certain terms.[74]

IX. HAVING POSSESSION OF BURGLARIOUS TOOLS OR IMPLEMENTS.

In some jurisdictions statutes have been enacted punishing any person who shall have possession of burglarious tools or implements with intent to use them in the commission of burglary or larceny, etc.[75] The gist of the offense is the having possession of the burglarious implements with intent to use them for a purpose specified in the statute, and the offense is complete as soon as they are procured with a design to so use them.[76] It is not necessary that the implements shall have been originally made and intended for burglarious use, but it is sufficient if they are suitable and intended by the possessor for such use.[77] The intention need not have been to use them in the county in which the defendant is prosecuted,[78]

State *v.* Burdett, 145 Mo. 674, 47 S. W. 796. It has been held that where an indictment charges burglary and larceny, a general verdict is a conviction of the burglary only, and is sufficient. State *v.* McClung, 35 W. Va. 280, 13 S. E. 654. And see State *v.* Williams, 40 W. Va. 268, 21 S. E. 721. But in England, where, on indictment for burglary and also for stealing in a dwelling-house, the defendant was acquitted of the burglary, but found guilty of the stealing, it was held that the verdict should be "not guilty of breaking and entering the dwelling-house in the night, but guilty of stealing," etc. Hungerford's Case, 2 East P. C. 518, 1 Leach 88.

Joint indictment.—On an indictment of two persons for burglary and larceny, one of them may be found guilty of the burglary and larceny, and the other of the larceny only. Rex *v.* Butterworth, R. & R. 387.

73. 4 Bl. Comm. 228.

74. For the construction of particular statutes fixing the punishment for burglary or burglary and larceny see Wilde *v.* Com., 2 Metc. (Mass.) 408; Hackett *v.* Com., 15 Pa. St. 95. Where the statute makes burglary punishable by death, but provides that the jury may commute the punishment to imprisonment for not less than ten nor more than twenty-one years, a verdict of guilty, fixing the punishment at imprisonment for five years, is void, and no judgment can be entered upon it. Murphy *v.* State, 7 Coldw. (Tenn.) 516.

As to forfeiture of property of the person convicted see Com. *v.* Pennock, 3 Serg. & R. (Pa.) 199.

Excessive punishment.— Seven years' imprisonment for burglary of a dwelling-house in the night-time is not excessive punishment. State *v.* O'Lacy, 55 Iowa 749, 7 N. W. 646; State *v.* Foster, 55 Iowa 748, 7 N. W. 643. And see, as to excessiveness of sentences, State *v.* Burton, (Wash. 1902) 67 Pac. 1097.

75. A statute prohibiting a person from making or mending burglars' tools, or from having the same in his possession, does not violate the constitutional provision that no person shall be deprived of his life, liberty, or property without due process of law. *Ex p.* Roberts, 166 Mo. 207, 65 S. W. 726.

76. Com. *v.* Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248.

An intent to commit a felony is not an essential ingredient of the offense of being "found by night, having in possession without lawful excuse any pick-lock, key, crow, jack, bit, or other implement of house-breaking," punished by the English statute of 14 & 15 Vict. c. 19. Reg. *v.* Bailey, 6 Cox C. C. 241, Dears. 244, 17 Jur. 1106, 23 L. J. M. C. 13, 2 Wkly. Rep. 64.

To convict under a statute punishing any person who "shall have or keep in his possession" burglarious tools, etc., "with the intention of using such tools or implements burglariously," it must be shown that the accused had such tools in his possession, knowing them to be such, with the general intent to use them burglariously; but it is not necessary to show a specific intent to use them at a particular time, or in a particular manner, or at any particular place. Nor is it necessary to show that the accused intended to use them himself; it is sufficient if use by another was intended. State *v.* Hahn, 11 Ohio S. & C. Pl. Dec. 311, 8 Ohio N. P. 101.

77. Com. *v.* Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248.

A common key may be within a statute punishing the having possession of any "pick-lock key, crow, jack, bit, or other implement of housebreaking," etc. Reg. *v.* Oldham, 5 Cox C. C. 551, 2 Den. C. C. 472, 16 Jur. 505, 21 L. J. M. C. 134.

78. People *v.* Jones, 124 Mich. 177, 82 N. W. 806. *Compare* Reg. *v.* Jarrald, 9 Cox C. C. 307, 9 Jur. N. S. 629, L. & C. 301, 32

or even within the state,[79] unless the statute so requires. In the notes below will be found decisions of the courts as to the sufficiency of indictments or informations,[80] as to the admissibility[81] and the sufficiency[82] of evidence, and as

L. J. M. C. 258, 8 L. T. Rep. N. S. 515, 11 Wkly. Rep. 787.

79. Davis *v.* State, 87 Ala. 10, 6 So. 266; People *v.* Reilly, 164 N. Y. 600, 59 N. E. 1128 [*affirming* 49 N. Y. App. Div. 218, 63 N. Y. Suppl. 18, 14 N. Y. Crim. 458].

80. See Ryan *v.* Com., 5 Ky. L. Rep. 177.

Sufficiency of indictment.— An indictment alleging possession by the defendants of burglarious implements with intent to use them for the purpose of breaking and entering a building or other depository of money or goods, in order to steal therefrom, may allege the intent generally, and need not allege an intent to use them in a particular place, or for a special purpose, or in any definite manner. Com. *v.* Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248. In England, under a statute punishing any person who shall be found by night armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any dwelling-house or other building, it was held necessary for the indictment to state and the prosecutor to prove the ownership of the building. Reg *v.* Jarrald, 9 Cox C. C. 307, L. & C. 301, 32 L. J. M. C. 258, 9 Jur. N. S. 629, 8 L. T. Rep. N. S. 515, 11 Wkly. Rep. 787. Generally, however, the statutes are such that it is not necessary to allege or prove the building intended to be broken and entered or the owner thereof. People *v.* Edwards, 93 Mich. 636, 53 N. W. 778. Under a statute punishing the having possession of burglar's tools adapted to break open places of deposit, in order to take therefrom any money or property, with intent to use them for such purpose, an information alleging possession with the intent to break open places of deposit in general, and take property therefrom, without specifying any particular place or property, is sufficient. Scott *v.* State, 91 Wis. 552, 65 N. W. 61. Under a statute punishing the having possession of burglar's tools "designed and intended to aid in the commission of burglary or larceny in this State or elsewhere," the place where it is intended to commit burglary is no part of the offense, and need not be stated in the indictment. Davis *v.* State, 87 Ala. 10, 6 So. 266. And see *supra*, notes 78, 79.

Forms of indictments for having possession of burglarious tools and implements see Com. *v.* Day, 138 Mass. 186; Com. *v.* Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248; People *v.* Jones, 124 Mich. 177, 82 N. W. 806; State *v.* Hahn, 11 Ohio S. & C. Pl. Dec. 311, 8 Ohio N. P. 101.

Joint possession and indictment.— Possession of burglarious implements may be joint as well as several, and where the guilty intent of several is manifested by their joint act it becomes a joint offense. In such a case all who join may be indicted jointly or severally. Com. *v.* Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248. And see Reg. *v.* Thompson, 11 Cox C. C. 362, 21 L. T. Rep. N. S. 397.

81. **Admissibility of evidence.**— On a trial for having possession of a burglar's tool knowingly and with intent to use it in committing burglary it is not admissible, in order to prove intent, to show that several months before such possession the defendants were seen covertly loitering about a dwelling-house at night under suspicious circumstances, and that at another time they were convicted of larceny. Leonard *v.* State, 60 N. J. L. 8, 41 Atl. 561. But on a prosecution for having possession of burglar's tools designed and intended for use for burglarious purposes, it may be shown that the defendant, on two occasions prior to the offense charged, committed burglary by the use of similar tools, for the purpose of showing the knowledge and intent alleged. Com. *v.* Day, 138 Mass. 186. And it may be shown that the defendant had possession of other burglar's tools than those mentioned in the indictment, as showing the character of the possession of those mentioned. Com. *v.* Day, 138 Mass. 186. See also State *v.* Hahn, 11 Ohio S. & C. Pl. Dec. 311, 8 Ohio N. P. 101. The state may show the purpose for which the tools found in the defendant's possession are adapted. People *v.* Jones, 124 Mich. 177, 82 N. W. 806. On the question of intent, where there is evidence that defendant had said that he had not been in the safe business long, and would have quit it if he had not met one B, who persuaded him to go out and do some work for him, and that defendant had burglar's tools in his possession, it may be shown that B was a burglar, safe-blower, pickpocket, and chief. People *v.* Howard, 73 Mich. 10, 40 N. W. 789.

82. **Sufficiency of evidence.**— As to the sufficiency of the evidence to sustain a conviction of having possession of burglar's tools with intent to use them in committing burglary see People *v.* Reilly, 164 N. Y. 600, 59 N. E. 1128 [*affirming* 49 N. Y. App. Div. 218, 63 N. Y. Suppl. 18, 14 N. Y. Crim. 458]; People *v.* Thompson, 33 N. Y. App. Div. 177, 53 N. Y. Suppl. 497, 13 N. Y. Crim. 273; People *v.* Morgan, 13 N. Y. Suppl. 448, 35 N. Y. St. 643; Scott *v.* State, 91 Wis. 552, 65 N. W. 61. To support a conviction it is not necessary to prove that all of the implements described in the indictment were in the possession of the defendant, or were suitable for burglarious use, but it is sufficient if it is proved that some of them were. Com. *v.* Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248. Where two defendants are indicted jointly for possession of burglarious implements with intent to use them for burglary, and possession by one is proved, the other cannot be convicted, although it may appear that both intended to use them in a joint undertaking. Com. *v.* Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248.

to the trial in prosecutions for the offense of having possession of burglarious tools with intent to use them in committing burglary, larceny, etc.[83]

BURGLARY INSURANCE. See THEFT INSURANCE.

BURIAL. The act of interring the dead.[1] (Burial: Generally, see CEMETERIES; DEAD BODIES. Liability For Expenses of, see EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE.)

BURKING. The practice of killing persons for the purpose of selling their bodies for dissection.[2]

BURN. To consume with fire.[3] (Burn: Civil Liability For Causing to, see NEGLIGENCE; RAILROADS. Criminal Liability For Causing to, see ARSON.)

BURNING FLUID. A mixture of camphene and alcohol.[4]

BURNING IN THE HAND. See BRANDING.

BURNT-RECORD ACT. See RECORDS.

BURSAR. A treasurer of a college.[5]

BURST. To break or rend by force or violence.[6]

BURYING ALIVE. The ancient punishment of sodomites, and those who contracted with Jews.[7]

BURYING GROUND. See CEMETERIES.

BUSHEL. See WEIGHTS AND MEASURES.

BUSHWACKER. In the civil war of the United States, a person not a part of any regular army, and not answerable to any discipline, but who was a mere lawless bandit, engaged in plundering, robbery, murder, and all conceivable crimes.[8]

BUSINESS.[9] That which occupies the time, attention and labor of men for the purpose of a livelihood or profit;[10] that which occupies the time, attention

83. Questions for jury.— The intent of a person shown to have had possession of burglar's tools is a question of fact for the jury. Reg. *v.* Oldham, 5 Cox C. C. 551, 2 Den. C. C. 472, 16 Jur. 505, 21 L. J. M. C. 134.

Argument of counsel.— An assertion by the prosecuting attorney in his argument that the defendant is a thief, and a ruling by the court that the assertion is warranted by the evidence, is ground for reversing a conviction, where the only evidence is that the defendant had possession of burglar's tools when arrested. Scott *v.* State, 91 Wis. 552, 65 N. W. 61.

1. Wharton L. Lex.

2. 4 Redf. Surr. (N. Y.) 540, where it is said that the term takes its name from a man named Burke who was convicted and executed for the crime in Scotland in 1829.

3. People *v.* Haggerty, 46 Cal. 354, 355 [*quoting* Bishop Crim. L. § 325]; Hester *v.* State, 17 Ga. 130, 132 [*quoting* Webster Dict.].

4. Putnam *v.* Commonwealth Ins. Co., 18 Blatchf. (U. S.) 368, 4 Fed. 753, 764.

5. Wharton L. Lex.

At some American colleges the title is still employed. See Davidson Coll. Cat. (1902) 5; Harvard Univ. Cat. (1902–3) 17.

6. Webster Dict. [*quoted* in Evans *v.* Columbian Ins. Co., 44 N. Y. 146, 151, 4 Am. Rep. 650, where it is said to be synonymous with "explode"].

7. Burrill L. Dict.

8. Curry *v.* Collins, 37 Mo. 324, 328.

9. **Distinguished from "good will."**— "The good will of a business is not the business but is one result springing out of it." McGowan *v.* Griffin, 69 Vt. 168, 172, 37 Atl. 298. *Compare* Middall *v.* Garsed, 125 Pa. St. 358, 361, 17 Atl. 418, where it is said: "The 'transfer of the business' is an uncertain, equivocal expression, and may mean property, or it may mean good will."

Distinguished from "stock," "machinery," and "capital."— "Business does not mean stock, or machinery, or capital and the like. While business cannot be done without these, in commercial language it is as distinct from them as labor is from capital. In speaking of the business that may be done by a merchant, banker or railroad company, the mind does not contemplate or dwell upon the character or quality of the means used, but of the operations, whether great or small, complex or simple, numerous or few, for one or the other of these conditions may arise from much or little stock or capital. In other words, 'business' does not mean dry-goods, nor cash, nor iron rails and coaches. Business is not these lifeless and dead things, but the activities in which they are employed. When in motion, then the owners are said to be in business; and then it is that merchants and others speak of the profits of the business." Braeutigam *v.* Edwards, 38 N. J. Eq. 542, 545.

10. Abel *v.* State, 90 Ala. 631, 633, 8 So. 760; Martin *v.* State, 59 Ala. 34, 36 [*quoted* in Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 153, 24 S. W. 16, 22 L. R. A. 802]; Harris *v.* State, 50 Ala.

and labor of men for the purpose of profit or improvement;[11] that employment which occupies the time, attention and labor;[12] that which busies, or that which occupies the time, attention, or labor of one as his principal concern, whether for a longer or shorter time;[13] that which busies or occupies one's time, attention and labor as his chief concern; that which one does for a livelihood;[14] a calling for the purpose of a livelihood;[15] the employment or occupation in which a person is engaged to procure a living;[16] any particular occupation or employment for a livelihood or gain;[17] employment;[18] occupation;[19] trade or calling;[20] mercantile transactions or traffic in general; concern; right or occasion of making one's self busy; affair;[21] transaction,[22] used in an indefinite sense, and modified by the connected words.[23] The word is of large signification,[24] and in its broadest sense includes nearly all the affairs in which either an individual or a corporation can be actors.[25] (Business: Exemption of Implements Used in, see EXEMPTIONS. Homestead Used in, see HOMESTEADS. Hours For Presentment of Bill or Note, see COMMERCIAL PAPER. License, see LICENSES. Place of — For Presentment of Bill or Note, see COMMERCIAL PAPER; For Service of Process, see PROCESS. Prohibition of, on Sunday, see SUNDAY. Suspension of, on Non-Business Day, see HOLIDAYS; SUNDAY.)

BUSINESS SECTION. That part of a community which is mainly and chiefly

127, 130; Moore *v.* State, 16 Ala. 411, 414 [*quoted* in Weil *v.* State, 52 Ala. 19, 21]; State *v.* Boston Club, 45 La. Ann. 585, 589, 12 So. 895, 20 L. R. A. 185.

11. Webster Dict. [*quoted* in Shryock *v.* Latimer, 57 Tex. 674, 677].

12. Stephenson *v.* Primrose, 8 Port. (Ala.) 155, 167, 33 Am. Dec. 281 [*quoted* in Adam *v.* Musson, 37 Ill. App. 501, 503]. See also Hickey *v.* Thompson, 52 Ark. 234, 237, 12 S. W. 475; Netterville *v.* Barber, 52 Miss. 168, 171.

13. Webster Dict. [*quoted* in Territory *v.* Harris, 8 Mont. 140, 143, 19 Pac. 286; Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 153, 24 S. W. 16, 22 L. R. A. 802].

14. Century Dict. [*quoted* in Waggener *v.* Haskell, 89 Tex. 435, 437, 35 S. W. 1].

15. Moore *v.* State, 16 Ala. 411, 414 [*quoted* in Weil *v.* State, 52 Ala. 19, 21]; State *v.* Boston Club, 45 La. Ann. 585, 589, 12 So. 895, 20 L. R. A. 185.

16. Brush Electric Light, etc., Co. *v.* Wills, 110 Ga. 192, 198, 35 S. E. 365; Goddard *v.* Chaffee, 2 Allen (Mass.) 395, 79 Am. Dec. 796 [*quoted* in Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 153, 24 S. W. 16, 22 L. R. A. 802]; Hacheny *v.* Leary, 12 Oreg. 40, 44, 7 Pac. 329.

17. Webster Dict. [*quoted* in Territory *v.* Harris, 8 Mont. 140, 143, 19 Pac. 286].

18. Sterne *v.* State, 20 Ala. 43, 46; Territory *v.* Harris, 8 Mont. 140, 143, 19 Pac. 286 [*quoting* Webster Dict.]; Waggener *v.* Haskell, 89 Tex. 435, 437, 35 S. W. 1 [*quoting* Century Dict.]; Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 153, 24 S. W. 16, 22 L. R. A. 802 [*quoting* Webster Dict.]; Raines *v.* Watson, 2 W. Va. 371, 390 [*citing* Walker Dict.; Webster Dict.].

19. Territory *v.* Harris, 8 Mont. 140, 143, 19 Pac. 286 [*quoting* Webster Dict.]; Hoagland *v.* Segur, 38 N. J. L. 230, 237; Waggener *v.* Haskell, 89 Tex. 435, 437, 35 S. W. 1 [*quoting* Century Dict.]; Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 153, 24 S. W. 16, 22 L. R. A. 802 [*quoting* Webster Dict.].

20. People *v.* Warden City Prison, 144 N. Y. 529, 538, 39 N. E. 686, 64 N. Y. St. 51, 27 L. R. A. 718.

21. Webster Dict. [*quoted* in Territory *v.* Harris, 8 Mont. 140, 143, 19 Pac. 286].

22. De Forth *v.* Wisconsin, etc., R. Co., 52 Wis. 320, 328, 9 N. W. 17, 38 Am. Rep. 737 [*citing* Webster Dict.].

23. Webster Dict. [*quoted* in Territory *v.* Harris, 8 Mont. 140, 143, 19 Pac. 286].

24. Goddard *v.* Chaffee, 2 Allen (Mass.) 395, 79 Am. Dec. 796 [*quoted* in Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 153, 24 S. W. 16, 22 L. R. A. 802]; Hacheny *v.* Leary, 12 Oreg. 40, 44, 7 Pac. 329.

Broader than "trade." — The word has a more extensive meaning than "trade" (Harris *v.* Amery, L. R. 1 C. P. 148, 154, H. & R. 357, 1 Hop. & Ph. 294, 12 Jur. N. S. 165, 35 L. J. C. P. 89, 13 L. T. Rep. N. S. 504, 14 Wkly. Rep. 199), but must be limited when used in connection therewith (Bohnsack *v.* McDonald, 26 Misc. (N. Y.) 493, 496, 56 N. Y. Suppl. 347).

25. People *v.* Tax Com'rs, 23 N. Y. 242, 244; People *v.* New York, 22 How. Pr. (N. Y.) 143, 147; *In re* Alabama, etc., R. Co., 9 Blatchf. (U. S.) 390, 1 Fed. Cas. No. 124, 6 Am. L. Rev. 577, 5 Am. L. T. Rep. 76, 6 Nat. Bankr. Reg. 107. See also Bloom *v.* Richards, 2 Ohio St. 387, 403.

"When applied to a public corporation, signifies the conduct of the usual affairs of the corporation, and the conduct of such affairs as commonly engage the attention of township and county officers." Jackson County *v.* State, 147 Ind. 476, 487, 46 N. E. 908; Mount *v.* State, 90 Ind. 29, 31, 47 Am. Rep. 192.

devoted to business purposes or uses and in which stores, factories, offices, shops, and the like predominate.[26]

BUT. Except;[27] except that;[28] without this;[29] on the contrary; on the other hand;[30] in addition; to boot;[31] yet; still;[32] moreover.[33] It is an appropriate term to indicate the intention of those who use it, to limit or restrain the sense or effect of something which had before been said;[34] a proviso, condition or qualification;[35] or that what follows is an exception to that which has gone before, and is not to be controlled by it.[36]

BUTCHER. One who slaughters animals or dresses their flesh for market; one whose occupation is to kill animals for food;[37] one who slaughters animals for market; one whose occupation is to kill animals for the table;[38] a person who kills animals to sell their flesh;[39] but the word may and often does include the person who cuts up and sells meat.[40] (Butcher: License of, see LICENSES. Place of Business of, as Nuisance, see NUISANCE. Regulation of Business of, see HEALTH.)

BUTCHERED. Killed in an unusual, cruel or wanton manner.[41]

BUTT. A measure of wine containing at least one hundred and twenty-six gallons.[42]

BUTTALS. See ABUTTALS.

BUTTER. See ADULTERATION; FOOD.

BUTTS. Short pieces of land left unplowed at the ends of fields where the plow was turned about.[43]

BUTTS AND BONDS. A phrase sometimes used in conveyancing, where a particular piece of land is described by enumerating the several lands or parcels which adjoin it, or upon which it abuts, on the different sides.[44]

BUY IN. To purchase, at public sale, property which is one's own or which one has caused or procured to be sold.[45]

26. Capital City Gaslight Co. *v.* Des Moines, 93 Iowa 547, 557, 61 N. W. 1066, where it is said: "The word 'business' is here used in contradiction from the word 'resident' or 'dwelling,' or 'vacant' or 'unoccupied.' The great majority of men have one place in which they perform their daily labor, and another in which they live,— their homes. For convenience, business usually concentrates itself, and the place or area of such concentration is the 'business' section of a city. On the contrary, the homes or residences of the inhabitants spread themselves over a wide area, and the latter is the 'residence' section of a city."

27. Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408, 436; Rock Springs First Nat. Bank *v.* Foster, 9 Wyo. 157, 165, 61 Pac. 466, 467, 63 Pac. 1056, 54 L. R. A. 549; Abbott *v.* Middleton, 21 Beav. 143, 145, 7 H. L. Cas. 68, 5 Jur. N. S. 717, 28 L. J. Ch. 110.

28. Robert *v.* Sliffe, 41 Ohio St. 225, 231; State *v.* McAllister, 38 W. Va. 485, 502, 18 S. E. 770, 24 L. R. A. 343.

29. Abbott *v.* Middleton, 21 Beav. 143, 145, 7 H. L. Cas. 68, 5 Jur. N. S. 717, 28 L. J. Ch. 110.

30. Sterling Gas Co. *v.* Higby, 134 Ill. 557, 565, 25 N. E. 660.

31. Abbott *v.* Middleton, 21 Beav. 143, 145, 7 H. L. Cas. 68, 5 Jur. N. S. 717, 28 L. J. Ch. 110.

32. Adams *v.* Yazoo, etc., R. Co., 75 Miss. 275, 284, 22 So. 824.

33. Adams *v.* Yazoo, etc., R. Co., 75 Miss. 275, 284, 22 So. 824; Abbott *v.* Middleton, 21 Beav. 143, 145, 7 H. L. Cas. 68, 5 Jur. N. S. 717, 28 L. J. Ch. 110.

34. Stonestreet *v.* Harrison, 5 Litt. (Ky.) 161, 164.

35. Leggett *v.* Firth, 132 N. Y. 7, 11, 29 N. E. 950, 42 N. Y. St. 851.

36. Western Union Tel. Co. *v.* Harris, (Tenn. Ch. 1899) 52 S. W. 748, 752.

37. Webster Dict. [*quoted* in Rockville *v.* Merchant, 60 Mo. App. 365, 369].

38. Cleaver *v.* Bacon, 4 Times Rep. 27, 28 [*quoting* Imperial Dict.].

39. Eastman *v.* Jackson, 10 Lea (Tenn.) 162, 163.

40. Green *v.* State, 56 Ark. 386, 387, 19 S. W. 1055 [*citing* Browne Judicial Interpret. 57]; Rockville *v.* Merchant, 60 Mo. App. 365; Doe *v.* Spry, 1 B. & Ald. 617, 620, 19 Rev. Rep. 404. See also District of Columbia *v.* Oyster, 4 Mackey (D. C.) 285, 287, 54 Am. Rep. 275; Wiest *v.* Luyendyk, 73 Mich. 661, 665, 41 N. W. 839, 840 (holding that "butcher shop" and "meat market" are interchangeably used, and commonly used as synonymous terms). But *compare* Henback *v.* State, 53 Ala. 523, 526, 25 Am. Rep. 650.

41. State *v.* Gile, 8 Wash. 12, 22, 35 Pac. 417.

42. Burrill L. Dict.

43. Littleton Rep. 13, where they are also called "headlands."

44. Burrill L. Dict., where it is said that properly these words have "nearly or quite the same sense as the more technical expression 'metes and bounds.'"

45. Black L. Dict.

BY.[46] Along the line of;[47] near;[48] besides; passing; in presence;[49] on;[50] at;[51] not later than;[52] as soon as;[53] as early as;[54] before;[55] on or before;[56] to;[57] through the means, act or instrumentality of;[58] according to.[59] (See also BYE.)

BY-BIDDING. Making fictitious bids on property at an auction, under a secret arrangement with the owner or auctioneer, for the purpose of misleading and stimulating other persons who are bidding in good faith.[60] (See, generally, AUCTIONS AND AUCTIONEERS.)

BYE or BY. An habitation;[61] a township.[62]

BY ESTIMATION. A phrase used in conveyances, in describing the quantity of land conveyed, where it is not precisely ascertained by measurement.[63]

BY GOD AND MY COUNTRY. In old English criminal practice, the established formula of reply by a prisoner, when arraigned at the bar, to the question, "Culprit, how wilt thou be tried?"[64]

BY-LAWS. The law of the inhabitants of the corporate place or district, made by themselves or the authorized body, in distinction from the general law of the country, or the statute law of the particular state;[65] the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns, and the rights and duties of its members amongst themselves;[66] a rule or law of a corporation for its government;[67] the private laws of corporations or other boards or bodies.[68]

46. Use in description of boundaries see BOUNDARIES, 5 Cyc. 869, note 4.

47. Bailey *v.* White, 41 N. H. 337, 343; Peaslee *v.* Gee, 19 N. H. 273, 277.

48. Wilson *v.* Inloes, 6 Gill (Md.) 121, 153; Rix *v.* Johnson, 5 N. H. 520, 522, 22 Am. Dec. 472; Rankin *v.* Woodworth, 3 Penr. & W. (Pa.) 48; Ferguson *v.* Coleman, 3 Rich. (S. C.) 99, 100, 45 Am. Dec. 761.

49. Rankin *v.* Woodworth, 3 Penr. & W. (Pa.) 48.

50. Reese *v.* Billing, 9 Ala. 263, 265; Wachsmuth *v.* Routledge, (Oreg. 1897) 51 Pac. 443, 444.

51. Reese *v.* Billing, 9 Ala. 263, 265; Ferguson *v.* Coleman, 3 Rich. (S. C.) 99, 100, 45 Am. Dec. 761.

52. Elizabeth City Cotton Mills *v.* Dunstan, 121 N. C. 12, 16, 27 S. E. 1001, 61 Am. St. Rep. 654 [*quoting* Century Dict.; Standard Dict.; Webster Dict.].

53. Elizabeth City Cotton Mills *v.* Dunstan, 121 N. C. 12, 16, 27 S. E. 1001, 61 Am. St. Rep. 654 [*quoting* Webster Dict.].

54. Elizabeth City Cotton Mills *v.* Dunstan, 121 N. C. 12, 16, 27 S. E. 1001, 61 Am. St. Rep. 654 [*quoting* Standard Dict.].

55. Express Pub. Co. *v.* Aldine Press, 126 Pa. St. 347, 352, 17 Atl. 608; Miller *v.* Phillips, 31 Pa. St. 218, 221; Wilson *v.* Rodeman, 30 S. C. 210, 213, 8 S. E. 855 [*citing* Webster Dict.].

56. Higley *v.* Gilmer, 3 Mont. 433, 438; Coonley *v.* Anderson, 1 Hill (N. Y.) 519, 522; Ferguson *v.* Coleman, 3 Rich. (S. C.) 99, 100, 45 Am. Dec. 761.

57. Com. *v.* Griffin, 105 Mass. 175.

58. O'Brien *v.* East River Bridge Co., 36 N. Y. App. Div. 17, 21, 55 N. Y. Suppl. 206 [*reversed*, on other grounds, in 161 N. Y. 539, 56 N. E. 74, 48 L. R. A. 122].

59. Haubert *v.* Haworth, 78 Pa. St. 78, 83 [*citing* Webster Dict.].

60. Black L. Dict.

61. Hanna *v.* Nassau Electric R. Co., 18 N. Y. App. Div. 137, 142, 45 N. Y. Suppl. 437.

62. Board of Health *v.* Copcutt, 71 Hun (N. Y.) 87, 24 N. Y. Suppl. 625, 54 N. Y. St. 311. See also *infra*, note 65.

63. Burrill L. Dict. See also Hays *v.* Hays, 126 Ind. 92, 93, 25 N. E. 600, 11 L. R. A. 376; Jenkins *v.* Bolgiano, 53 Md. 407, 420; Tarbell *v.* Bowman, 103 Mass. 341, 344; Weart *v.* Rose, 16 N. Y. Eq. 290, 297.

64. Black L. Dict.

65. Hanna *v.* Nassau Electric R. Co., 18 N. Y. App. Div. 137, 142, 45 N. Y. Suppl. 437.

"The terms 'by-law,' 'ordinance' and 'municipal regulation' have substantially the same meaning, and are defined 'to be the laws of the corporate district, made by the authorized body, in distinction from the general law of the state." State *v.* Lee, 29 Minn. 445, 451, 13 N. W. 913 [*quoted* in Rutherford *v.* Swink, 96 Tenn. 564, 567, 35 S. W. 554]. See also Bills *v.* Goshen, 117 Ind. 221, 225, 20 N. E. 115, 3 L. R. A. 261; National Bank of Commerce *v.* Grenada, 44 Fed. 262, 263.

"Their history is briefly this: When the Danes acquired possession of a shire in England, the township was often called a 'by,' and as they enacted laws of their own they were called by-laws or town laws." Board of Health *v.* Copcutt, 71 Hun (N. Y.) 87, 24 N. Y. Suppl. 625, 54 N. Y. St. 311.

66. Com. *v.* Turner, 1 Cush. (Mass.) 493, 496.

67. Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508, 539.

68. Board of Health *v.* Copcutt, 71 Hun (N. Y.) 87, 24 N. Y. Suppl. 625, 54 N. Y. St. 311.

They are properly subordinate rules for the government of the body passing them.[69] (By-Laws of: Banking Corporations, see BANKS AND BANKING. Building and Loan Associations, see BUILDING AND LOAN SOCIETIES. Clubs, see CLUBS. Corporations, see CORPORATIONS. Exchanges, see EXCHANGES. Insurance Companies, see INSURANCE. Municipal Corporations, see MUNICIPAL CORPORATIONS. Mutual Benefit Insurance Associations, see MUTUAL BENEFIT INSURANCE. Unincorporated Associations, see ASSOCIATIONS.)

BY-ROAD. An unfrequented path; an obscure road;[70] a private, unfrequented, or obscure road;[71] an obscure or neighborhood road in its earlier existence not used to any great extent by the public, yet so far a public road that the public have, of right, free access to it at all times;[72] a road used by the inhabitants but not laid out.[73] (See, generally, PRIVATE ROADS.)

BYSTANDER. One who stands near; one who has no concern with the business transacting.[74] (Bystander: Signing Bill of Exceptions, see APPEAL AND ERROR. Summoning For Juryman, see JURIES.)

BY THE BYE. Incidentally.[75]

BY VIRTUE OF. By or through the authority of.[76]

BY VOTE. By vote of the majority, unless a different intent is shown by express terms.[77]

BY WAY OF. As for the purpose of; in character of; as being.[78]

C. See CENT.

CABALLERIA. In Spanish law, an allotment to a horse soldier of land acquired by conquest, being a strip one hundred feet wide and two hundred feet deep.[79]

CABINET. The advisory board or counsel of a chief executive;[80] a room set apart and devoted to the preservation of articles of antiquity;[81] a set of boxes or drawers for curiosities; any place in which things of value are hidden; a closet; a small room.[82]

CABLE. See SHIPPING; TELEGRAPHS AND TELEPHONES.

CABLE-ROAD. See STREET RAILROADS.

CABOOSE CAR. See CARRIERS.

CACHEPOLUS or CACHERELLUS. An inferior bailiff; a catchpole.[83]

CACICAZGOS. In Spanish-American law, property entailed on the caciques, or heads of Indian villages, and their descendants.[84]

CADASTRE. In Spanish law, an official statement of the quantity and value

69. Kirkpatrick *v.* Keota United Presby. Church, 63 Iowa 372, 376, 19 N. W. 272, where it is said that a by-law "may be a rule subordinate to a charter or articles of incorporation, but it may as well be a rule subordinate to mere articles of association, such as mere unincorporated clubs and societies adopt for their government." See also Taylor *v.* Lambertville, 43 N. J. Eq. 107, 111, 10 Atl. 809.

70. Worcester Dict. [*quoted* in Stevens *v.* Allen, 29 N. J. L. 68, 71].

71. Perrine *v.* Farr, 22 N. J. L. 356, 372 [*citing* Johnson Dict.; Webster Dict.].

72. Wood *v.* Hurd, 34 N. J. L. 87, 89 [*quoted* in State *v.* Ridgewood, 46 N. J. L. 508, 509].

73. Van Blarcom *v.* Frike, 29 N. J. L. 516, 517, where it is said they are often called "drift-ways."

74. State *v.* Jones, 102 Mo. 305, 307, 14 S. W. 946, 15 S. W. 556 [*quoting* Webster Dict.].

75. Burrill L. Dict.

A term used in former English practice to denote the method of filing a declaration against a defendant who was already in the custody of the court at the suit of a different plaintiff or of the same plaintiff in another cause. Black L. Dict.

76. Bassett *v.* Mills, 89 Tex. 162, 166, 34 S. W. 93 [*quoting* Century Dict.].

77. Bean *v.* Glover School Dist. No. 11, 38 Vt. 177, 178.

78. Jersey City Gas-Light Co. *v.* United Gas Imp. Co., 46 Fed. 264, 266.

79. Strother *v.* Lucas, 12 Pet. (U. S.) 410, 442 note, 9 L. ed. 1137.

80. Black L. Dict.

81. *In re* Glaenzer, 55 Fed. 642, 644, 5 C. C. A. 225 [*citing* Century Dict.].

82. Worcester Dict. [*quoted* in *In re* Glaenzer, 67 Fed. 532, 533].

83. Jacob L. Dict.

84. Burrill L. Dict. [*citing* Schmidt Civ. L. 309].

of real property in any district, made for the purpose of justly apportioning the taxes payable on such property.[85]

CADASTU. In French law, the same as CADASTRE,[86] *q. v.*

CADE. A cask containing five hundred herrings or one thousand sprats.[87]

CADET. A student at the military academy at West Point[88] and formerly at the naval academy at Annapolis;[89] one who is trained for the English army at Woolwich, previously to obtaining a commission; a younger brother.[90] (See, generally, ARMY AND NAVY.)

CADI. The name of a Turkish civil magistrate.[91]

CADUCARY. Having the character of escheat.[92]

CADUCITY. In Louisiana, lapse; failure to take effect.[93] (See, generally, DESCENT AND DISTRIBUTION.)

CÆSAREAN OPERATION. A surgical operation whereby the fœtus, which can neither make its way into the world by the ordinary and natural passage, nor be extracted by the attempts of art, whether the mother and fœtus be yet alive, or whether either of them be dead, is, by a cautious and well-timed operation, taken from the mother, with a view to save the lives of both, or either of them.[94]

CÆTERIS TACENTIBUS. The others being silent; the other judges expressing no opinion.[95]

CAIRNS' ACT. An English statute[96] for enabling the court of chancery to award damages.[97]

CALCULATE. To compute or reckon.[98]

CALCULATED. Fitted; adapted;[99] suited;[1] adapted by design.[2]

CALEFAGIUM. A right to take fuel yearly.[3]

CALENDAR. The division of time into years, months, weeks and days, and a register of them;[4] a list or enumeration of causes arranged for trial in court.[5] (Calendar: Month, see MONTH. Of Causes—For Trial, see CRIMINAL LAW; TRIAL; On Appeal, see APPEAL AND ERROR. Of Prisoners, see CALENDAR OF PRISONERS.)

CALENDAR OF PRISONERS. In English practice, a list kept by the sheriffs, containing the names of all the prisoners in their custody, with the several judgments against each in the margin.[6]

CALENDS. The first day of each Roman month.[7]

CALF. The young of the bovine species.[8]

85. Strother *v.* Lucas, 12 Pet. (U. S.) 410, 428 note, 9 L. ed. 1137.

86. Black L. Dict.

87. Wharton L. Lex.

88. U. S. Rev. Stat. (1872), 1309.

89. See 22 U. S. Stat. at L. 285, where such students are styled "naval cadets." But by the act of congress of July 1, 1902, this title was changed to "midshipman."

90. Wharton L. Lex.

91. Black L. Dict.

92. Burrill L. Dict.

Used in the expression "It became a sort of caducary succession" by Ld. Mansfield in Burgess *v.* Wheate, 1 Eden 177, 228, 1 W. Bl. 123.

93. Century Dict. See also Merrick Rev. Civ. Code La. (1900), p. 951.

94. Black L. Dict.

95. Burrill L. Dict.

Used in the old reports as in the sentence "Ch. J. and Eyres (*cæteris tacentibus*) that the action lieth" in Stockton *v.* Collison, Comb. 186.

96. 21 & 22 Vict. c. 27.

97. Wharton L. Lex.

98. Oakes *v.* Mitchell, 15 Me. 360, 362.

99. Smallwood *v.* Com., 19 Ky. L. Rep. 344, 40 S. W. 248.

1. Smallwood *v.* Com., 19 Ky. L. Rep. 344, 40 S. W. 248; Gerrish *v.* Norris, 9 Cush. (Mass.) 167, 170.

2. Gerrish *v.* Norris, 9 Cush. (Mass.) 167, 170.

3. Burrill L. Dict.

4. Rives *v.* Guthrie, 46 N. C. 84, 86.

The word is derived from the verb *calare*, — to proclaim, from the fact that, among the Romans, it was the duty of the *Pontifex Maximus*, on the first day of every month, to proclaim the month, with the festivals occurring in it, and the time of the new moon. Rives *v.* Guthrie, 46 N. C. 84, 86.

5. Titley *v.* Kaehler, 9 Ill. App. 537, 539, where it is said: "It may or may not be synonymous with the statutory word 'docket.'"

6. Burrill L. Dict.

7. Rives *v.* Guthrie, 46 N. C. 84, 87.

8. Milligan *v.* Jefferson County, 2 Mont. 543, 547.

CALL. An official declaration that sums subscribed are required to be paid,[9] sometimes termed assessments;[10] a privilege of calling or not calling for property bought;[11] the designation, in an entry, patent, or grant of lands, of a visible natural object as a limit or boundary;[12] a summons to the parties entitled to meet, directing them to meet.[13] In the Presbyterian church, an instrument issuing from the congregation, which may be signed either by the elders and deacons, by the trustees, or by a select committee, and attested by the moderator of the meeting, inviting a minister to become their pastor.[14]

CALLED FOR TRIAL. The stage of the cause when both parties have announced that they are ready, or when a continuance, having been applied for, has been denied.[15] (See also CALLING A CASE FOR TRIAL.)

CALLING. Employment;[16] profession; trade;[17] usual occupation, profession, or employment; vocation.[18]

CALLING A CASE FOR TRIAL. An announcement or declaration by the court that the cause has been reached in its order, and that the judicial examination of the issues of law or fact upon which the decision of the cause depends is about to begin.[19] (See also CALLED FOR TRIAL.)

CALLING THE PLAINTIFF. An old term for a nonsuit.[20]

CALLING TO THE BAR. Conferring the dignity or degree of barrister at law upon a member of one of the Inns of Court.[21]

CALLING UPON A PRISONER. ALLOCUTION,[22] *q. v.*

CALUMNY. In the civil law, an unjust prosecution or defense of a suit.[23]

CAMBIPARTIA. In old English law, champerty.[24]

CAMBIPARTICEPS. In old English law, a champertor.[25]

CAMBIST. A person skilled in exchanges; a dealer in promissory notes and bills of exchange.[26]

CAMERA. In old English law, a chamber, room, or apartment; a judge's chamber; a treasury; a chest or coffer.[27]

9. Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. L. 363, 365 [*quoted* in American Alkali Co. *v.* Campbell, 113 Fed. 398, 400]; Germania Iron Min. Co. *v.* King, 94 Wis. 439, 441, 69 N. W. 181, 36 L. R. A. 51. See, generally, CORPORATIONS.

"The term 'call' is susceptible of three meanings. It may signify the resolution itself, or the time of notification, or the day on which the money is made payable." Ambergate, etc., R. Co. *v.* Mitchell, 4 Exch. 540, 19 L. J. Exch. 89, 6 R. & Can. Cas. 235. See also Germania Iron Min. Co. *v.* King, 94 Wis. 439, 442, 69 N. W. 181, 36 L. R. A. 51 [*quoting* Cook Stock, § 104]; Newry, etc., R. Co. *v.* Edmunds, 2 Exch. 119, 17 L. J. Exch. 102, 5 R. & Can. Cas. 275; Reg. *v.* Londonderry, etc., R. Co., 13 Q. B. 998, 13 Jur. 939, 18 L. J. Q. B. 343, 6 R. & Can. Cas. 1, 66 E. C. L. 998.

10. Arroyo Ditch, etc., Co. *v.* Los Angeles Super. Ct., 92 Cal. 47, 50, 28 Pac. 54, 27 Am. St. Rep. 91; Santa Cruz R. Co. *v.* Spreckles, 65 Cal. 193, 196, 3 Pac. 661, 802; Stewart *v.* Walla Walla Printing, etc., Co., 1 Wash. 521, 522, 20 Pac. 605.

11. Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 97, 43 N. E. 774, 31 L. R. A. 529; Pearce *v.* Foote, 113 Ill. 228, 234, 55 Am. Rep. 414; Pixley *v.* Boynton, 79 Ill. 351, 353; Miles *v.* Andrews, 40 Ill. App. 155, 172; Carroll *v.* Holmes, 24 Ill. App. 453, 456; Miller *v.* Bensley, 20 Ill. App. 528, 530; Osgood *v.* Bander, 75 Iowa 550, 556, 39 N. W. 887, 1 L. R. A. 655.

12. Burrill L. Dict. See, generally, BOUNDARIES.

13. Paola, etc., R. Co. *v.* Anderson County, 16 Kan. 302, 307.

14. Paddock *v.* Brown, 6 Hill (N. Y.) 530, 532 [*citing* Const. Presby. Church (Ed. 1842) 436]. See, generally, RELIGIOUS SOCIETIES.

15. Shaw *v.* State, 17 Tex. App. 225.

16. Raines *v.* Watson, 2 W. Va. 371, 390 [*citing* Walker Dict.; Webster Dict.].

17. Shryock *v.* Latimer, 57 Tex. 674, 677.

18. Century Dict. [*quoted* in Waggener *v.* Haskell, 89 Tex. 435, 437, 35 S. W. 1].

19. Moore *v.* Sargent, 112 Ind. 484, 488, 14 N. E. 466.

20. Sweet L. Dict.

21. Burrill L. Dict.

22. Sweet L. Dict.

23. Lanning *v.* Christy, 30 Ohio St. 115, 117, 27 Am. Rep. 431, where it is said: "The phrase is still said to be used in the courts of Scotland and the ecclesiastical and admiralty courts of England, though we do not find cases of the kind in the reports."

24. Black L. Dict.

25. Burrill L. Dict.

26. Wharton L. Lex.

27. Black L. Dict.

CAMERA SCACCARII. The exchequer chamber.[28]

CAMERA STELLATA. The Star Chamber.[29]

CAMPBELL'S ACT. The English statute[30] by which an action for damages was given for the benefit of certain relatives of a person whose death has been caused by a wrongful act, neglect, or default, for which he himself could, if death had not ensued, have recovered damages from the wrong-doer.[31] (See, generally, DEATH.)

CAMPFIGHT. The fighting of two champions or combatants in the field; the judicial combat or duellum.[32] (See also ACRE FIGHT; BATTEL.)

CAMPHENE. Turpentine purified by repeated distillation.[33]

28. Burrill L. Dict. See also Bretherton *v.* Wood, 3 B. & B. 54, 6 Moore C. P. 141, 9 Price 408, 23 Rev. Rep. 556.
29. Wharton L. Lex.
30. 9 & 10 Vict. c. 93.
31. Sweet L. Dict.
32. Burrill L. Dict.
33. Putnam *v.* Commonwealth Ins. Co., 18 Blatchf. (U. S.) 368, 4 Fed. 753, 764.

CANALS

By Robert M. Heath

CROSS-REFERENCES

For Matters Relating to:
Canals:
As Boundaries, see BOUNDARIES.
For Drainage, see DRAINS.
For Irrigation, see WATERS.
Right to Cut Ice in, see WATERS.
Riparian Rights of Owners Bounded by, see NAVIGABLE WATERS.
Taxation of, see TAXATION.
Improvement of Navigable Waters, see NAVIGABLE WATERS.
Jurisdiction of Admiralty Over Canals and Canal-Boats, see ADMIRALTY.

I. DEFINITION.

A canal has been defined as "a trench or excavation in the earth, for conducting water and confining it to narrow limits."[1] The term includes the excavation, banks, and other parts of the general structure, as well as the stream itself.[2]

II. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

A. Location. In locating a canal it is the duty of a company to carry out as far as possible the object for which its franchise was granted,[3] but the company can select the route within the limits of its charter.[4]

B. Acquisition of Property — 1. MANNER OF ACQUIRING — a. In General. The acquisition of property of all kinds for the construction or maintenance of canals must be in the particular way provided by the law or charter.[5]

1. Bishop *v.* Seeley, 18 Conn. 389, 394 [*quoting* Webster Dict.]. See also Agawam Canal Co. *v.* Edwards, 36 Conn. 476, 501.

Canals for purposes of navigation are alone considered in this article. For drainage canals see DRAINS; for irrigation canals see WATERS.

2. *Connecticut.*—Agawam Canal Co. *v.* Edwards, 36 Conn. 476; Bishop *v.* Seeley, 18 Conn. 389.

New Jersey.— State *v.* Betts, 24 N. J. L. 555.

New York.— Genesee Valley Canal R. Co. *v.* Slaight, 49 Hun (N. Y.) 35, 1 N. Y. Suppl. 554, 17 N. Y. St. 241, 14 N. Y. Civ. Proc. 420.

Ohio.— Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92.

Pennsylvania.— Pennsylvania Canal Co. *v.* Harris, 101 Pa. St. 80.

Ponds from overflow not part of canal.— A pond formed in low grounds by overflow from a canal is not a part thereof. Brookville Hydraulic Co. *v.* Butler, 91 Ind. 134, 46 Am. Rep. 580.

3. Binney's Case, 2 Bland (Md.) 99; Chesapeake, etc., Canal Co. *v.* Key, 3 Cranch C. C. (U. S.) 599, 5 Fed. Cas. No. 2,649.

4. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Chesapeake, etc., Canal Co. *v.* Key, 3 Cranch C. C. (U. S.) 599, 5 Fed. Cas. No. 2,649.

5. Farnum *v.* Blackstone Canal Corp., 1 Sumn. (U. S.) 46, 8 Fed. Cas. No. 4,675.

Right of canal company as riparian owner. — A canal company purchased riparian lands, and by act of parliament was authorized to take water for canal purposes from all streams within a certain distance of the canal. A mill company having a mill upon the banks of the same stream on which the lands bought by the canal company were situated used the stream not only for mill purposes but also to supply a town with water. It was held that the canal company had greater rights as riparian owner than others and could prevent the mill company from taking more water than it was entitled to as riparian owner. Swindon Waterworks Co. *v.* Wilts, etc., Canal Nav. Co., L. R. 7 H. L. 697, 45 L. J. Ch. 638,

b. By Eminent Domain — (I) *In General.* The state having the power to build canals itself and to grant to others franchises so to do can authorize the acquisition of property of all kinds needed in making and maintaining canals.[6] In exercising this right of eminent domain no more property can be taken than is necessary for the canal purpose;[7] and the appropriation must be directly for canal purposes,[8] and must be so definite that the parties to be affected thereby can know what is taken and how their rights are affected.[9]

(II) *Possession and Use.* Where the law authorizes it the appropriation of property may be made by taking possession of it and using the same,[10] but where property is so appropriated the acts must be performed by or under the direction of the particular officials designated by the law or charter.[11]

33 L. T. Rep. N. S. 513, 24 Wkly. Rep. 284.

6. Lands may be thus acquired upon which canals may be dug and the necessary water to fill the same can be taken and appropriated in the manner required for such purpose. Such waters may be accumulated by dams and reservoirs and conveyed by feeders and cuts or otherwise into the canal. Blair *v.* Kiger, 111 Ind. 193, 12 N. E. 293; Wabash, etc., Canal *v.* State, 7 Ind. 180; Butler *v.* State, 6 Ind. 165; Wright *v.* Shanahan, 149 N. Y. 495, 44 N. E. 74; Silsby Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264; Walrath *v.* Barton, 11 Barb. (N. Y.) 382; Lynch *v.* Stone, 4 Den. (N. Y.) 356; Varick *v.* Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417; Cooper *v.* Williams, 5 Ohio 391, 24 Am. Dec. 299; Spangler's Appeal, 64 Pa. St. 387.

Right of condemnation lost by change of route.—Where the right of condemning property at a certain point once existed such right was lost by a change in the route of the canal. People *v.* Illinois, etc., Canal, 14 Ill. 292.

Right to appropriate for enlargements.—Where the law or charter contemplates enlargements of the canal, appropriations of property therefor may be made as the necessities arise. Wright *v.* Shanahan, 149 N. Y. 495, 44 N. E. 74; Bruce *v.* Delaware, etc., Canal Co., 19 Barb. (N. Y.) 371.

7. **No more water can be taken than is necessary for navigation.**— A surplus cannot be taken for the purpose of selling or leasing water-power, and leakage and wastage should be prevented. Silsby Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264; Varick *v.* Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417; Buckingham *v.* Smith, 10 Ohio 288; Cooper *v.* Williams, 4 Ohio 253, 22 Am. Dec. 475 [*affirmed* in 5 Ohio 391, 24 Am. Dec. 299].

In crossing highways or streets a canal company can only take so much of the public easement as may be reasonably necessary for the canal purposes. Lehigh Valley R. Co. *v.* Orange Water Co., 42 N. J. Eq. 205, 7 Atl. 659.

Extension of street.— Where a street and a canal each terminated at a river and the canal company was authorized to build wharves, it could not fill in land in front of the terminus of the street and thus cut off the street from the river. The public were held to be entitled to the extension of the street to the river. Jersey City *v.* Morris Canal, etc., Co., 12 N. J. Eq. 547.

8. Thus where an act of the legislature provided that, upon the owner of a certain mill releasing all damages arising from the construction of a canal, the canal commissioners should dig a race to supply the mill with water, it was held that this race could not be constructed on the property of third persons without their consent. McArthur *v.* Kelly, 5 Ohio 139.

9. Thus an appropriation of "the water and lands necessary for said feeder" was held void for uncertainty. Hayden *v.* State, 132 N. Y. 533, 30 N. E. 961, 44 N. Y. St. 911. See also Waller *v.* State, 144 N. Y. 579, 39 N. E. 680, 64 N. Y. St. 220, holding that the appropriation of the waters of a lake and outlet did not affect the rights of lower riparian owners on the outlet because the general words of the appropriation had been used with reference to certain plans which only showed certain lands and the owners thereof, not being the lands in question.

10. Blair *v.* Kiger, 111 Ind. 193, 12 N. E. 293; Turrell *v.* Norman, 19 Barb. (N. Y.) 263; Rexford *v.* Knight, 15 Barb. (N. Y.) 627 [*affirmed* in 11 N. Y. 308]; Baker *v.* Johnson, 2 Hill (N. Y.) 342; State *v.* Pittsburg, etc., Co., 53 Ohio St. 189, 41 N. E. 205; Merrill *v.* Currier, 3 Ohio S. & C. Pl. Dec. 153, 2 Ohio N. P. 52.

Persons entering to take materials not trespassers.— The laws of the particular states under which state canals have been constructed have provided for taking materials from adjacent property to be used in the construction or repair of such canals. In entering upon lands and taking such materials the canal officials are not trespassers. Ten Broeck *v.* Sherrill, 71 N. Y. 276; Wheelock *v.* Young, 4 Wend. (N. Y.) 647; Jerome *v.* Ross, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484; Bliss *v.* Hosmer, 15 Ohio 44.

11. St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258; Lyon *v.* Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Bliss *v.* Hosmer, 15 Ohio 44.

Giving notice of authority under which officer acts.— A canal official in appropriating water required for a state canal was held not bound to give notice of the authority under which he acted, the statutes not requiring it. Walrath *v.* Redfield, 18 N. Y. 457 [*affirming* 11 Barb. (N. Y.) 382].

2. Payment For Property Taken — a. In General. Unless there be a constitutional provision forbidding the same, property can be taken for canal purposes, under laws authorizing it, without previous payment therefor, if provision is made for payment by the law or charter;[12] and it has been held that damages claimed for property taken for a canal can be offset and paid by benefits derived by the owner of the property from the canal.[13]

b. Limitations. Limitations as to the time within which claims arising out of the construction or maintenance of state canals should be presented have been often imposed by law,[14] and similar limitations have been made as to claims against private canal companies in their charters.[15]

3. Extent of Interest Acquired. The government through its laws or the charters granted by it determines as to the character of the interest to be taken in the property to be acquired for a canal, which interest may be either the fee or an easement.[16] In acquiring property by contract, the rights of the state or of a canal company depend upon the terms of such contract, but it may be construed in the light of the general laws in reference to the construction of canals.[17] All

Presumptions as to taking.— Where property is acquired for the canal by taking possession and using the same the presumption is that the acts were regular, that the estate acquired was of the character contemplated by the law or charter (Wyoming Coal, etc., Co. *v.* Price, 81 Pa. St. 156; Ligat *v.* Com., 19 Pa. St. 456), and that all the property necessary for the canal purpose was taken, as land for berm-banks and towing-paths (Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92; Pennsylvania Canal Co. *v.* Harris, 101 Pa. St. 80).

12. Blair *v.* Kiger, 111 Ind. 193, 12 N. E. 293; Kimble *v.* White Water Valley Canal Co., 1 Ind. 285; Hankins *v.* Lawrence, 8 Blackf. (Ind.) 266; Den *v.* Morris Canal, etc., Co., 24 N. J. L. 587; Gridley *v.* Darcey, 11 N. J. L. 292; Eldridge *v.* Binghamton, 42 Hun (N. Y.) 202 [*affirmed* in 120 N. Y. 309, 24 N. E. 462, 30 N. Y. St. 1007]; Turrell *v.* Norman, 19 Barb. (N. Y.) 263; Birdsall *v.* Cary, 66 How. Pr. (N. Y.) 358; Baker *v.* Johnson, 2 Hill (N. Y.) 342; Brinckerhoff *v.* Wemple, 1 Wend. (N. Y.) 470; Robinson *v.* West Pennsylvania R. Co., 72 Pa. St. 316.

Payment in scrip.— Where the law provided for payment in scrip there was no recourse upon the state for the difference between the cost and face value of the scrip. State *v.* Beard, Smith (Ind.) 276.

Settlement by appraisers or arbitration.— Where the acts provided for settlement of claims against the state by canal appraisers or by arbitration the state auditor could not dispute such settlement or award but was obliged to pay drafts drawn in payment thereof. People *v.* Thayer, 63 N. Y. 348; People *v.* Newell, 13 Barb. (N. Y.) 86.

13. Eldridge *v.* Binghamton, 120 N. Y. 309, 24 N. E. 462, 30 N. Y. St. 1007 [*affirming* 42 Hun (N. Y.) 202]; Rexford *v.* Knight, 15 Barb. (N. Y.) 627 [*affirmed* in 11 N. Y. 308]; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266. *Contra*, Jacob *v.* Louisville, 9 Dana (Ky.) 114, 33 Am. Dec. 533.

14. Nelson *v.* Fleming, 56 Ind. 310; Benedict *v.* State, 120 N. Y. 228, 24 N. E. 314, 30 N. Y. St. 651; Eldridge *v.* Binghamton, 42 Hun (N. Y.) 202 [*affirmed* in 120 N. Y. 309, 24 N. E. 462, 30 N. Y. St. 1007]; Birdsall *v.* Cary, 66 How. Pr. (N. Y.) 358.

After a long lapse of time presumptions arise that such claims have been paid or waived. Blair *v.* Kiger, 111 Ind. 193, 12 N. E. 293.

15. Heard *v.* Middlesex Canal, 5 Metc. (Mass.) 81.

16. *Indiana.*— Cromie *v.* Wabash, etc., Canal, 71 Ind. 208; Nelson *v.* Fleming, 56 Ind. 310; Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364.

Massachusetts.— Dingley *v.* Boston, 100 Mass. 544.

New York.—Heyward *v.* New York, 7 N. Y. 314; Rexford *v.* Knight, 15 Barb. (N. Y.) 627 [*affirmed* in 11 N. Y. 308].

Ohio.— Malone *v.* Toledo, 34 Ohio St. 541.

Pennsylvania.— Craig *v.* Allegheny, 53 Pa. St. 477.

To give an absolute title technical words are not necessary if the language of the statute or charter be sufficiently broad. Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

Where the language is equivocal and the object of the statute or charter would be as well accomplished, an easement is regarded as appropriated. U. S. *v.* Harris, 1 Sumn. (U. S.) 21, 26 Fed. Cas. No. 15,315.

Where the statute or charter authorized property to be entered upon, taken, and used for the canal purpose, the estate acquired thereunder was regarded simply as an easement which would terminate with the existence of the canal. New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133; Barnett *v.* Johnson, 15 N. J. Eq. 481; McCombs *v.* Stewart, 40 Ohio St. 647; Corwin *v.* Cowan, 12 Ohio St. 629; Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23.

17. **Thus, where the instrument is not otherwise certain** and its language is consistent with such idea, it will be regarded as conveying the same estate whether a fee or an easement as the general law contemplated to be held for the canal purpose. Derby *v.* Hall,

grants by a state are, however, subject to the right of eminent domain to be thereafter exercised, unless such right be expressly relinquished;[18] but title by prescription cannot be claimed against the state as to property connected with state canals where a grant from the state could not be presumed.[19]

C. Right to State Aid. The right of canals to receive public aid is dependent upon the construction placed upon various constitutional provisions.[20]

D. How Constructed and Maintained — 1. In General — a. Following Statute or Charter Provisions. The canal must be constructed in the manner pointed out by the statute or charter under which it is built.[21] In constructing a

2 Gray (Mass.) 236; Craig *v.* Allegheny, 53 Pa. St. 477; Haldeman *v.* Pennsylvania Cent. R. Co., 50 Pa. St. 425; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

18. Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314; Pennsylvania Canal Co. *v.* Philadelphia, etc., R. Co., 2 Pearson (Pa.) 354; Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374. *Compare* State *v.* Jersey City, 58 N. J. L. 262, 33 Atl. 740, holding that where an act authorized a city when it deemed proper to acquire "water, water rights or property within or without said city for the purpose of supplying said city with water" the language was not strong enough to authorize the taking of the water rights and privileges of a canal corporation so that its franchise would be extinguished.

19. Burbank *v.* Fay, 5 Lans. (N. Y.) 397 [*affirmed* in 65 N. Y. 57].

Title by prescription cannot be gained to the use of water from a public canal, as the canal corporation would thereby be deprived of control of the canal. Such a claim would be against the right of the public. Waterloo Woolen Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358, 40 N. Y. St. 95, 14 L. R. A. 481; Rochdale Canal Co. *v.* Radcliffe, 18 Q. B. 287, 21 L. J. Q. B. 297, 83 E. C. L. 287; Staffordshire, etc., Canal Nav. Co. *v.* Birmingham Canal Nav. Co., L. R. 1 H. L. 254, 35 L. J. Ch. 757.

20. In Illinois a constitutional provision that "the General Assembly shall never loan the credit of the State, or make appropriations from the treasury thereof, in aid of railroads or canals" was held not to prevent the state from improving the navigation of a river by locks and slack water so as to pass canal-boats. People *v.* Kankakee River Imp. Co., 103 Ill. 491.

In Louisiana, where the constitution provided "that State aid shall not be given to companies," and declared that swamp lands granted by congress to the state to aid in leveeing and draining them should not be diverted from the purposes for which they were granted, it was held that the state could grant a right of preëmption of such lands, fixing the price and providing that the parties should cut a canal through them. The act allowed the parties to use the land contiguous to the canal for its benefit, but such lands and the canal were to revert to the state at the end of fifty years. State *v.* Burgess, 23 La. Ann. 225.

21. Farnum *v.* Blackstone Canal Corp., 1 Sumn. (U. S.) 46, 8 Fed. Cas. No. 4,675.

Discretion in awarding contracts.— Under the New York act of July 10, 1851, directing the canal board to cause the board of canal commissioners and the state and division engineers to award contracts for the doing of canal work on such terms as the board shall approve, it was held that the canal board had discretion as to such matters and that they would not be compelled by mandamus to approve or disapprove of proposed contracts. People *v.* State Canal Board, 13 Barb. (N. Y.) 432.

Lowest bidder.— N. Y. Const. art. 7, § 3, requiring all contracts for work or materials on any state canal to "be made with the person who shall offer to do or provide the same at the lowest price with adequate security for their performance," it was held that, where such a contract was awarded to the lowest bidder and he failed to complete it, the contract could not be awarded to the next lowest bidder under the same advertisement. People *v.* Fay, 3 Lans. (N. Y.) 398. After awarding the contract to the lowest bidder the canal board could not increase the price even if authorized to do so by an act of the legislature. People *v.* Canal Board, 4 Lans. (N. Y.) 272. The constitutional provision, however, was merely a restriction upon the state officials, it having been held that the legislature itself could make additional compensation where the claim therefor was proper. People *v.* Dayton, 55 N. Y. 367; People *v.* Canal Board, 1 Thomps. & C. (N. Y.) 309; People *v.* Densmore, 1 Thomps. & C. (N. Y.) 280.

Prescribing terms of contract.—N. Y. Laws (1854), c. 329, § 10, subs. 3, required that the terms of the contract into which successful bidders for canal work would be required to enter should be "prescribed by the contracting board." It was held that the terms should be prescribed before the bidding, so that all bidders would be apprised of the kind of contract. People *v.* Contracting Board, 33 N. Y. 382 [*affirming* 33 Barb. (N. Y.) 510 (*reversing* 20 How. Pr. (N. Y.) 206)].

Bound only to charter obligations.— Where a canal is operated under a charter the canal company is liable only to the obligations imposed thereby. Thus where the charter does not require it the canal company is not bound to erect railings or fences along the margin of the canal (Barnes *v.* New Orleans Canal, etc., Banking Co., 9 La. Ann. 366; Binks *v.*

canal its banks should be made strong enough to retain the water in its channel not only against the adjacent land in the condition it then is but also against any lawful use that such land may be put to,[22] and a canal company should furnish pure water for the navigation of its canal. The use of foul polluted water being a nuisance, it is no excuse that others caused the foulness.[23]

b. Bridges — (i) *In General.* Charters of canal companies sometimes provide that bridges shall be constructed over the canal when it divides lands of individuals. These requirements cannot be dispensed with,[24] but such provisions do not apply where the right of way was acquired by deed or agreement.[25]

(ii) *Over Highways.* Where a canal is constructed under a charter[26] it must be bridged where it crosses an existing[27] public highway[28] and the duty to build and maintain bridges at such points exists whether it is specifically imposed by the charter or not.[29] Since where a canal is constructed upon a street the

South Yorkshire R., etc., Co., 3 B. & S. 244, 32 L. J. Q. B. 26, 7 L. T. Rep. N. S. 350, 11 Wkly. Rep. 56, 113 E. C. L. 244) or to build levees (New Orleans *v.* Carondelet Canal, etc., Co., 42 La. Ann. 6, 7 So. 63).

22. Staffordshire, etc., Canal Nav. Co. *v.* Hallen, 6 B. & C. 317, 9 D. & R. 266, 5 L. J. K. B. O. S. 154, 30 Rev. Rep. 333, 13 E. C. L. 151, where the owner of land who dug clay pits thereon, thus weakening the canal banks and causing them to give way, was held not liable.

23. Reg. *v.* Bradford Nav. Co., 6 B. & S. 631, 11 Jur. N. S. 769, 34 L. J. Q. B. 191, 13 Wkly. Rep. 892, 118 E. C. L. 631; Atty.-Gen. *v.* Bradford Canal Nav. Co., 35 L. J. Ch. 619, 15 L. T. Rep. N. S. 9, 14 Wkly. Rep. 579.

24. Delaware, etc., Canal Nav. Co. *v.* Mifflin, 1 Yeates (Pa.) 430.

25. Perry *v.* Pennsylvania R. Co., 55 N. J. L. 178, 26 Atl. 829; Brearley *v.* Delaware, etc., Canal Co., 20 N. J. L. 236.

26. **Where constructed and maintained by a state,** the state determines for itself where the canal shall be bridged and it cannot be forced to furnish bridges at other points or wherever roads intersect the canal. People *v.* Canal Trustees, 14 Ill. 402.

Grantee of state.— The state built a public bridge over a canal and assumed the duty of keeping it in repair and afterward sold the canal. This sale was "subject to all contracts and arrangements heretofore made by Act of Assembly, or otherwise, for and in respect to the use of such works." It was held that as the purchaser had assumed the duty of the state he could be forced to replace the bridge after it fell. Pennsylvania R. Co. *v.* Duquesne, 46 Pa. St. 223.

27. **Highways made after canal.**— Where a canal is in existence and highways and streets are subsequently laid out the canal company is not bound to bridge the canal at the intersection of such highways and streets. Lowell *v.* Proprietors Merrimack River Locks, etc., 7 Metc. (Mass.) 1, 104 Mass. 18; Morris Canal, etc., Co. *v.* State, 24 N. J. L. 62; Oswego *v.* Oswego Canal Co., 6 N. Y. 257. See also Erie *v.* Erie Canal Co., 59 Pa. St. 174, where it was held that, there being no reserved power to alter the charter, a subsequent law could not impose upon the canal company the obligation to construct or repair bridges over highways subsequently laid out.

Expense cannot be increased.— A canal company was required by its charter to build and keep in repair bridges over public and private roads. A road was subsequently converted into a state road. The travel on the road and the expense of maintaining bridges was thereby greatly increased. It was held that the canal company was no longer bound to keep up the bridge on such road. Union Canal Co. *v.* Pinegrove Tp., 6 Watts & S. (Pa.) 560.

28. **Private road.**— The duty to bridge also exists where the canal crosses a private road. State *v.* Savannah, etc., Canal Co., 26 Ga. 665.

29. Fresno County *v.* Fowler Switch Canal Co., 68 Cal. 359, 9 Pac. 309; State *v.* Savannah, etc., Canal Co., 26 Ga. 665; Franklin County *v.* White Water Valley Canal Co., 2 Ind. 162; Chesapeake, etc., Canal Co. *v.* Allegany County, 57 Md. 201, 40 Am. Rep. 430; Eyler v. Allegany County, 49 Md. 257, 33 Am. Rep. 249; Leopard *v.* Chesapeake, etc., Canal Co., 1 Gill (Md.) 222, in which last case, plaintiff having conveyed land upon which a canal was built, it was held that he was not precluded by the deed from insisting that the highway at such point divided by the canal should be bridged.

Not exonerated because others liable.— Where canal companies are liable to repair bridges crossing its canal such liability continues although others may become liable also. Thus where a street railroad was liable by law for repairs between its tracks and failed to make them where the tracks crossed a canal bridge the canal company was held liable to a city that had made the repairs. Lowell *v.* Proprietors Merrimack River Locks, etc., 104 Mass. 18. See also Eyler *v.* Allegany County, 49 Md. 257, 33 Am. Rep. 249; Ammerman *v.* Wyoming Canal Co., 40 Pa. St. 256.

Pleading.— Where a suit is instituted by a county against a canal company based on its failure to build a bridge over the canal at the intersection of a highway the declaration must allege a special damage. Franklin County *v.* White Water Valley Canal Co., 2 Ind. 162.

rights of the public therein continue as far as consistent with its use as a canal; the canal may be bridged by the city and sewers run under it,[30] but such bridges must be so constructed as not to materially obstruct the navigation of the canal.[31]

e. Liability For Damages — (I) *In General* — (A) *Of Canal Company* — (1) In General. A canal corporation not being a public corporation its liabilities are those of individuals generally.[32] In constructing a canal the owners thereof are liable for damages resulting from its negligent and improper construction.[33]

(2) Discharge of Water. The owners of a canal are liable for injuries caused by the discharge of water therefrom,[34] although the same was done with prudence and care;[35] but water coming into a canal from outside sources may be excluded, although damages to others result therefrom.[36]

(3) Diverting or Blocking Stream. Canal companies are liable to a

Prosecution for failure to repair.— Where the charter of a canal company makes it the duty of the company to erect and maintain bridges over the canal where any public road crosses the canal it is an indictable offense to permit such a bridge to decay and become unsafe. State *v.* Morris Canal, etc., Co., 22 N. J. L. 537. An information against canal trustees for maintaining a nuisance by failing to keep a bridge in repair so as to be safe for public travel should show by what right the defendants became possessed of the bridge and were charged with any duty as to it. Butler *v.* State, 17 Ind. 450.

30. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82.

31. Korch *v.* Ottawa, 32 Ill. 121, 83 Am. Dec. 255; Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 43, 36 Am. Dec. 374.

32. *Connecticut.*— Hooker *v.* New Haven, etc., Co., 15 Conn. 312, 322.

Maryland.— Brady *v.* State, 26 Md. 290.

Michigan.— People *v.* Lake Superior Ship Canal, etc., Co., 32 Mich. 233.

New Jersey.— Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23.

33. Morris Canal, etc., Co. *v.* Ryerson, 27 N. J. L. 457; Silsby Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264; Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634; Delaware, etc., Canal Co. *v.* Goldstein, 125 Pa. St. 246, 17 Atl. 442.

Accidental breaches in canal.—A canal company is not liable for an accidental breach in the canal where the company is without fault. Higgins *v.* Chesapeake, etc., Canal Co., 3 Harr. (Del.) 411.

Percolations.— Where a canal was properly constructed and maintained it was held there was no liability arising from percolations of water therefrom on adjoining premises. Cuddeback *v.* Delaware, etc., Canal Co., 20 N. Y. Wkly. Dig. 454.

Pleading.— Where a canal has not been constructed of the prescribed dimensions or was not kept in proper repair its owner is not liable to a person who has suffered no special damage thereby apart from that sustained by the general public. Moore *v.* Wabash, etc., Canal, 7 Ind. 462; Quincy Canal *v.* Newcomb, 7 Metc. (Mass.) 276, 39 Am. Dec. 778.

Suits for compensation must include all damage, present or prospective.—Where property is taken to build a canal or lands are flooded by the construction of such canal, its dams, or reservoirs, any action to recover compensation should include all damage, prospective as well as present. Subsequent actions cannot be brought to recover remote or unforeseen damages. Chesapeake, etc., Canal Co. *v.* Grove, 11 Gill & J. (Md.) 398; Heard *v.* Middlesex Canal, 5 Metc. (Mass.) 81; Woods *v.* Nashua Mfg. Co., 5 N. H. 467; Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605; Van Schoick *v.* Delaware, etc., Canal Co., 20 N. J. L. 249. Damages caused by the construction of a canal must be estimated as of that time. A subsequent purchaser cannot claim them. Zimmerman *v.* Union Canal Co., 1 Watts & S. (Pa.) 346.

Evidence.— The fact that damages have been occasioned by the construction or operation of a canal can be shown by circumstantial as well as by direct evidence. Morris Canal, etc., Co. *v.* Ryerson, 27 N. J. L. 457; Morris Canal, etc., Co. *v.* Seward, 23 N. J. L. 219; Delaware, etc., Canal Co. *v.* Goldstein, 125 Pa. St. 246, 17 Atl. 442. In an action for a continuous nuisance or damage to property caused by a canal the condition of the property at the time of trial may be shown in evidence in order to furnish the most precise and reliable information as to the nature and extent of the injury complained of.

34. McKee *v.* Delaware, etc., Canal Co., 125 N. Y. 353, 26 N. E. 305, 35 N. Y. St. 12, 21 Am. St. Rep. 740, where a canal company having constructed a dam across a stream upon its own land and used the stream, which ran through plaintiff's premises, as a feeder to the canal, it was held that the canal company could not discharge water from the dam into the stream in greater quantities than it would naturally carry, and that a liability existed for flooding land by the discharge of greater quantities.

35. Hooker *v.* New Haven, etc., Co., 14 Conn. 146, 36 Am. Dec. 477, 15 Conn. 312.

36. Nield *v.* London, etc., R. Co., L. R. 10 Exch. 4, 44 L. J. Exch. 15, 23 Wkly. Rep. 60.

riparian owner for the diversion and use of the waters of a stream,[37] and where natural streams and drains are stopped by the construction of a canal so as to cause injury by overflow or otherwise.[38]

(4) Obstructions in Canal. A canal company in maintaining its canal is bound only to the exercise of reasonable care that it shall be navigable without danger and is not liable for accidents not resulting from the want of such reasonable care.[39]

(B) *Of Canal Officials.* By statute the officials[40] of a state canal or parties connected therewith[41] are sometimes made liable for damages resulting from their neglect of duties.[42]

37. Illinois, etc., Canal *v.* Haven, 10 Ill. 548, 11 Ill. 554; Adams *v.* Slater, 8 Ill. App. 72.

38. Mabire *v.* Canal Bank, 11 La. 83, 30 Am. Dec. 710; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243.

Use of stream as part of canal.— Where a stream was used as part of a canal and a dam was erected therein, it was held that the owners of land upon the opposite bank of the stream could recover damages occasioned by overflows caused by the dam. Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233.

Evidence.— Where a canal divided a tract of land and overflowed a part thereof it was held that evidence could be introduced to show the cost of bridging the canal so as to connect the land and of draining the overflowed part of the land. State *v.* Beackmo, 6 Blackf. (Ind.) 488. Where a canal company was sued for damages caused by sand being washed on land by means of a canal dam, evidence that sand was carried on other land below the dam was held not admissible to prove that the dam had not caused the damage complained of. Morris Canal, etc., Co. *v.* Ryerson, 27 N. J. L. 457.

39. Watts *v.* Savannah, etc., Canal Co., 64 Ga. 88, 37 Am. Rep. 53; Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35; Exchange F. Ins. Co. *v.* Delaware, etc., Canal Co., 10 Bosw. (N. Y.) 180; Pennsylvania Canal Co. *v.* Burd, 90 Pa. St. 281, 35 Am. Rep. 659; Schuylkill Nav. Co. *v.* McDonough, 33 Pa. St. 73.

Where accidents result from hidden obstructions in a canal, as rocks, sunken logs, etc., no liability exists against the canal company if the existence of such obstructions was unknown and reasonable care had been exercised in the supervision of the canal (Bryne *v.* Chicago, 80 Ill. 195; Weitner *v.* Delaware, etc., Canal Co., 4 Rob. (N. Y.) 234; Exchange F. Ins. Co. *v.* Delaware, etc., Canal Co., 10 Bosw. (N. Y.) 180; Pennsylvania Canal Co. *v.* Burd, 90 Pa. St. 281, 35 Am. Rep. 659); but a canal company is liable for negligence where it allows such obstructions to remain in the channel of the canal and damage results (Pajewski *v.* Carondelet Canal, etc., Co., 11 Fed. 313; Parnaby *v.* Lancaster Canal Co., 11 A. & E. 223, 9 L. J. Exch. 338, 3 P. & D. 162, 1 R. & Can. Cas. 696, 39 E. C. L. 139). A floating storehouse permanently moored in a canal is *prima facie* a nuisance as an obstruction to navigation. Hart *v.* Albany, 3 Paige (N. Y.) 213.

In removing obstructions to navigation property cannot be destroyed unless absolutely necessary. Hicks *v.* Dorn, 1 Lans. (N. Y.) 81, 54 Barb. (N. Y.) 172 [*affirmed* in 42 N. Y. 47].

40. In Wright *v.* Shanahan, 149 N. Y. 495, 44 N. E. 74, it was held that the canal commissioner should have removed the flush boards from the crest of a canal dam at the close of canal navigation. The court said it is "the settled law of the state that the negligent omission of a public officer to perform a ministerial duty, or an improper discharge thereof, renders him liable to be enjoined and to respond in damages to the injured party."

Illegality of appointment no defense.— A statute prohibited the employment on state canals as superintendent or agent of any person connected with any hydraulic works dependent upon the state for their water supply. Where such a disqualified person was made an agent it was held he could not plead his agency as a defense to an action brought against him by the owner of lands which had been overflowed by raising the flush boards on a canal dam. Such party could not claim he had discretionary authority to close or open the canal gates or to regulate the flush boards. Shaver *v.* Eldred, 38 Hun (N. Y.) 632.

41. Canal contractors.— Persons who contract to keep canals in repair or to remove obstacles therefrom are liable for the damages resulting from their failure to perform their contracts. Johnson *v.* Belden, 47 N. Y. 130; Fulton F. Ins. Co. *v.* Baldwin, 37 N. Y. 648, 5 Transcr. App. (N. Y.) 180; Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713.

42. Discretion of canal official.— It is the duty of a canal commissioner to examine the banks of that part of the canal committed to his care and to judge as to the necessity of repairs thereto. As to such matters he is not liable if he act in good faith, although his judgment be in fact wrong and the banks gave way because not strengthened. On the other hand the duties of such officer are imperative as to the removal of obstructions in the canal which endanger or impede navigation. Griffith *v.* Follett, 20 Barb. (N. Y.) 620; Adsit *v.* Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; Shepherd *v.* Lincoln, 17 Wend. (N. Y.) 250.

(c) *Of State.* While a state cannot take property for a public use without compensation, it is not liable for consequential damages where it has not assumed to pay them;[43] but in constructing and maintaining canals states have often, by special laws, assumed liability that would not otherwise exist.[44]

(11) *How Enforced* — (A) *In General.* Where a charter authorizes the construction of a canal and provides a method of redress for those injured in their property or rights by the natural effect of such construction the charter remedy

Pleading.— Where a canal officer is sued for damages resulting from his neglect to repair the banks of a canal or in not removing obstructions from the channel of the canal the declaration need not allege that such officer had public funds in his hands sufficient to have enabled him to have performed his duties (Griffith *v.* Follett, 20 Barb. (N. Y.) 620; Adsit *v.* Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305); and in a suit for injuries sustained by his neglect to remove obstructions from the channel of a canal the declaration need not allege that the neglect was wilful or malicious (Adsit *v.* Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305).

43. Rexford *v.* State, 105 N. Y. 229, 11 N. E. 514; Hoffer *v.* Pennsylvania Canal Co., 87 Pa. St. 221; Delaware Division Canal Co. *v.* McKeen, 52 Pa. St. 117. See also Stone *v.* State, 138 N. Y. 124, 33 N. E. 733, 51 N. Y. St. 718.

Constitutional limitations requiring compensation for property taken apply to the property taken, not to consequential damages. Bruce *v.* Delaware, etc., Canal Co., 19 Barb. (N. Y.) 371; West Branch, etc., Canal Co. *v.* Mulliner, 68 Pa. St. 357; Spangler's Appeal, 64 Pa. St. 387.

Canal feeder used as highway.— The state constructed a canal feeder on its land and covered it with timber and earth. The feeder was used as a highway for more than twenty years, but it was never laid out as a street. A person knowing of the feeder, its construction, and use in walking thereupon broke through the covering of the feeder. The state was held not to be liable for the resulting damage, as no dedication of the feeder as a street could be inferred and its use as a highway had been merely by sufferance. Donahue *v.* State, 112 N. Y. 142, 19 N. E. 419, 20 N. Y. St. 243, 2 L. R. A. 576.

44. **Break in canal.**— Where a break occurred in a canal owing to the negligence of parties in charge the state was held liable for damages resulting to a bridge. Bidelman *v.* State, 110 N. Y. 232, 18 N. E. 115, 18 N. Y. St. 107, 1 L. R. A. 258.

Canal dams.— Where the erection of canal dams or increasing their height causes land to be overflowed the state is liable whether such dams be temporary or permanent. Wright *v.* Shanahan, 149 N. Y. 495, 44 N. E. 74; Benedict *v.* State, 120 N. Y. 228, 24 N. E. 314, 30 N. Y. St. 651; Stewart *v.* State, 105 N. Y. 254, 11 N. E. 652; Heacock *v.* State, 105 N. Y. 246, 11 N. E. 638.

Continuous injuries.— Injuries caused by water seeping through the side of a defectively constructed canal reservoir are continuous in their nature. Such injuries are not complete at their inception. Actions therefor may be brought at any time within the statutory period of limitation prior to their commencement. Folts *v.* State, 118 N. Y. 406, 23 N. E. 567, 29 N. Y. St. 42; Reed *v.* State, 108 N. Y. 407, 15 N. E. 735.

Defective canal reservoir.— In constructing a canal reservoir a gravel bed was uncovered and left as a side thereto. Water seeped through the gravel causing damage for which the state was liable. Reed *v.* State, 108 N. Y. 407, 15 N. E. 735.

Land, materials, and crops.— The state is liable for land and materials taken by it to construct its canals and for loss of crops occasioned by removing fences in getting such materials. Wheelock *v.* Young, 4 Wend. (N. Y.) 647.

Lateral support of land.—Where in digging a canal the adjacent land caved, it was held that such land in its natural state was entitled to the support of the land dug away in making the canal and that the state was liable for withdrawing such support. People *v.* Canal Board, 2 Thomps. & C. (N. Y.) 275.

Negligence of canal employees.— The state was held liable for damage resulting from the negligent conduct of parties engaged in tending the canal and its locks. Bidelman *v.* State, 110 N. Y. 232, 18 N. E. 115, 18 N. Y. St. 107, 1 L. R. A. 258; Silsby Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264; Sipple *v.* State, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657.

Obstructed drain.— The state constructed a sewer to drain its canal and allowed parties to connect therewith. The sewer became obstructed and damage resulted from back water and the state was held liable. Ballou *v.* State, 111 N. Y. 496, 18 N. E. 627, 19 N. Y. St. 82.

Seepage from defective canal.—Lands were flooded by seepage from an improperly constructed canal. The state was held liable for the cost of draining the land and putting it in a tillable condition. Sayre *v.* State, 123 N. Y. 291, 25 N. E. 163, 33 N. Y. St. 156.

Waste of water.— The walls, locks, and gates of a canal were not kept in a proper condition and water leaked and was wasted. The state was held liable to a riparian owner who had suffered damage by the waste of water. Silsby Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264.

Evidence.— Where a claim was filed against the state of New York for damages resulting from the overflow of land caused by the state not maintaining proper canal banks and an award was made by the board of claims in

is generally exclusive;[45] but where the claim is based upon the negligence and wrongful conduct of the canal company the remedy provided in the charter of such company specifying how compensation may be recovered for property taken does not apply and resort may be had to other remedies.[46]

(B) *Against State.* Where a state has assumed liabilities in reference to state canals and passed laws prescribing how and when claims on account thereof should be presented and prosecuted, the requirements of these laws must be followed as the sovereign can be sued only to the extent of and in the manner indicated by such laws.[47]

2. ENLARGING. After their construction, canals may be enlarged, where such enlargement is contemplated by the law or charter as being necessary or advisable,[48] and the height of dams connected with canals may be increased and their capacity augmented.[49]

III. REGULATION AND OPERATION.

A. In General. State canals are operated through the instrumentality of officers appointed by the state, whose powers and duties are derived from and governed by the particular laws under which they are appointed.[50] Private canals built upon private property are subject to the control of their owners. The use of such canals being merely permissive the public acquire no vested rights therein.[51]

B. Rules as to Use. Where the canal is a state canal[52] the state by its laws

favor of claimant, it was held that such award could not be used as evidence in favor of another claimant having a similar claim to show liability of the state. Stone *v.* State, 138 N. Y. 124, 33 N. E. 733, 51 N. Y. St. 718.

45. Hazen *v.* Essex Co., 12 Cush. (Mass.) 475; Stevens *v.* Middlesex Canal, 12 Mass. 466; Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605; Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161. See, however, Selden *v.* Delaware, etc., Canal Co., 24 Barb. (N. Y.) 362, where a canal was enlarged and lands were overflowed thereby and it was held that the owner was not confined to the charter remedy for the taking of land but might maintain a common-law action for his injury.

In absence of express provision it was held that upon an appeal from the adjustment of damages by arbitrators under the act incorporating the Warren Canal company, the cause must be proceeded in by proper pleading, and an issue to a jury as in other cases. Cooper *v.* Warren Canal Co., 7 Ohio 242.

46. Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243; McKee *v.* Delaware, etc., Canal Co., 125 N. Y. 353, 26 N. E. 305, 35 N. Y. St. 12, 21 Am. St. Rep. 740; Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161; Schuylkill Nav. Co. *v.* McDonough, 33 Pa. St. 73; Schuylkill Nav. Co. *v.* Loose, 19 Pa. St. 15.

47. Illinois, etc., Canal *v.* Daft, 56 Ill. 121. See also People *v.* Wells, 12 Ill. 102; Benedict *v.* State, 120 N. Y. 228, 24 N. E. 314, 30 N. Y. St. 651; Stewart *v.* State, 105 N. Y. 254, 11 N. E. 652; Heacock *v.* State, 105 N. Y. 246, 11 N. E. 638.

48. Bruce *v.* Delaware, etc., Canal Co., 19 Barb. (N. Y.) 371; Rex *v.* Glamorganshire, 7 B. & C. 722, 14 E. C. L. 325.

Such enlargement may be by increasing the depth as well as width of the canal, and the increase of depth may be by excavations from the bottom of the canal or by raising the banks, or by both. Selden *v.* Delaware, etc., Canal Co., 24 Barb. (N. Y.) 362.

49. Shaver *v.* Eldred, 114 N. Y. 236, 21 N. E. 411, 23 N. Y. St. 293; Wright *v.* Eldred, 46 Hun (N. Y.) 12; Freeland *v.* Pennsylvania R. Co., 2 Leg. Gaz. (Pa.) 85.

50. Clark *v.* State, 142 N. Y. 101, 36 N. E. 817, 58 N. Y. St. 444; Shaver *v.* Eldred, 114 N. Y. 236, 21 N. E. 411, 23 N. Y. St. 293; Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; People *v.* Schoonmaker, 13 N. Y. 238; Wright *v.* Eldred, 46 Hun (N. Y.) 12; People *v.* Bristol, 1 Lans. (N. Y.) 45; People *v.* McCumber, 27 Barb. (N. Y.) 632; State *v.* Buttles, 3 Ohio St. 309; Com. *v.* Canal Com'rs, 9 Watts (Pa.) 466.

Revenues not to be anticipated.— Under a provision that "the remainder of the revenues of the said canals shall, in each fiscal year, be applied, in such manner as the legislature shall direct, to the completion of the Erie Canal enlargement, and the Genesee Valley and Black River canals, until the said canals shall be completed," it was held that these revenues could not be anticipated and appropriated before the periods fixed by the constitution. Newell *v.* People, 7 N. Y. 9; Rodman *v.* Munson, 13 Barb. (N. Y.) 63.

51. Harvey *v.* Potter, 19 La. Ann. 264, 92 Am. Dec. 532; Potter *v.* Indiana, etc., R. Co., 95 Mich. 389, 54 N. W. 956; Ward *v.* Warner, 8 Mich. 508.

Obstruction of canal.— A part owner of the land on which a private canal is constructed cannot obstruct the navigation thereof by driving piles in it. Page *v.* Young, 106 Mass. 313.

52. United States canal.—In U. S. *v.* Ormsbee, 74 Fed. 207, it was held that congress

prescribes the rules and regulations as to the use of the canal.[53] The owners of a private canal situated upon private property can make such rules as to its use as they see fit, and, where the canal is operated under a charter, rules and regulations as to its use may be made and enforced by the canal company. The discretion allowed as to such matters is not, however, an arbitrary one, and regulations must be reasonable and must be exercised with a proper regard for the rights of others.[54]

C. Disposition of Surplus Water. After taking such water only as may be necessary for canal purposes the state or canal company may[55] lease or dispose of water if the navigation of the canal is not thereby interfered with.[56] Provision may be made by law or in the contract for the resumption of the water so disposed of if its use becomes necessary to the canal or its resumption is desired;[57] and where successive leases of water-power are made and the supply of surplus water afterward becomes inadequate for all, the water should be supplied in the order in which the leases were executed.[58]

D. Implied Agreement as to Navigability. Where a boat is induced by a canal company to enter a canal in the expectation that for compensation it shall have a passage through, the law implies an agreement on the part of the canal company that the boat shall get through the canal in a reasonable time.[59]

could delegate to the secretary of war power to prescribe rules and regulations for the use, administration, and navigation of canals owned or operated by the United States.

53. Under the laws of New York passenger boats have the preference over other boats in passing the locks of canals. This right may be enforced by a passenger boat by any means short of a breach of the peace, as by pulling back the boat over which it has such preference and forcing itself forward. Houghton *v.* Walce, 64 Barb. (N. Y.) 613; Farnsworth *v.* Groot, 6 Cow. (N. Y.) 698.

54. Sheldon *v.* New Orleans Canal, etc., Co., 9 Rob. (La.) 360; Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 31 N. Y. 91.

Must allow facilities for navigation.— A canal company in maintaining its canal as a navigable highway must allow the use of the ordinary facilities for the navigation thereof. Thus where tugs were necessary to propel vessels through the canal a vessel could not be excluded by forbidding the use of a tug that owed tolls for other passages of the canal by it. Buffalo Bayou Ship Channel Co. *v.* Milby, 63 Tex. 492, 51 Am. Rep. 668.

Sunday navigation.— A regulation of a canal company forbade boats passing its locks on Sunday "without a written permit from the superintendent or his assistant" which permit would not be granted "unless in cases of actual necessity." The regulation was held unreasonable and void, as the officer might not be accessible when the permit was needed. The court further held that the boat owner had the right to determine for himself whether Sunday navigation was necessary, he being subject to liability under the statute for unnecessary navigation. McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139.

Use of boats propelled by steam.— In Case *v.* Midland R. Co., 27 Beav. 247, 5 Jur. N. S. 1017, 28 L. J. Ch. 727, it was held that there was a public right of user of a canal by boats propelled by steam, if they occasioned no more injury to the canal than traction by horses would occasion. See also Sheldon *v.* New Orleans Canal, etc., Co., 9 Rob. (La.) 360, as to right to exclude steam vessels from a canal if they occasioned injury thereto.

55. Ordinarily the canal company is not bound to lease out or dispose of such surplus waters. Binney *v.* Chesapeake, etc., Canal Co., 8 Pet. (U. S.) 201, 8 L. ed. 917. Where, however, the company had held itself out as a source of water supply, and expensive machinery had been set up along the banks of the canal upon the faith of obtaining such water-power, it was held that it must be furnished if it was reasonably within the power of the canal company so to do. Millers *v.* Augusta, 63 Ga. 772. And in French *v.* Gapen, 105 U. S. 509, 26 L. ed. 951, it was held that it was the duty of the state to lease out certain water-powers of a state canal, as the legislature had provided that the contractors who had erected the water-power were to be paid out of rents.

56. Armstrong *v.* Pennsylvania R. Co., 38 N. J. L. 1; Hoppock *v.* United New Jersey R., etc., Co., 27 N. J. Eq. 286; Little Miami Elevated Co. *v.* Cincinnati, 30 Ohio St. 629; Buckingham *v.* Smith, 10 Ohio 288; Cooper *v.* Williams, 4 Ohio 253, 22 Am. Dec. 745, 5 Ohio 391, 24 Am. Dec. 299; Kaukauna Water Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004.

Such leases may embrace the bare use of passing water. Thus where the state erected a canal dam and leased surplus waters it was held that the lessee could only use the water as it passed over the dam and could not divert it to the injury of a riparian owner upon the stream below the dam. Varick *v.* Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417.

57. Dermott *v.* State, 99 N. Y. 101, 1 N. E. 242; Mattoon *v.* Munroe, 21 Hun (N. Y.) 74; *Ex p.* Miller, 2 Hill (N. Y.) 418; State *v.* Board Public Works, 42 Ohio St. 607.

58. Wabash, etc., Canal *v.* Reinhart, 22 Ind. 463.

59. Muir *v.* Louisville, etc., Canal Co., 8 Dana (Ky.) 161, holding that, in a suit against a canal company for delay in passing

E. Tolls — 1. In General. Private persons owning canals constructed upon private property can charge tolls for the use thereof and fix the rate of the same;[60] but where canals are constructed by a state or under charters granted by it only such tolls can be charged for the use thereof as the law under which the canals are built or such charters expressly authorize.[61]

2. Discrimination. Where canals are operated under charters no discrimination in favor of particular persons can be made in charging tolls.[62]

3. Use of Canal Entitling Company to Charge. Parties using a canal must pay the tolls exacted for such use. They cannot deny liability on the ground that the canal was not constructed as required by its charter.[63] On the other hand a canal company after receiving tolls cannot claim that the boat or craft was improperly in the canal.[64]

IV. PROTECTION.

The general laws of particular states in which canals are situated furnish remedies for the protection of canals and their operation,[65] but special laws have also been passed by the different states for the protection of canals.[66]

a boat through a canal, an averment that the canal company agreed for a "reasonable reward" that the boat should pass is a sufficient averment of a consideration.

60. Harvey *v.* Potter, 19 La. Ann. 264, 92 Am. Dec. 532.

61. Sturgeon Bay, etc., Ship Canal, etc., Co. *v.* Leatham, 62 Ill. App. 386 [*affirmed* in 164 Ill. 239, 45 N. E. 422]; Myers *v.* Foster, 6 Cow. (N. Y.) 567; Perrine *v.* Chesapeake, etc., Canal Co., 9 How. (U. S.) 172, 13 L. ed. 92; Stourbridge Canal *v.* Wheeley, 2 B. & Ad. 792, 22 E. C. L. 333; Leeds, etc., Canal Co. *v.* Hustler, 1 B. & C. 424, 2 D. & R. 556, 8 E. C. L. 181; Barrett *v.* Stockton, etc., R. Co., 11 Cl. & F. 590, 8 Eng. Reprint 1225, 2 M. & G. 134, 2 Scott N. R. 337, 40 E. C. L. 528.

Effect of change in classification of goods. — Where goods were heavy goods when a canal act was passed and a lower rate of tolls was fixed on them than on light goods by the act, it was held that the same tolls should be charged on such goods, though they were afterward classed as light goods by the custom of the country where the canal was situated. Staffordshire, etc., Canal Nav. Co. *v.* Trent, etc., Nav. Co., 6 Taunt. 151, 1 E. C. L. 551.

Rate dependent on rate of another company. — Where an act provided that a canal company should charge no higher rate of tolls than those charged by another company, and such latter company by resolution reduced the rate of tolls, it was held that the former company could not question collaterally the validity of the resolution but were bound by it as long as it was acted under. Monmouthshire Canal Nav. Co. *v.* Kendall, 4 B. & Ald. 453, 6 E. C. L. 557.

Where a maximum rate is prescribed a lower rate may be legally charged. Delaware, etc., Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131.

Impairment of right. — The rights of a canal company under its charter are not impaired by the diminution of revenues occasioned by the construction of a railroad in the same territory as the canal, although the legislature had not reserved the right to decrease tolls (Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314); but where creditors were secured by the revenues of a canal in which the United States was principally interested it was held that congress could not impair their rights by reducing tolls and making the canal unprofitable (U. S. *v.* Louisville, etc., Canal Co., 4 Dill. (U. S.) 601, 1 Flipp. (U. S.) 260, 26 Fed. Cas. No. 15,633, 1 Centr. L. J. 101).

62. **Covenant not to allow others same drawbacks.** — Where a company covenanted that it would not allow to others the same drawback from established rates on transportation of merchandise that it agreed to allow to the covenantee, it was held that the agreement to allow such drawback to the covenantee was valid, but that the covenant not to allow it to others was void. Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505.

Covenant to pay less than others. — A covenant that covenantee should pay twenty per cent less than whatever rate should be charged others was held void. Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754. See also Com. *v.* Delaware, etc., Canal Co., 43 Pa. St. 295.

63. Quincy Canal *v.* Newcomb, 7 Metc. (Mass.) 276, 39 Am. Dec. 778.

64. Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35.

65. Thus where sawdust was discharged from a sawmill in such a way as to enter a canal it was held to be a nuisance (Delaware, etc., Canal Co. *v.* Torrey, 33 Pa. St. 143), and the owner of a factory was held liable for damages where he permitted a steam-pipe therefrom to extend so near a canal as to blow dust and air across the towing-path, thereby frightening animals used in towing boats (Conklin *v.* Phœnix Mills, 62 Barb. (N. Y.) 299).

66. **Depositing material washed into canal.** — Where a statute provided that any one depositing earth, sand, gravel, or other mate-

V. TRANSFER AND DISCONTINUANCE.

A. In General. The properties of canal companies may be encumbered by transfers thereof by way of mortgage or otherwise, under the powers given in their charters or under laws passed in regard to such matters;[67] but the alienation of state canals has been forbidden by some state constitutions.[68] Laws have been passed by the various states authorizing the abandonment and discontinuance of canals, whether state canals or not, and providing for sales of canal properties.[69]

B. Conveyance of Canal. In conveying a canal it is not necessary to describe land specifically — everything essential to the beneficial use and enjoyment of the property will pass under the general words of the conveyance.[70] Where the canal was to be discontinued as such and to be filled up the title of a purchaser thereof extended only to the highest water-line.[71]

C. Effect of Discontinuance — 1. Upon Canal Laws. Upon the abandonment of a canal, laws passed for the protection thereof sometimes cease to be applicable.[72]

rial whereby any substance was washed into a canal to its injury should be fined, it was held that defendants who had deposited on their own land waste from their factory which by unusual, extraordinary, and unexpected floods were washed into the canal were not liable. People *v.* Utica Cement Co., 22 Ill. App. 159.

Driving along banks of canal.—A statute making it an offense subject to penalty for persons to drive along the banks of a canal for purposes not connected with the use of the canal, it was held, in an action to recover such penalty, to be no defense that defendant had approached the canal at a point where there was a bridge over it, and the bridge being broken there was no other way than along the canal banks to reach a place where the canal could be crossed except by a very circuitous route. White *v.* State, 14 Ohio 468.

Tapping canal and taking water.— Under a statute providing that no one should tap and take water from a canal without the written permission of certain canal officials it was held to be no defense in a suit for a penalty under the act that a verbal permission had been granted to take water. Losh *v.* Pennsylvania Canal Co., 103 Pa. St. 515.

Boat owners liable for acts of servants.— The owners of boats navigating canals have been held liable for penalties imposed by law for the protection of canals, where they have been violated by the servants or agents of such owners. Davis *v.* Bemis, 40 N. Y. 453 note; State *v.* Lyon, 1 Ohio Dec. (Reprint) 251, 5 West. L. J. 463.

Who may sue for penalty.—Where canal properties had been conveyed by the state to trustees it was held that the beneficial interest remained in the people and that they could still maintain actions for penalties imposed by former statutes for trespasses. People *v.* Nichols, 9 Ill. 307. Where the injury complained of is to the business transacted by the canal proprietor and not to the canal property itself, the lessees of a state canal can sue in their own names. Public Works *v.* Cleveland, 4 Ohio Dec. (Reprint) 378, 2 Clev. L. Rep. 58.

67. Canal Co.'s Case, 83 Md. 549, 35 Atl. 131, 354, 581; State *v.* Brown, 73 Md. 484, 21 Atl. 374; Virginia *v.* State, 32 Md. 501; Brady *v.* State, 26 Md. 290.

Effect of assignment.— An assignment by a canal company to a contractor, of all its moneys in hand, together with future tolls and revenues, for the purpose of securing a necessary improvement and repair of the canal, passes the title thereto to the contractor, and the moneys so assigned cannot be diverted from the purposes for which it was assigned by a judgment creditor of the canal company in satisfaction of his judgment. Sedam *v.* Cincinnati, etc., Canal Co., 2 Disn. (Ohio) 309.

68. But such provision did not prevent a disposition of the property upon the abandonment or discontinuance of a canal (People *v.* Stephens, 13 Hun (N. Y.) 17), the use of water from a lake which the state had acquired for canal purposes (Comstock *v.* Syracuse, 129 N. Y. 643, 27 N. E. 1081, 29 N. E. 289, 41 N. Y. St. 649; Sweet *v.* Syracuse, 129 N. Y. 316, 29 N. E. 289, 41 N. Y. St. 649), or the releasing of certain tolls that had been imposed by law upon freight carried by railroads where they had been payable "to the commissioners of the canal fund" (People *v.* New York Cent. R. Co., 34 Barb. (N. Y.) 123 [*affirmed* in 24 N. Y. 485]).

69. Chase *v.* Sutton Mfg. Co., 4 Cush. (Mass.) 152; Whitney *v.* State, 96 N. Y. 240; State *v.* George, 34 Ohio St. 657; Pennsylvania Canal Co. *v.* Manning, 87 Pa. St. 240.

70. Indiana Cent. Canal Co. *v.* State, 53 Ind. 575; Sheets *v.* Selden, 2 Wall (U. S.) 177, 17 L. ed. 822.

71. Morgan *v.* Bass, 14 Fed. 454.

72. Thus, in a prosecution for maliciously cutting the bank of a canal reservoir, evidence that the canal had fallen into disuse and the

2. Upon Condition of Property. Upon the discontinuance and abandonment of a canal as such the canal company is not bound to restore property to the condition in which it originally was.[73] Rights may, however, exist in respect to the property in the condition in which it then exists.[74]

3. Upon Duties to Public. Where a canal company is authorized by law to abandon its canal and does so[75] its duties to the public cease.[76]

4. Upon Leases of Surplus Water. The discontinuance of a state canal terminates leases made by the state of surplus water or water privileges.[77]

5. Upon Title to Property — a. Where Fee Was Acquired. Where the state or canal company acquired the absolute title to canal property it does not revert to the original owners upon the discontinuance and abandonment of the canal.[78]

b. Where Easement Was Acquired. Where the right acquired in property by the state or canal company was a mere easement the easement generally terminates when the canal is discontinued and abandoned, and the rights of parties originally interested in the property then revive.[79] Where, however, the ease-

reservoir was unnecessary was held to be admissible to rebut a malicious intent. State *v.* Bush, 29 Ind. 110. See, however, State *v.* Doig, 2 Rich. (S. C.) 179, where a party was indicted for injuring a waste weir and taking materials therefrom. The statute forbade any one to "wilfully and maliciously throw down, break or destroy, any lock, dam, bank, waste weir," etc., of any canal. It was held to be no defense that the canal was abandoned or not in use and defendant was held guilty, although he took the materials openly and with the expectation of paying for the same if called upon so to do.

73. Agawam Canal Co. *v.* Edwards, 36 Conn. 476.

74. Thus where land was condemned for the right of way of a canal and embankments were erected to protect a riparian owner, on the abandonment of the canal such owner was entitled to have the embankment remain. Burk *v.* Simonson, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304. And where a person to whom compensation was due agreed to release his damages in consideration of an agreement of the canal company to supply his mill with water through a waste weir and the canal was abandoned and lands of the company bought at an execution sale, it was held that while the purchaser was not bound to continue the canal he could not prevent or impair the flow of water through the waste weir as long as it would flow for the use of the mill. Beaver Falls Water-power Co. *v.* Wilson, 83 Pa. St. 83.

75. Where portions of a canal are abandoned under a law authorizing abandonment of all or parts of a canal the obligation to keep the balance of the canal in repair continues. State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121.

76. Thus, after an abandonment bridges over such canals connecting highways do not have to be kept up and maintained by the canal company. Pennsylvania, etc., Canal Co. *v.* Portage County, 27 Ohio St. 14.

77. Hoagland *v.* New York, etc., R. Co., 111 Ind. 443, 12 N. E. 83, 13 N. E. 572; Wabash, etc., Canal *v.* Brett, 25 Ind. 409; Little Miami Elevator Co. *v.* Cincinnati, 30 Ohio St. 629; Hubbard *v.* Toledo, 21 Ohio St. 379; Erkenbrecher *v.* Cincinnati, 2 Cinc. Super. Ct. (Ohio) 412; Com. *v.* Pennsylvania R. Co., 51 Pa. St. 351; Fox *v.* Cincinnati, 104 U. S. 783, 26 L. ed. 928.

78. Frank *v.* Evansville, etc., Co., 111 Ind. 132, 12 N. E. 105; Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364; Rexford *v.* Knight, 11 N. Y. 308; Genesee Valley Canal R. Co. *v.* Slaight, 49 Hun (N. Y.) 36, 1 N. Y. Suppl. 554, 17 N. Y. St. 241, 14 N. Y. Civ. Proc. 420; Birdsall *v.* Cary, 66 How. Pr. (N. Y.) 358; Craig *v.* Allegheny, 53 Pa. St. 477; Haldeman *v.* Pennsylvania Cent. R. Co., 50 Pa. St. 425; Mason *v.* Lake Erie, etc., R. Co., 9 Biss. (U. S.) 239, 1 Fed. 712. See also Whitney *v.* State, 96 N. Y. 240, holding that where a state appropriated land for a state canal which was paid for as allowed by law in benefits the owner received from the canal, no claim on his behalf existed against the state when the canal was abandoned and the land occupied by it released to a city for a street. If the state had acquired a fee in the land no claim existed. If only an easement had been acquired which had terminated the remedy was against the city.

79. Barnett *v.* Johnson, 15 N. J. Eq. 481; Corwin *v.* Cowan, 12 Ohio St. 629.

Effect on streets.— The state in constructing the Wabash and Erie canal through the streets of Logansport paid no damages and no rights were released by any one. Upon abandonment of the canal it was held that the rights of the public and of the abutting landowners in the streets revived. Logansport *v.* Shirk, 88 Ind. 563. See also Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82. It was held, however, in Williamsport *v.* Pennsylvania R. Co., 8 Pa. Co. Ct. 350, that the state of Pennsylvania, under its laws, had acquired a fee-simple estate in the property occupied by its canals, and that upon the abandonment of a canal a railroad company purchasing the canal property could not be prevented from laying tracks upon the streets traversed by such canal.

Effect on river used as part of canal.— A

ment when originally acquired was regarded as permanent, the discontinuance of the canal will not terminate the easement unless it can also be regarded as abandoned.[80]

VI. CANAL COMPANIES.

A. Right to Incorporate. The right of a canal company to incorporate is dependent upon the provision of law of each state.[81]

B. Privileges and Franchises. The existence and extent of a canal company's privileges and franchises and of the duties resulting therefrom depend upon the particular law or charter creating the same, and such general constitutional and statutory provisions as may relate thereto. The franchise may be exclusive in its nature, and if so all interference therewith will be prevented.[82] The words of the charter will not be construed in their most restricted sense but so as to carry out its object.[83]

C. Forfeiture of Franchise — Waiver. The state by its legislature may waive the right of forfeiture of a canal company's franchise.[84]

CANCEL.[1] To blot out or obliterate; to annul or destroy;[2] to cross out;[3] to annul;[4] doing away with.[5]

CANCELLARIA. Chancery; the court of chancery.[6]

CANCELLARIUS. Chancellor.[7]

CANCELLATION. The act of crossing out a writing; the manual operation of tearing or destroying a written instrument.[8] (Cancellation: Of Instruments, see CANCELLATION OF INSTRUMENTS.)

canal company had used the bed and waters of a river as part of its canal. The company was dissolved by order of court and it was held that the rights of the public in the river revived and could not be conveyed away. Day *v.* Pittsburg, etc., R. Co., 44 Ohio St. 406, 7 N. E. 528.

80. Thus, where a railroad company by purchase had succeeded to the rights of a canal company and the state had not questioned the right of the railroad company to operate its road on the property so purchased, it was held that the easement had not been abandoned but still existed, as the general purposes of the use were the same. Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92. See also Chase *v.* Sutton Mfg. Co., 4 Cush. (Mass.) 152.

Non-user of easement.— Where the easement was acquired by grant or its equivalent no length of mere non-user will destroy it. Curran *v.* Louisville, 83 Ky. 628.

81. Where the power to incorporate was under a statute authorizing the formation of private corporations of different kinds named, including canals for irrigation or manufacturing purposes and "for any other purpose intended for mutual profit" it was held that the general clause did not include and allow the incorporation of a canal company, where the canal was to be used for purposes of navigation. Texas, etc., Canal, etc., Co. *v.* Galveston County, 45 Tex. 272.

82. Singer *v.* Carondelet Canal, etc., Co., 39 La. Ann. 478, 2 So. 102.

83. Thus, where the charter gave authority to "continue the canal to the waters of the Hudson, at or near the city of Jersey" it was held that the piers and basin of the canal which were in the Hudson river were parts of the canal, it not being bound to terminate at the line of high or low water mark of the river. State *v.* Betts, 24 N. J. L. 555. And where a canal company was authorized "to discontinue or alter any part of a public road or highway" this included a turnpike. Rogers *v.* Bradshaw, 20 Johns. (N. Y.) 735.

84. Where an act suspended the collection of tolls by a navigation company "until all obstructions shall be removed or said channel deepened to the depth heretofore specified," it was held that this was a waiver of the right to forfeit the franchise, because the channel of the canal had become so obstructed as to impede navigation, and especially so if the obstructions were temporary in their character. State *v.* Morris, 73 Tex. 435, 11 S. W. 392.

1. **Derivation.**— "The Latin verb, from which the term 'cancel' is derived, means to make lattice work, and the corresponding noun in Latin, in the plural, *cancelli*, signifies lattice work; and when applied to marks, means marks made in the form of lattice work." Warner *v.* Warner, 37 Vt. 356, 362. See also 2 Bl. Comm. 309.

2. Auburn City Bank *v.* Leonard, 40 Barb. (N. Y.) 119, 134.

3. Townshend *v.* Howard, 86 Me. 285, 288, 29 Atl. 1077.

4. Golden *v.* Fowler, 26 Ga. 451, 464.

5. Winton *v.* Spring, 18 Cal. 451, 455.

6. Black L. Dict.

7. Burrill L. Dict.

8. Black L. Dict.

CANCELLATION OF INSTRUMENTS

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CROSS-REFERENCES

For Cancellation of Instrument:

In Proceedings Not in Equity, see BONDS; CHATTEL MORTGAGES; COMMERCIAL PAPER; CONTRACTS; DEEDS; MORTGAGES; VENDOR AND PURCHASER; and the like.

In Suit Not Brought to Cancel or Rescind, see CREDITORS' SUITS; EQUITY; QUIETING TITLE; SPECIFIC PERFORMANCE; TRESPASS TO TRY TITLE.

Of Particular Character, see BONDS; BOUNDARIES; CHATTEL MORTGAGES; COMMERCIAL PAPER; CONTRACTS; DEEDS; INSURANCE; MORTGAGES; VENDOR AND PURCHASER; WILLS; and the like.

Confidential or Fiduciary Relation as Ground For Cancellation, see APPRENTICES; CORPORATIONS; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; HUSBAND AND WIFE; PARENT AND CHILD; PARTNERSHIP; PRINCIPAL AND AGENT; TRUSTS; and the like.

Effect of Canceled Conveyance as Color of Title, see ADVERSE POSSESSION.

Reformation of Instrument, see REFORMATION OF INSTRUMENTS.

Removal of Cloud on Title, see QUIETING TITLE.

Setting Aside Fraudulent Conveyances, see FRAUDULENT CONVEYANCES.

I. IN GENERAL.

A. What Included in the Remedy. Cancellation, rescission, surrender up, and discharge of instruments are one and the same remedy; the decree for cancellation generally includes a direction for surrender up, and, if necessary, for a discharge of record.[1]

B. Rescission at Law Distinguished from Rescission in Equity. A court of equity entertains a suit for the express purpose of procuring a contract or conveyance to be canceled, and renders a decree conferring in terms that exact relief. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and although nothing is said concerning it, either in the pleading or in

1. Pomeroy Eq. Jur. §§ 1375, 1377, notes. See also *infra*, XI, A, 1.
Compare statutory provision in California. Cal. Civ. Code, § 3406, which provides for a judgment of rescission without cancellation in certain cases.

the judgment, a contract or conveyance, as the case may be, is virtually rescinded; the recovery is based upon the fact of such rescission, and could not have been granted unless the rescission had taken place.[2]

II. JURISDICTION.

A. Equitable Jurisdiction Is Exclusive. Although the facts which are the occasion of the equitable remedy of cancellation are usually grounds for some legal action or defense, cancellation is properly classed in the exclusive jurisdiction of equity, since it is a remedy which equity courts alone are able to confer.[3]

B. Grounds For Cancellation — 1. In General. When courts are called upon to set aside contracts there must be some substantial reasons shown, and a court of chancery, particularly, will not act, when it is kept in the dark as to the reasons or purposes of the transaction in reference to which relief is sought.[4]

2. Mistake. Cancellation of an instrument embodying an agreement or transaction is a proper remedy either when the minds of both parties have failed to meet upon the same matters, so that no agreement at all has really been made, or else the agreement or transaction is different, with respect to its subject-matter or terms, from that which was intended.[5]

3. Misrepresentations and Fraud — a. In General. Fraud in its various forms is the most frequent ground for the cancellation of instruments.[6]

b. Constructive Fraud[7] — (1) *Inadequacy of Consideration and Improvidence.* A contract or conveyance which is improvident, or based on an inadequate consideration will not be set aside for these reasons alone, unless, as the rule is generally stated, the improvidence or inadequacy is so great as to furnish of itself convincing evidence of fraud.[8]

2. Pomeroy Eq. Jur. § 110.

The fact that the same word, "rescission," is used to designate both the equitable remedy of cancellation, and the termination of a contract by the act of a party, has been productive of no little confusion. "In many of the cases for rescission in equity language is used from which it might be inferred that precisely the same principles govern in suits in equity that are applied to determine the right of the party to sue at law." Brown *v.* Norman, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663. See *infra*, IV, B, 6, b; and also Contracts.

3. Pomeroy Eq. Jur. § 138.

Under the Iowa statute of limitations the action for cancellation is an action "solely cognizable in equity." Relf *v.* Eberly, 23 Iowa 467.

4. Scanlan *v.* Gillan, 5 Cal. 182, an action which had for its object the cancellation of a bill of sale of an interest in a mining claim.

5. Pomeroy Eq. Jur. § 870. For the requisites to relief on the ground of mistake see, generally, Contracts; Equity. See also Dietrich *v.* Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. Rep. 698.

Reformation is the proper relief where the instrument, by mistake, fails to express the agreement actually made. See, generally, Reformation of Instruments; also Schelling *v.* Bischoff, 61 N. Y. Super. Ct. 68, 18 N. Y. Suppl. 859, 46 N. Y. St. 536.

Accident can hardly ever be a ground for cancellation, except in the case of relief against judgments, where the defendant was prevented by accident from setting up a defense to the action. See, generally, Judgments.

6. See Barrington *v.* Ryan, 88 Mo. App. 85; and *infra*, II, C.

The various elements that make up the complex conception of fraud are treated elsewhere. See, generally, Bonds; Chattel Mortgages; Commercial Paper; Contracts; Deeds; Mortgages; Vendor and Purchaser; and the like.

The element of scienter is not generally considered necessary to relief in equity; the general rule in equity being that any contract may be rescinded for an innocent misrepresentation which was a sufficient inducement thereto. Baptiste *v.* Peters, 51 Ala. 158. See also Brooks *v.* Hamilton, 15 Minn. 26.

A promise made with an intention not to perform it has sometimes been held to constitute a fraud for which a contract may be rescinded. Hodsden *v.* Hodsden, 69 Minn. 486, 72 N. W. 562; Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

7. For a full discussion of the grounds for cancellation coming under this head see, generally, Bonds; Chattel Mortgages; Commercial Paper; Contracts; Deeds; Mortgages; Vendor and Purchaser; and the like.

8. *California.*— Barry *v.* St. Joseph's Hospital, etc., (Cal. 1897) 48 Pac. 68.

Colorado.— Smith *v.* McCourt, 8 Colo. App. 146, 45 Pac. 239.

Delaware.— Wiest *v.* Garman, 3 Del. Ch. 422.

(II) *TOTAL OR PARTIAL INCAPACITY.* Contracts and conveyances have been set aside for mental weakness of which an inequitable advantage has been taken,[9] although a degree of mental weakness that is consistent with an understanding of the nature of the transaction, and is unaccompanied with any inequitable incident is not a ground for cancellation.[10] Undue influence, either alone or in combination with other inequitable elements, is of course a very frequent ground.[11]

(III) *CONFIDENTIAL OR FIDUCIARY RELATIONS.* Confidential or fiduciary relations of the parties to a contract or transaction as grounds for its rescission are not within the scope of this article.[12]

(IV) *CONVEYANCES AND CONTRACTS IN FRAUD OF CREDITORS, ETC.* Such conveyances and contracts are not within the scope of this article.[13]

4. ILLEGALITY. Illegality is a frequent ground for cancellation.[14]

5. CLOUD ON TITLE TO REAL PROPERTY. Equity has jurisdiction to cancel, when the instrument is a deed or other document concerning real estate, which although inoperative if suffered to remain uncanceled, would throw a cloud upon the plaintiff's title to the lands which it embraces, or to which it refers.[15]

Florida.— Stephens *v.* Orman, 10 Fla. 9.

Maryland.— Goodwin *v.* White, 59 Md. 503.

Missouri.— Schields *v.* Hickey, 26 Mo. App. 194.

New York.— Dunn *v.* Chambers, 4 Barb. (N. Y.) 376; Coster *v.* Griswold, 4 Edw. (N. Y.) 364.

North Carolina.—Potter *v.* Everitt, 42 N. C. 152; Green *v.* Thompson, 37 N. C. 365.

West Virginia.— Korne *v.* Korne, 30 W. Va. 1, 3 S. E. 17.

United States.— Morton *v.* Morris, 72 Fed. 392, 36 U. S. App. 550, 18 C. C. A. 611.

England.— Harrison *v.* Guest, 6 De G. M. & G. 424, 2 Jur. N. S. 911, 25 L. J. Ch. 544, 4 Wkly. Rep. 585, 55 Eng. Ch. 331.

Compare Richards *v.* Reeves, (Ind. App. 1896) 45 N. E. 624.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 3.

9. Tomlinson *v.* Tomlinson, 103 Iowa 740, 72 N. W. 664; Harris *v.* Wamsley, 41 Iowa 671; Esham *v.* Lamar, 10 B. Mon. (Ky.) 43; Clark *v.* Lopez, 75 Miss. 932, 23 So. 648, 957; Mays *v.* Prewett, 98 Tenn. 474, 40 S. W. 483.

Mere pecuniary necessity, of which an unfair advantage has been taken, has sometimes been treated as warranting the remedy of cancellation; but such cases are exceptional. Butler *v.* Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711; Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899; Hough *v.* Hunt, 2 Ohio 495, 15 Am. Dec. 569.

10. Harris *v.* Wamsley, 41 Iowa 671; Sprague *v.* Duel, 11 Paige (N. Y.) 480; Fidelity Title, etc., Co. *v.* Weitzel, 152 Pa. St. 498, 31 Wkly. Notes Cas. (Pa.) 414, 25 Atl. 569; Travis' Appeal, (Pa. 1887) 8 Atl. 601.

Other species of incapacity such as coverture (see HUSBAND AND WIFE), infancy (see INFANTS), insanity (see INSANE PERSONS; Fitzgerald *v.* Reed, 9 Sm. & M. (Miss.) 94), duress (see CONTRACTS; Fry *v.* Piersol, 166 Mo. 429, 66 S. W. 171), intoxication (see CONTRACTS; Hotchkiss *v.* Fortson, 7 Yerg. (Tenn.) 66), and the disabilities of heirs, expectants, and reversioners (see ASSIGNMENTS, 4 Cyc. 14 *et seq.*; CONTRACTS) are treated elsewhere.

11. *Alabama.*— Smith *v.* Pearson, 24 Ala. 355.

Georgia.— Walker *v.* Hunter, 27 Ga. 336.

Illinois.— Dorsey *v.* Wolcott, 173 Ill. 539, 50 N. E. 1015.

Kentucky.— Brannin *v.* Sherley, 91 Ky. 450, 12 Ky. L. Rep. 977, 16 S. W. 94.

Maryland.— Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

Ohio.— Truman *v.* Lore, 14 Ohio St. 144.

United States.— Harding *v.* Handy, 11 Wheat. (U. S.) 103, 6 L. ed. 429.

See also DEEDS.

12. Confidential or fiduciary relations between the parties to a contract or transaction as grounds for its rescission see GUARDIAN AND WARD; PARENT AND CHILD; PRINCIPAL AND AGENT; TRUSTS; and the like.

13. Conveyances and contracts in fraud of creditors, subsequent purchasers, etc., see FRAUDULENT CONVEYANCES.

14. Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117; Dickson *v.* Valentine, 57 N. Y. Super. Ct. 128, 6 N. Y. Suppl. 540, 24 N. Y. St. 957; Place *v.* Conklin, 23 Misc. (N. Y.) 40, 51 N. Y. Suppl. 407; Arden *v.* Patterson, 5 Johns. Ch. (N. Y.) 44; Porter *v.* Jones, 6 Coldw. (Tenn.) 313; Johnson *v.* Cooper, 2 Yerg. (Tenn.) 523, 24 Am. Dec. 502. See also *infra*, V; and CHAMPERTY AND MAINTENANCE; CONTRACTS; GAMING.

15. Field *v.* Holbrook, 6 Duer (N. Y.) 597, 14 How. Pr. (N. Y.) 103 [*quoted* in Lewis *v.* Tobias, 10 Cal. 575, and *citing* Van Doren *v.* New York, 9 Paige (N. Y.) 388; Pettit *v.* Shepherd, 5 Paige (N. Y.) 493, 28 Am. Dec. 437; Atty.-Gen. *v.* Morgan, 2 Russ. 306, 26 Rev. Rep. 81, 3 Eng. Ch. 306; Hayward *v.* Dimsdale, 17 Ves. Jr. 111; Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229]; Morton *v.* Morris, (Tex. Civ. App. 1901) 66 S. W. 94. See also Angus *v.* Craven, 132 Cal. 691, 64 Pac. 1001; and, generally, QUIETING TITLE.

Adverse claim for money or personal property is a ground for cancellation under the

6. Negotiability of the Instrument. A ground for cancellation exists, when the instrument is negotiable in its character, as a bill of exchange, and the putting it into circulation by the holder would be a fraudulent act.[16]

7. Danger of Loss of Evidence. Equitable jurisdiction to cancel may be exerted, where the plaintiff claims to have a defense valid at law, but which rests upon evidence which he is in danger of losing, if the adverse party is suffered to delay the prosecution of his claims.[17]

8. Multiplicity of Suits. The avoidance of a multiplicity of suits is, by the preponderance of authority, a sufficient ground for invoking the jurisdiction of equity, when claims depending on the same questions of fact or law, are urged or threatened by numerous persons against a single individual.[18]

9. Non-Performance. Non-performance by the defendant has occasionally been treated as a sufficient ground for rescission of a contract by decree in equity;[19] but the weight of authority is against this view.[20] Thus a conveyance of land in consideration of the grantee's agreement to support and care for the grantor during the remainder of his life will not, according to the weight of

statutes of certain states. Thus in Minnesota an overdue note was canceled under a statute which reads: "An action may be brought by one person against another, for the purpose of determining an adverse claim, which the latter makes against the former, for money or property upon an alleged obligation." Miller *v.* Rouse, 8 Minn. 124. See also Quieting Title.

16. Field *v.* Holbrook, 6 Duer (N. Y.) 597, 14 How. Pr. (N. Y.) 103 [*quoted* in Lewis *v.* Tobias, 10 Cal. 575]. And see *infra*, II, C, 5; and, generally, Commercial Paper.

17. Field *v.* Holbrook, 6 Duer (N. Y.) 597, 14 How. Pr. (N. Y.) 103 [*quoted* in Lewis *v.* Tobias, 10 Cal. 575, and *citing* Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517]. And see *infra*, II, C, 6; and, generally, Contracts.

But *compare* Loggie *v.* Chandler, 95 Me. 220, 49 Atl. 1059, holding that where a chattel mortgage has been paid the fact that the continued existence in the possession of the mortgagee of the mortgage makes it necessary for the mortgagor to carefully preserve the evidence of such payment is not sufficient ground for a decree in equity requiring the cancellation or surrender of the instrument.

18. See Pomeroy Eq. Jur. §§ 243–275. See also Bill of Peace; Equity; Injunctions.

Injunction or cancellation.— Injunction is here the remedy most frequently used; but cancellation may also be appropriate. Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Scott *v.* McFarland, 70 Fed. 280; Louisville R. Co. *v.* Ohio Valley Imp., etc., Co., 57 Fed. 42, 69 Fed. 431 [*affirmed* in 174 U. S. 552, 19 S. Ct. 823, 43 L. ed. 1081]; Ulman *v.* Iaeger, 67 Fed. 980. See also Rodgers *v.* Stern, 112 Ga. 624, 37 S. E. 877.

19. *Illinois.*— Fabrice *v.* Von der Brelie, 190 Ill. 460, 60 N. E. 835.

Kansas.— Winfield *v.* Winfield Water Co., 51 Kan. 70, 32 Pac. 663, where there was, however, insufficient notice and demand by plaintiff.

Kentucky.— See Kentucky River Nav. Co. *v.* Com., 13 Bush (Ky.) 435, rescission of a lease for breach of covenants by the lessee, where the defendant was insolvent, and actual physical performance was the only substantial interest the commonwealth could have in the lease, and irremediable mischief would result from either imperfect or non-performance. See also Thomas *v.* Sweet, 23 Ky. L. Rep. 1599, 63 S. W. 787, cancellation of deed for total failure of consideration.

Michigan.— Grand Haven *v.* Grand Haven Waterworks Co., 99 Mich. 106, 57 N. W. 1075.

Mississippi.— Light, etc., Co. *v.* Jackson, 73 Miss. 598, 19 So. 771.

Ohio.— Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677.

United States.— Farmers' L. & T. Co. *v.* Galesburg, 133 U. S. 156, 10 S. Ct. 316, 33 L. ed. 573 [*approved* in Ferris *v.* Hoglan, 121 Ala. 240, 25 So. 834; Winfield *v.* Winfield Water Co., 51 Kan. 70, 32 Pac. 663; Grand Haven *v.* Grand Haven Waterworks, 99 Mich. 106, 57 N. W. 1075; Light, etc., Co. *v.* Jackson, 73 Miss. 598, 19 So. 771; Palestine Water, etc., Co. *v.* Palestine, 91 Tex. 548, 44 S. W. 814, 40 L. R. A. 203], where an agreement of a water company to furnish a city with water in stipulated quantities was canceled at the suit of the city for non-performance, the circumstances rendering a suit for damages a wholly inadequate remedy.

See also 33 Am. L. Rev. 702.

20. Shaw *v.* Horner, 7 Colo. App. 83, 42 Pac. 689; Harrington *v.* Rutherford, 38 Fla. 321, 21 So. 283; Field *v.* Holbrook, 6 Duer (N. Y.) 597, 14 How. Pr. (N. Y.) 103; Rutland Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339, 19 L. ed. 955; Blake *v.* Pine Mountain Iron, etc., Co., 76 Fed. 624, 43 U. S. App. 490, 22 C. C. A. 430, "because, acting upon it [defective performance] the parties may voluntarily abandon or rescind the contract, and successfully sue or defend at law for non-performance, it does not follow that a court of equity will also rescind for non-performance." See also 33 Am. L. Rev. 702; and also *infra*, notes 21, 22.

A contemporaneous parol agreement by the grantee to destroy the deed within a certain time, which has not been carried out,

authority, be canceled for the mere failure of the grantee to fulfil his contract,[21] unless such failure amounts to the breach of a condition subsequent, in which case the deed may be canceled.[22]

10. Where Specific Performance Cannot Be Decreed. The fact that the contract is such that specific performance must be refused to one party is not of itself a sufficient ground for rescinding the contract at the suit of the other party.[23]

is not, in the absence of mistake or of fraudulent intent on the part of the grantee, a ground for its cancellation. Stacey *v.* Walter, 125 Ala. 291, 28 So. 89, 82 Am. St. Rep. 235 [*citing* Pomeroy Eq. Jur. § 854, and note].

Breach of grantor's promise, forming the inducement to the purchase, does not entitle the grantee to cancellation of the contract of purchase. Moore *v.* Cross, 87 Tex. 557, 29 S. W. 1051 [*reversing* (Tex. Civ. App.) 1894, 26 S. W. 122].

Failure of grantor's title.— Defect of title alone without fraud will not usually authorize a cancellation at the suit of the grantee, as his remedy upon the covenants of warranty is adequate. See *infra,* II, C, 7, b.

Forfeiture of insurance policy.— A life-insurance policy not fraudulently obtained will not be canceled during the life of the assured on the ground of a forfeiture occurring after the making of the contract. Connecticut Mut. L. Ins. Co. *v.* Bear, 26 Fed. 582.

Non-performance of grantee's agreement.— So a deed of right of way to a railroad company will not be canceled for non-performance of the grantee's agreement as to the construction of the road and the location of a station on the land granted (Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39); nor a deed conveying land to a manufacturing company in consideration of its agreement to establish its works thereon and operate them for a stated time, because of the company's failure to operate the works for the stipulated time (Piedmont Land Imp. Co. *v.* Piedmont Foundry, etc., Co., 96 Ala. 389, 11 So. 332). On the other hand it was held in Boyes *v.* Green Mountain Falls Town, etc., Co., 3 Colo. App. 295, 33 Pac. 77, that the breach of the grantee's agreement to make certain improvements on the land authorized the grantor to rescind and either sue at law for the breach or in equity for cancellation. See also Willard *v.* Ford, 16 Nebr. 543, 20 N. W. 859.

21. *Alabama.*— Gardner *v.* Knight, 124 Ala. 273, 27 So. 298.

Georgia.— Brand *v.* Power, 110 Ga. 522, 36 S. E. 53; Lindsey *v.* Lindsey, 62 Ga. 546.

Kentucky.— Powers *v.* Powers, 19 Ky. L. Rep. 266, 39 S. W. 825; Graves *v.* George, 18 Ky. L. Rep. 453, 37 S. W. 59.

Missouri.— Anderson *v.* Gaines, 156 Mo. 664, 57 S. W. 726.

North Carolina.—Murray *v.* King, 42 N. C. 19.

Tennessee.— A contract to convey a tract of land at the plaintiff's death in consideration of the defendant's agreement to support the plaintiff during the rest of his life will not be canceled for the defendant's failure to perform. Hale *v.* Witt, 1 Heisk. (Tenn.) 567.

See also, generally, Deeds.

Cancellation was decreed, however, in Penfield *v.* Penfield, 41 Conn. 474; Lane *v.* Lane, 21 Ky. L. Rep. 9, 50 S. W. 857; Cash *v.* Cash, 19 Ky. L. Rep. 686, 41 S. W. 579; Reid *v.* Burns, 13 Ohio St. 49; Lowman *v.* Crawford, 99 Va. 688, 40 S. E. 17.

See also Bogie *v.* Bogie, 41 Wis. 209, where it is held that courts of equity have power, in proper cases, to rescind conveyances and agreements of this character and to grant such relief as is necessary to prevent a fraud upon the party seeking the cancellation, especially in the case of aged and infirm persons who have conveyed their property to their children in consideration of support, where the grantees neglect to perform their duty in that respect.

In Illinois such conveyances have been frequently canceled, the courts proceeding upon the theory that they were made in the first instance with a fraudulent intent on the part of the grantee not to carry out the agreement. See McClelland *v.* McClelland, 176 Ill. 83, 51 N. E. 559; Cooper *v.* Gum, 152 Ill. 471, 39 N. E. 267; Kusch *v.* Kusch, 143 Ill. 353, 32 N. E. 267; Jones *v.* Neely, 72 Ill. 449; Oard *v.* Oard, 59 Ill. 46; Frazier *v.* Miller, 16 Ill. 48. It is too late on the trial to set aside a deed given in consideration of support to the grantor, which the grantees have failed to furnish, for the grantees to offer to take care of the grantor and give security for performance of such obligation. Fabrice *v.* Von der Brelie, 190 Ill. 460, 60 N. E. 835.

In Oregon, while refusing cancellation, equity will take jurisdiction in order to prevent a multiplicity of suits for damages, and will make the support a charge upon the premises. Patton *v.* Nixon, 33 Oreg. 159, 52 Pac. 1048; Watson *v.* Smith, 7 Oreg. 448.

22. Teague *v.* Teague, 22 Tex. Civ. App. 443, 54 S. W. 632; Knutson *v.* Bostrak, 99 Wis. 469, 75 N. W. 156.

23. *Alabama.*— Beck *v.* Simmons, 7 Ala. 71.

New Jersey.— Young Lock Nut Co. *v.* Brownley Mfg. Co., (N. J. 1896) 34 Atl. 947.

Ohio.— Watkins *v.* Collins, 11 Ohio 31.

Virginia.— Thompson *v.* Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721.

United States.— Jackson *v.* Ashton, 11 Pet. (U. S.) 229, 9 L. ed. 698.

But see Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677.

Yet it has been broadly asserted that "if a case is made out which will justify the court in declaring a contract at an end, it

11. Absence of Authority of Plaintiff's Agent. The absence of authority of plaintiff's agent to make the contract has been considered sufficient ground for the cancellation of the contract.[24]

C. Inadequacy of the Legal Remedy — 1. General Rule. While the existence of the jurisdiction to cancel an instrument does not depend upon the inadequacy of the complainant's legal remedy,[25] the jurisdiction, as a general rule, will not be exercised when his remedy at law, by way either of action or defense, is plain, adequate, and complete.[26]

2. Where Instrument Is Void. The fact that an instrument is void is no reason why it should not be canceled,[27] but an instrument whose invalidity is appar-

will in general be ordered to be delivered up to be cancelled." Wilson *v.* Getty, 57 Pa. St. 266.

That a deed was based upon a consideration that could not be specifically enforced was held to be a sufficient ground for its rescission at the suit of the grantor, in Grimmer *v.* Carlton, 93 Cal. 189, 28 Pac. 1043, 27 Am. St. Rep. 171. This extraordinary and wholly unprecedented decision is sharply criticized by the editor of the American State Reports who says (27 Am. St. Rep. 174): "According to this decision, if our publisher should convey us a tract of land in consideration of our agreement to edit a volume of these reports to the best of our skill, he might at once pursue us in a court of equity for having perpetrated a fraud on him in procuring the conveyance in consideration of our agreement, because no court would undertake to compel us to edit anything; and he might obtain a decree canceling his conveyance, though we were willing to render the services as agreed."

24. Meridian Waterworks Co. *v.* Marks, (Miss. 1894) 16 So. 357 [*overruling* Meridian Waterworks Co. *v.* Schulherr, (Miss. 1892) 17 So. 167], holding that where the agent of a water company, without authority, executes a contract to furnish water at rates below the company's regular tariff rates, the court of chancery has jurisdiction of a suit by the company to cancel the contract, although complainant can obtain redress by refusing to carry out the contract. See also Field *v.* Holbrook, 6 Duer (N. Y.) 597, 14 How. Pr. (N. Y.) 103, 105 [*quoted* in Lewis *v.* Tobias, 10 Cal. 574], holding that equity has jurisdiction to cancel an instrument "when the plaintiff alleges that the instrument, which he prays may be surrendered or cancelled, is void upon grounds of which a court of equity alone can take cognizance."

25. Gefken *v.* Graef, 77 Ga. 340; Pomeroy Eq. Jur. §§ 221, 911, 914, 1377. See also *infra*, II, C, 7.

26. See cases cited *infra*, note 27 *et seq.*

The exercise of the jurisdiction is discretionary, but this discretion must be used in conformity with established principles. Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 178.

Where no injury at all is caused or threatened to the complainant by the existence of the instrument uncanceled and in other hands, a court of equity will not interfere.

California.— Fitch *v.* Bunch, 30 Cal. 208.

Georgia.— Johnson *v.* Johnson, 59 Ga. 613.

Iowa.— Huff *v.* Jennings, Morr. (Iowa) 454.

Kentucky.— Morris *v.* McMillen, 3 A. K. Marsh. (Ky.) 565.

Massachusetts.— Jewett *v.* Davis, 10 Allen (Mass.) 68.

Missouri.— Culligan *v.* Wingerter, 57 Mo. 241.

New Jersey.— McArthur *v.* McArthur, (N. J. 1890) 19 Atl. 1094.

New York.— Johnson *v.* Crane, 40 Barb. (N. Y.) 78.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 2.

But a grantor cannot defend a suit for cancellation grounded on mistake as to the subject-matter, by showing that the tract conveyed is as valuable as the tract bargained for. Clapp *v.* Greenlee, 100 Iowa 586, 69 N. W. 1049.

27. *Alabama.*— Smith *v.* Pearson, 24 Ala. 355.

Arkansas.— Breathwit *v.* Rogers, 32 Ark. 758.

Illinois.— Moore *v.* Munn, 69 Ill. 591.

Indiana.— Hardy *v.* Brier, 91 Ind. 91; Huston *v.* Schindler, 46 Ind. 38; Huston *v.* Roosa, 43 Ind. 517.

Iowa.— Gray *v.* Coan, 23 Iowa 344.

Maryland.— Singery *v.* Atty.-Gen., 2 Harr. & J. (Md.) 487.

Mississippi.— Sessions *v.* Jones, 6 How. (Miss.) 123.

New York.— Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Arden *v.* Patterson, 5 Johns. Ch. (N. Y.) 44.

West Virginia.— Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251; Alexander *v.* Davis, 42 W. Va. 465, 26 S. E. 291, forged deed.

United States.—Rich *v.* Braxton, 158 U. S. 375, 16 S. Ct. 1006, 39 L. ed. 1022; Bunce *v.* Gallagher, 5 Blatchf. (U. S.) 481, 4 Fed. Cas. No. 2,133, 7 Am. L. Reg. N. S. 32.

England.— *In re* Cooper, 20 Ch. Div. 611, 51 L. J. Ch. 862, 47 L. T. Rep. N. S. 89, 30 Wkly. Rep. 648 (forged mortgages); Hayward *v.* Dimsdale, 17 Ves. Jr. 111; Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229; St. John *v.* St. John, 11 Ves. Jr. 526; Colchester *v.* Lawten, 1 Ves. & B. 226, 12 Rev. Rep. 216.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 11.

ent upon its face will not, by a rule almost universally held, but often severely criticized,[28] be relieved against in equity.[29]

3. Where Instrument Was Obtained by Fraud. In England, by an unbroken line of authority from the earliest days, jurisdiction is held by courts of equity in all cases of fraud, and the exercise of the jurisdiction is not dependent upon the inadequacy of the legal remedy.[30] This broader view of the jurisdiction in cases of fraud has been entertained by a number of courts in this country.[31]

28. See the following cases:

New York.— Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517.

Rhode Island.— Linnell *v.* Battey, 17 R. I. 241, 21 Atl. 606, 1 Keener Cas. Eq. Jur. 387.

Tennessee.— Almony *v.* Hicks, 3 Head (Tenn.) 38; Jones *v.* Perry, 10 Yerg. (Tenn.) 58, 30 Am. Dec. 430.

Texas.— Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865, 1 Keener Cas. Eq. Jur. 364; Norton *v.* Morris, (Tex. Civ. App. 1901) 66 S. W. 94.

West Virginia.— Simpson *v.* Edmiston, 23 W. Va. 675. See also, generally, Quieting Title; and Pomeroy Eq. Jur. § 1399, where the criticism, as regards a cloud upon the title to realty, is based upon the fact that such an instrument, if left uncanceled, may depreciate the market value of the land quite as much as one whose invalidity must be established by extrinsic evidence.

29. *California.*— Oakland *v.* Carpenter, 21 Cal. 642.

District of Columbia.— O'Connell *v.* Noonan, 1 App. Cas. (D. C.) 332.

Maine.— Briggs *v.* Johnson, 71 Me. 235.

Missouri.— Benton County *v.* Morgan, 163 Mo. 661, 64 S. W. 119.

New York.— Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Levy *v.* Hart, 54 Barb. (N. Y.) 248; Field *v.* Holbrook, 6 Duer (N. Y.) 597, 14 How. Pr. (N. Y.) 103.

Wisconsin.— S. L. Sheldon Co. *v.* Mayers, 81 Wis. 627, 51 N. W. 1082, counter-claim seeking cancellation of the contract sued upon.

United States.— Peirsoll *v.* Elliott, 6 Pet. (U. S.) 95, 8 L. ed. 332; Elliott *v.* Peirsoll, 1 McLean (U. S.) 11, 8 Fed. Cas. No. 4,395.

England.—Simpson *v.* Howden, 3 Myl. & C. 97, 14 Eng. Ch. 97; Smyth *v.* Griffin, 13 Sim. 245, 36 Eng. Ch. 245; Gray *v.* Mathias, 5 Ves. Jr. 286, 5 Rev. Rep. 48.

See 8 Cent. Dig. tit. "Cancellation of Instruments." § 12.

Equity will not interfere in case of an instrument invalid on its face, nor where its invalidity will appear upon the proofs of the party claiming under it. Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Marsh *v.* Brooklyn, 59 N. Y. 280; Ward *v.* Dewey, 16 N. Y. 519; Cox *v.* Clift, 2 N. Y. 118. See also, generally, Quieting Title.

30. See Pomeroy Eq. Jur. § 912. See also London, etc., Ins. Co. *v.* Seymour, L. R. 17 Eq. 85, 2 Aspin. 169, 43 L. J. Ch. 126, 29 L. T. Rep. N. S. 641, 22 Wkly. Rep. 201; Hoare *v.* Bremridge, L. R. 14 Eq. 522, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 503, 21 Wkly. Rep. 43; Bartlett *v.* Salmon, 60 De G., M. & G. 33, 1 Jur. N. S. 277, 55 Eng. Ch. 26; Jenning *v.* Broughton, 5 De G., M. & G. 126, 23 L. J. Ch. 999, 54 Eng. Ch. 102.

31. Either expressly or implicitly in the following cases:

Alabama.— Merritt *v.* Ehrman, 116 Ala. 278, 22 So. 514; Waddell *v.* Lanier, 62 Ala. 347.

Arkansas.— Brittin *v.* Crabtree, 20 Ark. 309.

Kentucky.— Mershon *v.* Commonwealth Bank, 6 J. J. Marsh. (Ky.) 438; Bradberry *v.* Keas, 5 J. J. Marsh. (Ky.) 446; Caldwell *v.* Caldwell, 1 J. J. Marsh. (Ky.) 53; Ashley *v.* Denton, 1 Litt. (Ky.) 86.

Maine.— Clark *v.* Robinson, 58 Me. 133.

Maryland.— Baltimore Sugar Refining Co. *v.* Campbell, etc., Co., 83 Md. 36, 34 Atl. 369 (purchase of chattels); Taymon *v.* Mitchell, 1 Md. Ch. 496.

Massachusetts.— Nathan *v.* Nathan, 166 Mass. 294, 44 N. E. 221; Fuller *v.* Percival, 126 Mass. 381.

Michigan.— John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566; Cogswell *v.* Mitts, 90 Mich. 353, 51 N. W. 514.

Mississippi.— Garrett *v.* Mississippi, etc., R. Co., Freem. (Miss.) 70.

New Jersey.—Crane *v.* Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

New York.— Ranney *v.* Warren, 13 Hun (N. Y.) 11; Thompson *v.* Graham, 1 Paige (N. Y.) 384.

United States.— Patton *v.* Glatz, 56 Fed. 367.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 7.

In Massachusetts the courts have adopted this English view of the jurisdiction in cases of fraud in consequence of the statute conferring full equity jurisdiction. Mass. Pub. Stat. c. 151, § 4; Nathan *v.* Nathan, 166 Mass. 294, 44 N. E. 221; Billings *v.* Mann, 156 Mass. 203, 30 N. E. 1136; Holden *v.* Hoyt, 134 Mass. 181, bill by owner of a promissory note, and a mortgage securing it, to restrain a sale of the property covered by the mortgage and to compel the surrender of the note and mortgage by a person claiming to hold them under a transfer fraudulently made to him by an agent of the owner; remedy by writ of entry, or by replevin, not adequate. Under the restricted view of the jurisdiction which prevailed in Massachusetts previous to the above statute (see Pomeroy Eq. Jur. § 318) it was held that there was no jurisdiction of a suit on behalf of

4. Where Instrument Creates Cloud on Title. Where the instrument sought to be canceled creates a cloud upon the complainant's title to land, and the instrument is valid upon its face, his legal remedy is usually inadequate.[32]

5. Negotiable Instruments. Where cancellation is sought of a negotiable instrument, before its maturity, on the ground of fraud, mistake, etc., jurisdiction is freely exercised, for the reason that by the negotiation of the instrument to a *bona fide* purchaser, the complainant may lose the benefit of his defense.[33]

6. Other Instruments; Where Defense Exists Against Action on Instrument. As a general rule, sustained by a preponderance of authority, a suit will not be sustained to cancel a non-negotiable instrument, to which a defense may be made in an action at law thereon, unless some substantial reason is assigned showing that the defense at law is an insufficient protection.[34] This is especially true where an

the grantor to set aside a deed of land procured from him by fraud, since the land could be recovered by writ of entry. White *v.* Thayer, 121 Mass. 226; Boardman *v.* Jackson, 119 Mass. 161.

32. See cases cited *supra*, note 27; and, generally, Quieting Title. For the rule in Pennsylvania see Gans *v.* Drum, 24 Pa. Co. Ct. 481; Andrews *v.* Emery, 24 Pa. Co. Ct. 210, 31 Pittsb. Leg. N. S. (Pa.) 138.

Plaintiff's possession.— It is generally held that the plaintiff, in order to obtain cancellation in case of a cloud upon a legal title, must be in possession. Arnett *v.* Bailey, 60 Ala. 435; Polk *v.* Pendleton, 31 Md. 118; Buck Mountain Coal Co. *v.* Conrad, 6 Phila. (Pa.) 111, 22 Leg. Int. (Pa.) 373; Christian *v.* Vance, 41 W. Va. 754, 24 S. E. 596. See also Wilkinson *v.* Wilkinson, 129 Ala. 279, 30 So. 578. See, however, Hogueland *v.* Arts, 113 Iowa 634, 85 N. W. 818; Bunce *v.* Gallagher, 5 Blatchf. (U. S.) 481, 4 Fed. Cas. No. 2,133, 7 Am. L. Reg. N. S. 32.

But possession is not required where the plaintiff is seeking to clear an equitable title (Fox *v.* Blossom, 17 Blatchf. (U. S.) 352, 9 Fed. Cas. No. 5,008, suit by second mortgagee to cancel first mortgage on the ground that it is barred by the statute of limitations), or where he holds the legal title under such circumstances that the law cannot furnish him full and complete relief (Sneathen *v.* Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; Beedle *v.* Mead, 81 Mo. 297), or where other distinct grounds of equity jurisdiction are averred (Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528; Crane *v.* Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519; Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251). See also Pomeroy Eq. Jur. § 1399 note; and, generally, Quieting Title.

33. *Arkansas.*— Breathwit *v.* Rogers, 32 Ark. 758.

Georgia.—Hairalson *v.* Carson, 111 Ga. 57, 36 S. E. 319.

Michigan.— Maclean *v.* Fitzsimons, 80 Mich. 336, 45 N. W. 145.

Missouri.— Cass County *v.* Green, 66 Mo. 498, negotiable bonds.

New Jersey.— Paterson *v.* Baker, 51 N. J. Eq. 49, 26 Atl. 324; Meiler *v.* Meiler, 19 N. J. Eq. 457, 18 N. J. Eq. 270.

Wisconsin.— Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263.

United States.— White *v.* Clarke, 5 Cranch C. C. (U. S.) 102, 29 Fed. Cas. No. 17,540.

England.— Minshaw *v.* Jordan, 3 Bro. Ch. 17, note *a*; Jervis *v.* White, 7 Ves. Jr. 413; Winchester *v.* Fournier, 2 Ves. 445.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 13.

In such cases an injunction against the transfer of the instrument is frequently granted. See cases cited *supra*, this note; and, generally, Injunctions.

When injunction and cancellation refused. — But an injunction and cancellation of a negotiable note fraudulently altered after its execution and therefor invalidated in the hands of a *bona fide* holder was refused in Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577. See also Trimble *v.* Minnesota Thresher Mfg. Co., 10 Okla. 578, 64 Pac. 8.

Where a note secured by chattel mortgage was procured by fraud, and the note was not yet due, the maker of the note might sue to cancel the note and mortgage and incidentally to restrain the foreclosure of the latter. Hodson *v.* Eugene Glass Co., 156 Ill. 397, 40 N. E. 971 [*affirming* 54 Ill. App. 248].

34. Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373, 21 L. ed. 174; Pomeroy Eq. Jur. § 914 note.

"If the mere fact that a defence exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury." Venice *v.* Woodruff, 62 N. Y. 462, 467, 20 Am. Rep. 495.

That there has been a full trial on the merits of the suit for cancellation, and findings in favor of the plaintiff, are important circumstances in influencing the court to exercise its discretionary power, notwithstanding the adequacy of the legal defense. See Crump *v.* Ingersoll, 47 Minn. 179, 49 N. W. 739; Glastenbury *v.* McDonald, 44 Vt. 450.

action at law upon the instrument is actually pending.[35] As to what circumstances will render the defense in a future action upon the instrument an inadequate protection there is a great lack of unanimity among the decisions;[36] that

35. *Alabama.*— Dickinson *v.* Lewis, 34 Ala. 638.

California.— Shain *v.* Belvin, 79 Cal. 262, 21 Pac. 747; Smith *v.* Sparrow, 13 Cal. 596.

Georgia.— Trammell *v.* Marks, 44 Ga. 166.

Minnesota.— Turnbull *v.* Crick, 63 Minn. 91, 65 N. W. 135.

New York.— Crane *v.* Bunnell, 10 Paige (N. Y.) 333.

Ohio.— Quebec Bank *v.* Weyand, 30 Ohio St. 126; Guardian Mut. L. Ins. Co. *v.* Sandal, 7 Ohio Dec. (Reprint) 503, 3 Cinc. L. Bul. 559.

Tennessee.— McLin *v.* Marshall, 1 Heisk. (Tenn.) 678.

United States.— Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373, 21 L. ed. 174; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616, 20 L. ed. 501; Ætna L. Ins. Co. *v.* Smith, 73 Fed. 318.

See also Pomeroy Eq. Jur. § 179; and 8 Cent. Dig. tit. "Cancellation of Instruments," §§ 8, 13.

Limits of rule.— But where the plaintiff in the legal action might at any time withdraw it and bring another at his convenience, the defense at law was not considered an adequate protection. Domingo *v.* Getman, 9 Cal. 97; Buxton *v.* Broadway, 45 Conn. 540; Ferguson *v.* Fisk, 28 Conn. 501; Porter *v.* Jones, 6 Coldw. (Tenn.) 313. As to other circumstances warranting exercise of the discretion of the court of equity to intervene see Glastenbury *v.* McDonald, 44 Vt. 450.

36. Negotiable instruments after maturity have been canceled: For mistake, giving concurrent jurisdiction with courts of law. Fitzmaurice *v.* Mosier, 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854. For fraud, giving concurrent jurisdiction, and because delay in settling the affairs of a partnership would result from awaiting a suit upon the note. Fuller *v.* Percival, 126 Mass. 381. For fraud, where the case has been tried on its merits. Glastenbury *v.* McDonald, 44 Vt. 450. For forgery, rendering delay undesirable, because the defendant is likely to be unscrupulous in his use of evidence. Hardy *v.* Brier, 91 Ind. 91; Huston *v.* Schindler, 46 Ind. 38; Huston *v.* Roosa, 43 Ind. 517. For failure of consideration, though an action at law was pending on the instrument, this fact being regarded as of no importance, as the action might at any time be withdrawn by the plaintiff therein and another brought at his convenience. Ferguson *v.* Fisk, 28 Conn. 501. See also Domingo *v.* Getman, 9 Cal. 97. A note pledged as security for a usurious loan may be canceled under N. Y. Code Civ. Proc. § 1911. Dickson *v.* Valentine, 57 N. Y. Super. Ct. 128, 6 N. Y. Suppl. 540, 24 N. Y. St. 957.

Negotiable instruments after maturity not canceled.— In the absence of fraud the mere existence of the following defenses was held insufficient: Accord and satisfaction. Lewis *v.* Tobias, 10 Cal. 574. Illegality. Cincinnati, etc., R. Co. *v.* McKeen, 64 Fed. 36, 24 U. S. App. 218, 12 C. C. A. 14. That the notes in question were made by a married woman for the accommodation of her husband. Hoffman *v.* Treadwell, 39 N. Y. Super. Ct. 183. Duress, where it did not appear that the defense in an action pending at law was in any way embarrassed. McLin *v.* Marshall, 1 Heisk. (Tenn.) 678. See also Black *v.* Miller, 173 Ill. 489, 50 N. E. 1009.

Non-negotiable notes were canceled in the following cases: Notes discharged by payment. Garrett *v.* Mississippi, etc., R. Co., Freem. (Miss.) 70. Note procured by fraud, and having ten years to run at the time of the suit, on account of the probable loss of evidence. Buxton *v.* Broadway, 45 Conn. 540. Note procured by fraud, on ground that action thereon may be delayed until evidence to establish complainant's defense at law is not available. Merritt *v.* Ehrman, 116 Ala. 278, 22 So. 514. Note void for illegality of consideration (and action thereon enjoined) on the ground of the capacity of the court of equity to administer more effectual relief. Porter *v.* Jones, 6 Coldw. (Tenn.) 313.

Non-negotiable notes not canceled.— Payment of notes was held no ground for their cancellation. Mercantile Bank *v.* Pettigrew, 74 N. C. 326. So also in the well-considered case of Butler *v.* Durham, 2 Ga. 413, where cancellation was sought of fourteen different notes, but no danger was shown of loss of evidence of payment, and it was not apparent that the defendant intended to harass the complainant. Want of consideration was held not to be a ground for cancellation in Burlington Tp. *v.* Cross, 15 Kan. 74.

Forged note.—A federal court of equity has jurisdiction of a suit for the cancellation of a forged note brought by the purported maker against the payee, who is alleged to be asserting the validity of such note and attempting to negotiate the same, where under the state statute an action to recover on said note will not be barred for more than eleven years; the complainant's remedy at law in such case by defending against the note when sued thereon not being as practical and efficient as that in equity, and therefore not adequate and complete, so as to exclude the jurisdiction of equity. Schmidt *v.* West, 104 Fed. 272. See also Hardy *v.* Brier, 91 Ind. 91; Huston *v.* Schindler, 46 Ind. 38; Huston *v.* Roosa, 43 Ind. 517; Patterson *v.* Smith, 4 Dana (Ky.) 153; Bunce *v.* Gallagher, 5 Blatchf. (U. S.) 481, 4 Fed. Cas. No. 2,133, 7 Am. L. Reg. N. S. 32.

Bonds.— In a suit to enjoin an action on certain municipal bonds, and for cancellation thereof, allegations that the bonds were unauthorized, in violation of law and in fraud of the town, and that the obligee was not a

the instrument was obtained by fraud is, as has been seen, such a circumstance,

bona fide holder for value, constitute a complete defense at law; hence, as no difficulty in establishing these facts was suggested, the remedy at law was adequate. Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373, 21 L. ed. 174. See also Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495 [*followed* in Farmington Village Corp. *v.* Sandy River Nat. Bank, 85 Me. 46, 26 Atl. 965]. But in a later New York case it was held that where extrinsic proof was necessary to establish a defense to actions to recover on such bonds, the existence of such defense, combined with the risk of losing evidence, and the apprehension of a multiplicity of suits, established a proper case for equitable relief. Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397. In an early New York case it was said "that the habit of this court is not to cancel bonds or other instruments because they have no validity as matters of legal obligation or cognizance." Noah *v.* Webb, 1 Edw. (N. Y.) 604. See also Brown *v.* Boyd, 158 Mass. 470, 33 N. E. 568. In Patterson *v.* Smith, 4 Dana (Ky.) 153, it was held that a party whose name has been forged as surety in a replevin bond may maintain a bill to have the bond canceled, so far as it purports to bind him. In general, that the grounds upon which the jurisdiction is invoked may avail the party as a defense in an action at law is not a sound objection to the exercise of the jurisdiction to cancel a bond, unless a suit at law has been commenced, or the defense is of a character plain and palpable, and within the command of the party at any time. Cornish *v.* Bryan, 10 N. J. Eq. 146. See also Canon *v.* Ballard, 62 N. J. Eq. 383, 50 Atl. 178 [*reversed* on other grounds in 52 Atl. 352].

Contract for purchase of land.— In a suit by the vendee to rescind such a contract on the ground of defect in title or want of power in the vendor to sell, relief was refused, as the vendee had a perfect defense to any action brought against him on the contract. Bruner *v.* Meigs, 64 N. Y. 506.

Contract of marriage.—An instrument purporting to be a written contract of marriage, alleged to be forged or fraudulent, was held a proper subject for cancellation, for the reason that evidence to prove its fictitious character lay peculiarly within the knowledge of the complainant, and was liable to be lost by his death. Sharon v. Hill, 20 Fed. 1.

County warrants.— An action cannot be maintained to cancel county warrants alleged to have been illegally issued, when there exists an adequate remedy at law under a statute providing that an action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for moneys or property upon an alleged obligation. Ada County *v.* Bullen Bridge Co., (Ida. 1896) 47 Pac. 818, 36 L. R. A. 367 [*distinguishing* Andrews *v.* Pratt, 44 Cal. 309].

Deed — Warranty clause fraudulently inserted by the grantee may be canceled at the suit of the grantor, although it may be avoided in an action upon it at law. Maise *v.* Carner, Mart. & Y. (Tenn.) 382, 17 Am. Dec 817.

Lease.— The fact that the premises were unfit for use by reason of latent defects, being a good defense to an action for rent, was held not a reason for cancellation in Reedy *v.* Chicago Vinegar, etc., Co., 30 Ill. App. 153.

Insurance policies.— Traill *v.* Baring, 4 De G. J. & S. 318, 69 Eng. Ch. 247; Whittingham *v.* Thornburgh, 2 Vern. 206. See also John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566, where a suit at law which had been brought on a life-insurance policy fraudulently obtained was enjoined and the policy decreed to be canceled. In Security Trust Co. *v.* Tarpey, 66 Ill. App. 589, suit was brought in the lifetime of the assured to cancel a similar policy, and jurisdiction was held not to be taken away by his death during the pendency of the suit. In Commercial Mut. Ins. Co. *v.* McLoon, 14 Allen (Mass.) 351, a bill to cancel a marine insurance policy on the ground of fraud was sustained, without any special reasons being assigned, but it appears from the allegations of the bill that there was unusual danger of loss of evidence. On the other hand it was held in Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616, 20 L. ed. 501, and in Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202, that a suit to cancel a life-insurance policy on the ground of fraud brought after the death of the insured will not be sustained in the absence of special circumstances rendering the remedy in equity necessary to prevent irreparable injury. See also Ætna L. Ins. Co. *v.* Smith, 73 Fed. 318; Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 1 Dill. (U. S.) 424, 12 Fed. Cas. No. 6.660, 5 Am. L. Rev. 564, 4 Am. L. T. Rep. (U. S. Cts.) 171, 3 Chic. Leg. N. 97. When no fraud was shown in the procurement of a fire-insurance policy, the fact that the insured set fire to the property was not a ground for its cancellation. Imperial F. Ins. Co. *v.* Gunning, 81 Ill. 236.

Insurance adjustment obtained by fraud was held not a proper subject for cancellation in Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. 378.

Judgment note.—In Ginsberg *v.* Rubinowitz, 20 Pa. Co. Ct. 230, the surrender was compelled of a note with warrant of attorney authorizing confession of judgment, of which the payee had no right to make any use whatsoever, on the ground that the note might be used for the harassment and distress of the complainant.

Patents.— See Hughes *v.* U. S., 4 Wall. (U. S.) 232, 18 L. ed. 303. An agreement whereby the plaintiffs granted to the defendants the exclusive right to sell and dispose of certain patented machines throughout the Pacific coast, on the condition that the grantee

in the view of a few courts only;[37] and the mere ordinary danger of losing evidence to establish the defense is not, in many states, regarded as sufficient, standing alone.[38]

7. When a Remedy by Action at Law Exists — a. In General. The same absence of a general criterion for determining the adequacy of the complainant's legal remedy is found in this class of cases also, where the complainant may take the initiative as plaintiff in an action of deceit, or for the recovery of the consideration paid, etc.[39]

b. Action on Covenants. It is the general rule that a purchaser of land, who

would make faithful efforts to sell the machines within the same territory, having been violated by the defendants, the latter claimed that notwithstanding their violation they possessed all the rights conferred by the agreement, and disputed the right of the plaintiffs to terminate it, and threatened that they would endeavor to enjoin the plaintiffs from disposing of the machines within the specified territory. It was held that the fact that the plaintiffs might successfully defend an injunction suit, or suits, in the various states covered by the agreement, was no objection to the remedy for cancellation of the agreement. Bradley *v.* Anglo-American Gas Control Co., 102 Cal. 627, 36 Pac. 1011.

Where an obligation was obtained from plaintiff by fraudulent representations, and both defendants claimed to own it by assignment, and each commenced an action against him claiming in hostility to each other, it was held that the plaintiff might, during the pendency of the actions against him, bring a suit against both claimants to be relieved from the contract, as otherwise he would be subjected to the expense of the double litigation and the hazard of a double recovery. McHenry *v.* Hazard, 45 N. Y. 580.

A writing which might be used as evidence of a gift of slaves by the complainant to the defendant procured by fraud was canceled, although the fraud might have been set up in defense to an action on the writing. Johnson *v.* Hendley, 5 Munf. (Va.) 219.

37. See cases cited *supra*, note 31.

38. It seems to be held sufficient in Alabama. Merritt *v.* Ehrman, 116 Ala. 278, 288, 22 So. 514, where it is said: "Before it can be said that the remedy at law is full and complete, it must appear that the defrauded party can obtain immediate relief, either by affirmative or defensive action." *Compare* cases cited *infra*, this note.

Effect of statutes for the perpetuation of testimony.— It has been said that the effect of these statutes has been wholly to dispense with the necessity of resorting to equity on the ground of the danger of the loss of the plaintiff's evidence to establish his defense to the instrument. Brown *v.* Boyd, 158 Mass. 470, 33 N. E. 568; Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577; Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495. But this argument was rejected by the eminent judge who advanced it in the case last mentioned, in Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; in Hardy *v.* Brier, 91 Ind. 91; and in Schmidt *v.* West, 104 Fed. 272.

39. See, generally, EQUITY; VENDOR AND PURCHASER; and the illustrations *infra*, this note.

Rescission at suit of purchases of realty.— In Boyce *v.* Grundy, 3 Pet. (U. S.) 210, 7 L. ed. 655, it was held that fraudulent representations as to the nature, quality, and quantity of the land, affecting the whole subject-matter of the contract, entitled the purchaser to rescission, and did not present a case for compensation merely. But it was explained in Buzard *v.* Houston, 119 U. S. 347, 7 S. Ct. 249, 30 L. ed. 451, that this decision rested on the ground of the multiplicity of suits to which the vendee might be subjected for the recovery of instalments of the purchase-money. Rescission should not be decreed for mere deficiency in quantity of the land, if adequate compensation can be made. Anderson *v.* Snyder, 21 W. Va. 632. Rescission was decreed on ground of failure of title and vendor's insolvency (Griggs *v.* Woodruff, 14 Ala. 9); but refused where vendor, though non-resident, is solvent (Parks *v.* Brooks, 16 Ala. 529); and the vendor's insolvency is unimportant where the purchase-money note for the part of the land the title to which has failed was expressly conditioned on a good title (Graham *v.* Nesmith, 18 Ala. 763). Cancellation on the ground of vendor's breach of the conditions of the title bond was refused. Shoup *v.* Cook, 1 Ind. 135.

Rescission at suit of vendor of realty.— A bill to cancel, on the ground of plaintiff's mental incapacity, a contract by which the plaintiffs gave defendant a half interest in a lot and allowed him to control the rents and profits, and which provided that it should not be sold within ten years without his consent, was sustained, as the remedy at law by recovery of possession of the lot was inadequate. Luffboro *v.* Foster, 92 Ala. 477, 9 So. 281. Cancellation on ground of failure of payment was decreed in Allread *v.* Harris, 75 Ga. 687, but refused in Brainard *v.* Holsaple, 4 Greene (Iowa) 485.

Contract of sale of chattels does not present a subject of equitable cognizance as a general rule. Davis *v.* Moorefield, 40 Ga. 185; Gore *v.* Kramer, 117 Ill. 176, 7 N. E. 504; Deveraux *v.* Cooper, 15 Vt. 88. But see Bohannon *v.* Kerr, 1 B. Mon. (Ky.) 87, under Kentucky statute of 1838 respecting fraudulent purchases. Nor does a contract of purchase of county bonds induced by false rep-

is in possession under a warranty deed, cannot, in the absence of fraud, have relief in equity against his contract on the mere ground of defect in his title, but must resort to a common-law action on the covenants in his deed;[40] but where there has been fraud on the part of his vendor he may maintain an action to rescind the sale.[41]

c. In Case of Stock Subscriptions. A stock-holder whose contract of sub-

resentations, when the county denies the validity of the bonds, present such a question. U. S. Bank *v.* Lyon County, 46 Fed. 514.

The relation of trust between the parties was a feature of the case that was decisive in favor of the exercise of the jurisdiction in Cohen *v.* Ellis, 16 Abb. N. Cas. (N. Y.) 320.

Agreement to arbitrate.—Where a contract contained a provision that either party might terminate it upon proper notice, whereupon arbitrators should be appointed to determine the terms upon which the contract should be rescinded and the compensation be awarded, equity would not entertain a bill to cancel the contract; such bill being in itself a violation of the provision for arbitration. Young Lock Nut Co. *v.* Brownley Mfg. Co., (N. J. 1896) 34 Atl. 947. See also Naugle *v.* Yerkes, 83 Ill. App. 310 [*affirmed* in 187 Ill. 388, 58 N. E. 310].

Assignment of contract to purchase chattels.— The plaintiffs alleged that they made a contract by which the defendant was to deliver to them a certain number of cattle; that subsequently the defendant induced them to accept an assignment of a contract in his favor by another person to deliver the cattle; that thereupon the plaintiffs paid defendant fifteen thousand dollars, which he had paid to such third party, gave him their obligation to pay him a sum which represented a profit on his sale to them, and returned to him the original contract with him; that they were induced to accept such assignment, to pay said sum, and to give the obligation, by the false and fraudulent representations of the defendant as to such third party's solvency and business standing; and praying for a discovery, for the rescission and cancellation of the assignment and of the plaintiff's obligation, for a reinstatement and confirmation of the original contract and its enforcement; or if that could not be done, that the defendant be compelled to repay the fifteen thousand dollars paid him, and to pay the damages sustained. It was held that the bill stated a case for which an action of deceit could be maintained at law and would afford a full, complete, and adequate remedy. Buzard *v.* Houston, 119 U. S. 347, 7 S. Ct. 249, 30 L. ed. 451.

Suit to cancel settlement.— Where the settlement would be no bar to an action at law in disregard of the settlement, as a general rule an equitable action will not lie. Balestier *v.* Mechanics' Nat. Bank, 15 N. Y. St. 46; Jaffrey *v.* Bear, 42 Fed. 569. *Compare* Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103, where the plaintiff's success depends on making one a party to the suit who could not be joined as co-defendant in the legal action in disregard of the instrument, suit in equity may be maintained.

40. *Alabama.*— Parker *v.* Parker, 93 Ala. 80, 9 So. 426.

Arkansas.— Peay *v.* Wright, 22 Ark. 198.

Illinois.— Beebe *v.* Swartwout, 8 Ill. 162.

Kentucky.— Upshaw *v.* Debow, 7 Bush (Ky.) 442; Campbell *v.* Whittington, 5 J. J. Marsh. (Ky.) 96, 20 Am. Dec. 241; Hieronymus *v.* Hicks, 3 J. J. Marsh. (Ky.) 701; Miller *v.* Long, 3 A. K. Marsh. (Ky.) 334.

Minnesota.—Miller *v.* Miller, 47 Minn. 546, 50 N. W. 612, and cases cited.

Missouri.— Hart *v.* Hannibal, etc., R. Co., 65 Mo. 509.

New York.— Ryerson *v.* Willis, 81 N. Y. 277 [*affirming* 8 Daly (N. Y.) 462]; Abbott *v.* Allen, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554.

South Carolina.— Maner *v.* Washington, 3 Strobb. Eq. (S. C.) 171, and cases cited.

Tennessee.—Stipe *v.* Stipe, 2 Head (Tenn.) 168; Young *v.* Butler, 1 Head (Tenn.) 639; Barnett *v.* Clark, 5 Sneed (Tenn.) 435.

Virginia.— Thompson *v.* Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721.

Wisconsin.— Reuter *v.* Lawe, 86 Wis. 106, 56 N. W. 472, same rule, where there is nothing to prevent the purchaser from taking possession.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 21.

41. *Alabama.*— Lindsey *v.* Veasy, 62 Ala. 421; Calloway *v.* McElroy, 3 Ala. 406; Perry *v.* Boyd, 126 Ala. 162, 28 So. 711, 85 Am. St. Rep. 17.

Arkansas.— Yeates *v.* Pryor, 11 Ark. 58.

Connecticut.— Sherwood *v.* Salmon, 5 Day (Conn.) 439, 5 Am. Dec. 167.

Kentucky.— Campbell *v.* Whittington, 5 J. J. Marsh. (Ky.) 96, 20 Am. Dec. 241; Breeding *v.* Flannery, 12 Ky. L. Rep. 609, 14 S. W. 907.

Mississippi.— English *v.* Benedict, 25 Miss. 167.

New York.— Wright *v.* Deniston, 9 Misc. (N. Y.) 79, 29 N. Y. Suppl. 718, 59 N. Y. St. 549.

So also where the vendor's assertions of title were mistaken but not fraudulent. Baptiste *v.* Peters, 51 Ala. 158. And where the grantee alleges that he has been prevented from taking possession of the premises by reason of possession by a third party under a prior lease from the grantor, with an agreement to convey at the end of the term, and denies any knowledge of the encumbrance, he may have rescission. Smith *v.* Scribner, 59 Vt. 96, 7 Atl. 711. But where, at or before the final hearing, the vendor makes and tend-

scription for shares was obtained by fraud may maintain an action to cancel his subscription, and to have his name removed from the books of the corporation.[42]

III. ESTOPPEL, RATIFICATION, OR LACHES.

A. Effect of Estoppel. The doctrine of equitable estoppel is frequently invoked in suits for cancellation.[43]

B. Effect of Ratification — 1. In General. When a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterward, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation. An express ratification is not required in order thus to defeat his remedy; any acts of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it, have the effect of an election to affirm.[44] "This doctrine seems to rest not upon the principle of a new contract between the parties,

ers a perfect title, no rescission will generally be decreed. Kimball *v.* West, 15 Wall. (U. S.) 377, 21 L. ed. 95.

42. Damages in an action of deceit would not be an adequate remedy, as the plaintiff would still remain a stock-holder, subject as such to certain liabilities and responsibilities imposed by law. Negley *v.* Hagerstown Mfg., etc., Co., 86 Md. 692, 39 Atl. 506; Bosley *v.* National Mach. Co., 123 N. Y. 550, 25 N. E. 990, 34 N. Y. St. 277; Higgins *v.* Crouse, 63 Hun (N. Y.) 134, 17 N. Y. Suppl. 696, 44 N. Y. St. 151; Benton *v.* Ward, 47 Fed. 253.

As incident to the remedy for the wrongful transfer of stock, in favor of the person entitled thereto, to compel the issue of certificates to himself, where the loss of the stock cannot be adequately compensated in a common-law action, he may have cancellation of the certificates wrongfully issued. Walker *v.* Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187.

43. See, generally, EQUITY; ESTOPPEL. See also Cooley *v.* Wilson, 42 Iowa 425 (defendant in execution estopped by his conduct at the execution sale to set the sale aside for mistake in the description of the property); Howell *v.* Earp, 21 Hun (N. Y.) 393 (owner of property who allows another to sell it and recovers a judgment against him for its value, cannot set aside the transfer).

An admission, in order to amount to estoppel, must injure the other party; hence a person is not estopped to claim that certain notes were forged, by an admission of their genuineness made after their purchase by the defendant. Ehrler *v.* Braun, 22 Ill. App. 391 [*affirmed* in 120 Ill. 503, 12 N. E. 996].

Presence at execution of instrument.— The devisee of a mortgagor seeking to cancel the mortgage on the ground of the mortgagor's insanity is not estopped by the fact that he was present when the mortgage was executed. Brigham *v.* Fayerweather, 144 Mass. 48, 10 N. E. 735.

44. *Alabama.*— Baker *v.* Maxwell, 99 Ala. 558, 14 So. 468; Howle *v.* North Birmingham Land Co., 95 Ala. 389, 11 So. 15; Dent *v.* Long, 90 Ala. 172, 7 So. 640; Lockwood *v.* Fitts, 90 Ala. 150, 7 So. 467; Garrett *v.* Lynch, 45 Ala. 204; Pierce *v.* Wilson, 34 Ala. 596; Harrison *v.* Deramus, 33 Ala. 463; Thompson *v.* Lee, 31 Ala. 292; Bryant *v.* Boothe, 30 Ala. 311, 68 Am. Dec. 117; Sadler *v.* Robinson, 2 Stew. (Ala.) 520.

Arkansas.— Yeates *v.* Pryor, 11 Ark. 58.

California.— Olivas *v.* Olivas, 61 Cal. 382.

Illinois.— McClelland *v.* McClelland, 176 Ill. 83, 51 N. E. 559; Day *v.* Ft. Scott Invest., etc., Co., 153 Ill. 293, 38 N. E. 567 [*affirming* 53 Ill. App. 165]; Perry *v.* Pearson, 135 Ill. 218, 25 N. E. 636 [*affirming* 30 Ill. App. 389].

Indiana.—Thompson *v.* Thompson, 132 Ind. 288, 31 N. E. 529; Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; Patten *v.* Stewart, 24 Ind. 332; Scarce *v.* Indiana, etc., R. Co., 17 Ind. 193; Gatling *v.* Newell, 9 Ind. 572.

Iowa.— Blackman *v.* Wright, 96 Iowa 541, 65 N. W. 843; Kraner *v.* Chambers, 92 Iowa 681, 61 N. W. 373; Evans *v.* Montgomery, 50 Iowa 325; Montgomery *v.* Gibbs, 40 Iowa 652.

Kansas.— Bell *v.* Keepers, 39 Kan. 105, 17 Pac. 785; Knaggs *v.* Mastin, 9 Kan. 532.

Kentucky.—McCulloch *v.* Scott, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561; Lacey *v.* McMillen, 9 B. Mon. (Ky.) 523; Jones *v.* Evans, 7 Dana (Ky.) 96; Collier *v.* Thompson, 4 T. B. Mon. (Ky.) 81; Cocke *v.* Hardin, Litt. Sel. Cas. (Ky.) 374; Carr *v.* Callaghan, 3 Litt. (Ky.) 365; Edwards *v.* Handley, Hard. (Ky.) 602, 3 Am. Dec. 745; Northrup *v.* Mollett, 18 Ky. L. Rep. 89, 35 S. W. 268.

Louisiana.— Meyers *v.* Henderson, 49 La. Ann. 1547, 16 So. 729.

Maryland.— Kerby *v.* Kerby, 57 Md. 345; Foley *v.* Crow, 37 Md. 51.

Massachusetts.— Childs *v.* Stoddard, 130 Mass. 110; Montgomery *v.* Pickering, 116 Mass. 227.

Michigan.— De Armand *v.* Phillips, Walk. (Mich.) 186.

Minnesota.—Parsons *v.* McKinley, 56 Minn. 464, 57 N. W. 1134; Paine *v.* Harrison, 38 Minn. 346, 37 N. W. 588.

Mississippi.—Georgia Pac. R. Co. *v.* Brooks, 66 Miss. 583, 6 So. 467; Hanson *v.* Field, 41 Miss. 712; Johnson *v.* Jones, 13 Sm. & M. (Miss.) 580; Edwards *v.* Roberts, 7 Sm. & M. (Miss.) 544; Ayres *v.* Mitchell, 3 Sm. & M. (Miss.) 683; Pintard *v.* Martin, Sm. & M. Ch. (Miss.) 126.

nor yet upon the ordinary principle of estoppel *in pais*, but rather upon a distinct principle of public policy, that all that justice or equity requires for the relief of a party having such cause to impeach a contract is that he should have but one fair opportunity, after full knowledge of the rights, to decide whether he will affirm and take the benefits of the contract or disaffirm it and demand the consequent redress. Any other rule would be regarded as unjust, even toward the party guilty of the wrong out of which grows the right to rescind." [45]

2. What Amounts to Ratification — a. In General. The following acts on the part of the party claiming to be injured have been held to be acts of recognition affirming the transaction: On the part of a vendee, payment of purchase-money after knowledge of the fraud;[46] receipt of purchase-money on the part of a vendor;[47] voluntary dismissal of a suit brought to set aside the instrument;[48] failure of vendee to repudiate the contract when the fraudulent vendor demanded the price;[49] where the ground of cancellation was non-performance by the vendor,

Missouri.— Thiemann *v.* Heinze, 120 Mo. 630, 25 S. W. 533; Taylor *v.* Short, 107 Mo. 384, 17 S. W. 970; McClure *v.* Lewis, 72 Mo. 314.

New Jersey.— Arnold *v.* Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712; Dennis *v.* Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899.

New York.— Cherry Creek *v.* Becker, 123 N. Y. 161, 25 N. E. 369, 33 N. Y. St. 411 [*affirming* 2 N. Y. Suppl. 514, 18 N. Y. St. 485]; Myers *v.* King, 48 Hun (N. Y.) 106, 15 N. Y. St. 482; Howell *v.* Earp, 21 Hun (N. Y.) 393; Wager *v.* Reid, 3 Thomps. & C. (N. Y.) 332; La Follette *v.* Noble, 13 Misc. (N. Y.) 574, 34 N. Y. Suppl. 955; Cohen *v.* Ellis, 16 Abb. N. Cas. (N. Y.) 320; Treacy *v.* Hecker, 51 How. Pr. (N. Y.) 69; Lawrence *v.* Dale, 3 Johns. Ch. (N. Y.) 23.

North Carolina.— Allen *v.* Wilmington, etc., R. Co., 106 N. C. 515, 11 S. E. 576, 826; Moore *v.* Reed, 37 N. C. 580.

Tennessee.— Johnson *v.* Lellyett, 12 Heisk. (Tenn.) 723; Knuckolls *v.* Lea, 10 Humphr. (Tenn.) 576; Blackman *v.* Stone, 3 Tenn. Ch. 370.

Texas.— Tom *v.* Wollhoefer, 61 Tex. 277; Temple Nat. Bank *v.* Warner, (Tex. Civ. App. 1895) 31 S. W. 239; Ellis *v.* Ellis, 5 Tex. Civ. App. 46, 23 S. W. 996.

Virginia.— Dickenson *v.* Farley, 84 Va. 240, 4 S. E. 375; Robertson *v.* Tapscott, 81 Va. 533; Pollard *v.* Rogers, 4 Call (Va.) 239; Broddus *v.* McCall, 3 Call (Va.) 546.

Wisconsin.— Knutson *v.* Bostrak, 99 Wis. 469, 75 N. W. 156.

United States.— Litchfield *v.* Browne, 70 Fed. 141, 36 U. S. App. 130, 17 C. C. A. 28; Bement *v.* La Dow, 66 Fed. 185; Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 22 U. S. App. 12, 9 C. C. A. 415; Watts *v.* British, etc., Mortg. Co., 60 Fed. 483, 23 U. S. App. 257, 9 C. C. A. 98; Scheftel *v.* Hays, 58 Fed. 457, 19 U. S. App. 220, 7 C. C. A. 308; Hatch *v.* Ferguson, 57 Fed. 972; Richardson *v.* Walton, 49 Fed. 888; Gross *v.* George W. Scott Mfg. Co., 48 Fed. 35; Hough *v.* Richardson, 3 Story (U. S.) 659, 12 Fed. Cas. No. 6,722.

England.—Wright *v.* Vanderplank, 8 De G., M. & G. 133, 2 Jur. N. S. 599, 2 Kay & J. 1, 25 L. J. Ch. 753, 4 Wkly. Rep. 410, 57 Eng. Ch. 104; Savery *v.* King, 5 H. L. Cas. 627, 2 Jur. N. S. 503, 25 L. J. Ch. 482, 4 Wkly. Rep. 571.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 23.

45. Emma Silver Min. Co. *v.* Emma Silver Min. Co. of New York, 7 Fed. 401, by Choate, District J.

46. *Alabama.*— Howle *v.* North Birmingham Land Co., 95 Ala. 389, 11 So. 15, part payment, and two years' delay.

Kansas.— Bell *v.* Keepers, 39 Kan. 105, 17 Pac. 785, part payment and the sale by the plaintiff of one of the tracts conveyed to him.

Kentucky.— Lacey *v.* McMillen, 9 B. Mon. (Ky.) 523, payments, with long delay, and sale of part of the land.

Mississippi.—Ayres *v.* Mitchell, 3 Sm. & M. (Miss.) 683.

New Jersey.— Dennis *v.* Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899, payments, with continued use of the property.

Tennessee.— Johnson *v.* Lellyett, 12 Heisk. (Tenn.) 723 (payments, and retaining possession for two years after discovery of the fraud); Knuckolls *v.* Lea, 10 Humphr. (Tenn.) 576.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 23.

Payment of interest on town bonds for six years without questioning their validity was one of the reasons for refusing cancellation of the bonds at the suit of the town. Cherry Creek *v.* Becker, 123 N. Y. 161, 25 N. E. 369, 33 N. Y. St. 411 [*affirming* 2 N. Y. Suppl. 514, 18 N. Y. St. 485].

47. Oaks *v.* Harrison, 24 Iowa 179; Litchfield *v.* Browne, 70 Fed. 141, 36 U. S. App. 130, 17 C. C. A. 28 (receipt of deferred payments, and delay for three years after discovery of the fraud); Hatch *v.* Ferguson, 57 Fed. 972; Richardson *v.* Walton, 49 Fed. 888. But where the money was paid to the defrauded grantor's general agent, his mere receipt of it from the agent does not prove his acquiescence in the fraud. McLean *v.* Clark, 47 Ga. 24.

48. Kerby *v.* Kerby, 57 Md. 345.

49. Parsons *v.* McKinley, 56 Minn. 464, 57 N. W. 1134.

giving an extension of time for the removal of encumbrances;[50] and, in general, any transactions with the defendant relating to the subject-matter of the contract, and inconsistent with an intention to rescind.[51]

b. Receipt of Benefits. Receipt of benefits under the contract, or acts of dominion or ownership exercised over the property received under the contract, after knowledge of the ground of rescission, amount to a ratification.[52] Among such acts are the continued possession and use of the property,[53] and receipt of rents and profits,[54] and making improvements thereon.[55] So the sale of a portion

50. Kraner *v.* Chambers, 92 Iowa 681, 61 N. W. 373.

51. *Alabama.*— Harrison *v.* Deramus, 33 Ala. 463; Sadler *v.* Robinson, 2 Stew. (Ala.) 520.

Illinois.— Day *v.* Ft. Scott Invest., etc., Co., 153 Ill. 293, 38 N. E. 567 [*affirming* 53 Ill. App. 165]; Perry *v.* Pearson, 135 Ill. 218, 25 N. E. 636.

Indiana.— Scarce *v.* Indiana, etc., R. Co., 17 Ind. 193.

Iowa.— Blackman *v.* Wright, 96 Iowa 541, 65 N. W. 843.

Kansas.— Knaggs *v.* Mastin, 9 Kan. 532.

Maryland.— Foley *v.* Crow, 37 Md. 51.

Michigan.— De Armand *v.* Phillips, Walk. (Mich.) 186.

Minnesota.— Paine *v.* Harrison, 38 Minn. 346, 37 N. W. 588.

Mississippi.—Georgia Pac. R. Co. *v.* Brooks, 66 Miss. 583, 6 So. 467; Pintard *v.* Martin, Sm. & M. Ch. (Miss.) 126.

New York.—Treacy *v.* Hecker, 51 How. Pr. (N. Y.) 69.

Tennessee.— Bostick *v.* Haynie, (Tenn. Ch. 1896) 36 S. W. 856; Blackman *v.* Stone, 3 Tenn. Ch. 370.

Texas.— Tom *v.* Wollhoefer, 61 Tex. 277; Ellis *v.* Ellis, 5 Tex. Civ. App. 46, 23 S. W. 996.

United States.— St. Louis, etc., R. Co. *v.* Terre Haute, etc., R. Co., 33 Fed. 440; Hough *v.* Richardson, 3 Story (U. S.) 659, 12 Fed. Cas. No. 6,722.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 23.

Instances of conduct amounting to acquiescence.— Entering into new stipulations regarding the contract. Sadler *v.* Robinson, 2 Stew. (Ala.) 520. Vendee, who is entitled to rescind his contract of purchase because of partial failure of title, accepting a conveyance without objection (Harrison *v.* Deramus, 33 Ala. 463); or agreeing to accept an abatement in the price as compensation for the deficiency (Foley *v.* Crow, 37 Md. 51). Grantors, with knowledge of the fraud, becoming tenants of their grantee and paying him rent for a term of years. Knaggs *v.* Mastin, 9 Kan. 532. Grantor, after the undue influence is removed, treating the land as the grantees' and expressing a desire to his lawyer of confirming their title. Ellis *v.* Ellis, 5 Tex. Civ. App. 46, 23 S. W. 996. Vendor, having ground for rescission in vendees' non-performance, shows acquiescence by executing deed. Northup *v.* Mollett, 18 Ky. L. Rep. 89, 35 S. W. 268.

52. Foley *v.* Crow, 37 Md. 51; Bement *v.* La Dow, 66 Fed. 185.

This is especially true if the plaintiff, with knowledge of his right to rescind, has so dealt with the property as to make restoration thereof impossible without an accounting. Dent *v.* Long, 90 Ala. 172, 7 So. 640; Myers *v.* King, 48 Hun (N. Y.) 106, 15 N. Y. St. 482. See also *infra*, IV.

Illustrations.— If the vendor sues for damages for deceit he thereby elects to affirm the contract. Stuart *v.* Hayden, 72 Fed. 402, 36 U. S. App. 462, 18 C. C. A. 618. A lessee's prosecution of a suit for rents against a sublessee is a waiver of the former's right to rescind the lease. Meyers *v.* Henderson, 49 La. Ann. 1547, 16 So. 729. A mortgagee discharged his mortgage and received a new one in ignorance that an intervening mortgage was on record; after learning the facts he relied upon and enforced his second mortgage; this was held to be a waiver of his right to have the discharge of his first mortgage canceled for mistake. Childs *v.* Stoddard, 130 Mass. 110. But the commencement and prosecution of an action at law against the agents of the vendor, to recover damages for deceit in inducing the plaintiff to purchase property, is not necessarily an election to affirm the sale, so as to preclude the plaintiff from maintaining a subsequent suit to rescind the sale. Such an action is not an election to affirm, where there is nothing in the complaint showing that the sale has been adopted and affirmed, and where the *ad damnum* in the complaint is the alleged price paid for the property. Emma Silver Min. Co. *v.* Emma Silver Min. Co. of New York, 7 Fed. 401.

53. *Alabama.*— Garrett *v.* Lynch, 45 Ala. 204.

Indiana.— Gatling *v.* Newell, 9 Ind. 572.

Iowa.— Montgomery *v.* Gibbs, 40 Iowa 652.

Kentucky.—McCulloch *v.* Scott, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561; Cocke *v.* Hardin, Litt. Sel. Cas. (Ky.) 374.

Mississippi.— Pintard *v.* Martin, Sm. & M. Ch. (Miss.) 126.

Missouri.— Thiemann *v.* Heinze, 120 Mo. 630, 25 S. W. 533.

New Jersey.—Dennis *v.* Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899.

Texas.— Temple Nat. Bank *v.* Warner, (Tex. Civ. App. 1895) 31 S. W. 239.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 26.

54. Montgomery *v.* Gibbs, 40 Iowa 652.

55. Dent *v.* Long, 90 Ala. 172, 7 So. 640; Montgomery *v.* Gibbs, 40 Iowa 652.

of the property,[56] or a contract to sell the property may constitute a ratification of the contract or transaction.[57]

c. **Conduct Must Be Unequivocal.** Equivocal acts, which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind.[58]

C. Effect of Laches — 1. In General. It is not within the scope of this article to attempt to reconcile the various judicial utterances on the subject of laches.[59] On the one hand are found statements emphasizing the necessity of prompt election by the plaintiff on discovering the ground of rescission, in order to avoid the imputation of acquiescence.[60] On the other hand statements abound

56. *Alabama.*— Dent *v.* Long, 90 Ala. 172, 7 So. 640.

Illinois.— Day *v.* Ft. Scott Invest., etc., Co., 153 Ill. 293, 38 N. E. 567 [*affirming* 53 Ill. App. 165].

Kansas.— Bell *v.* Keepers, 39 Kan. 105, 17 Pac. 785.

Kentucky.— Lacey *v.* McMillen, 9 B. Mon. (Ky.) 523.

Michigan.— Bedier *v.* Reaume, 95 Mich. 518, 55 N. W. 366.

57. La Follette *v.* Noble, 13 Misc. (N. Y.) 574, 34 N. Y. Suppl. 955.

But mere unavailing efforts to dispose of the thing purchased do not constitute ratification on the part of a defrauded vendee who has perfected his right to claim a rescission in a court of equity by a timely offer to rescind and tender of the property. Pierce *v.* Wilson, 34 Ala. 596.

Merely advertising land for sale under a mortgage, after filing a bill to rescind the mortgage for fraud, is not an affirmance of the mortgage, where no attempt to sell under the advertisement was made. Watts *v.* British, etc., Mortg. Co., 60 Fed. 483, 23 U. S. App. 257, 9 C. C. A. 98.

58. Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607. See also McLean *v.* Clark, 47 Ga. 24; McClelland *v.* McClelland, 176 Ill. 83, 51 N. E. 559; Allen *v.* Wilmington, etc., R. Co., 106 N. C. 515, 11 S. E. 576, 826; Knutson *v.* Bostrak, 99 Wis. 469, 75 N. W. 156; Watts *v.* British, etc., Mortg. Co., 60 Fed. 483, 23 U. S. App. 257, 9 C. C. A. 98.

Such use of property as is necessary to ascertain its defects, or to furnish evidence of fraud, does not evidence a ratification. See *infra*, III, E, I.

Where subsequent acts are relied upon as a defense in a case where fraud is clearly established, it is said the acts must stand upon the clearest evidence, and must evince a purpose to waive or forgive the fraud, and must amount to a clear election not to rescind. If what is done is merely for the purpose of saving the plaintiff from further loss, without any purpose to give up whatever right he may have either at law or in equity to rescind, the right of rescission will not be affected. Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; Montgomery *v.* Pickering, 116 Mass. 227; Morse *v.* Royal, 12 Ves. Jr. 355, 8 Rev. Rep. 338.

59. See, generally, EQUITY. See also Dean *v.* Oliver, 131 Ala. 634, 30 So. 865; Vermilion County Children's Home *v.* Varner, 192 Ill. 594, 61 N. E. 830; Lewis *v.* McGrath, 191 Ill. 401, 61 N. E. 135; Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402; De Roux *v.* Girard, 105 Fed. 798 [*affirmed* in 112 Fed. 89, 50 C. C. A. 136]; and cases cited *infra*, note 60 *et seq.*

60. "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value." Grymes *v.* Sanders, 93 U. S. 55, 23 L. ed. 798 [*citing* Thomas *v.* Bartow, 48 N. Y. 193; Minturn *v.* Main, 7 N. Y. 220; Saratoga, etc., R. Co. *v.* Row, 24 Wend. (N. Y.) 74, 35 Am. Dec. 598; Lloyd *v.* Brewster, 4 Paige (N. Y.) 537, 27 Am. Dec. 88; Diman *v.* Providence, etc., R. Co., 5 R. I. 130]; Campbell *v.* Fleming, 1 A. & E. 40, 3 L. J. K. B. 136, 3 N. & M. 834, 28 E. C. L. 44; Jennings *v.* Broughton, 5 De G., M. & G. 126, 23 L. J. Ch. 999, 54 Eng. Ch. 102; Flint *v.* Woodin, 9 Hare 618, 16 Jur. 719, 41 Eng. Ch. 618]. "It is usually necessary for a party who desires to rescind a contract, to make his application as soon as he discovers the ground of rescission." Ayres *v.* Mitchell, 3 Sm. & M. (Miss.) 683; Pintard *v.* Martin, Sm. & M. Ch. (Miss.) 126.

Other cases less empathic in their language establish "reasonable diligence" as the criterion. Gatling *v.* Newell, 9 Ind. 572; Carroll *v.* Rice, Walk. (Mich.) 373; Grewing *v.* Minneapolis Threshing Mach. Co., 12 S. D. 127, 80 N. W. 176.

"The rule of equity is that a man who seeks the aid of the court must assert his claim with reasonable diligence. What is reasonable diligence is not and cannot be defined by any general rule. No precise or definite limit of time can be stated within which the interposition of the court must be sought. What is reasonable time must in a great measure depend upon the exercise of the sound discretion of the court, under the circumstances of each particular case." Sears *v.* Hicklin, 13 Colo. 143, 21 Pac. 1022 [*citing*

in the opinions of eminent judges which, taken literally, would seem to excuse any delay short of the period of the statute of limitations which has not worked to the prejudice of the defendant.[61] To adopt the language of one of the most learned equity judges of the present day,[62] "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the rights be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of

Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Wade *v.* Pettibone, 11 Ohio 57, 37 Am. Dec. 408; Piatt *v.* Vattier, 9 Pet. (U. S.) 405, 9 L. ed. 173]. The court, in the principal case, further says that "the time in which the courts have treated demands as stale varies from four to twenty years, depending upon the character of the case." If this is meant to fix upon four years as the shortest time upon which laches have ever been predicated the accuracy of the statement may be doubted.

Reasonable diligence, whether a question of fact or of law.— In an action to rescind a contract on the ground of fraud, the question whether the offer to rescind was made within a reasonable time after the fraud was discovered is purely a question of law if there is no dispute as to the facts; but is a mixed question of law and fact if the time of the discovery of the fraud is a disputed question. Gatling *v.* Newell, 9 Ind. 572.

61. See, generally, EQUITY.

62. Stiness, J., in Chase *v.* Chase, 20 R. I. 202, 203, 204, 37 Atl. 804, where it is also said: "The rule as thus stated is recognized in the following citations: In Wollaston *v.* Tribe, L. R. 9 Eq. 44, 21 L. T. Rep. N. S. 449, 18 Wkly. Rep. 83, Lord Romilly said: 'Great stress was laid on the lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing which had altered the state of matters, that might have raised a question; but there is nothing of the sort.' See also Daggers *v.* Van Dyck, 37 N. J. Eq. 130. Sir Barnes Peacock said, in Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221, 239: 'The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material.'" "Where, however, an equitable action must be brought, by analogy a court of equity will follow the period fixed in law cases by statute. Peele *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29. Of course, if the delay in the preservation of the equitable right has involved the other party, by causing an alteration of the status of the parties, which alteration was known to the plaintiff, and he blindly allowed such status interfered with, a court of equity would punish such plaintiff for his want of diligence." Du Pont *v.* Du Bos, 52 S. C. 244, 252, 29 S. E. 665. "Staleness or laches is founded upon acquiescence in the assertion of adverse rights and unreasonable delay on complainant's part in not asserting her own to the prejudice of the adverse party." Treadwell *v.* Torbert, 122 Ala. 297, 25 So. 216. "Enactment of statutes of express limitation upon distinctively equitable actions has modified the position of the courts to some extent. In some aspects such statutes absolutely control the court's action, as where the full statutory term has run and the excuses offered are not those recognized by the statute. In other respects such statutes serve to suggest a general policy, or an analogy to which courts of equity yield voluntary compliance. For example, it is not probable that a court would now consider mere lapse of time less than the statutory period sufficient to exclude a suitor if wholly free from any circumstances of negligence or of embarrassment to the defendant. . . . Nevertheless, the proper exercise by a court of equity of its judgment, subject to the limitations above suggested, whether delay with its attendant circumstances is such that a plaintiff ought not to be permitted to invoke its beneficent jurisdiction, is by no means taken away by such statutes." McCann *v.* Welch, 106 Wis. 142, 149, 81 N. W. 996 [*citing* Cross *v.* Bowker, 102 Wis. 497, 78 N. W. 564; Ellis *v.* Southwestern Land Co., 102 Wis. 400, 78 N. W. 747; Frederick *v.* Douglas County, 96 Wis. 411, 71 N. W. 798; Coon *v.* Seymour, 71 Wis. 340, 37 N. W. 243; Pomeroy Eq. Jur. § 419]. See also Great West Min. Co. *v.* Woodmas, etc., Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Newman *v.* Newman, 152 Mo. 398, 54 S. W. 19; Bradshaw *v.* Yates, 67 Mo. 221; Richardson *v.* Green, 61 Fed. 423, 15 U. S. App. 488, 9 C. C. A. 565.

relief." In whatever language the doctrine of laches, as applied to the remedy of cancellation, may have been expressed, there can be no doubt that relief has been given in spite of unexplained delay on the plaintiff's part, amounting in some cases to several years;[63] and on the other hand that courts have frequently refused relief on the ground of great delay alone, without basing their refusal on the ground of prejudice sustained by the plaintiff's inaction.[64]

2. CHANGE IN RELATIVE POSITION OF PARTIES. Change in the relative condition of the parties resulting from the delay is an element of great weight with the court in determining whether the delay shall be fatal to the plaintiff's suit.[65] Thus relief has been refused where the property received as consideration by the plaintiff, and which he must return to the defendant as a condition precedent to relief, has depreciated in value,[66] or become worthless;[67] or where the value of the property conveyed and sought to be recovered has increased,[68] especially where the

63. *Alabama.*— Treadwell *v.* Torbert, 122 Ala. 297, 25 So. 216 (three years); Foster *v.* Gressett, 29 Ala. 393 (one year).

Colorado.— Sears *v.* Hicklin, 13 Colo. 143, 21 Pac. 1022 (sixteen months); Great West. Min. Co. *v.* Woodmas, etc., Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Harker *v.* Scudder, 15 Colo. App. 69, 61 Pac. 197 (sixteen months).

Georgia.— Carbine *v.* McCoy, 85 Ga. 185, 11 S. E. 651 (two years); Gardner *v.* Crockett, 58 Ga. 603 (five years).

Illinois.— Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399 (eleven years); Ward *v.* Armstrong, 84 Ill. 151 (one year).

Iowa.— O'Connor *v.* O'Connor, 100 Iowa 476, 69 N. W. 676, four years.

Maryland.— Canton *v.* McGraw, 67 Md. 583, 11 Atl. 287 (three years); Highberger *v.* Stiffler, 21 Md. 338, 83 Am. Dec. 593.

Massachusetts.— Merriam *v.* Boston, etc., R. Co., 117 Mass. 241, eighteen months.

Michigan.— Tabor *v.* Michigan Mut. L. Ins. Co., 44 Mich. 324, 6 N. W. 830, two months.

Mississippi.— Bonner *v.* Bynum, 72 Miss. 442, 18 So. 82; Gilpin *v.* Smith, 11 Sm. & M. (Miss.) 109, less than two years.

Missouri.— Newman *v.* Newman, 152 Mo. 398, 54 S. W. 19, delay less than the statutory period.

South Carolina.— Du Pont *v.* Du Bos, 52 S. C. 244, 29 S. E. 665, fourteen months.

South Dakota.— Grewing *v.* Minneapolis Threshing Mach. Co., 12 S. D. 127, 80 N. W. 176, five months.

United States.— Allore *v.* Jewell, 94 U. S. 506, 24 L. ed. 260 (nearly seven years); Northern Pac. R. Co. *v.* Kindred, 3 McCrary (U. S.) 627, 14 Fed. 77 (three months); Smith *v.* Babcock, 2 Woodb. & M. (U. S.) 246, 22 Fed. Cas. No. 13,009 (one year after the discovery of the fraud).

England.— Savery *v.* King, 5 H. L. Cas. 627, 2 Jur. N. S. 503, 25 L. J. Ch. 482, 4 Wkly. Rep. 571 (twelve years); Gresley *v.* Mousley, 4 De G. & J. 78, 5 Jur. N. S. 583, 28 L. J. Ch. 620, 7 Wkly. Rep. 427, 61 Eng. Ch. 63 (eighteen years).

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 49.

64. *Alabama.*— Kern *v.* Burnham, 28 Ala. 428 (five years); Johnson *v.* Johnson, 5 Ala. 90.

Georgia.— MacIntyre *v.* Cotton States L. Ins. Co., 82 Ga. 478, 9 S. E. 1124 (fifteen years); Nunn *v.* Burger, 76 Ga. 705 (nearly twenty years).

Illinois.— Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804 (seventeen years); Brown *v.* Brown, 154 Ill. 35, 39 N. E. 983 (seven years); Eberstein *v.* Willets, 134 Ill. 101, 24 N. E. 967 (three years); Hall *v.* Fullerton, 69 Ill. 448 (six years).

Indiana.— Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788, fourteen years.

Louisiana.— Mendelsohn *v.* Armstrong, 52 La. Ann. 1300, 27 So. 735, nineteen years.

Maryland.— Hewitt's Appeal, 55 Md. 509, ten years.

Michigan.— Earle *v.* Humphrey, 121 Mich. 518, 80 N. W. 370, two and a half years.

Mississippi.— Jones *v.* Smith, 33 Miss. 215, three years and eight months.

New York.— Boyer *v.* East, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. Rep. 290, eight years.

Tennessee.— McDonald *v.* Allen, 8 Baxt. (Tenn.) 446, three years.

Texas.— Haskins *v.* Wallet, 63 Tex. 213, fourteen years.

United States.— Rugan *v.* Sabin, 53 Fed. 415, 10 U. S. App. 519, 3 C. C. A. 578, seven years.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 49.

65. See cases cited *infra*, note 66 *et seq.*

66. Cunningham *v.* Fithian, 7 Ill. 650 (five years); Carroll *v.* Rice, Walk. (Mich.) 373; Pintard *v.* Martin, Sm. & M. Ch. (Miss.) 126; Hudson *v.* Waugh, 93 Va. 518, 25 S. E. 530.

67. Sears *v.* Smith, 2 Mich. 243, outlawed note.

68. Goree *v.* Clements, 94 Ala. 337, 10 So. 906 (six years); Sheffield Land, etc., Co. *v.* Neill, 87 Ala. 158, 6 So. 1 (two years and seven months); Connely *v.* Rue, 148 Ill. 207, 35 N. E. 824 (over three years; great rise in value); Hamilton *v.* Beall, 2 Harr. & J. (Md.) 414 (seven years); Hatch *v.* Ferguson, 57 Fed. 959 (short delay, but great increase in value).

increase is due to permanent improvements placed upon it by the defendant.[69] Speculative delay is to be discouraged,[70] particularly in the case of property that is subject to great and sudden fluctuations in value.[71]

3. Impairment of Evidence. The death of important witnesses or the loss or impairment of evidence frequently turns the scales in the defendant's favor. After the lapse of considerable time the evidence will be subjected to a severer scrutiny.[72]

4. May Be Excuses For Delay. There may exist an excuse for a delay which would under ordinary circumstances constitute laches.[73] Thus laches cannot be imputed to an infant.[74] Coverture is sometimes held to be an excuse,[75] or at least a fact to be reckoned with.[76] A remainderman, it is said, cannot be guilty of laches during the continuance of the preceding estate, if the statute of limitations

69. *Alabama.*— Goree *v.* Clements, 94 Ala. 337, 10 So. 906 (six years); Dent *v.* Long, 90 Ala. 172, 7 So. 640 (six years).

Illinois.— Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213, over three years.

Michigan.— Sears *v.* Smith, 2 Mich. 243.

Missouri.— Landrum *v.* Union Bank, 63 Mo. 48, eight years.

United States.— Cockrill *v.* Cockrill, 79 Fed. 143 (seven years); Kinne *v.* Webb, 49 Fed. 512 (seven years); Murphy *v.* Paynter, 1 Dill. (U. S.) 333, 17 Fed. Cas. No. 9,952 (twelve years).

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 50.

70. Askew *v.* Hooper, 28 Ala. 634 (thirteen or fourteen years); Lion *v.* McClory, 106 Cal. 623, 40 Pac. 12 (two years); Chapman *v.* Wilson, 4 Woods (U. S.) 30, 5 Fed. 305 (nine years).

71. Mineral land, exposed to utmost fluctuations in value. Kinne *v.* Webb, 49 Fed. 512, seven years.

Defendant's change of position, consequent upon the complainant's delay.— The general principle is well illustrated by the case of Chase *v.* Chase, 20 R. I. 202, 208, 37 Atl. 804. There a grantor, mentally incompetent, conveyed land in consideration of the grantee's agreement to live with and support the grantor and his wife as long as either should live. The agreement was carried out for sixteen years until the death of the wife, thirteen years after the death of the grantor. A bill brought shortly thereafter by the grantor's heirs to set the conveyance aside was dismissed, because of laches, though complainants offered to pay the grantee for services rendered by him under the contract. It was said: "Clearly an allowance for board, and sewing, and use of carriage, and general and special services and attendance, such as can now be recalled, would fall far short of equitable compensation. We cannot know, indeed we can hardly believe, that the service would have been undertaken on such a basis of payment. Sixteen years is a long part of a man's life to be given to the execution of a contract. What opportunities may have been lost by being tied to one place, and to the care of those who proposed to reward the service in another way, no one can tell. The respondent, Alfred W. Chase, was a school teacher, and this arrangement necessarily narrowed the field in which he could follow his profession," etc.

72. See *infra*, IX, B, 2. "The suggestion in the brief that the complainant rather than the defendant has been injured by the delay through the death of witnesses, is a begging of the question. We cannot know this: we can only know that there has been delay until of necessity the facts have become obscure or the proof of them lost; but whether this would tend to the prejudice of one party rather than the other is matter of conjecture merely. It is sufficient to justify a denial of relief that the moving party is responsible for the delay." Cooley, C. J., in Haff *v.* Haff, 54 Mich. 511, 513, 20 N. W. 563. See also Haff *v.* Haff, 54 Mich. 511, 20 N. W. 563 (twelve years); Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262; McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996; Cockrill *v.* Cockrill, 79 Fed. 143 (seven years); Chapman *v.* Wilson, 4 Woods (U. S.) 30, 5 Fed. 305 (nine years).

73. See cases cited *infra*, note 74 *et seq.*

Failure on the part of stock-holders to bring suit to have certain illegal issues of bonds canceled until nearly twelve years had elapsed since the illegal issue of the bonds does not amount to laches, where in the meantime the railroad company had no assets, the bonds had never in the meantime been asserted against the company, and the project of building the road had utterly fallen through. Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899.

In a suit to set aside a will as a forgery (in a state where the validity of the will cannot be contested in probate proceedings), laches cannot be imputed to the plaintiff until the will is probated. Richardson *v.* Green, 61 Fed. 423, 15 U. S. App. 488, 9 C. C. A. 565.

74. Sims *v.* Snyder, 86 Ind. 602; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Kroenung *v.* Grehri, 112 Mo. 641, 20 S. W. 661. See, generally, Infants.

75. Sims *v.* Snyder, 86 Ind. 602; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263. See, generally, Husband and Wife.

76. Merriam *v.* Boston, etc., R. Co., 117 Mass. 241.

does not run against him.[77] In an action to set aside a deed made between parties standing in a confidential relation with each other, the defense of laches is not usually regarded with favor.[78] On the other hand the fact that the parties are near relatives and have desired to avoid family quarrels does not excuse a protracted delay.[79] The complainant's poverty and inability to secure the service of counsel is no excuse,[80] nor the fact that he is a habitual drunkard, if in his sober intervals he possesses sufficient mind to understand his rights and move for their enforcement.[81] Continual assertion of a claim, unaccompanied by any act to give effect to it, will not keep alive a right which would otherwise be barred by laches;[82] but laches, it seems, is not attributable to a grantor who remains in possession.[83]

5. Statute of Limitations. The analogy of the statute of limitations applicable to the corresponding legal remedy is generally followed in fixing the time in excess of which delay will not be excused.[84] In many states the statutes of limitations expressly apply to actions in equity.[85] The question has frequently arisen whether, when the effect of the decree would be to restore the possession of land to the complainant, the action for cancellation is governed by the statute of limitations applicable to actions for the recovery of real property.[86]

D. Where Original Duress Is Continued. Where the ground of relief is

77. Borders *v.* Hodges, 154 Ill. 498, 39 N. E. 597, referring to Ill. Rev. Stat. c. 83, § 3.

78. Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399, eleven years' delay. See also Sears *v.* Hicklin, 13 Colo. 143, 21 Pac. 1022; Gardner *v.* Crockett, 58 Ga. 603.

79. Haff *v.* Haff, 54 Mich. 511, 20 N. W. 563. In Hemphill *v.* Holford, 88 Mich. 293, 50 N. W. 300, however, it was held that the children of a grantor were not guilty of laches in waiting until his death before attacking his conveyance on the ground of his incompetency instead of having his incompetency adjudged before his death. See also, to the same effect, Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881.

80. Lumley *v.* Wabash R. Co., 71 Fed. 21, three and a half years.

81. Wright *v.* Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886, twenty years.

82. Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804.

83. Treadwell *v.* Torbert, 122 Ala. 297, 25 So. 216, three years.

84. Scruggs *v.* Decatur Mineral, etc., Co., 86 Ala. 173, 5 So. 440; Askew *v.* Hooper, 28 Ala. 634; Davis *v.* Tarwater, 15 Ark. 286; Valentine *v.* Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788, and *supra*, cases cited note 62.

Federal courts sitting in equity adopt the statute of limitations of the state. Rugan *v.* Sabin, 53 Fed. 415, 10 U. S. App. 519, 3 C. C. A. 578. See, generally, Limitations of Actions.

85. *California.*— Castro *v.* Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84.

Colorado.— Walker *v.* Pogue, 2 Colo. App. 149, 29 Pac. 1017.

Kentucky.— Woods *v.* James, 87 Ky. 511, 9 S. W. 513; Carneals *v.* Parker, 7 J. J. Marsh. (Ky.) 455.

Missouri.—Barrett *v.* Allegheny Nat. Bank, 6 Mo. App. 317.

New York.— Sears *v.* Shafer, 6 N. Y. 268 [*affirming* 1 Barb. (N. Y.) 408].

South Carolina.—Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412; Kibler *v.* McIlwain, 16 S. C. 550; Shannon *v.* White, 6 Rich. Eq. (S. C.) 96, 60 Am. Dec. 115.

Texas.— Cooper *v.* Lee, 1 Tex. Civ. App. 9, 21 S. W. 998.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 54; and, generally, Limitations of Actions.

Against remaindermen.— The statute of limitations, it has been held, does not run against a remainderman during the continuance of the life-estate. McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996.

86. Holding that the suit is one for recovery of real property see Oakland *v.* Carpentier, 13 Cal. 540; Barrett *v.* Allegheny Nat. Bank, 6 Mo. App. 317.

Contra.— McMillan *v.* Cheeney, 30 Minn. 519, 16 N. W. 404; Morgan *v.* Morgan, 10 Wash. 99, 38 Pac. 1054.

An action to remove a cloud on title, brought by one in possession of the land, is not an action "to procure a judgment other than for a sum of money on the ground of fraud," under N. Y. Code Civ. Proc. § 382, subd. 5. Schoener *v.* Lissauer, 107 N. Y. 111, 13 N. E. 741 [*reversing* 36 Hun (N. Y.) 100].

An action to set aside a tax-deed taken by one who was under obligation to the plaintiff to pay the taxes is an action for relief on the ground of fraud, under Kan. Code, § 18, subd. 3. Doyle *v.* Doyle, 33 Kan. 721, 7 Pac. 615.

A suit to set aside a deed executed in payment of a gaming loss is not affected by a statute limiting the time for bringing actions to recover specific property lost and delivered in a gaming transaction, as such statute applies only to legal actions. Johnson *v.* Cooper, 2 Yerg. (Tenn.) 523, 24 Am. Dec. 502.

duress or undue influence, so long as the original pressure continues, the conduct of the plaintiff cannot be construed against him as a confirmation or as acquiescence,[87] nor can laches be imputed to him because of his delay in moving to set aside the transaction.[88]

E. With Respect to Knowledge of the Facts — 1. As Affecting Laches or Ratification. No act of a party will amount to a confirmation of a fraudulent transaction, or acquiescence therein, unless done with full knowledge of the fraud[89] and while he is free from its influence.[90] The plaintiff's ignorance of his rights also, as a general rule, negatives any laches on his part,[91] but this rule is subject to the principle that notice of acts and circumstances which would put a man of ordinary prudence and intelligence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose.[92] A

87. Gowland *v.* De Faria, 17 Ves. Jr. 20, 25, 11 Rev. Rep. 9, where it is said: "There is I believe no case, in which during the continuance of the same situation, in which the party entered into the contract, acquiescence has ever gone for any thing: it has always been presumed, that the same distress which pressed him to enter into the contract, prevented him from coming to set it aside; that it is only when he is relieved from that distress that he can be expected to resist the performance of the contract." See also Thompson *v.* Lee, 31 Ala. 292; Thompson *v.* Thompson, 132 Ind. 288, 31 N. E. 529; McClure *v.* Lewis, 72 Mo. 314.

Thus where a wife, under the coercion of her husband, made a deed to her step-son, the fact that nothing was said or done about the matter for three years after, during which she continued to live with her husband as a dutiful wife, does not amount to a ratification. Thompson *v.* Thompson, 132 Ind. 288, 31 N. E. 529.

88. Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Bradshaw *v.* Yates, 67 Mo. 221.

It seems that in New York the continuance of the undue influence does not prolong the time of running of the statute of limitations, as undue influence is not one of the disabilities mentioned by the statute as having this effect. Piper *v.* Hoard, 65 How. Pr. (N. Y.) 228.

89. *Alabama.*— Baker *v.* Maxwell, 99 Ala. 558, 14 So. 468.

Kentucky.— Carr *v.* Callaghan, 3 Litt. (Ky.) 365.

New York.— Wager *v.* Reid, 3 Thomps. & C. (N. Y.) 332; Cohen *v.* Ellis, 16 Abb. N. Cas. (N. Y.) 320.

Virginia.—Broddus *v.* McCall, 3 Call (Va.) 546.

United States.—Pence *v.* Langdon, 99 U. S. 578, 25 L. ed. 420; Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 22 U. S. App. 12, 9 C. C. A. 415.

England.— Savery *v.* King, 5 H. L. Cas. 627, 2 Jur. N. S. 503, 25 L. J. Ch. 482, 4 Wkly. Rep. 571.

See 8 Cent. Dig. tit. "Cancellation of Instruments," §§ 27, 53.

90. McLean *v.* Clark, 47 Ga. 24; Montgomery *v.* Pickering, 116 Mass. 227.

91. Sutherland *v.* Reeve, 151 Ill. 384, 38 N. E. 130; Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645; Pence *v.* Langdon, 99 U. S. 578, 25 L. ed. 420; Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 22 U. S. App. 12, 9 C. C. A. 415; Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237. See also Pinkston *v.* Boykin, 130 Ala. 483, 30 So. 398.

92. *Alabama.*— Yeates *v.* Pryor, 11 Ark. 58.

Georgia.— De Give *v.* Healey, 60 Ga. 391.

Indiana.— Patten *v.* Stewart, 24 Ind. 332; Parks *v.* Evansville, etc., R. Co., 23 Ind. 567; Barton *v.* Simmons, 14 Ind. 49.

United States.— Scheftel *v.* Hays, 58 Fed. 457, 19 U. S. App. 220, 7 C. C. A. 308; Farrar *v.* Walker, 3 Dill. (U. S.) 506 note, 8 Fed. Cas. No. 4,679, 2 Centr. L. J. 670, 13 Nat. Bankr. Reg. 82, 1 N. Y. Wkly. Dig. 229.

England.— Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 237.

See 8 Cent. Dig. tit. "Cancellation of Instruments," §§ 27, 53.

Illustrations.— Thus, the failure of vendee for eight years to examine his title, although the records were easily accessible, is a lack of reasonable diligence, showing acquiescence in a fraudulent representation as to his title. Patten *v.* Stewart, 24 Ind. 332. A defrauded vendee who has received notice sufficient to put him on guard cannot evade the duty of speedy and diligent inquiry by merely calling on the chief perpetrator to reiterate or prove his false statements. Scheftel *v.* Hays, 58 Fed. 457, 19 U. S. App. 220, 7 C. C. A. 308. Where a person was induced by the false and fraudulent representations of the officers to take stock in a corporation two years before its bankruptcy, for which he gave in payment his note secured by deed of trust on real estate, and during that period made no inquiry as to the true condition of the corporation, but suffered his note to be held out to the public as an asset of the corporation, the lapse of time is too long to allow the fraud to be pleaded against the creditors of the corporation, as represented by the assignee in bankruptcy, in avoidance of the obligation expressed in the note. Farrar *v.* Walker, 3 Dill. 506 note, 8 Fed. Cas. No. 4,679, 2 Centr. L. J. 670, 13 Nat. Bankr. Reg. 82, 1 N. Y. Wkly. Dig. 229.

As to what constitutes reasonable diligence in the pursuit of inquiries see Hopkins *v.* Snedaker, 71 Ill. 449; Whitridge *v.* Whit-

reasonable time is allowed the plaintiff for the purpose of making inquiries and taking advice of counsel,[93] and for experiment to ascertain whether the representations are true;[94] and a vendee's dealing with the property for the mere purpose of verifying his suspicions of fraud, and learning facts which would justify a demand for rescission, does not constitute an acquiescence or waiver so as to defeat rescission.[95]

2. As Affecting Running of the Statute of Limitations. Statutes of limitation, in cases of fraud, do not begin to run until the discovery of the fraud,[96] or, at least, until the receipt of information by the plaintiff which would enable him by the exercise of ordinary diligence to discover the fraud.[97]

IV. PERFORMANCE AND RESTITUTION BY COMPLAINANT.

A. Complainant's Performance. Where rescission of a contract is sought on the ground of defendant's non-performance, it will not generally be granted unless plaintiff has done, or shown himself ready to do, all that he stipulated to do under the contract.[98]

B. Restoration of the Status Quo — 1. In General. As a condition to his obtaining relief, complainant must, as a general rule, restore defendant as far as possible to the position which he occupied before the transaction which is sought to be rescinded.[99] The remedy of cancellation, like other forms of equitable relief, is subject to the maxim: "He who seeks equity must do equity."

ridge, 76 Md. 54, 24 Atl. 645; Pairo *v.* Vickery, 37 Md. 467; Baker *v.* Lever, 67 N. Y. 304, 309, 23 Am. Rep. 117 [*affirming* 5 Hun (N. Y.) 114], where it is said: "It might well be that opportunities to ascertain the fraud would be of no avail to a person unfamiliar with the business transactions of corporations, as was probably the fact here, and the authorities do not hold that a mere want of diligence without knowledge of the fraud is sufficient to deprive a party of his legal right to rescind a fraudulent contract."

Discovery of new features of the fraud does not revive a right to rescind which has once been waived. Taylor *v.* Short, 107 Mo. 384, 17 S. W. 970; Campbell *v.* Fleming, 1 A. & E. 40, 3 L. J. K. B. 136, 3 N. & M. 834, 28 E. C. L. 44; Fry Spec. Perf. §§ 703, 704.

93. Du Pont *v.* Du Bos, 52 S. C. 244, 29 S. E. 665; Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65.

94. Taylor *v.* Fleet, 1 Barb. (N. Y.) 471.

95. Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 22 U. S. App. 12, 9 C. C. A. 415. In this case complainant purchased a silver mine from defendant and afterward discovered that the samples by which he had been induced to purchase had been "salted." He at once requested defendant to take the property back, but he refused to do so. Complainant then erected a small mill in order to make more complete tests of the quality of the ore, and also sought to discover evidence to convict defendant of the "salting." He did not reach conviction on this point until a year after the sale was consummated, and then at once filed a bill for rescission. It was held that he had not waived his right to rescind, and was not guilty of laches.

96. Crowther *v.* Rowlandson, 27 Cal. 376.

See also, generally, Limitations of Actions.

In a few states the statute also provides an absolute bar, in a specified number of years after the act complained of. See Packard *v.* Beaver Valley Land, etc., Co., 96 Ky. 249, 16 Ky. L. Rep. 451, 28 S. W. 779.

97. *Alabama.*— Scruggs *v.* Decatur Mineral, etc., Co., 86 Ala. 173, 5 So. 440.

Kentucky.— Woods *v.* James, 87 Ky. 511, 10 Ky. L. Rep. 531, 9 S. W. 513.

South Carolina.— Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412; Shannon *v.* White, 6 Rich Eq. (S. C.) 96, 60 Am. Dec. 115.

Tennessee.— Peck *v.* Bullard, 2 Humphr. (Tenn.) 41.

Texas.— Cooper *v.* Lee, 1 Tex. Civ. App. 9, 21 S. W. 998.

See also, generally, Limitations of Actions.

98. Duncan *v.* Jeter, 5 Ala. 604, 39 Am. Dec. 342; Hester *v.* Hooker, 7 Sm. & M. (Miss.) 768; Mitchell *v.* Sherman, Freem. (Miss.) 120; Pryor *v.* Hunter, 31 Nebr. 678, 48 N. W. 736.

Contra.—Buchanan *v.* Lorman, 3 Gill (Md.) 51, vendee asking rescission for failure of title need not offer payment.

99. *Alabama.*—Loxley *v.* Douglas, 121 Ala. 575, 25 So. 998; George *v.* New England Mortg. Security Co., 109 Ala. 548, 20 So. 331; Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 13 So. 564; Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; New England Mortg. Security Co. *v.* Powell, 97 Ala. 483, 12 So. 55; American Freehold Land, etc., Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; Orendorff *v.* Tallman, 90 Ala. 441, 7 So. 821; Thompson *v.* Sheppard, 85 Ala. 611, 5 So. 334; Ellis *v.* Ellis, 84 Ala. 348, 4 So. 868; Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722; Martin *v.* Martin, 35 Ala. 560; Garner *v.* Leverett, 32 Ala. 410; Bailey *v.* Jordan, 32 Ala. 50; Foster *v.*

2. When Complete Restoration Is Impossible. If by the act of the fraudulent party complete restoration is made impossible, "if he has so entangled himself in

Gressett, 29 Ala. 393; Read *v.* Walker, 18 Ala. 323; Parks *v.* Brooks, 16 Ala. 529; Elliott *v.* Boaz, 9 Ala. 772; Duncan *v.* Jeter, 5 Ala. 604, 39 Am. Dec. 342; Kennedy *v.* Kennedy, 2 Ala. 571.

Arkansas.— Buckner *v.* Pacific, etc., R. Co., 53 Ark. 16, 13 S. W. 332; Bozeman *v.* Browning, 31 Ark. 364; Freeman *v.* Reagan, 26 Ark. 373; Johnson *v.* Walker, 25 Ark. 196; Davis *v.* Tarwater, 15 Ark. 286; Bennett *v.* Owen, 13 Ark. 177; Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271.

California.— Larkin *v.* Mullen, 128 Cal. 449, 60 Pac. 1091; Barry *v.* St. Joseph's Hospital, etc., (Cal. 1897) 48 Pac. 68; Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243, 40 Pac. 386; Freeman *v.* Kieffer, 101 Cal. 254, 35 Pac. 767; Fountain *v.* Semitropic Land, etc., Co., 99 Cal. 677, 34 Pac. 497; Goodrich *v.* Lathrop, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91; Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; More *v.* Calkins, 85 Cal. 177, 24 Pac. 729; Wilson *v.* Moriarty, 77 Cal. 596, 20 Pac. 134; Potter *v.* Roeth, (Cal. 1885) 7 Pac. 762; Herman *v.* Haffenegger, 54 Cal. 161; Oakland *v.* Carpentier, 21 Cal. 642; Watts *v.* White, 13 Cal. 321.

Colorado.— Elder *v.* Schumacher, 18 Colo. 433, 33 Pac. 175 (dissenting opinion); Pershing *v.* Wolfe, 6 Colo. App. 410, 40 Pac. 856; Travelers' Ins. Co. *v.* Redfield, 6 Colo. App. 190, 40 Pac. 195; Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832.

Connecticut.— Penfield *v.* Penfield, 41 Conn. 474; Ashmead *v.* Colby, 26 Conn. 287.

Georgia.— Bowden *v.* Achor, 95 Ga. 243; 22 S. E. 254; Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863; Macon *v.* Huff, 60 Ga. 221; Miller *v.* Cotten, 5 Ga. 341; Coffee *v.* Newsom, 2 Ga. 442.

Illinois.— Wenegar *v.* Bollenbach, 180 Ill. 222, 54 N. E. 192; Franklin *v.* Walker, 171 Ill. 405, 49 N. E. 556; McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Rigdon *v.* Walcott, 141 Ill. 649, 31 N. E. 158; Rogers *v.* Rogers, 141 Ill. 226, 30 N. E. 542; Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Strong *v.* Lord, 107 Ill. 25; Stone *v.* Wood, 85 Ill. 603; Wickiser *v.* Cook, 85 Ill. 68; Oard *v.* Oard, 59 Ill. 46; Underwood *v.* West, 52 Ill. 397; Miller *v.* Whittaker, 23 Ill. 400; Edmunds *v.* Myers, 16 Ill. 207; Duncan *v.* Humphries, 58 Ill. App. 440. See also O'Connell *v.* O'Conor, 191 Ill. 215, 60 N. E. 1063.

Indiana.— Thrash *v.* Starbuck, 145 Ind. 673, 44 N. E. 543; Cree *v.* Sherfy, 138 Ind. 354, 37 N. E. 787; Hormann *v.* Hartmetz, 128 Ind. 353, 27 N. E. 731; Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; Peck *v.* Vinson, 124 Ind. 121, 24 N. E. 726; Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. Rep. 330; Bengett *v.* Teal, 91 Ind. 260; Fulwider *v.* Ingels, 87 Ind. 414; Vance *v.* Schroyer, 79 Ind. 380; Axtel *v.* Chase, 77 Ind. 74; Martin *v.* Bolton, 75 Ind. 295; Watson Coal, etc., Co. *v.* Casteel, 68 Ind. 476; Johnson *v.* Cookerly, 33 Ind. 151; Patten *v.* Stewart, 24 Ind. 332; Parks *v.* Evansville, etc., R. Co., 23 Ind. 567; Teter *v.* Hinders, 19 Ind. 93; Shepherd *v.* Fisher, 17 Ind. 229; Gatling *v.* Newell, 9 Ind. 572; Colson *v.* Smith, 9 Ind. 8; Osborn *v.* Dodd, 8 Blackf. (Ind.) 467; Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 178; Long *v.* Johnson, 15 Ind. App. 498, 44 N. E. 552; Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 103.

Iowa.— Hale *v.* Kobbert, 109 Iowa 128, 80 N. W. 308; Jackson *v.* Lynan, 94 Iowa 151, 62 N. W. 704, 58 Am. St. Rep. 386; McCorkell *v.* Karhoff, 90 Iowa 545, 58 N. W. 913; Seymour *v.* Shea, 62 Iowa 708, 16 N. W. 196; Stringer *v.* Keokuk, etc., R. Co., 59 Iowa 277, 13 N. W. 308; Ashcraft *v.* De Armond, 44 Iowa 229; Mitchell *v.* Moore, 24 Iowa 394; Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431; Rynear *v.* Neilin, 3 Greene (Iowa) 310. See also Harkness *v.* Cleaves, 113 Iowa 140, 84 N. W. 1033.

Kansas.— Thayer *v.* Knote, 59 Kan. 181, 52 Pac. 433; State *v.* Williams, 39 Kan. 517, 18 Pac. 727; Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; Jeffers *v.* Forbes, 28 Kan. 174; Burlington Tp. *v.* Cross, 15 Kan. 74.

Kentucky.— Halley *v.* Winchester Diamond Lodge, 97 Ky. 438, 17 Ky. L. Rep. 293, 30 S. W. 999; Mosely *v.* Miller, 13 Bush (Ky.) 408; Barbour *v.* Morris, 6 B. Mon. (Ky.) 120; Keltner *v.* Keltner, 6 B. Mon. (Ky.) 40; Abel *v.* Cave, 3 B. Mon. (Ky.) 159; Sneed *v.* Waring, 2 B. Mon. (Ky.) 522; Slaughter *v.* Huling, 4 Dana (Ky.) 424; Williams *v.* Wilson, 1 Dana (Ky.) 157; Edwards *v.* Hanna, 5 J. J. Marsh. (Ky.) 18; Davis *v.* James, 4 J. J. Marsh. (Ky.) 8; Tennell *v.* Roberts, 2 J. J Marsh. (Ky.) 577; Camplin *v.* Burton, 2 J. J. Marsh. (Ky.) 216; Tibbs *v.* Timberlake, 4 Litt. (Ky.) 12; Clay *v.* Turner, 3 Bibb (Ky.) 52; Gray *v.* Shaw, 17 Ky. L. Rep. 61, 30 S. W. 402; Brill *v.* Rack, 15 Ky. L. Rep. 383, 23 S. W. 511; Anderson *v.* McDaniel, 15 Ky. L. Rep. 151, 22 S. W. 647; Worthington *v.* Campbell, 8 Ky. L. Rep. 416, 1 S. W. 714.

Louisiana.— Bryant *v.* Stothart, 46 La. Ann. 485, 15 So. 76; Ackerman *v.* McShane, 43 La. Ann. 507, 9 So. 483; West Carroll *v.* Gaddis, 34 La. Ann. 928; Blake *v.* Nelson, 29 La. Ann. 245; Stewart *v.* Presley, 22 La. Ann. 514; Lee *v.* Taylor, 21 La. Ann. 514; Latham *v.* Hicky, 21 La. Ann. 425; Millard *v.* Farley, 15 La. Ann. 518; McDonald *v.* Vaughan, 14 La. Ann. 716; Matta *v.* Henderson, 14 La. Ann. 473; Thompson *v.* Kilcrease, 14 La. Ann. 340; Simon *v.* Burnett, 8 La. Ann. 84; Tippett *v.* Jett, 3 Rob. (La.) 313; Walden *v.* New Orleans City Bank, 2 Rob. (La.) 165.

Maine.— Chase *v.* Hinckley, 74 Me. 181.

Maryland.— Linthicum *v.* Thomas, 59 Md. 574; Smith *v.* Townshend, 27 Md. 368, 92 Am. Dec. 637; Cumberland Coal, etc., Co. *v.*

the meshes of his own knavish plot that the defrauded party cannot unloose him,"

Sherman, 20 Md. 117; Long *v.* Long, 9 Md. 348; Griffith *v.* Frederick County Bank, 6 Gill & J. (Md.) 424.

Massachusetts.—Thomas *v.* Beals, 154 Mass. 51, 27 N. E. 1004.

Michigan.— Jandorf *v.* Patterson, 90 Mich. 40, 51 N. W. 352; Gates *v.* Cornett, 72 Mich. 420, 40 N. W. 740; Place *v.* Brown, 37 Mich. 575; Hanold *v.* Bacon, 36 Mich. 1.

Minnesota.— Nelson *v.* Carlson, 54 Minn. 90, 55 N. W. 821; Knappen *v.* Freeman, 47 Minn. 491, 50 N. W. 533.

Mississippi.— Powell *v.* Plant, (Miss. 1898) 23 So. 399; American Freehold Land, etc., Co. *v.* Jefferson, 69 Miss. 770, 12 So. 464, 30 Am. St. Rep. 587; Watts *v.* Bonner, 66 Miss. 629, 6 So. 187; Brown *v.* Norman, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663; Bowdre *v.* Carter, 64 Miss. 221, 1 So. 162; Deans *v.* Robertson, 64 Miss. 195, 1 So. 159; Hanson *v.* Field, 41 Miss. 712; Ezelle *v.* Parker, 41 Miss. 520; Shipp *v.* Wheeless, 33 Miss. 646; White *v.* Trotter, 14 Sm. & M. (Miss.) 30, 53 Am. Dec. 112; Martin *v.* Broadus, Freem. (Miss.) 35.

Missouri.— McKenzie *v.* Donnell, 151 Mo. 431, 52 S. W. 214; Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Blount *v.* Spratt, 113 Mo. 48, 20 St. W. 967; Sayer *v.* Devore, 99 Mo. 437, 13 S. W. 201; McClure *v.* Lewis, 72 Mo. 314.

Montana.— Waite *v.* Vinson, 14 Mont. 405, 36 Pac. 828; Maloy *v.* Berkin, 11 Mont. 138, 27 Pac. 442.

Nebraska.— Miller *v.* Gunderson, 48 Nebr. 715, 67 N. W. 769.

New Hampshire.— Sanborn *v.* Batchelder, 51 N. H. 426.

New Jersey.— Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Pidcock *v.* Swift, 51 N. J. Eq. 405, 27 Atl. 470; Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449, 52 N. J. Eq. 431, 29 Atl. 190; Crandall *v.* Grow, 41 N. J. Eq. 482, 5 Atl. 136; Thornton *v.* Ogden, 41 N. J. Eq. 345, 7 Atl. 619; Alexander *v.* Berney, 28 N. J. Eq. 90; Warnock *v.* Campbell, 25 N. J. Eq. 485.

New York.— Alexander *v.* Donohoe, 143 N. Y. 203, 38 N. E. 263, 62 N. Y. St. 153; Kley *v.* Healy, 127 N. Y. 555, 28 N. E. 593, 40 N. Y. St. 215; Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143; Bissell *v.* Kellogg, 65 N. Y. 432; Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Hammond *v.* Pennock, 61 N. Y. 145; Mumford *v.* American Ins., etc., Co., 4 N. Y. 463; Littlejohn *v.* Leffingwell, 40 N. Y. App. Div. 13, 57 N. Y. Suppl. 839; Daiker *v.* Strelinger, 28 N. Y. App. Div. 220, 50 N. Y. Suppl. 1074; Reynolds *v.* Westchester F. Ins. Co., 8 N. Y. App. Div. 193, 40 N. Y. Suppl. 336; Weill *v.* Malone, 91 Hun (N. Y.) 261, 36 N. Y. Suppl. 114, 71 N. Y. St. 62; Hay *v.* Hay, 13 Hun (N. Y.) 315; Wilson *v.* Lawrence, 8 Hun (N. Y.) 593; Bedell *v.* Bedell, 3 Hun (N. Y.) 580, 6 Thomps. & C. (N. Y.) 324; Bissell *v.* Kellogg, 60 Barb. (N. Y.) 617; Gillet *v.* Moody, 5 Barb. (N. Y.) 185; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103; Smith *v.* Howlett, 21 Misc. (N. Y.) 386, 47 N. Y. Suppl. 1002; Mason *v.* Wheeler, 2 Misc. (N. Y.) 523, 24 N. Y. Suppl. 879; Spencer *v.* Clark, 1 N. Y. Suppl. 533, 15 N. Y. St. 949; Francis *v.* New York, etc., El. R. Co., 17 Abb. N. Cas. (N. Y.) 1; Cohen *v.* Ellis, 16 Abb. N. Cas. (N. Y.) 320; Beecher *v.* Ackerman, 1 Abb. Pr. N. S. (N. Y.) 141; McDonald *v.* Neilson, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431.

Ohio.— Columbus, etc., R. Co. *v.* Steinfeld, 42 Ohio St. 449; Waters *v.* Lemmon, 4 Ohio 229.

Oklahoma.— Ellison *v.* Beannabia, 4 Okla. 347, 46 Pac. 477; Day *v.* Mooney, 3 Okla. 608, 41 Pac. 142.

Oregon.— State *v.* Blize, 37 Oreg. 404, 61 Pac. 735.

Pennsylvania.— Bird's Appeal, 91 Pa. St. 68; Bell *v.* Hartman, 9 Phila. (Pa.) 1, 29 Leg. Int. (Pa.) 44.

South Carolina.— Du Pont *v.* Du Bos, 52 S. C. 244, 29 S. E. 665; McKenzie *v.* Sifford, 52 S. C. 104, 29 S. E. 388; Adams *v.* Kibler, 7 S. C. 47.

South Dakota.— Lovell *v.* McCaughey, 8 S. D. 471, 66 N. W. 1085.

Tennessee.— Cox *v.* Building, etc., Assoc., 101 Tenn. 490, 48 S. W. 226; Wright *v.* Dufield, 2 Baxt. (Tenn.) 218; Smithson *v.* Inman, 2 Baxt. (Tenn.) 88; Wiley *v.* Heidell, 12 Heisk. (Tenn.) 98; Coffee *v.* Ruffin, 4 Coldw. (Tenn.) 487; Coppedge *v.* Threadgill, 3 Sneed (Tenn.) 577; Work *v.* Walker, 1 Tenn. Ch. 487. See also Palmer *v.* Bosley, (Tenn. Ch. 1900) 62 S. W. 195.

Texas.— Folts *v.* Ferguson, 77 Tex. 301, 13 S. W. 1037; Chaney *v.* Coleman, 77 Tex. 100, 13 S. W. 850; Moore *v.* Giesecke, 76 Tex. 543, 13 S. W. 290; Stewart *v.* Houston, etc., R. Co., 62 Tex. 246; Coddington *v.* Wells, 59 Tex. 49; Terrill *v.* Dewitt, 20 Tex. 256; Hatch *v.* Garza, 7 Tex. 60; Wells *v.* Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; Davis *v.* Van Wie, (Tex. Civ. App. 1894) 30 S. W. 492; Teague *v.* Williams, 6 Tex. Civ. App. 468, 25 S. W. 1048; Garza *v.* Scott, 5 Tex. Civ. App. 289, 24 S. W. 89; Dawson *v.* Sparks, 1 Tex. Unrep. Cas. 735.

Utah.— Adams *v.* Reed, 11 Utah 480, 40 Pac. 720; Kelly *v.* Kershaw, 5 Utah 295, 14 Pac. 804.

Virginia.— Nalle *v.* Virginia Midland R. Co., 88 Va. 948, 14 S. E. 759; Walker *v.* Beauchler, 27 Gratt. (Va.) 511.

West Virginia.— Christian *v.* Vance, 41 W. Va. 754, 24 S. E. 596; Worthington *v.* Collins, 39 W. Va. 406, 19 S. E. 527.

Wisconsin.— Prickett *v.* Muck, 74 Wis. 199, 42 N. W. 256; O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635; Rietz *v.* Foeste, 30 Wis. 693; Hollenback *v.* Shoyer, 16 Wis. 499.

United States.— Thackrah *v.* Haas, 119 U. S. 499, 7 S. Ct. 311, 30 L. ed. 486; Neb-

the equitable remedy will not thereby be defeated;[1] but if cancellation is sought on other grounds than that of fraud, a change of defendant's situation which prevents a restoration of the *status quo* as to him will also prevent complainant's success.[2]

3. When Consideration Is Valueless. The consideration, as a general rule, need not be returned or tendered when it is of no value[3] at the time of bringing suit.[4]

lett *v.* Macfarland, 92 U. S. 101, 23 L. ed. 471; Harding *v.* Handy, 11 Wheat. (U. S.) 103, 6 L. ed. 429; Reeves *v.* Corning, 51 Fed. 774; Billings *v.* Aspen Min., etc., Co., 51 Fed. 338, 10 U. S. App. 1, 2 C. C. A. 252; Courtright *v.* Burnes, 48 Fed. 501; Gross *v.* George W. Scott Mfg. Co., 48 Fed. 35; New Castle Northern R. Co. *v.* Simpson, 23 Fed. 214; McNett *v.* Cooper, 13 Fed. 586; Schneider *v.* Foote, 23 Blatchf. (U. S.) 511, 27 Fed. 581; McAlister *v.* Barry, Brunn. Col. Cas. (U. S.) 24, 15 Fed. Cas. No. 8,656, 3 N. C. 290; Des Moines, etc., R. Co. *v.* Alley, 3 McCrary (U. S.) 589, 16 Fed. 732; Harding *v.* Wheaton, 2 Mason (U. S.) 378, 11 Fed. Cas. No. 6,051.

England.— Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586, 4 Jur. N. S. 829, 6 Wkly. Rep. 711; Savery *v.* King, 5 H. L. Cas. 627, 2 Jur. N. S. 503, 25 L. J. Ch. 482, 4 Wkly. Rep. 571; Bellamy *v.* Sabine, 2 Phil. 425, 22 Eng. Ch. 425; Niell *v.* Morley, 9 Ves. Jr. 478.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 32.

Entire contract.—Plaintiff must restore the whole consideration, where the contract was entire; he cannot rescind in part and affirm in part. Johnson *v.* Cookerly, 33 Ind. 151; Patten *v.* Stewart, 24 Ind. 332; Nalle *v.* Virginia Midland R. Co., 88 Va. 948, 14 S. E. 759; Worthington *v.* Collins, 39 W. Va. 406, 19 S. E. 527.

When the grantor was fraudulently induced to sign the deed in the belief that it was an instrument of a different nature, and in the belief that the money paid him by the grantee as consideration of the conveyance was paid for a different purpose, the grantor need not make restitution. Ellison *v.* Beannabia, 4 Okla. 347, 46 Pac. 477. See also Mullen *v.* Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349.

1. As where defendant, after knowledge of plaintiff's repudiation of the transaction, has made it impossible for him to restore the *status quo*. Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103; Coffee *v.* Ruffin, 4 Coldw. (Tenn.) 487.

It is no defense that the wrong-doer has by his own act made a full restoration impossible on plaintiff's part, or has entered into obligations to others. He cannot prevent a restoration, as far as is within his power, by showing that he has himself done acts which prevent his being restored to his original position. Hammond *v.* Pennock, 61 N. Y. 145 [*followed* in Paquin *v.* Milliken, 163 Mo. 79, 63 S. W. 417, 1092].

When plaintiff exchanged a farm for defendant's interest in a firm, relying on the latter's representations that the firm was solvent and prosperous, and the firm proved insolvent, and its affairs were soon turned over to a receiver, the fact that the *status quo* cannot be restored as to defendant will not prevent a rescission. Brown *v.* Norman, 65 Miss. 369, 4 So. 293, 7 Am. St. Rep. 663 [*followed* in Paquin *v.* Milliken, 163 Mo. 79, 63 S. W. 417, 1092].

2. Thus, a deed of a right of way to a railroad, made on the faith of certain promises, on the part of the railroad company, will not be set aside for its failure to perform such promises, if the road has already graded and constructed its track upon the right of way so granted; the grantor will be left to his action for damages. Stringer *v.* Keokuk, etc., R. Co., 59 Iowa 277, 13 N. W. 308. See also Buckner *v.* Pacific, etc., R. Co., 53 Ark. 16, 13 S. W. 332.

A vendee sued to rescind a sale for mistake, and to enjoin a judgment on a purchase-money note assigned to the defendants; as the defendants on the faith of the note had relinquished a lien on the land, and the *status quo* could not be restored, rescission was refused. Bennett *v.* Owen, 13 Ark. 177.

The case of Bedell v. Bedell, 3 Hun (N. Y.) 580, 6 Thomps. & C. (N. Y.) 324, seems a somewhat harsh application of the rule as to restoration. Plaintiff and her sister, under the will of their mother, received the mother's entire estate, the brothers of plaintiff receiving nothing. The brothers threatened to contest the will, and stated to plaintiff that the mother's family physician had told them that the mother was insane when she made it. This was untrue, but plaintiff was induced to transfer to them certain securities belonging to the estate, in consideration of which they withdrew their opposition, and the will was admitted to probate. Plaintiff then brought an action to rescind the transfer for fraud. It was held that, not being able to restore the brothers to the position they occupied before the transfer, so as to enable them to contest the will, plaintiff could not be allowed to rescind her contract.

3. Freeman *v.* Reagan, 26 Ark. 373; Adams *v.* Reed, 11 Utah 480, 40 Pac. 720.

4. Long *v.* Johnson, 15 Ind. App. 498, 44 N. E. 552. But it has been held that the mere fact that the securities received as consideration have been declared invalid by the courts does not dispense with an offer to return them. Perry County *v.* Stebbins, 66 Ill. App. 427. And in a case where a part of the con-

4. Restoration Need Not Be Exact — a. In General. The fact that the parties cannot be precisely put *in statu quo* as to the subject-matter of the contract will not preclude a decree for rescission; if it could, no executed contract could be so rescinded.[5]

b. Where Consideration Has Fallen in Value or Is Perishable. It is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction.[6] Nor if the property is of a perishable nature is the holder bound to keep it in a state of preservation until the bill is filed.[7] And when the property is lost in whole or in part through some inherent defect that existed at the time of its conveyance, plaintiff is called upon to restore only what he can.[8]

c. Where Complainant Has Parted With a Portion of Consideration — (1) *Before Discovery.* Where a return of all the property received by complainant is rendered impossible by reason of his having parted with a portion of the property so received before discovery of the fraud, it would seem that the requirements of justice should be satisfied by a return of the part of the property retained with compensation for the remainder;[9] but the strict rule of restitution

sideration received for a mortgage sought to be canceled was certain town lots, the title to which was worthless, the court, in remanding the case on other grounds, directed that judgment for plaintiff be conditioned on a conveyance of the lots or an offer to convey them to defendant; "while it is extremely probable that such a reconveyance will confer nothing of value upon defendant, there may be some collateral rights or interests which will be protected or made available thereby." Carlton *v.* Hulett, 49 Minn. 308, 51 N. W. 1053. An offer to reconvey land situated in another state, received in exchange by plaintiff, is not excused by the fact that his grantor's title to the land is defective for want of conformity to the law of that state, if this defect is not fatal. Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. Rep. 330.

5. Gatling *v.* Newell, 9 Ind. 572.

As to time and use.— Parties cannot be put *in statu quo* as to time, for the plaintiff is entitled to a reasonable time after he discovers the fraud; nor as to use necessary for discovery of the fraud; though if any benefit is received from such use the plaintiff must account for it. Gatling *v.* Newell, 9 Ind. 572.

Return in substance.— If the party defrauded can return to the other in substance what he received, affected only by time and legitimate experimental use, and is willing to take the value of what he conveyed to the defrauding party, he can do so. Gatling *v.* Newell, 9 Ind. 572.

6. Goodrich *v.* Lathrop, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91; Cohen *v.* Ellis, 16 Abb. N. Cas. (N. Y.) 320 (consideration is bonds whose value has depreciated owing to the obligor's insolvency, but without plaintiff's fault); Neblett *v.* Macfarland, 92 U. S. 101, 23 L. ed. 471; Veazie *v.* Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; Blake *v.* Mowatt, 21 Beav. 613.

When the consideration was the surrender of a bond executed by the complainant, and held by the defendant, the decree properly provided for the return of the bond, and not for its payment as a condition of relief. Neblett *v.* Macfarland, 92 U. S. 101, 23 L. ed. 471.

7. Scott *v.* Perrin, 4 Bibb (Ky.) 360; Dawson *v.* Sparks, 1 Tex. Unrep. Cas. 735; Neblett *v.* Macfarland, 92 U. S. 101, 23 L. ed. 471.

8. Where one has traded for lands and is entitled to a rescission of the contract because of insanity, but a portion of the lands for which he traded has meanwhile been washed away by the return of a river to an old channel which adjoined the land, and to which the river was liable at any time to return, a rescission will be decreed, though complete restoration cannot be made. Hale *v.* Kobbert, 109 Iowa 128, 80 N. W. 308 [*citing* Strodder *v.* Southern Granite Co., 99 Ga. 595, 27 S. E. 174; Wright *v.* Dickinson, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602; Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449; Hilton *v.* Advance Thresher Co., 8 S. D. 412, 66 N. W. 816; Neblett *v.* Macfarland, 92 U. S. 101, 23 L. ed. 471].

9. In a suit to rescind a contract for the purchase of land on the ground of fraud, it is not necessary to offer to restore the property where the bill alleged that such property has been sold under a prior existing lien, thus making it impossible to restore the same. Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449. And complainant will only be required to restore so much of the property in specie as he reasonably can, and the full consideration for so much of it as he may have disposed of before discovering the fraud. Henninger *v.* Heald, 52 N. J. Eq. 431, 29 Atl. 190. See also Ashmead *v.* Colby, 26 Conn. 287, where the land which was the consideration has been sold on execution reconveyance not necessary.

The impossibility of complete restoration does not destroy plaintiff's right of action to rescind an agreement for fraud. Baker *v.* Ziegler, 56 Hun (N. Y.) 405, 10 N. Y. Suppl. 249, 31 N. Y. St. 466.

is frequently enforced in such a case, and the equitable relief of cancellation refused to the complainant.[10]

(II) *AFTER DISCOVERY.* Parting with a portion of the consideration after discovery of the ground of rescission, not only is evidence of a ratification of the transaction,[11] but may also deprive plaintiff of the power to place defendant *in statu quo*.[12]

5. WHEN PLAINTIFF IS ENTITLED TO RETAIN CONSIDERATION IN EVENT OF HIS SUCCESS. One who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain, either by virtue of the contract sought to be set aside or of an original liability.[13] The considera-

10. Edwards *v.* Hanna, 5 J. J. Marsh. (Ky.) 18; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Francis *v.* New York, etc., El. R. Co., 17 Abb. N. Cas. (N. Y.) 1; Stewart *v.* Houston, etc., R. Co., 62 Tex. 246. In Strong *v.* Lord, 107 Ill. 25, plaintiff, a purchaser of land, contracted to convey an undivided interest therein to one who, after making full payment, died, leaving an infant heir entitled to a deed. It was held that plaintiff's inability to place his vendor *in statu quo* could not be aided by a decree directing a conveyance by the infant.

When the consideration was a certificate of membership in a mutual benefit society, which had become forfeited for non-payment of certain dues which plaintiff was bound to pay, he was clearly not entitled to relief. Anderson *v.* McDaniel, 15 Ky. L. Rep. 151, 22 S. W. 647.

Rescission was denied where the chattels which formed the consideration had been "mutilated and disfigured" by plaintiff and could not be restored in the same condition as that in which they were received. Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 178.

11. See *supra*, III, B, 2, c.

12. *Alabama.*— Betts *v.* Gunn, 31 Ala. 219.

Illinois.— Cunningham *v.* Fithian, 7 Ill. 650.

Indiana.— Watson Coal, etc., Co. *v.* Casteel, 68 Ind. 476, extracting minerals from the land.

Kentucky.— Collier *v.* Thompson, 4 T. B. Mon. (Ky.) 81.

New York.— Myers *v.* King, 48 Hun (N. Y.) 106, 15 N. Y. St. 482.

North Carolina.— Moore *v.* Reed, 36 N. C. 418, 37 N. C. 580.

13. Winter *v.* Kansas City Cable Co., 160 Mo. 159, 61 S. W. 606; Kley *v.* Healy, 127 N. Y. 555, 28 N. E. 593, 40 N. Y. St. 215; Littlejohn *v.* Leffingwell, 40 N. Y. App. Div. 13, 57 N. Y. Suppl. 839, 47 N. Y. App. Div. 377, 62 N. Y. Suppl. 79; Reynolds *v.* Westchester F. Ins. Co., 8 N. Y. App. Div. 193, 40 N. Y. Suppl. 336; Hollenback *v.* Shoyer, 16 Wis. 499.

This rule is of frequent application in suits to cancel releases or compromises fraudulently obtained, and is in contrast with the rule of restoration recognized by courts of law in actions based on rescission by the act of plaintiff. Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75. Thus, in a suit to set aside the release of a judgment as having been procured by the fraud of defendant judgment debtor, plaintiff need not offer to return the costs paid by defendant as a consideration of such release, for in either event plaintiff is entitled to such costs. Kley *v.* Healy, 127 N. Y. 555, 28 N. E. 593, 40 N. Y. St. 215. In an action to cancel for fraud a settlement of a claim against defendant insurance company, it is sufficient for plaintiff to request in her complaint that the amount received by her under the settlement be credited and allowed to defendant on the amount due plaintiff on her policy. Reynolds *v.* Westchester F. Ins. Co., 8 N. Y. App. Div. 193, 40 N. Y. Suppl. 336. The same principle was applied in a suit to set aside the discharge of a mortgage. Hollenback *v.* Shoyer, 16 Wis. 499. A judgment debtor who, pretending to purchase for a third person with the latter's money, induces his creditor to assign his judgment, on a trifling consideration paid by himself, has no right to insist that such creditor shall, before suing to set aside the assignment, return to him the consideration paid. Pidcock *v.* Swift, 51 N. J. Eq. 405, 27 Atl. 470. On the same principle where plaintiff was seized in fee of two pieces of land, and was induced by fraudulent representations as to his title to relinquish one piece in consideration of a deed to the other, upon discovery of the fraud, in order to maintain an action to set aside his conveyance of the one piece, it was not necessary to restore the other so as to put the parties *in statu quo*, it being his property. Du Pont *v.* Du Bos, 52 S. C. 244, 29 S. E. 665.

Where an infant sought to rescind his curator's settlement for less than the amount due on his judgment against a railroad company, on the ground of fraud and want of consideration, he was not obliged to tender the amount paid, to recover the balance due, since he was entitled to this in any event. Winter *v.* Kansas City Cable R. Co., 160 Mo. 159, 61 S. W. 606.

The rule appears to fail where, in the event of plaintiff's success in his suit for cancellation, it remains uncertain whether he is entitled to the amount received; thus, where there was a compromise of a judgment claim while a writ of error from the judgment was pending, the judgment creditor seeking to set aside the compromise as fraudulent must return the amount he has received under the compromise, with interest, and restore defendant as far as may be in position to prose-

tion, if money, need not be returned where, in case of a decree in favor of plaintiffs, defendant will be required to account for a greater sum.[14]

6. Whether Restoration Must Be Offered Before Suit — a. View That Offer Is Necessary — (I) *In General.* On this question there is no little confusion among the cases, even among cases in the same jurisdiction. The numerical weight of authority appears to be slightly in favor of the position that restoration or an offer to restore the consideration or benefits received under the contract must be made before suit; that an offer in the bill or complaint to do equity comes too late.[15]

(II) *There Need Not Be a Technical Tender.* The offer of restoration, it has been held, need not be a technical tender such as would be required as a condition precedent to an action at law.[16]

cute the writ of error. Graham *v.* Meyer, 99 N. Y. 611, 1 N. E. 143. See also Littlejohn *v.* Leffingwell, 47 N. Y. App. Div. 377, 62 N. Y. Suppl. 79.

14. Wilson *v.* Moriarity, 77 Cal. 596, 20 Pac. 134; Watts *v.* White, 13 Cal. 321; McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Thackrah *v.* Haas, 119 U. S. 499, 7 S. Ct. 311, 30 L. ed. 486; Billings *v.* Aspen Min., etc., Co., 51 Fed. 338, 10 U. S. App. 1, 2 C. C. A. 252.

15. *Arkansas.*— Davis *v.* Tarwater, 15 Ark. 286.

California.— Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243, 40 Pac. 386; Herman *v.* Haffenegger, 54 Cal. 161.

Colorado.— Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832.

Georgia.— Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863.

Illinois.— Edmunds *v.* Myers, 16 Ill. 207; Duncan *v.* Humphries, 58 Ill. App. 440.

Indiana.— Burgett *v.* Teal, 91 Ind. 260; Vance *v.* Schroyer, 79 Ind. 380; Patten *v.* Stewart, 24 Ind. 332; Parks *v.* Evansville, etc., R. Co., 23 Ind. 567; Teter *v.* Hinders, 19 Ind. 93.

Iowa.— Harkness *v.* Cleaves, 113 Iowa 140, 84 N. W. 1033.

Kansas.— State *v.* Williams, 39 Kan. 517, 18 Pac. 727; Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233.

Kentucky.— Sneed *v.* Waring, 2 B. Mon. (Ky.) 522.

Louisiana.— Bryant *v.* Stothart, 46 La. Ann. 485, 15 So. 76.

Mississippi.— Hanson *v.* Field, 41 Miss. 712.

Pennsylvania.— Bird's Appeal, 91 Pa. St. 68.

United States.— Reeves *v.* Corning, 51 Fed. 774; Kinne *v.* Webb, 49 Fed. 512; Des Moines, etc., R. Co. *v.* Alley, 3 McCrary (U. S.) 589, 16 Fed. 732.

The rule has been distinctly held to be the same in equity as at law (Davis *v.* Tarwater, 15 Ark. 286), and to be "too well settled to justify citations" (Reeves *v.* Corning, 51 Fed. 774). The complaint must show that plaintiff has performed or offered to perform every act necessary to put defendant *in statu quo*, according to Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243, 40 Pac. 386.

A grantee who has entered into possession must tender a reconveyance to his vendor, and offer to restore him to the possession, before commencing his action. Patten *v.* Stewart, 24 Ind. 332. And such surrender must be made to the grantor himself or to a person authorized to receive it. Davis *v.* Tarwater, 15 Ark. 286.

If a vendor is plaintiff he must before suit have tendered to the defendant the purchase-money or other consideration received.

California.— Herman *v.* Haffenegger, 54 Cal. 161.

Indiana.— Vance *v.* Schroyer, 79 Ind. 380 (must have offered to restore the purchase-money notes); Parks *v.* Evansville, etc., R. Co., 23 Ind. 567 (must have tendered certificate of stock received as consideration); Teter *v.* Hinders, 19 Ind. 93.

Kansas.— Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233.

Mississippi.— Hanson *v.* Field, 41 Miss. 712.

United States.— Des Moines, etc., R. Co. *v.* Alley, 3 McCrary (U. S.) 589, 16 Fed. 732.

It is not a sufficient excuse that the vendees have concealed the amount of purchase-money paid in order to avoid a tender, when the plaintiffs might have learned the amount from other sources. Burgett *v.* Teal, 91 Ind. 260.

Tender before suit is required of mortgagor seeking cancellation of the mortgage (Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863); of assignee of patent rights (Edmunds *v.* Myers, 16 Ill. 207; Reeves *v.* Corning, 51 Fed. 774).

16. Tarkington *v.* Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607. In a suit to rescind an exchange of lands and cancel the deeds, plaintiff's expression of willingness, before suit, to restore to defendant all he had received from him in the exchange, upon the defendant's reconveying the land received, was a sufficient tender. Mitchell *v.* Moore, 24 Iowa 394. A grantor, on demanding rescission, need not tender to the grantee a reconveyance for the latter's signature. Peck *v.* Vinson, 124 Ind. 121, 24 N. E. 726. Where the consideration was the assignment of a mortgage, a tender of the mortgage to de-

(iii) *When Necessity of Offer Is Dispensed With.* Such offer is not necessary when there is no one entitled to receive it,[17] and in the classes of cases mentioned above, where restoration of the consideration is not required as a price of affirmative relief, the idle ceremony of an offer before suit may be dispensed with.[18]

b. View That Offer Is Unnecessary. On the other hand, the courts of many states have held, in numerous well considered cases, that no offer of restoration before bringing suit is necessary.[19] These courts advert to the distinction, so often lost sight of, between the equitable remedy of rescission or cancellation, where the avoidance of the contract, with its indispensable adjunct of restoration, is accomplished by the decree of the court, and legal rescission, where the act of plaintiff in avoiding the contract reinvests him with his legal title or right to sue, and must therefore be accompanied with restitution of the thing received by him.[20]

fendant, without tender of a reassignment, was sufficient; though such reassignment must be provided for in the decree. Chase *v.* Hinckley, 74 Me. 181.

Personal tender of a chattel is not necessary, if on the purchaser's application to be relieved from the contract the seller has declared that he will not receive the property. Tibbs *v.* Timberlake, 4 Litt. (Ky.) 12.

A partner who has purchased the interest of his copartner is not bound to give up the possession or tender back the property, in order to rescind the purchase for fraud; it is sufficient if he give notice of disaffirmance to his vendor. Slaughter *v.* Huling, 4 Dana (Ky.) 424.

17. Cree *v.* Sherfy, 138 Ind. 354, 37 N. E. 787.

18. See *supra*, IV, B, 2–5.

Tender excused — Insanity.—One who takes a conveyance from a person whom he knows to be of unsound mind is not entitled to a tender of the price as a prerequisite to an avoidance of the instrument. Thrash *v.* Starbuck, 145 Ind. 673, 44 N. E. 543. In a suit by the guardian of an insane grantee, whose insanity was not known to his vendor at the time of the contract, to set aside the purchase, the impossibility of a reconveyance by act of the grantee or his guardian is no objection, if the parties can be placed *in statu quo* by the action of the court. Fulwider *v.* Ingels, 87 Ind. 414.

Where a deed is procured by fraud from a grantor who is incompetent and a spendthrift, some money being paid as consideration, the court should not refuse to decree a rescission until such money is repaid, since the inability of such grantor to pay back the money is the natural result of defendant's act in advancing money to one so irresponsible. More *v.* More, 133 Cal. 489, 65 Pac. 1044.

Where plaintiff believed that tender would be unavailing, and pleads this belief in excuse and alleges a readiness to repay the money with interest, his failure to make the tender is not fatal to his bill. Gross *v.* George W. Scott Mfg. Co., 48 Fed. 35.

When the consideration has been forfeited to plaintiff by the terms of the contract no tender thereof is necessary. Jackson *v.* Lynn, 94 Iowa 151, 62 N. W. 704, 58 Am. St. Rep. 386.

If a contract is obtained by bribery of state officials it seems that the state may obtain a cancellation of the contract without returning or offering to return the money paid by the briber upon the contract. State *v.* Cross, 38 Kan. 696, 17 Pac. 190.

19. *Alabama.*— Martin *v.* Martin, 35 Ala. 560.

Georgia.— Coffee *v.* Newsom, 2 Ga. 442.

Illinois.— Wenegar *v.* Bollenbach, 180 Ill. 222, 54 N. E. 192; Wickiser *v.* Cook, 85 Ill. 68, semble.

Iowa.— McCorkell *v.* Karhoff, 90 Iowa 545, 58 N. W. 813; Taylor *v.* Ormsby, 66 Iowa 109, 23 N. W. 288; Binford *v.* Boardman, 44 Iowa 53.

Kansas.— Thayer *v.* Knote, 59 Kan. 181, 52 Pac. 433.

Massachusetts.— Thomas *v.* Beals, 154 Mass. 51, 27 N. E. 1004.

Michigan.— Jandorf *v.* Patterson, 90 Mich. 40, 51 N. W. 352.

Minnesota.— Nelson *v.* Carlson, 54 Minn. 90, 55 N. W. 821; Carlton *v.* Hulett, 49 Minn. 308, 51 N. W. 1053; Knappen *v.* Freeman, 47 Minn. 491, 50 N. W. 533; Kiefer *v.* Rogers, 19 Minn. 32.

Montana.— Maloy *v.* Berkin, 11 Mont. 138, 27 Pac. 442.

New York.— Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75; Allerton *v.* Allerton, 50 N. Y. 670; Beecher *v.* Ackerman, 1 Abb. Pr. N. S. (N. Y.) 141.

Oklahoma.— Day *v.* Mooney, 3 Okla. 608, 41 Pac. 142.

Tennessee.— Wiley *v.* Heidell, 12 Heisk. (Tenn.) 98.

Texas.— Wells *v.* Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; Garza *v.* Scott, 5 Tex. Civ. App. 289, 24 S. W. 89.

Wisconsin.— O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635; Dunn *v.* Amos, 14 Wis. 106. See also the important case of Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571.

United States.— See Crocker *v.* Oakes, 106 Fed. 760.

England.— Barker *v.* Walters, 8 Beav. 92; Jervis *v.* Berridge, L. R. 8 Ch. 351.

20. An estimate of the comparative value of the competing rules on this subject should not overlook the fact that the decisions enumerated *supra*, note 15, show on a careful reading that the courts rendering them did

7. **Restoration by Insane Person.** A conveyance or contract obtained from an insane person by one who was ignorant of the insanity and acted in good faith will not be set aside unless the parties can be restored to their original position.[21]

8. **Restoration by Mortgagor.** In pursuance of the principle of restitution, the mortgagor seeking cancellation of the mortgage must pay to the mortgagee the amount which is due under the mortgage, with lawful interest.[22]

9. **Restoration by Vendee.** The vendee of land, who has entered under the contract, must give up possession of the land, and if he has received conveyance of the title must reconvey.[23]

not have their attention directed to this distinction between the legal and equitable aspects of rescission. See also *supra*, I, B.

21. *Illinois.*— Ronan *v.* Bluhin, 173 Ill. 277, 50 N. E. 694.

Iowa.— Ashcraft *v.* De Armond, 44 Iowa 229.

Kansas.— Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233.

Kentucky.—Rusk *v.* Fenton, 14 Bush (Ky.) 490, 29 Am. Rep. 413.

Missouri.— McKenzie *v.* Donnell, 151 Mo. 431, 461, 52 S. W. 214, 222; Blount *v.* Spratt, 113 Mo. 48, 20 S. W. 967.

North Carolina.—Riggan *v.* Green, 80 N. C. 175, 30 Am. Rep. 77.

England.— Nicll *v.* Morley, 9 Ves. Jr. 478.

But where the grantee knows of the insanity restoration is not a condition precedent. Thrash *v.* Starbuck, 145 Ind. 673, 44 N. E. 543. And see Gibson *v.* Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Dewey *v.* Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468. See also Pomeroy Eq. Jur. § 946; Insane Persons; and *supra*, note 18.

22. *Alabama.*— George *v.* New England Mortg. Security Co., 109 Ala. 548, 20 So. 331; Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 13 So. 564; Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; New England Mortg. Security Co. *v.* Powell, 97 Ala. 483, 12 So. 55; American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299.

California.— More *v.* Calkins, 85 Cal. 177, 24 Pac. 729.

Colorado.—Pershing *v.* Wolfe, 6 Colo. App. 410, 40 Pac. 856; Travelers' Ins. Co. *v.* Redfield, 6 Colo. App. 190, 40 Pac. 195.

Georgia.—Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863.

Indiana.— Hormann *v.* Hartmetz, 128 Ind. 353, 27 N. E. 731.

Kansas.—Burlington Tp. *v.* Cross, 15 Kan. 74.

Kentucky.— Brill *v.* Rack, 15 Ky. L. Rep. 383, 23 S. W. 511.

Louisiana.— Pugh *v.* Cantey, 33 La. Ann. 786.

Michigan.— Hanold *v.* Bacon, 36 Mich. 1.

Mississippi.— Pounds *v.* Clarke, 70 Miss. 263, 14 So. 22; American Freehold Land, etc., Co. *v.* Jefferson, 69 Miss. 770, 12 So. 464, 30 Am. St. Rep. 587; Watts *v.* Bonner, 66 Miss. 629, 6 So. 187; Deans *v.* Robertson, 64 Miss. 195, 1 So. 159.

Nebraska.— Miller *v.* Gunderson, 48 Nebr. 715, 67 N. W. 769.

New York.— Bissell *v.* Kellogg, 65 N. Y. 432 [*affirming* 60 Barb. (N. Y.) 617]; Spencer *v.* Clark, 1 N. Y. Suppl. 533, 15 N. Y. St. 949.

Texas.— Folts *v.* Ferguson, 77 Tex. 301, 13 S. W. 1037.

Utah.— Kelly *v.* Kershaw, 5 Utah 295, 14 Pac. 804.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 36.

23. *Alabama.*— Crendorff *v.* Tallman, 90 Ala. 441, 7 So. 821; Thompson *v.* Sheppard, 85 Ala. 611, 5 So. 334; Garner *v.* Leverett, 32 Ala. 410; Bailey *v.* Jordan, 32 Ala. 50; Foster *v.* Gressett, 29 Ala. 393; Read *v.* Walker, 18 Ala. 323; Parks *v.* Brooks, 16 Ala. 529; Elliott *v.* Boaz, 9 Ala. 772; Duncan *v.* Jeter, 5 Ala. 604, 39 Am. Dec. 342.

Arkansas.— Johnson *v.* Walker, 25 Ark. 196; Davis *v.* Tarwater, 15 Ark. 286; Bennett *v.* Owen, 13 Ark. 177.

California.— Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243, 40 Pac. 386; Goodrich *v.* Lathrop, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91.

Colorado.— Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832.

Connecticut.— Ashmead *v.* Colby, 26 Conn. 287.

Georgia.— Coffee *v.* Newsom, 2 Ga. 442.

Illinois.— Strong *v.* Lord, 107 Ill. 25; Underwood *v.* West, 52 Ill. 397.

Indiana.—Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. Rep. 330; Fulwider *v.* Ingels, 87 Ind. 414; Patten *v.* Stewart, 24 Ind. 332; Osborn *v.* Dodd, 8 Blackf. (Ind.) 467.

Iowa.— Mitchell *v.* Moore, 24 Iowa 394.

Kansas.— Jeffers *v.* Forbes, 28 Kan. 174.

Kentucky.—Abel *v.* Cave, 3 B. Mon. (Ky.) 159; Slaughter *v.* Huling, 4 Dana (Ky.) 424; Davis *v.* James, 4 J. J. Marsh. (Ky.) 8; Tibbs *v.* Timberlake, 4 Litt. (Ky.) 12.

Louisiana.— Formento *v.* Robert, 27 La. Ann. 489; Matta *v.* Henderson, 14 La. Ann. 473; Simon *v.* Burnett, 8 La. Ann. 84.

Maryland.— Buchanan *v.* Lorman, 3 Gill (Md.) 51.

Michigan.— Jandorf *v.* Patterson, 90 Mich. 40, 51 N. W. 352.

Mississippi.— Shipp *v.* Wheeless, 33 Miss. 646; Martin *v.* Broadus, Freem. (Miss.) 35.

Missouri.— Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

New Jersey.—Henninger *v.* Heald, 51 N. J.

10. Restoration by Vendor. The vendor or grantor seeking cancellation of a contract of sale or of a conveyance must restore the cash payment which has been made.[24]

11. Restoration in Case of Usurious or Other Illegal Contract. The maxim, "He who seeks equity must do equity," has a striking illustration in suits brought by the borrower to be relieved from mortgages or other securities infected by usury. Unless the statute expressly directs that relief in such cases shall be unconditional[25] a court of equity will require plaintiff to repay what is justly due with lawful interest.[26] The same principle applies to all cases where cancellation is sought on the ground of illegality.[27]

Eq. 74, 26 Atl. 449, 52 N. J. Eq. 431, 29 Atl. 190.

Ohio.— Waters *v.* Lemmon, 4 Ohio 229.

Utah.— Adams *v.* Reed, 11 Utah 480, 40 Pac. 720.

Virginia.— Nalle *v.* Virginia Midland R. Co., 88 Va. 948, 14 S. E. 759.

West Virginia.— Worthington *v.* Collins, 39 W. Va. 406, 19 S. E. 527.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 35.

See also *infra*, XI, B, 2, for other relief on cancellation by vendee.

24. *Alabama.*— Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722.

Arkansas.— Buckner *v.* Pacific, etc., R. Co., 53 Ark. 16, 13 S. W. 332; Bozeman *v.* Browning, 31 Ark. 364; Freeman *v.* Reagan, 26 Ark. 373.

California.— Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; Herman *v.* Haffenegger, 54 Cal. 161; Oakland *v.* Carpentier, 21 Cal. 642; Watts *v.* White, 13 Cal. 321.

Georgia.— Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Miller *v.* Cotten, 5 Ga. 341.

Illinois.— McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Rigdon *v.* Walcott, 141 Ill. 649, 31 N. E. 158; Wickiser *v.* Cook, 85 Ill. 68.

Indiana.— Thrash *v.* Starbuck, 145 Ind. 673, 44 N. E. 543; Cree *v.* Sherfy, 138 Ind. 354, 37 N. E. 787; Peck *v.* Vinson, 124 Ind. 121, 24 N. E. 726; Burgett *v.* Teal, 91 Ind. 260; Vance *v.* Schroyer, 79 Ind. 380; Parks *v.* Evansville, etc., R. Co., 23 Ind. 567; Teter *v.* Hinders, 19 Ind. 93; Shepherd *v.* Fisher, 17 Ind. 229; Colson *v.* Smith, 9 Ind. 8.

Iowa.— Jackson *v.* Lynn, 94 Iowa 151, 62 N. W. 704, 58 Am. St. Rep. 386; Stringer *v.* Keokuk, etc., R. Co., 59 Iowa 277, 13 N. W. 308; Ashcraft *v.* De Armond, 44 Iowa 229; Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Kansas.— State *v.* Williams, 39 Kan. 517, 18 Pac. 727; Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233.

Kentucky.— Barbour *v.* Morris, 6 B. Mon. (Ky.) 120; Keltner *v.* Keltner, 6 B. Mon. (Ky.) 40; Sneed *v.* Waring, 2 B. Mon. (Ky.) 522; Gray *v.* Shaw, 17 Ky. L. Rep. 61, 30 S. W. 402; Anderson *v.* McDaniel, 15 Ky. L. Rep. 151, 22 S. W. 647.

Louisiana.— Bryant *v.* Stothart, 46 La. Ann. 485, 15 So. 76; Savoie *v.* Meyers, 40 La. Ann. 677, 4 So. 882; West Carroll *v.* Gaddis, 34 La. Ann. 928; Lee *v.* Taylor, 21 La. Ann. 514; Latham *v.* Hicky, 21 La. Ann. 425; Thompson *v.* Kilcrease, 14 La. Ann. 340.

Maine.— Chase *v.* Hinckley, 74 Me. 181.

Maryland.— Smith *v.* Townshend, 27 Md. 368, 92 Am. Dec. 637; Cumberland Coal, etc., Co. *v.* Sherman, 20 Md. 117; Long *v.* Long, 9 Md. 348.

Massachusetts.— Thomas *v.* Beals, 154 Mass. 51, 27 N. E. 1004.

Michigan.— Place *v.* Brown, 37 Mich. 575.

Minnesota.— Knappen *v.* Freeman, 97 Minn. 491, 50 N. W. 533.

Mississippi.— Hanson *v.* Field, 41 Miss. 712; Ezelle *v.* Parker, 41 Miss. 520; White *v.* Trotter, 14 Sm. & M. (Miss.) 30, 53 Am. Dec. 112.

Missouri.— Blount *v.* Spratt, 113 Mo. 48, 20 S. W. 967.

Montana.— Waite *v.* Vinson, 14 Mont. 405, 36 Pac. 828; Maloy *v.* Berkin, 11 Mont. 138, 27 Pac. 442.

New Jersey.— Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

New York.— Wilson *v.* Lawrence, 8 Hun (N. Y.) 593; Francis *v.* New York, etc., El. R. Co., 17 Abb. N. Cas. (N. Y.) 1.

North Carolina.— Riggan *v.* Green, 80 N. C. 175, 30 Am. Rep. 77.

Tennessee.— Wiley *v.* Heidell, 12 Heisk. (Tenn.) 98; Coppedge *v.* Threadgill, 3 Sneed (Tenn.) 577.

Texas.— Coddington *v.* Wells, 59 Tex. 49; Terrill *v.* Dewitt, 20 Tex. 256; Davis *v.* Van Wie, (Tex. Civ. App. 1894) 30 S. W. 492; Teague *v.* Williams, 6 Tex. Civ. App. 468, 25 S. W. 1048; Georza *v.* Scott, 5 Tex. Civ. App. 289, 24 S. W. 89.

Wisconsin.— O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 34.

See also *infra*, XI, B, 3, 4, for other relief to vendee.

25. See Bissell *v.* Kellogg, 65 N. Y. 432 [*affirming* 60 Barb. (N. Y.) 617]; N. Y. Stat. (1837), c. 430.

26. New England Mortg. Security Co. *v.* Powell, 97 Ala. 483, 12 So. 55; American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; American Frechold Land, etc., Co. *v.* Jefferson, 69 Miss. 770, 12 So. 464, 30 Am. St. Rep. 587; Beecher *v.* Ackerman, 1 Abb. Pr. N. S. (N. Y.) 141; Rietz *v.* Foeste, 30 Wis. 693. See also Pomeroy Eq. Jur. § 391.

27. George *v.* New England Mortg. Security Co., 109 Ala. 548, 20 So. 331; Ross *v.*

V. APPLICATION OF MAXIM, "HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS."[28]

A. In General. It is a well-established rule of courts of equity not to assist one wrong-doer against another — a doctrine expressed in the maxim, "He who comes into equity must come with clean hands." The rule is a broad one; it includes within its operation several other maxims, as, "*Ex turpi causa, non actio oritur;*" "*Ex dolo malo non oritur actio;*" "*In pari delicto potior est conditio defendentis.*" It applies to all cases, including the cancellation of instruments,[29] where the party seeking the aid of the courts has been guilty of conduct in violation of the principles of equity jurisprudence with reference to the subject-matter of litigation. In all such cases equity leaves the parties in the position in which they have placed themselves, refusing all affirmative aid to either of the participants in the fraud, illegality, or other misconduct.[30]

B. Plaintiff In Pari Delicto — 1. ILLUSTRATIONS. Relief is refused to the plaintiff where the contract or other act sought to be avoided is substantially a fraud upon the rights, interests, or intentions of third parties;[31] as where he asks

New England Mortg. Security Co., 101 Ala. 362, 13 So. 564; Bowdre *v.* Carter, 64 Miss. 221, 1 So. 162 (maxim not applicable to complainant answering cross-bill based on an illegal contract); Deans *v.* Robertson, 64 Miss. 195, 1 So. 159; Shipp *v.* Wheeless, 33 Miss. 646; Martin *v.* Broadus, Freem. (Miss.) 35; Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463; New Castle Northern R. Co. *v.* Simpson, 23 Fed. 214 (*ultra vires* contract). See also Pomeroy Eq. Jur. § 391.

28. See, generally, EQUITY.

29. *Arkansas.*— Shattuck *v.* Watson, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551.

California.— Lawton *v.* Gordon, 34 Cal. 36, 91 Am. Dec. 670.

Connecticut.— Barnes *v.* Starr, 64 Conn. 136, 28 Atl. 980.

Illinois.— Paige *v.* Hieronymus, 180 Ill. 637, 54 N. E. 583; Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642 [*reversing* 25 Ill. App. 333]; Baehr *v.* Wolf, 59 Ill. 470; Fitzgerald *v.* Forristal, 48 Ill. 228; Dunning *v.* Bathrick, 41 Ill. 425.

Indiana.— Overshiner *v.* Wisehart, 59 Ind. 135; Swain *v.* Bussell, 10 Ind. 438.

Iowa.— Williams *v.* Collins, 67 Iowa 413, 25 N. W. 682; Allison *v.* Hess, 28 Iowa 388.

Kentucky.— Harper *v.* Harper, 85 Ky. 160, 8 Ky. L. Rep. 820, 3 S. W. 5, 7 Am. St. Rep. 583; Anderson *v.* Merideth, 82 Ky. 564; Marksbury *v.* Taylor, 10 Bush (Ky.) 519; Deatly *v.* Murphy, 3 A. K. Marsh. (Ky.) 472.

Maryland.— Brown *v.* Reilly, 72 Md. 489, 20 Atl. 239; Gotwalt *v.* Neal, 25 Md. 434; Wilson *v.* Watts, 9 Md. 356; Long *v.* Long, 9 Md. 348.

Massachusetts.— Bryant *v.* Peck, etc., Co., 154 Mass. 460, 28 N. E. 678; Belding *v.* Smythe, 138 Mass. 530.

Michigan.—Poppe *v.* Poppe, 114 Mich. 649, 72 N. W. 612, 68 Am. St. Rep. 503; Cedar Springs *v.* Schlich, 81 Mich. 405, 45 N. W. 994, 8 L. R. A. 851; Gage *v.* Gage, 36 Mich. 229; Welles *v.* River Raisin, etc., R. Co., Walk. (Mich.) 35.

Mississippi.— O'Conner *v.* Ward, 60 Miss. 1025; Prewett *v.* Coopwood, 30 Miss. 369.

Missouri.— Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Poston *v.* Balch, 69 Mo. 115.

New Jersey.— Brown *v.* Carpenter, 57 N. J. Eq. 23, 41 Atl. 562; Ruckman *v.* Ruckman, 32 N. J. Eq. 259; Cannon *v.* Cannon, 26 N. J. Eq. 316.

New York.— Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Watkins *v.* Jones, 78 Hun (N. Y.) 496, 29 N. Y. Suppl. 557, 61 N. Y. St. 237; Bolt *v.* Rogers, 3 Paige (N. Y.) 154.

North Carolina.— Blossom *v.* Van Amringe, 62 N. C. 133; Jones *v.* Gorman, 42 N. C. 21.

South Carolina.—Booker *v.* Wingo, 29 S. C. 116, 7 S. E. 49.

Tennessee.— Copeland *v.* Long, (Tenn. Ch. 1896) 41 S. W. 866.

Texas.— Teague *v.* Williams, 6 Tex. Civ. App. 468, 25 S. W. 1048.

Virginia.— Jeffries *v.* Southwest Virginia Imp. Co., 88 Va. 862, 14 S. E. 661; Helsley *v.* Fultz, 76 Va. 671.

Washington.— Rozell *v.* Vansyckle, 11 Wash. 79, 39 Pac. 270.

West Virginia.— Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266; Corrothers *v.* Harris, 23 W. Va. 177.

Wisconsin.— Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520; Swartzer *v.* Gillett, 2 Pinn. (Wis.) 238, 1 Chandl. (Wis.) 207.

United States.— McCutcheon *v.* Merz Capsule Co., 71 Fed. 787, 37 U. S. App. 586, 19 C. C. A. 108 [*affirming* 67 Fed. 414]; Schermerhorn *v.* De Chambrun, 64 Fed. 195, 26 U. S. App. 212, 12 C. C. A. 81.

30. See, generally, EQUITY.

31. *Connecticut.*—Barnes *v.* Starr, 64 Conn. 136, 28 Atl. 980.

Illinois.— Dunning *v.* Bathrick, 41 Ill. 425.

Indiana.— Overshiner *v.* Wisehart, 59 Ind. 135.

Maryland.— Wilson *v.* Watts, 9 Md. 356.

New York.— Bolt *v.* Rogers, 3 Paige (N. Y.) 154.

Virginia.— Jeffries *v.* Southwest Virginia Imp. Co., 88 Va. 862, 14 S. E. 661.

the court to aid him in consummating a breach of trust.[32] The court will not aid a *particeps criminis* to an illegal transaction,[33] for example, one who has conveyed his land to a lottery company cannot ask that his deed be canceled on the ground that he was defrauded.[34]

2. Exceptions to Rule — a. Public Policy. The rule that when parties are *in pari delicto* the court will lend its aid to neither is subject to certain exceptions. Thus, where the public interest requires its intervention, relief will be granted, though the result may be that the property will be restored to or a benefit derived by a plaintiff who is in equal guilt with the defendant.[35]

b. Executory Contract. A second exception is that the affirmative relief of cancellation or injunction may be extended to one of the parties *in pari delicto*, where the contract is still executory,[36] provided that his remedy by defense to an action at law that might be brought upon the contract by the other party would not be equally certain and adequate.[37]

3. Inequality of Turpitude. Although both parties are chargeable with knowledge that their agreement is contrary to some rule of law, yet, if one of them acts under duress, or what the law regards as undue influence on the part of the other, they do not stand on an equal footing; and the weaker one may be granted affirmative relief.[38] This is especially true where the parties stand in a

West Virginia.— Corrothers *v.* Harris, 23 W. Va. 177, fraudulent scheme to prevent bidding at a trustee's sale.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 43.

Barnes *v.* Starr, 64 Conn. 136, 28 Atl. 980, is a case somewhat peculiar in its facts. The plaintiff made an antenuptial agreement for the release of her dower, with the understanding that it should be shown by her intended husband to his heirs for the purpose of inducing them to cease their opposition to the marriage, and should then be destroyed. The agreement accomplished this purpose, but was never destroyed. It was held that the plaintiff could not maintain an action to cancel the agreement, as she had been a party to the imposition upon the heirs.

32. Helsley *v.* Fultz, 76 Va. 671. In this case plaintiff joined with the trustee of an estate in a *devastavit* by paying a debt, well secured by a mortgage, in Confederate money. In a suit many years afterward to cancel the mortgage it was held that both he and the trustee were wrong-doers, and that he was entitled to no assistance at the hands of a court of equity.

33. Marksbury *v.* Taylor, 10 Bush. (Ky.) 519 (executed contract for sale of lands, based upon consideration of illicit sexual intercourse); Cedar Springs *v.* Schlich, 81 Mich. 405, 45 N. W. 994, 8 L. R. A. 851 (suit by town to cancel an illegal issue of bonds, where it was held that as plaintiff secured permission from the state legislature to issue these bonds under the pretense that the money was to be used in public improvements it should be left to its defense at law).

The plaintiff's belief that the transaction was illegal does not make it illegal. Thus, putting the title to one's land in the name of another, with the avowed intention of escaping liability to be drafted under the enrolment act of congress, was not in contravention of the policy of that act, as no property qualification was thereby required to make one liable to be drafted. Cannon *v.* Cannon, 26 N. J. Eq. 316. And a transfer to evade the confiscation acts of the Confederate government was not illegal, as that government was a public enemy. Blossom *v.* Van Amringe, 62 N. C. 133.

34. Swain *v.* Bussell, 10 Ind. 738.

35. In such case the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public, the guilty party to whom relief is granted being only the instrument by which the public is served. O'Conner *v.* Ward, 60 Miss. 1025; Jackman *v.* Mitchell, 13 Ves. Jr. 581, 9 Rev. Rep. 229. See also Pomeroy Eq. Jur. § 941.

36. McCutcheon *v.* Merz Capsule Co., 71 Fed. 787, 37 U. S. App. 586, 19 C. C. A. 108 [*affirming* 67 Fed. 414].

37. Booker *v.* Wingo, 29 S. C. 116, 7 S. E. 49, the instrument being a negotiable note, the plaintiff's defense might be lost by transfer of the note. See also Pomeroy Eq. Jur. § 940.

38. *Illinois.*— Baehr *v.* Wolf, 59 Ill. 470.

Kentucky.— Anderson *v.* Merideth, 82 Ky. 564; Deatly *v.* Murphy, 3 A. K. Marsh. (Ky.) 472.

Maryland.— Long *v.* Long, 9 Md. 348.

Massachusetts.— Bryant *v.* Peck, etc., Co., 154 Mass. 460, 28 N. E. 678.

Mississippi.— Prewett *v.* Coopwood, 30 Miss. 369.

Missouri.— Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505.

New York.— Loomis *v.* Cline, 4 Barb. (N. Y.) 453.

Tennessee.— Copeland *v.* Long, (Tenn. Ch. 1896) 41 S. W. 866.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 46.

Thus where a party indicted for an alleged crime conveyed his property to another as security for becoming his bail, and for the pur-

relation of trust or confidence, and the conveyance or other instrument was obtained from the plaintiff by means of that relation.[39]

4. Compounding Felony. The *in pari delicto* rule has frequent application in suits to cancel conveyances or contracts made with the view to compounding a felony; neither party in such a case can obtain relief in a court of equity.[40] Where, however, such contract or conveyance was obtained by duress or undue influence, the parties do not stand *in pari delicto*, and the one subjected to such duress or undue influence has therein a ground for cancellation.[41]

5. Conveyances in Fraud of Creditors. Conveyances in fraud of creditors furnish the most frequent application of the rule. Where a person makes a fraudulent conveyance of his property to another, for the purpose of defeating his creditors, equity will not interfere as between the parties themselves to set aside the conveyance.[42] Here, again, if the parties were not *in pari delicto*, if the conveyance or mortgage was obtained by undue influence exercised by the grantee or mortgagee, or through abuse of a confidential relation, the reason of the rule fails, and the less guilty party may have the relief of cancellation.[43]

pose of assisting the former to flee from justice, the conveyance being obtained by undue influence, equity will relieve the grantor by canceling the deed. Baehr *v.* Wolf, 59 Ill. 470.

39. *Kentucky.*— Harper *v.* Harper, 85 Ky. 160, 8 Ky. L. Rep. 820, 3 S. W. 5, 7 Am. St. Rep. 583.

Massachusetts.— Belding *v.* Smythe, 138 Mass. 530.

Mississippi.— O'Conner *v.* Ward, 60 Miss. 1025.

Missouri.— Poston *v.* Balch, 69 Mo. 115.

New York.— Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Watkins *v.* Jones, 78 Hun (N. Y.) 496, 29 N. Y. Suppl. 557, 61 N. Y. St. 237.

Washington.— Rozell *v.* Vansyckle, 11 Wash. 79, 39 Pac. 270.

See 8 Cent. Dig tit. "Cancellation of Instruments," § 46.

Relation of attorney and client.— But the mere fact that the defendant was the plaintiff's attorney does not make the plaintiff the less guilty party to a transfer of property by the plaintiff to defendant in fraud of creditors, if the transfer was not made on the attorney's suggestion and advice. Schermerhorn *v.* De Chambrun, 64 Fed. 195, 26 U. S. App. 212, 12 C. C. A. 81.

40. *Arkansas.*— Shattuck *v.* Watson, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551.

Illinois.— Paige *v.* Hieronymus, 180 Ill. 637, 54 N. E. 583.

Iowa.— Allison *v.* Hess, 28 Iowa 388.

Maryland.— Gotwalt *v.* Neal, 25 Md. 434.

South Carolina.— Booker *v.* Wingo, 29 S. C. 116, 7 S. E. 49.

Texas.— Teague *v.* Williams, 6 Tex. Civ. App. 468, 25 S. W. 1048.

Wisconsin.— Swartzer *v.* Gillett, 2 Pinn. (Wis.) 238, 1 Chandl. (Wis.) 207.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 44.

41. Bryant *v.* Peck, etc., Co., 154 Mass. 460, 28 N. E. 678; Bell *v.* Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Loomis *v.* Cline, 4 Barb. (N. Y.) 453.

42. *California.*—Lawton *v.* Gordon, 34 Cal. 36, 91 Am. Dec. 670.

Illinois.— Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642 [*reversing* 25 Ill. App. 333]; Dunaway *v.* Robertson, 95 Ill. 419; Fitzgerald *v.* Forristal, 48 Ill. 228.

Michigan.— Poppe *v.* Poppe, 114 Mich. 649, 72 N. W. 612, 68 Am. St. Rep. 503; Gage *v.* Gage, 36 Mich. 229.

New Jersey.— Brown *v.* Carpenter, 57 N. J. Eq. 23, 41 Atl. 562; Ruckman *v.* Ruckman, 32 N. J. Eq. 259.

North Carolina.— Jones *v.* Gorman, 42 N. C. 21.

West Virginia.— Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266. See also Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402.

United States.—Schermerhorn *v.* De Chambrun, 64 Fed. 195, 26 U. S. App. 212, 12 C. C. A. 81.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 45.

Grantees of a fraudulent mortgagor stand in no better position. Brown *v.* Carpenter, 57 N. J. Eq. 23, 41 Atl. 562.

The character of the act must be determined by the circumstances that existed when the act was done; the fact that the plaintiff has subsequently paid his creditors does not relieve him from the operation of the rule. Brown *v.* Reilly, 72 Md. 489, 20 Atl. 239.

The doctrine was questioned in Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520. See also, generally, Fraudulent Conveyances.

43. *Kentucky.*— Harper *v.* Harper, 85 Ky. 160, 8 Ky. L. Rep. 820, 3 S. W. 5, 7 Am. St. Rep. 583; Anderson *v.* Merideth, 82 Ky. 564; Deatly *v.* Murphy, 3 A. K. Marsh. (Ky.) 472.

Mississippi.— O'Conner *v.* Ward, 60 Miss. 1025; Prewett *v.* Coopwood, 30 Miss. 369.

Missouri.— Poston *v.* Balch, 69 Mo. 115.

New York.— Boyd *v.* De la Montagnie, 73 N. Y. 498, 29 Am. Rep. 197; Watkins *v.* Jones, 78 Hun (N. Y.) 496, 29 N. Y. Suppl. 557, 61 N. Y. St. 237.

Tennessee.— Copeland *v.* Long, (Tenn. Ch. 1896) 41 S. W. 866.

VI. BONA FIDE PURCHASERS.

The relief of cancellation will not be granted against a *bona fide* purchaser for value, and without notice of the fraud or other ground for cancellation.[44]

VII. PARTIES.[45]

A. In General. It is the general rule, in suits for rescission or cancellation, that all persons whose rights, interests, or relations with or through the subject-matter of the suit would be affected by the cancellation or rescission should be brought before the court, so that they can be heard in their own behalf.[46]

B. Plaintiffs — 1. In Suits to Cancel Conveyances — a. In General. The heirs[47]

Washington.— Rozell *v.* Vansyckle, 11 Wash. 79, 39 Pac. 270.

Reformation.— In Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520, land was conveyed for the purpose of defrauding creditors, and by mistake of the grantor, and the fraud of the grantee, the former's homestead was included in the deed. It was held that while the grantor could not recover the land intended to be fraudulently conveyed he was entitled to a decree correcting the deed in accordance with such intention.

44. *Illinois.*—Henson *v.* Westcott, 82 Ill. 224.

Indiana.— Somers *v.* Pumphrey, 24 Ind. 231.

Kentucky.— Rusk *v.* Fenton, 14 Bush (Ky.) 490, 29 Am. Rep. 413.

Louisiana.— Thomas *v.* Mead, 8 Mart. N. S. (La.) 341, 19 Am. Dec. 187.

North Carolina.— Dixon *v.* Wilmington Sav., etc., Co., 115 N. C. 274, 20 S. E. 464.

Texas.— Cook *v.* Moore, 39 Tex. 255; Goree *v.* Goree, 22 Tex. Civ. App. 470, 54 S. W. 1036.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 48.

As to who is a bona fide purchaser see CHATTEL MORTGAGES; COMMERCIAL PAPER; MORTGAGES; NOTICE; VENDOR AND PURCHASER. That payment of a valuable consideration is necessary to bring the purchaser within the protection of the doctrine see Reddin *v.* Dunn, 2 Colo. App. 518, 31 Pac. 947; Baker *v.* Lever, 67 N. Y. 304, 23 Am. Rep. 117; Settle *v.* Stephens, 18 Tex. Civ. App. 695, 45 S. W. 969. That absence of notice is requisite see Lockwood *v.* Tate, 96 Ala. 353, 11 So. 406 (notice by putting on inquiry); Jordan *v.* McNeil, 25 Kan. 459; Brice *v.* Brice, 5 Barb. (N. Y.) 533 (notice from possession); Hofecker *v.* Pfeil, 193 Pa. St. 288, 44 Atl. 421; Taylor *v.* Dakota Nat. Bank, 6 S. D. 511, 62 N. W. 99; Goree *v.* Goree, 22 Tex. Civ. App. 470, 54 S. W. 1036; Sullivan *v.* Crouch, 10 Tex. Civ. App. 404, 32 S. W. 144 (notice from recitals). That a purchaser with notice who has sold the property to a *bona fide* purchaser and afterward reacquires it is not protected see Lockwood *v.* Tate, 96 Ala. 353, 11 So. 406; Pomeroy Eq. Jur. § 754. That the assignee of a mortgage is not protected by the doctrine, but takes the mortgage subject to equities between mortgagor and mortgagee see Rapps *v.* Gottlieb, 142 N. Y. 164, 36 N. E. 1052, 58 N. Y. St. 636 [*affirming* 67 Hun (N. Y.) 115, 22 N. Y. Suppl. 52, 51 N. Y. St. 195]. See, generally, MORTGAGES. That an innocent purchaser from an insane person may retain his purchase unless he can be put *in statu quo* see Somers *v.* Pumphrey, 24 Ind. 231; Rusk *v.* Fenton, 14 Bush (Ky.) 490, 29 Am. Rep. 413. And that if restitution be made to the lunatic's grantee, no restoration need be made to a *bona fide* purchaser from the latter see Dewey *v.* Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468. See *supra*, IV, B, 7; and, generally, INSANE PERSONS.

A mortgage by a married woman of her separate estate, induced by false representations on the part of her husband, of which the mortgagee was innocent and ignorant, cannot be canceled. Pacific Guano Co. *v.* Anglin, 82 Ala. 492, 1 So. 852; Vancleave *v.* Wilson, 73 Ala. 387; Finnegan *v.* Finnegan, 3 Tenn. Ch. 510; Paxton *v.* Marshall, 18 Fed. 361.

Negotiable paper.—Cancellation will not be decreed of negotiable paper in the hands of a *bona fide* purchaser for value before maturity. Mayes *v.* Robinson, 93 Mo. 114, 5 S. W. 611; Cheney *v.* Janssen, 20 Nebr. 128, 29 N. W. 289.

45. See, generally, EQUITY; PARTIES.

46. Pomeroy Code Rem. § 379. For the general principles of equity relating to parties see EQUITY.

Assignability of the cause of action.— The assignment of a mere right of action to procure a transaction to be set aside on the ground of fraud is not permitted, as violating the policy of the law against champerty or maintenance. See Pomeroy Eq. Jur. § 1276; Illinois Land, etc., Co. *v.* Speyer, 138 Ill. 137, 27 N. E. 931. See CHAMPERTY AND MAINTENANCE.

47. Webb *v.* Janney, 9 App. Cas. (D. C.) 41; Foxworth *v.* Bullock, 44 Miss. 457; Keenan *v.* Keenan, 12 N. Y. Suppl. 747, 34 N. Y. St. 996. So, in a suit by a widow to set aside a deed by her deceased husband and herself conditioned on their support, the children are proper co-plaintiffs. Lane *v.* Lane, 21 Ky. L. Rep. 9, 50 S. W. 857. See also Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599.

and devisees[48] of the deceased grantor are usually necessary parties; his executor[49] or administrator is not a necessary party, having no interest in the land.[50] When the land was devised in trust, the beneficiary was permitted to sue, instead of the trustee, to set aside a conveyance made by the testator, when the trustee had been the latter's confidential adviser, had prepared the deed himself, and was not in a position to attack the transaction.[51] When a person obtained a conveyance by fraud, the grantors may disregard it and convey to a third party, who may establish the fraud in equity and have the same relief which the grantors, but for their conveyance, would have had.[52] The assignee of a purchase-money mortgage, void on account of defective execution, does not, by virtue of such assignment, succeed to the grantor's right to avoid the sale for failure of consideration.[53] When the life-tenant and remainderman make a joint deed, the former must be joined, either as plaintiff or defendant, in a suit for cancellation by the latter, as the grantor might have an interest in resisting a partial rescission;[54] and, in general, all the owners who joined in a deed are necessary parties to an action to set it aside.[55]

But an heir who has alienated his inheritance has no interest in the subject-matter of the suit. Martin *v.* Martin, 15 La. Ann. 585; McCalla *v.* Bane, 45 Fed. 828.

The children and grandchildren of a living ancestor cannot sue on the ground of his incompetency, to set aside his conveyance. Sellman *v.* Sellman, 63 Md. 520. And where a deed conditioned on the support of the grantor contained a provision that on breach of the condition the land should revert to his wife, his children have no interest in the land entitling them to sue for cancellation of the deed on the ground of non-performance. Hensley *v.* Hensley, 17 Ky. L. Rep. 122, 30 S. W. 613. Where A contracted that the land should belong to B and B's children after A's death, and afterward conveyed to C, B's children are necessary parties to a suit by B to enforce the contract and cancel the conveyance to C. Barnett *v.* Geisinger, 148 Ill. 98, 35 N. E. 354.

48. Webb *v.* Janney, 9 App. Cas. (D. C.) 41; Foxworth *v.* Bullock, 44 Miss. 457.

49. Webb *v.* Janney, 9 App. Cas. (D. C.) 41.

50. Keenan *v.* Keenan, 12 N. Y. Suppl. 747, 34 N. Y. St. 996.

51. Le Gendre *v.* Goodridge, 46 N. J. Eq. 419, 19 Atl. 543.

52. Whitney *v.* Roberts, 22 Ill. 381; Paine *v.* Baker, 15 R. I. 100, 23 Atl. 141.

A deed having been made to the wrong person by his fraud, the proper plaintiff is the one to whom the grantor had bargained and intended to convey. Bellair *v.* Wool, 35 Mich. 440.

53. Camden *v.* Vail, 24 Cal. 392.

54. Brinker *v.* Haydon, 3 Dana (Ky.) 156.

Contra.— In a suit by the assignee of a remainderman to set aside, as to the remainder, a deed executed by the life-tenant and remainderman, it was held that the life-tenant was not a necessary party. Gandy *v.* Fortner, 119 Ala. 303, 24 So. 425.

55. Robinson *v.* Kind, 23 Nev. 330, 47 Pac. 977. The title to real estate on which a building loan was made was in the name of plaintiff, but there was evidence that it belonged to her husband, who joined in notes given for borrowed money, and in a trust deed on the property to secure the same. The money secured by the deed was not all paid to the owners. Held, that an alternative decree, in an action by the wife to set aside the trust deed, that the deed and notes should be surrendered by a certain time, or that plaintiff should have a money judgment for the money secured by the deed, must be reversed, where the husband was not a party, since the decree would not conclude the husband. Chandler *v.* Ward, 83 Ill. App. 315 [*reversed* on other grounds in 188 Ill. 322, 58 N. E. 919].

A husband cannot sue alone to avoid a release of a right of homestead executed by himself and his wife, since without her presence no decree can be rendered affecting her rights in the premises. Eyster *v.* Hatheway, 50 Ill. 521, 99 Am. Dec. 537. But if the wife have no interest or estate in the land, she is not a necessary or a proper party plaintiff to a suit by the husband to cancel a mortgage of the homestead. Pounds *v.* Clarke, 70 Miss. 263, 14 So. 22. But the fact that the plaintiff's relief may be conditioned on a conveyance to the defendant by himself and his wife, of her property, does not render her a necessary party to his suit for cancellation of an exchange of lands; the rights of the defendant are not affected by the failure to make the wife a party. Stevens *v.* Thompson, 98 Mich. 9, 56 N. W. 1041.

Heirs of the grantor's deceased wife, who had a "community" interest in the land when sold, are not necessary parties to his suit for cancellation, as a judgment in his favor would not be conclusive of any rights of theirs against him. Gibson *v.* Fifer, 21 Tex. 260.

Members of church.— In a suit to set aside a conveyance made by a trustee of land held for church purposes, all the members of the church should be made parties, either as plaintiffs or defendants, unless this be impracticable. Whitney *v.* Mayo, 15 Ill. 251.

b. Particular Conveyances — (I) *LEASE.* It has been held that the right to quiet title against a lease, on the ground of duress, is personal, and does not pass to the lessor's grantee.[56]

(II) *MORTGAGE.* One of several vendees who have given a joint mortgage to secure their separate notes for their several shares of the purchase-money may sue to set aside the mortgage as to himself, but not for the others.[57] In an action to set aside a chattel mortgage, executed by the plaintiff and his wife on her separate property, she is a necessary party.[58]

(III) *MORTGAGE AND NOTE.* The maker of a note joined with another in executing a mortgage to secure it on the latter's land; their interests were so united and blended that they properly joined in an action to cancel the note and mortgage.[59] A mortgagor, suing to cancel notes and a mortgage, on the ground that the contract was usurious, and that the debt, exclusive of the usury, had been paid, properly joins with him as plaintiff one who has no present pecuniary interest in the transaction, but who is still liable on the notes, and might, if they should be assigned, be involved in expense.[60]

2. IN SUITS BY VENDEE OR IN HIS RIGHT. A grantee's heirs are necessary parties; his executor cannot sue without joining them.[61] One of several grantees in the same deed cannot prosecute a suit in the name of the other purchasers, without their consent, to rescind the sale as to them.[62] The vendee's surety,[63] or joint obligor,[64] in his bond for the purchase-money is a necessary party; and his surety who executes a note and mortgage to secure the payment of the price is the person most injured by the vendor's fraud, and may sue for cancellation of the note and mortgage.[65]

3. IN OTHER SUITS. In a suit by a principal to cancel a contract appointing three persons as agents, on the ground of fraud perpetrated by two of them, the third, who is an essential party to the suit, but was ignorant of and repudiates the fraud, is properly joined as plaintiff.[66] Two subscribers to stock may join in an action to cancel their subscriptions for false representations, when they acted jointly in the whole transaction, the representations were made to them jointly or to one of them acting for both, and the money paid for the stock was drawn out of a former copartnership between them.[67]

C. Defendants — 1. IN GENERAL. A person whom the defendant, in the

56. Schee *v.* McQuilken, 59 Ind. 269. The fact that A had been negotiating with B to obtain a lease of B's premises, and that B, under the mistaken impression that he was still dealing with A, leased the premises to C, gives A no standing to attack the lease. Stiner *v.* Stiner, 58 Barb. (N. Y.) 643.

57. Moulton *v.* Lowe, 32 Me. 466.

A married woman is a proper co-complainant in a bill filed by her testamentary trustee, which seeks to set aside and cancel a mortgage of her property executed by her and her husband to secure a recited indebtedness. Tatum *v.* Walker, 77 Ala. 563.

58. Beane *v.* Givens, (Ida. 1898) 51 Pac. 987.

59. Bowman *v.* Germy, 23 Kan. 306.

60. Valentine *v.* Fish, 45 Ill. 462.

Parties in interest.— M and another owned a tile and brick mill, and, to secure their joint note, mortgaged the mill. Thereafter M sold his interest to his co-mortgagor, who, in part consideration, assumed the note and mortgage, but, becoming insolvent, never paid the same. He sold to T and another, receiving in part payment their note payable when the mortgage was satisfied. T afterward bought his partner's interest, assuming the note last mentioned, and, to protect his title on foreclosure of the mortgage, procured an assignment of the foreclosure judgment. It was held that T and M each had an interest in the subject of an action to cancel the former's note and have the amount thereof applied in payment of the judgment assigned to T, and hence were properly united as plaintiffs. Troxel *v.* Thomas, 155 Ind. 519, 58 N. E. 725.

61. Haggins *v.* Peck, 10 B. Mon. (Ky.) 210.

62. Moulton *v.* Lowe, 32 Me. 466.

63. Cummins *v.* Boyle, 1 J. J. Marsh. (Ky.) 480.

64. Crittenden *v.* Craig, 2 Bibb (Ky.) 474.

One of three joint makers of a note for the purchase-money may join in the suit to rescind the sale, although he be estopped from obtaining any relief against the holder of the note. Lanier *v.* Hill, 25 Ala. 554.

65. Waterbury *v.* Andrews, 67 Mich. 281, 34 N. W. 575.

66. Crump *v.* Ingersoll, 44 Minn. 84, 46 N. W. 141.

67. Sherman *v.* American Stove Co., 85 Mich. 169, 48 N. W. 537.

event of the plaintiff's success, will have a right to call on for reimbursement, is a necessary party to the determination of the whole controversy.[68] But a person holding by paramount title, under whom neither party claims, is not a proper party, as the decree cannot affect his rights.[69]

2. IN SUIT TO CANCEL CONVEYANCES — a. In General. The grantor, if not a plaintiff in the suit, should be joined as defendant,[70] and in a suit by certain of the grantor's heirs all the heirs who are not joined as plaintiffs are at least proper parties defendant,[71] and are necessary parties if they can be brought before the court, before it can proceed to a final decree setting aside the deed and directing a sale.[72] All persons claiming under the deed,[73] or holding the title to a part of the land

68. Alexander *v.* Horner, 1 McCrary (U. S.) 634, 1 Fed. Cas. No. 169, 9 Centr. L. J. 111, holding that in a suit by the payee of a note against the maker, who has paid it to a fraudulent indorsee, with notice of the fraud, to set aside such assignment and recover from the maker the indorsee is a necessary party. See also Daniell Ch. Pr. 281, 282.

An assignor, all of whose interest has been transferred, is not a necessary party to a bill for relief against the assignee alone. Mullins *v.* McCandless, 57 N. C. 425.

Both the assignor and the assignee are necessary parties to an action for canceling the assignment of a contract alleged to be fraudulent, if either objects to the other being omitted. Miller *v.* Mahaffy, 45 Iowa 289.

In an action to annul a conveyance to one and his assigns, the assigns need not be made parties, as unknown assigns or otherwise, unless it appear that the grantee has transferred the property. Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599, 30 L. R. A. 747.

In a suit by a stock-holder for the cancellation of certain bonds of a railroad company secured by mortgage to a trust company, the latter is a necessary party. "It is a trustee for the bondholders, and not merely an agent of the railway company . . . has a right to be heard upon the question of the disposition which is to be made of the bonds, and is an indispensable party to a controversy in which its right to dispose of them as it deems lawful is assailed." Mayer *v.* Denver, etc., R. Co., 41 Fed. 723, 724.

In a suit for the cancellation of an alleged fraudulent assignment of a patent, and to expunge such assignment from the records of the patent office, the parties by and to whom the assignment is made are necessary parties; their interest is such that a final decree cannot be made without affecting that interest. Backus Portable Steam Heater Co. *v.* Simonds, 2 App. Cas. (D. C.) 290.

In a suit to cancel a note on the ground of payment to a previous holder, the person to whom payment was made is a necessary party defendant. Walker *v.* Smith, 8 Yerg. (Tenn.) 237. But in an action to cancel a non-negotiable note on the ground of fraud, after an assignment to a *mala fide* purchaser, an intermediate indorser is neither a proper nor necessary party. Campodonico *v.* Grossini, 66 Cal. 358, 5 Pac. 609. In a suit by the maker of a note on the ground of fraud, his joint maker who participated in the fraud is properly joined as defendant, not as complainant, as it is his interest to resist the bill. Williams *v.* Nicholson, 25 Ga. 560.

In a suit to set aside an insurance policy, infants who have a contingent interest in the proceeds of the policy are necessary defendants. Equitable L. Assur. Soc. *v.* Patterson, 1 Fed. 126.

In a suit to set aside satisfaction of a judgment, all the judgment defendants are necessary parties, because if one were not joined, the satisfaction would remain valid as to him and hence would operate a release as to all, and the plaintiff's decree would thus be a nullity. Humberd *v.* Kerr, 8 Baxt. (Tenn.) 291.

To a bill by a distributee to set aside an assignment of his distributive interest in a decedent's estate, the other distributees are not proper parties, and the misjoinder of such distributees is fatal on demurrer. Marsh *v.* Richardson, 99 Ala. 430.

Where defendant holds the instrument as bailee or depositary, the real owner not being joined as defendant, cancellation cannot be decreed. Edwards *v.* Brightly, (Pa. 1888) 12 Atl. 91.

69. Scott *v.* Moore, 4 Ill. 306.

70. Malone *v.* Kelly, 101 Ga. 194, 28 S. E. 689; Hannibal, etc., R. Co. *v.* Nortoni, 154 Mo. 142, 55 S. W. 220; Fairchild *v.* Fairchild, (N. J. 1899) 44 Atl. 944.

71. Canton *v.* McGraw, 67 Md. 583, 11 Atl. 287.

72. Harding *v.* Handy, 11 Wheat. (U. S.) 103, 6 L. ed. 429.

73. House *v.* Mullen, 22 Wall. (U. S.) 42, 22 L. ed. 838.

A partner is a proper party to a suit to set aside a conveyance to the partnership obtained by the fraud of his copartner. Palmer *v.* Searing, 12 N. Y. St. 559.

Partnership transactions. — Partnership rights cannot be finally determined as to anybody without the presence of all the parties. Hence, to a bill against one of the members of a partnership to set aside partnership transactions, and to vacate a conveyance of real estate, assets of the partnership — but held in the name of one of the partners for the benefit of the firm — and for an account, all the partners are indispensable parties. Bell *v.* Donohoe, 8 Sawy. (U. S.) 435, 17 Fed. 710. A was induced by the defendant, his partner, to sell the firm property, at an in-

conveyed,[74] are properly joined, though each defendant may have a separate interest in the fruits of the fraud in which they combined, and appropriate relief is prayed for against each.[75] On the question whether a grantee who has conveyed all his interest is a necessary party defendant the cases are divided.[76] Subsequent grantees of the original grantee are, as a general rule, properly joined with him as defendants.[77] A mere agent to effect the sale, who had no participation in the fraud, has no interest in the proceeding to cancel the deed.[78]

b. Deeds of Trust.[79] In suits to cancel deeds of trust the trustee[80] or his

adequate price, to defendant and to B, C, and D, who did not participate in the fraud. Payment was made in the notes of B, C, and D. It was held that the latter are not necessary parties to a bill brought to settle all the affairs of the old firm, and incidentally to set aside the sale so far as the price has been fixed by agreement, and to charge the defendant with the fair value of the property. Palmer *v.* Stevens, 100 Mass. 461.

The wife of the holder of the title is a proper, though not a necessary, defendant. Swihart *v.* Harless, 93 Wis. 211, 67 N. W. 413.

74. Morgan County *v.* Braner, 71 Ill. 546.

75. Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254.

But all the heirs of the grantee need not be joined, when the relief sought is only that the deed be canceled as to the interests of those who are actually made defendants; the several interests of the heirs are not interdependent. Ellesworth *v.* McCoy, 95 Ga. 44, 22 S. E. 39.

The administrator of the grantee's estate is not a necessary party, when there is nothing to show that his intestate was insolvent at the time of his death, or any right on the administrator's part to administer the real estate of his intestate. Ellesworth *v.* McCoy, 95 Ga. 44, 22 S. E. 39.

76. That such grantee is not a necessary party see Crooks *v.* Whitford, 40 Mich. 599; Dailey *v.* Kinsler, 31 Nebr. 340, 47 N. W. 1045. That he is a proper, if not a necessary, party see West *v.* Duncan, 42 Fed. 430. That he or his heirs are necessary parties see Hill *v.* Lewis, 45 Kan. 162, 25 Pac. 589 (where in a suit to cancel a conveyance made to H and his wife, and a conveyance made by them to P, H and P were made defendants, it was held that H's wife was a necessary party defendant, as it was the right of P, who must ultimately look to the covenants of his grantors, that both of them should be made co-defendants); Bradley *v.* Souther, 12 N. C. 427.

Suit by vendor to cancel deed of trust executed by vendee.— Under a contract for the purchase of realty the grantor was to make a deed when it was fully paid for. The grantee took possession, and made a payment, and subsequently, being notified that grantor would annul the contract unless the remainder of the purchase-price was paid within a certain time, he executed a deed of trust on the property. It was held that such grantee was a necessary party to a bill to cancel the deed of trust on the ground that the notice to the grantee had annulled his purchase and determined the interest of the parties under the trust deed, since his rights under his contract of purchase could not be adjudicated in a proceeding in which he was not a party. Burroughs *v.* Jones, 78 Miss. 235, 28 So. 944.

77. Ross *v.* Hobson, 131 Ind. 166, 23 N. E. 775; Free *v.* Buckingham, 57 N. H. 95; Silberg *v.* Pearson, 75 Tex. 287, 12 S. W. 850. But they are not necessary parties if their rights are not affected by the decree (Silberberg *v.* Pearson, 75 Tex. 287, 12 S. W. 850), as where the plaintiff asks judgment for the money value of the land conveyed by his immediate grantee (Edwards *v.* Richards, 95 Ga. 655, 22 S. E. 690; Muzzy *v.* Tompkinson, 2 Wash. 616, 27 Pac. 456, 28 Pac. 652).

78. Cooley *v.* Scarlett, 38 Ill. 316, 87 Am. Dec. 298.

Participant in the fraud.—A person instrumental in the fraud, but having no interest in the property, is not a proper party, unless it is necessary to hold such person for costs. Seiferd *v.* Mulligan, 36 N. Y. App. Div. 33. 55 N. Y. Suppl. 140, 28 N. Y. Civ. Proc. 373. But a notary public who took part in the forgery of the deed sought to be canceled, and certified a false certificate of acknowledgment of the deed to "his own interest and advantage" is a proper party. Alexander *v.* Davis, 42 W. Va. 465, 26 S. E. 291. A bill joined two persons as defendants, with allegations of fraudulent representations made by them, and a general confederating clause. There was no averment that they or either of them were agents or attorneys of the grantee, or that the grantee held the title in whole or in part for their benefit, or that they had or expected any interest in the land conveyed, and no relief was prayed against them. It was held that they were not proper parties. Smith *v.* Green, 37 Fed. 424.

79. Mortgages.— The mortgagor is a necessary party to a suit by a purchaser of land to cancel a mortgage thereon. Beeler *v.* Pope, 4 Bibb (Ky.) 26. In a suit to cancel a mortgage on the ground of payment of the debt, which is represented by three notes payable jointly to certain persons, all these persons are necessary defendants. Beach *v.* Mosgrove, 4 McCrary (U. S.) 50, 16 Fed. 305. In a suit to cancel a trust deed, the note secured thereby and referred to therein having been surrendered and canceled, an assignee of the trust deed is not a necessary party. Sullivan *v.* Crouch, 10 Tex. Civ. App. 404, 32 S. W. 144.

80. Barth *v.* Deuel, 11 Colo. 494, 19 Pac. 471; Erisman *v.* Erisman, 59 Mo. 367.

heirs[81] holding the legal title are necessary parties, as otherwise the title cannot be divested. All the beneficiaries named in the deed are usually necessary parties.[82]

3. In Suit by Vendee to Rescind Contract of Purchase. Where defect of the vendor's title is the ground of rescission, it is not necessary to join as defendants other parties for the purpose of ascertaining whether or not a title could be made to the vendor.[83] If the vendee has alienated the land, the second vendee is a necessary party.[84] The surety in the bond for purchase-money is a necessary party.[85] The vendor's agent in effecting the purchase is a proper, though not a necessary, party.[86] A mortgagee of the vendor is not a proper party, as he is not concerned in the transaction between the vendor and the vendee.[87]

VIII. PLEADING.[88]

A. Complaint or Bill[89] — 1. Grounds For Cancellation — a. In General. The bill should allege the special circumstances justifying the exercise of the court's

81. Lawrence *v.* Lawrence, 181 Ill. 248, 54 N. E. 918.

82. Voorhis *v.* Gamble, 6 Mo. App. 1; Conkling *v.* Davies, 53 How. Pr. (N. Y.) 409. But rule does not apply to contingent remaindermen, as their interests are represented by the trustees. Temple *v.* Scott, 143 Ill. 290, 32 N. E. 366. H executed a deed of trust to indemnify two sureties, A and B, who were jointly liable. A sale was made by the trustee and the property bought by A. To a bill brought by H against A to cancel the sale and for a reconveyance of the property, the trustee, against whom no charges are made and no relief sought, was not a necessary party; but B was a necessary party, the bill alleging that the debt for which he was jointly bound has been discharged, and this being an inquiry in which he has an interest. Hoffman *v.* Shields, 8 W. Va. 32.

Heirs of beneficiaries.— In a suit to set aside a deed executed to a trustee as security against any claim that might be made by the beneficiary on account of a certain sale by the trustee to plaintiff, the heirs of the beneficiary are proper parties. Quibell *v.* Morris, 71 Hun (N. Y.) 38, 24 N. Y. Suppl. 498, 53 N. Y. St. 873.

Where land was conveyed to one for the benefit of another both are proper parties. Miller *v.* Whittaker, 23 Ill. 453; Ross *v.* Hobson, 131 Ind. 166, 26 N. E. 775.

Where notes secured have been transferred. — Where a suit is brought to cancel a trust deed, and negotiable notes secured thereby, and the grantee has sold such notes, the holders thereof are necessary parties. Chandler *v.* Ward, 83 Ill. App. 315 [*reversed* on other grounds in 188 Ill. 322, 58 N. E. 919].

83. Prewitt *v.* Graves, 5 J. J. Marsh. (Ky.) 114.

But where vendor had an equitable title by contract with a person deceased, it was held that no rescission could be had without making the deceased's heirs and widow parties. Stimson *v.* Thorn, 25 Gratt. (Va.) 278.

If another person than the vendor named in the agreement is interested in the subject-matter of the sale, and is to receive part of the purchase-money, he is a necessary party. Atkins *v.* Billings, 72 Ill. 597.

84. Yoder *v.* Swearingen, 6 J. J. Marsh. (Ky.) 518.

85. Cummins *v.* Boyle, 1 J. J. Marsh. (Ky.) 480.

86. Freeman *v.* Kieffer, 101 Cal. 254, 35 Pac. 767.

Distinct matters.— In a suit by A and B, vendees of C, to rescind the contract of sale, it is improper to join D for the purpose of rescinding a separate contract between D and B with which A has no connection. Richardson *v.* McKinson, Litt. Sel. Cas. (Ky.) 320, 12 Am. Dec. 308.

In a suit by a lessee to cancel the lease and notes given for the rent, when the lease was executed by, and the notes to, a person who assumed to be the agent of the owner, in his own name, and there was no responsible principal, such person is a proper defendant. Potter *v.* Bassett, 35 Mo. App. 417.

87. Since the land is always subject to his claim. Orendorff *v.* Tallman, 90 Ala. 441, 7 So. 821.

88. See, generally, Equity; Pleading.

89. **So far as applicable** the ordinary rules of pleading govern actions to cancel instruments. See, generally, Equity; Pleading.

Plaintiff's title.— A bill to cancel a deed need not state the history of the title prior to the conveyance by such deed. Wilson *v.* Miller, 16 Iowa 111.

Defendant's interest.— A complaint in an action to set aside a deed which alleges that the defendant "has or claims to have some interest in the property," without further allegations as to his title, is sufficient against a general demurrer. Quibell *v.* Morris, 71 Hun (N. Y.) 38, 24 N. Y. Suppl. 498, 53 N. Y. St. 873 [*citing* Townsend *v.* Bogert, 126 N. Y. 370, 27 N. E. 555, 37 N. Y. St. 488, 22 Am. St. Rep. 835].

Value of the land need not be alleged, in an action by the vendor to rescind a sale thereof, as would be necessary in an action for damages. Ross *v.* Hobson, 131 Ind. 166, 26 N. E. 775.

discretionary power to decree a cancellation.[90] Where, however, the courts exercise jurisdiction to cancel instruments whose invalidity appears on their face, and the instrument is made a part of the bill, and appears upon its face to be invalid, a specification of the grounds of its invalidity is not essential.[91]

b. Mistake. Mistake as a ground of cancellation must be alleged with precision.[92]

c. Actual Fraud. The plaintiff must aver, fully and explicitly, the facts constituting the alleged fraud; mere conclusions will not avail.[93] It is, however,

Injury to the complainant.— A bill by a second mortgagee, before the debt is due, to compel a first mortgagee to surrender his mortgage, alleging that it had been paid, but not showing that the existence of the first mortgage is a prejudice to the plaintiff's security, rendering it less valuable, is demurrable. Jones *v.* Myers, 7 Blackf. (Ind.) 340.

90. Field *v.* Holbrook, 14 How. Pr. (N. Y.) 103.

Inadequacy of consideration.— An allegation to substantiate an averment of inadequacy of consideration in the sale of city real estate, that the property "was soon thereafter sold for more than eight times" the consideration named in the deed, but not stating how soon after, was insufficient, as such property might fluctuate largely in value within a short time. Rhino *v.* Emery, 65 Fed. 826.

Transactions between persons in confidential relations.— Complaints in suits to cancel such conveyances or contracts were approved in the following cases:

California.— Alaniz *v.* Casenave, 91 Cal. 41, 27 Pac. 521.

Michigan.— Carney *v.* Carney, 63 Mich. 382, 29 N. W. 875.

Minnesota.— Pinger *v.* Pinger, 40 Minn. 417, 42 N. W. 289.

Missouri.— Sayer *v.* Devore, 99 Mo. 437, 13 S. W. 201.

New Jersey.— Le Gendre *v.* Byrnes, 44 N. J. Eq. 372, 14 Atl. 621.

Texas.— Hickman *v.* Stewart, 69 Tex. 255, 5 S. W. 833; Cooper *v.* Lee, 1 Tex. Civ. App. 9, 21 S. W. 998.

Wisconsin.— Creamer *v.* Ingalls, 89 Wis. 112, 61 N. W. 82.

Non-delivery of deed as ground for cancellation thereof was sufficiently alleged in McGrath *v.* Hyde, 81 Cal. 38, 22 Pac. 293.

Want of proper acknowledgment.—For sufficient averment that probating officer did not examine a married woman touching her knowledge of the contents of the instrument see Fenton *v.* Bell, (Tenn. Ch. 1899) 53 S. W. 984.

Breach of condition subsequent in deed, as ground of cancellation, was sufficiently averred in Teague *v.* Teague, 22 Tex. Civ. App. 443, 54 S. W. 632.

Non-performance of promise which formed consideration of conveyance was sufficiently pleaded in Willard *v.* Ford, 16 Nebr. 543, 20 N. W. 859.

Failure of title.— Having received a conveyance and taken and enjoyed undisturbed possession, the vendee seeking a rescission must in his bill show clearly the defect of title which he alleges to exist. Moss *v.* Davidson, 1 Sm. & M. (Miss.) 112. An allegation that his vendor has no title and is unable to make one is insufficient. Alexander *v.* Moye, 38 Miss. 640.

Want of consideration.— The complaint in a suit to cancel a promissory note for want of consideration, in that it was given to secure the dismissal of an unfounded suit, should allege that this was the only consideration for the note. Moon *v.* Martin, 122 Ind. 211, 23 N. E. 668. A complaint to rescind a conveyance for false representations as to certain notes, which does not distinctly show that the notes were the consideration for the conveyance, is insufficient. Turner *v.* Engle, 121 Ind. 143, 22 N. E. 880. Complaint approved, for failure of consideration in the indorsement of a negotiable note see Maclean *v.* Fitzsimons, 80 Mich. 336, 45 N. W. 145.

Usury in mortgage was sufficiently pleaded in Baum *v.* Thoms, 150 Ind. 378, 50 N. E. 357, 65 Am. St. Rep. 368.

Payment of trust deed.— The petition need not allege the time, place, or manner of payment, where it sets out circumstances from which a presumption of payment might arise, and avers that the plaintiff has no actual knowledge as to the payment, in a suit by an administrator to cancel his intestate's trust deed. Johnson *v.* Lockhart, 20 Tex. Civ. App. 596, 50 S. W. 955.

Want of agent's authority.— In a suit to cancel the release of a mortgage for want of authority in the person who made the release, this is sufficiently shown by an allegation that the debt was unpaid, and that the property was released without the plaintiff's knowledge or consent. Lincoln University *v.* Richardson, 11 Colo. App. 151, 52 Pac. 682.

91. Simpson *v.* Edmiston, 23 W. Va. 675.

92. Stover *v.* Poole, 67 Me. 217; Salinas *v.* Stillman, 66 Fed. 677, 30 U. S. App. 40, 14 C. C. A. 50.

For form of complaint approved see Carbine *v.* McCoy, 85 Ga. 185, 11 S. E. 651.

93. *Alabama.*— Pinkston *v.* Boykin, 130 Ala. 483, 30 So. 398; Birmingham Warehouse, etc., Co. *v.* Elyton Land Co., 93 Ala. 549, 9 So. 235; Penny *v.* Jackson, 85 Ala. 67, 4 So. 720.

Illinois.— Murphy *v.* Murphy, 189 Ill. 360, 59 N. E. 796; Smith *v.* Brittenham, 98 Ill. 188.

Kansas.— Leavenworth, etc., R. Co. *v.* Douglas County, 18 Kan. 169.

neither necessary nor proper to detail minutely the conversations by which the fraudulent representations are proven.[94] So a complaint grounded on fraudulent promises should sufficiently aver the defendant's intention, existing at the time of making the promises, of not fulfilling them.[95] The averment of the untruth of the representations should be definite;[96] and the bill must show that injury has resulted to the complainant from the misrepresentations.[97]

d. Incapacity — (1) *GENERALLY.* A decree setting aside a deed for mental incompetency of the grantor cannot be sustained, unless the bill alleges such incompetency so as to put it in issue.[98] It has been held that an allegation that

Mississippi.— Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412.

New York.— Butler *v.* Viele, 44 Barb. (N. Y.) 166.

Rhode Island.— Corey *v.* Howard, 19 R. I. 723, 37 Atl. 946.

Tennessee.— Upchurch *v.* Anderson, (Tenn. Ch. 1900) 62 S. W. 1115.

United States.— Bartol *v.* Walton, etc., Co., 92 Fed. 13.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 78.

The word "fraudulent" cannot be considered as forming any specific charge. McCaleb *v.* Peery, 5 Hayw. (Tenn.) 88.

Particularity of statement excused.—A bill brought by the guardian of a lunatic to have a deed executed by her to her son set aside, which charges that defendant fraudulently procured the deed from his mother, either while she was *non compos* or when her mind was deranged or unsound or weak, or by undue influence exerted by him over her, describes with sufficient particularity the acts relied on as invalidating the deed, since the charge that he fraudulently procured the deed is specifically set forth, and the guardian could not have knowledge of the peculiar and special phase of fraud adopted. Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997.

It is not necessary that fraud should be alleged in totidem verbis; the charge may be substantially made by stating the facts from which the fraud would be necessarily implied. Grove *v.* Rentch, 26 Md. 367.

94. Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 276.

Allegations of the occurring of various distinct acts, conversations, omissions, and intentions of the defendant, tending to show that he obtained the conveyance by fraud, should, on motion, be stricken out as redundant. Wooden *v.* Strew, 10 How. Pr. (N. Y.) 48. Such allegations, it is said, are also open to the objection, under code pleading, that they tend to make the complaint a bill of discovery, which is prohibited by the code.

95. Birmingham Warehouse, etc., Co. *v.* Elyton Land Co., 93 Ala. 549, 9 So. 235; Harrington *v.* Rutherford, 38 Fla. 321, 21 So. 283.

For pleadings held to be sufficient see Lawrence *v.* Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; Newman *v.* Smith, 77 Cal. 22, 18 Pac. 791.

96. Thus in a complaint to cancel notes given for the purchase-price of a machine, alleging a representation that the machine would do good work, a mere general averment that the machine would not do good work, and is worthless to the complainant, is not definite enough. Aultman *v.* Seichting, 126 Ind. 137, 25 N. E. 894. But in a suit by a vendee, grounded on false representations of title by the vendor, an allegation that the title is in another is sufficient, without averring facts to show the defendant's want of title. Orendorff *v.* Tallman, 90 Ala. 441, 7 So. 821.

97. Bailey *v.* Fox, 78 Cal. 389, 20 Pac. 868; Smith *v.* Brittenham, 98 Ill. 188; Srader *v.* Srader, 151 Ind. 339, 51 N. E. 479; Crittenden *v.* Craig, 2 Bibb (Ky.) 474.

Illustrations of sufficient allegations.— In the following cases the allegations respecting various elements of misrepresentation were held sufficient:

Alabama.— Baker *v.* Maxwell, 99 Ala. 558, 14 So. 468.

Georgia.— Armstrong *v.* Penn, 105 Ga. 229, 31 S. E. 158.

Indiana.— Ross *v.* Hobson, 131 Ind. 166, 26 N. E. 775, holding that an allegation that the plaintiffs relied upon certain representations made by defendant and were deceived thereby sufficiently showed that plaintiffs were ignorant of the truth of the matters represented.

Kentucky.— Grundy *v.* Louisville, etc., R. Co., 98 Ky. 117, 17 Ky. L. Rep. 669, 32 S. W. 392.

New York.— Kley *v.* Healy, 127 N. Y. 555, 28 N. E. 593, 40 N. Y. St. 215 (sufficient averments to show plaintiff's reliance and right to rely on the representations made to him); Fieseler *v.* Stege, 86 Hun (N. Y.) 595, 33 N. Y. Suppl. 749, 66 N. Y. St. 571 (the word "assurance" equivalent in meaning to "representation").

Wisconsin.— Weirich *v.* Dodge, 101 Wis. 621, 77 N. W. 906.

United States.— Patton *v.* Glatz, 56 Fed. 367; Gross *v.* George W. Scott Mfg. Co., 48 Fed. 35 (where the misrepresentations were made by defendant's agent — sufficient allegations to show that defendant knew of his agent's statements to plaintiff and caused them to be made); Benton *v.* Ward, 47 Fed. 253 (averment that the representations made as an inducement to the contract were known to be false when made not necessary).

98. Harding *v.* Handy, 11 Wheat. (U. S.) 103, 6 L. ed. 429.

the plaintiff was "of unsound mind" at the time of making the contract pleads an ultimate fact and not a conclusion of law, and is therefore sufficient.[99]

(II) *INTOXICATION.* Where intoxication is the ground for cancellation, it has been held that the bill must distinctly allege that the plaintiff was incapacitated from doing business by the intoxication.[1]

(III) *MENTAL WEAKNESS CONNECTED WITH OTHER FACTS.* When mental weakness, not amounting to incapacity, is to be connected with other facts tending to establish fraud, in giving character to the transaction, and rendering it fraudulent, it is essential to good pleading that the *indicia* of fraud be alleged.[2]

e. Undue Influence. The complaint must aver, in substance, the facts which show the domination of the will of the person claimed to have been unduly influenced by the will of another;[3] but it is not necessary to state all the facts going to establish the fact of undue influence; such facts are, for the most part, evidentiary.[4] Undue influence need not be expressly averred, if it is an inference from the facts alleged.[5]

2. DESCRIPTION OF INSTRUMENT. It has been held that the bill should either set out a copy of the instrument sought to be canceled, or describe the same with such certainty that it can be identified by an officer of the court upon execution.[6]

99. Riggs *v.* American Tract Soc., 84 N. Y. 330 [*reversing* 19 Hun (N. Y.) 481]; Boynton *v.* Reese, 112 Ga. 354, 37 S. E. 437, in which case a petition for the cancellation of an instrument purporting to be a deed, averring that at the time of its execution the alleged maker was *non compos mentis* and totally incapable of contracting, is neither strengthened, nor, as to the real gravamen thereof, materially affected, by an additional allegation that the person named in the instrument as grantee procured its execution "by false and fraudulent means and artful practices." While such an allegation may be open to the objection that it is irrelevant, it does not render the petition subject to a special demurrer calling upon the plaintiff to set forth the particular acts constituting the alleged fraud. An allegation that a person "was of unsound mind and incapable from mental incapacity to transact business" was approved in Fulwider *v.* Ingels, 87 Ind. 414. On the other hand, the following allegations have been held not to raise an issue as to incompetency: That a person was of "weak and feeble intellect, and incapable of taking care of himself" (Lawrence *v.* Willis, 75 N. C. 471); that he was "old and infirm, and therefore incapacitated from attending properly to business" (Riley *v.* Riley, 34 Wis. 372). "Although a more direct and positive allegation that Comfort Wheaton was incapable of transacting business, would have been more satisfactory than the detail of circumstances from which the conclusion is drawn, yet, we think that the averment of his incompetency is sufficiently explicit to make it a question in the cause." Harding *v.* Handy, 11 Wheat. (U. S.) 103, 6 L. ed. 429. For further examples of pleading of mental incapacity see Mark *v.* North, 155 Ind. 575, 57 N. E. 902 (averments sufficient); Stockmeyer *v.* Tobin, 139 U. S. 176, 11 S. Ct. 504, 35 L. ed. 123 (averments insufficient under Civil Code of Louisiana).

Time of the incapacity.— The complaint must clearly show that the incapacity, if not amounting to insanity, existed at the time of the transaction sought to be annulled. Carnagie *v.* Diven, 31 Oreg. 366, 49 Pac. 891. But where the complaint showed that the alleged mental incapacity of the grantor was due to his old age, it is not demurrable for failure to allege that he continued to be of unsound mind until his death, or that he disaffirmed the deed after he became of sound mind, as there is no presumption that time gives relief from unsoundness of mind caused by old age. Raymond *v.* Wathen, 142 Ind. 367, 41 N. E. 815.

1. Hutchinson *v.* Brown, 1 Clarke (N. Y.) 408.

2. Darnell *v.* Rowland, 30 Ind. 342.

For forms of complaints sufficiently alleging mental weakness, together with inadequacy of consideration and fraud see Wilson *v.* Moriarty, 77 Cal. 596, 20 Pac. 134; Peck *v.* Vinson, 124 Ind. 121, 24 N. E. 726.

3. Jackson *v.* Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637.

4. Ashmead *v.* Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 238.

5. Brice *v.* Brice, 5 Barb. (N. Y.) 533; Whelan *v.* Whelan, 3 Cow. (N. Y.) 537.

Forms of complaint.— The complaints in the following cases were held to contain sufficient averments of undue influence and mental weakness. Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; Yount *v.* Yount, 144 Ind. 133, 43 N. E. 136; Tucker *v.* Roach, 139 Ind. 275, 38 N. E. 822; Ashmead *v.* Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 238; Hounshell *v.* Sams, 10 Ky. L. Rep. 485, 9 S. W. 410; Probasco *v.* Probasco, 30 N. J. Eq. 63.

6. Nation *v.* Cameron, 2 Dak. 347, 11 N. W. 525. See also Cobb *v.* Baker, 95 Me. 89, 49 Atl. 425.

The complaint is insufficient which merely refers to the contract as an exhibit attached to the complaint, since the contract should be incorporated in, or stated in substance in, the

The instrument need not be set out *in hæc verba*, but it may be pleaded by its legal effect.[7]

3. Excuse For Laches. Where the bill is filed after a considerable lapse of time,[8] and especially after the exercise by the plaintiff of the powers of an owner over the property received by him in the transaction sought to be avoided, the bill should state sufficient reasons for the delay.[9]

4. Statute of Limitations. If fraud is the ground of action, the plaintiff must not allege that the fraud was committed beyond the statute period, unless he brings himself within the exception by alleging that the discovery of the fraud was made within the statutory period.[10]

5. Negativing Bona Fide Purchase. A bill to cancel negotiable securities is not demurrable because it fails to show that defendants are not *bona fide* holders for value, as in such case the burden of proof is on them;[11] and facts which

complaint. Barnett *v.* Bryce Furnace Co., (Ind. App. 1901) 60 N. E. 363 [*appeal denied* in 157 Ind. 572, 62 N. E. 6].

The bill is sufficient if it furnishes data from which the identity of the land described in the instrument may be fixed with certainty by evidence *aliunde*. Pinkston *v.* Boykin, 130 Ala. 483, 30 So. 398.

7. Anderson *v.* Gaines, 156 Mo. 664, 57 S. W. 726.

Illustrations.— A petition describing a deed simply as a "conveyance," and failing to allege any consideration, or to aver that the deed was one of gift, is not bad on demurrer as not stating a cause of action. Poe *v.* Domec, 48 Mo. 441. It is not necessary to state that a contract to purchase land was in writing, as the allegation of the making of the contract implies that it was in writing. McDonald *v.* Mission View Homestead Assoc., 51 Cal. 210. Under the Code provision that "instruments in writing upon which the complainant's bill is founded" should be annexed to the bill, in a bill to cancel a deed certificates of stock which were the consideration for the land are not such instruments. Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357. And it seems that a copy of the note sought to be canceled need not be filed with the complaint, as the note itself is presumably in the possession of the adverse party; at any rate, a cross complaint to cancel a note sued on need not set out a copy of the note. Gardner *v.* Fisher, 87 Ind. 369.

The failure to set out the conveyance sought to be canceled could only be reached by motion to make the complaint more definite and certain, not by general demurrer. Bishop *v.* Aldrich, 48 Wis. 619, 4 N. W. 775. And a petition describing the deed simply as a "conveyance," and failing to allege any consideration, or to aver that the deed was one of gift, is informal, and subject to correction on motion to make more definite; but defendant, having gone to trial upon answer, waived the informality, and the allegation is sufficient to let in evidence and sustain a judgment. Poe *v.* Domec, 48 Mo. 441. It was held that a bill to cancel a deed, which failed to show the name of the grantee or person claiming adversely under it, was fatally defective. Nation *v.* Cameron, 2 Dak. 347, 11 N. W. 525. But where it was averred that the deed sought to be canceled was executed to the complainant, when it is apparent that the defendant was intended, the defect was cured by a copy of the deed attached to the bill as a part thereof, from which the name of the proper grantee was made to appear. Such a defect, being amendable, would not be considered on motion to dismiss the bill for want of equity. Piedmont Land Imp. Co. *v.* Piedmont Foundry, etc., Co., 96 Ala. 389, 11 So. 332.

8. Scruggs *v.* Decatur Mineral, etc., Co., 86 Ala. 173, 5 So. 440; Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804; Axtel *v.* Chase, 77 Ind. 74.

9. Fisher *v.* Boody, 1 Curt. (U. S.) 206, 9 Fed. Cas. No. 4,814. It is not necessary, however, for plaintiff, in a suit to cancel a deed obtained from him, through undue influence, when insane, to negative, by way of recital in his complaint, any confirmation of, or long acquiescence in, such transaction after recovering his mental capacity, in order to entitle him to prove that he acted with reasonable promptness on being restored to reason. Parszyk *v.* Mach, 10 S. D. 555, 74 N. W. 1027.

Ratification is a matter to be pleaded as a defense, and established by proof; that it need not be negatived by the bill see Northern Pac. R. Co. *v.* Kindred, 3 McCrary (U. S.) 627, 14 Fed. 77.

10. Le Roy *v.* Mulliken, 59 Cal. 281; Sublette *v.* Tinney, 9 Cal. 423; Walker *v.* Pogue, 2 Colo. App. 149, 29 Pac. 1017; Woods *v.* James, 87 Ky. 511, 10 Ky. L. Rep. 531, 9 S. W. 513; Carneals *v.* Parker, 7 J. J. Marsh. (Ky.) 455; Morrill *v.* Little Falls Mfg. Co., 60 Minn. 405, 62 N. W. 548. In a suit by a vendee to rescind the purchase for fraud, an averment that the fraud was not discovered "until long after the purchase," though indefinite, was held sufficient to bring the case within the exception, where the statutory period was six years, and the suit was commenced six years and twenty-three days after the purchase was consummated. Matlock *v.* Todd, 25 Ind. 128. See, further, as to pleading an exception to the statute, Embree *v.* Patrick, 72 Mo. 173.

11. Louisville, etc., R. Co. *v.* Ohio Valley Imp., etc., Co., 57 Fed. 42.

entitle defendant to the rights of a purchaser of real estate for value and without notice of an infirmity in the title of his grantor are matters of defense which need not be excluded by the averments of the petition.[12]

6. Restitution or Tender Before Suit. In those jurisdictions where the complainant is required to make an offer to restore the consideration or benefits received under the contract before bringing suit to rescind the same the bill must show that a sufficient offer was made,[13] or must allege a sufficient excuse for failure to make it.[14]

7. Offer to Do Equity. In nearly all jurisdictions a bill is demurrable in which the complainant does not offer to return any consideration which it shows that he received, or otherwise place defendant *in statu quo*, or sufficiently excuse himself from that duty.[15] A few courts, however, hold to the contrary and say

12. Gwynne *v.* Jones, 5 Ohio Cir. Ct. 298. But see Root *v.* Bancroft, 8 Gray (Mass.) 619 (a bill by a grantor, to avoid a deed which he has been induced to execute by fraud of the owners of other interests in the land, cannot be sustained without averring that the grantee had notice of the fraud or paid no valuable consideration for the deed); Garza *v.* Scott, 5 Tex. Civ. App. 289, 24 S. W. 89. See also, generally, Notice.

13. *Arkansas.*— Davis *v.* Tarwater, 15 Ark. 286.

California.—Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243, 40 Pac. 386; Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376, holding that an allegation made in the language of the statute is sufficient against a general demurrer.

Colorado.—Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832.

Georgia.— Dotterer *v.* Freeman, 88 Ga. 479, 14 S. E. 863.

Indiana.— Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. Rep. 330; Burgett *v.* Teal, 91 Ind. 260; Vance *v.* Schroyer, 79 Ind. 380.

United States.— Des Moines, etc., R. Co. *v.* Alley, 3 McCrary (U. S.) 589, 16 Fed. 732.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 72; and also *supra*, IV, B, 6, a.

In Wisconsin in a suit in equity for the rescission of a contract on the ground of fraud, failure to show by the complaint willingness to restore what had been received thereon does not go to the cause of action, unless taken advantage of by a special demurrer. Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571.

14. Orendorff *v.* Tallman, 90 Ala. 441, 7 So. 321 (bill need not aver relinquishment of possession by vendee when it alleges that he never had possession); Thrash *v.* Starbuck, 145 Ind. 673, 44 N. E. 543 (that grantor was insane, and this was known to the grantees); Martin *v.* Bolton, 75 Ind. 295 (that no consideration was received); Gross *v.* George W. Scott Mfg. Co., 48 Fed. 35 (that complainant believed a tender would be unavailing); Des Moines, etc., R. Co. *v.* Alley, 3 McCrary (U. S.) 589, 16 Fed. 732 (that the deed was wholly without consideration). See also *supra*, IV, B, 2-6.

15. *Alabama.*—Loxley *v.* Douglas, 121 Ala. 575, 25 So. 998; Martin *v.* Martin, 35 Ala. 560; Betts *v.* Gunn, 31 Ala. 219.

Arkansas.— Johnson *v.* Walker, 25 Ark. 196.

California.— Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243, 40 Pac. 386; Potter *v.* Roeth, (Cal. 1885) 7 Pac. 762.

Colorado.— Travelers' Ins. Co. *v.* Redfield, 6 Colo. App. 190, 40 Pac. 195.

Illinois.— Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Miller *v.* Whittaker, 23 Ill. 453; Edmunds *v.* Myers, 16 Ill. 207.

Indiana.— Westhafer *v.* Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. Rep. 330; Axtel *v.* Chase, 77 Ind. 74.

Iowa.— Seymour *v.* Shea, 62 Iowa 708, 16 N. W. 196; Montgomery *v.* Gibbs, 40 Iowa 652.

Mississippi.— Shipp *v.* Wheeless, 33 Miss. 646.

Missouri.— Fry *v.* Piersol, 166 Mo. 429, 66 S. W. 171.

Montana.— Waite *v.* Vinson, 14 Mont. 405, 36 Pac. 828.

New York.— Spencer *v.* Clark, 1 N. Y. Suppl. 533, 15 N. Y. St. 949.

North Carolina.— Martin *v.* Cook, 59 N. C. 199.

Texas.— Cates *v.* Sparkman, 73 Tex. 619, 11 S. W. 846, 15 Am. St. Rep. 806; Coddington *v.* Wells, 59 Tex. 49; Hatch *v.* Garza, 7 Tex. 60.

United States.— Des Moines, etc., R. Co. *v.* Alley, 3 McCrary (U. S.) 589, 16 Fed. 732.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 73.

A bill by a mortgagor to cancel the mortgage must offer to repay the principal and legal interest or whatever is justly due. Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; American Freehold Land, etc., Co. *v.* Jefferson, 69 Miss. 770, 12 So. 464, 30 Am. St. Rep. 587; Deans *v.* Robertson, 64 Miss. 195, 1 So. 159. An averment in such a case "that the complainant is not indebted to the defendant in any sum, but offers, if he is mistaken in this, to pay the defendant whatever sum the court may adjudge is due" is in substantial compliance with the rule as to the offer to do equity (New England Mortg. Security Co.

that the offer on the part of the complainant to do equity is purely a formal requirement, and may be dispensed with.[16]

8. WAIVER OR CURE OF DEFECTS. It has been held that an omission to aver a tender or readiness to return the consideration received by the plaintiff, if not taken advantage of by demurrer or answer, is not fatal to the action.[17] When a complaint is defective in some material allegation, and that defect is supplied by the answer, the defect in the complaint is cured.[18]

B. Special Demurrer or Motion to Make More Certain. The following objections, it has been held, must be raised by motion to make the complaint more certain, or by special,[19] not by general, demurrer: A failure to set out in the complaint the conveyance sought to be canceled;[20] that the allegation of offer to

v. Powell, 97 Ala. 483, 12 So. 55); while an averment that "if said interest notes past due are held valid in any event, complainant hereby offers, and is able and willing and ready, to pay the same" is insufficient (Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 13 So. 564).

A bill by a vendor to cancel the title bond on the ground of non-performance by the vendee must offer to refund what the complainant has received, or show that the vendee has had an equivalent from the use and occupation of the property, or otherwise. Terrill *v.* Dewitt, 20 Tex. 256.

If the bill avers a disaffirmance and tender before suit on the part of the complainant, a vendor, it need not offer to bring the money into court, as that need only be done as a condition to the final relief. Miller *v.* Louisville, etc., R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722.

If the bill shows that no consideration was received by the plaintiff, it is obvious that no offer of restoration is necessary. Larkin *v.* Mullen, 128 Cal. 449, 60 Pac. 109 (pleadings taken together show that nothing was received by plaintiff); Cumberland Coal, etc., Co. *v.* Sherman, 20 Md. 117; Des Moines, etc., R. Co. *v.* Alley, 3 McCrary (U. S.) 589, 16 Fed. 732.

Where a bill filed to vacate a sale of land for fraud averred that defendant had received rents and profits more than sufficient to repay him the amount paid in the purchase, but that, if not, plaintiff offered to pay any sum which should finally appear to be due and owing the defendant, and to perform such other things as the court may determine, fully submitting himself to the equity of the court, there was a sufficient offer on plaintiff's part to do equity. Pinkston *v.* Boykin, 130 Ala. 483, 30 So. 398.

Where an accounting was also sought, in a suit by a vendor, an averment that the defendant owes the plaintiff more than the amount paid to the plaintiff is equivalent to an offer to credit the defendant with that amount, and is therefore sufficient. Watts *v.* White, 13 Cal. 321.

Where the bill alleged that the consideration was worthless at the time of the contract, it must either offer to return the stock or show that it is still worthless. Long *v.* Johnson, 15 Ind. App. 498, 44 N. E. 552.

Where the consideration was the assignment to plaintiff of a patent right, the bill should offer to reconvey the patent right to the defendant. Miller *v.* Whittaker, 23 Ill. 453.

16. Knappen *v.* Freeman, 47 Minn. 491, 50 N. W. 533 (holding that the offer to do equity does not constitute part of the plaintiff's cause of action, and that it therefore cannot be required under the code system of pleading); Hay *v.* Hay, 13 Hun (N. Y.) 315. See also Coffee *v.* Newsom, 2 Ga. 442; Beecher *v.* Ackerman, 1 Abb. Pr. N. S. (N. Y.) 141 [*citing* Schermerhorn *v.* Talman, 14 N. Y. 93]; Wiley *v.* Heidell, 12 Heisk. (Tenn.) 98; Jones *v.* Galbraith, (Tenn. Ch. 1900) 59 S. W. 350.

17. McCormick *v.* Malin, 5 Blackf. (Ind.) 509; Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Hollenback *v.* Shoyer, 16 Wis. 499; Dunn *v.* Amos, 14 Wis. 106.

Timely objection must be made.— If a bill for the discovery, production, and cancellation of a deed and a will was defective in not stating the time when complainants first knew of the existence of the disputed documents, timely objections should have been made by demurrer or otherwise. It is too late to urge such objection for the first time on the argument. Green *v.* Terwilliger, 56 Fed. 384.

18. Richardson *v.* Green, 61 Fed. 423, 15 U. S. App. 488, 9 C. C. A. 565 [*citing* Vernam *v.* Smith, 15 N. Y. 327; White *v.* Joy, 13 N. Y. 83; Bate *v.* Graham, 11 N. Y. 237; Pomeroy Rem. & Rem. Rights, § 579]. In the principal case the court said: "It is true, these decisions arose under the code pleading, but I see no reason why the same rule should not apply under any system of pleading. It would seem highly technical for a court to reverse a cause, and compel a new trial, when all the facts necessary for the proper determination of the cause are before it in the record. I find the same principle is maintained in the federal courts" [*citing* Cavender *v.* Cavender, 114 U. S. 464, 5 S. Ct. 955, 29 L. ed. 212; Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547].

19. As to demurrers and motions to make more specific see, generally, EQUITY; PLEADING.

20. Bishop *v.* Aldrich, 48 Wis. 619, 4 N. W. 775.

return the consideration does not specify when such offer was made;[21] that the time of discovery of the ground of rescission is not alleged with certainty.[22]

C. Plea or Answer. The general rules of equity pleading, so far as applicable, govern the pleas and answers in actions to cancel instruments.[23] If a plea is ambiguous it will be construed as intended to be in conformity with the leave to plead.[24]

D. Counter-Claim or Cross-Bill. Affirmative relief cannot be given to defendant except on counter-claim or cross-bill.[25] A counter-claim for cancellation of a contract cannot be allowed in an action on such contract, where equity would not, on an original complaint, set it aside or restrain assertion of it.[26] By

21. Newman *v.* Smith, 77 Cal. 22, 18 Pac. 791.

22. Cohen *v.* Ellis, 16 Abb. N. Cas. (N. Y.) 320.

Defense that petition shows a ratification by acquiescence, with the knowledge of the fraud, it has been said, must be raised by special demurrer or plea, and cannot be reached by general demurrer or motion in arrest of judgment. Moore *v.* Cross, (Tex. Civ. App. 1894) 26 S. W. 122.

Inconsistency.— In an action to cancel a deed, the complaint stated that the deed was made without consideration, and procured by undue influence, but further showed that there was a sufficient consideration, which had failed, and stated no facts in regard to the exercise of undue influence. It was held sufficient to support a decree for plaintiff, when advantage of the defects was not taken by special demurrer. De Pedrorena *v.* Hotchkiss, 95 Cal. 636, 30 Pac. 787.

23. See, generally, EQUITY; PLEADING.

Consistency of defenses.— Under the Missouri code provision permitting defendant to set up as many consistent defenses as he may have, legal or equitable, the consistency need be of fact merely. In an action to set aside a deed on the ground of no delivery, there is no inconsistency in pleading in defense the execution and delivery of a prior deed of the same land, in which there was a misdescription of the property, and that the deed attacked was executed to correct the mistake. Crowder *v.* Searcy, 103 Mo. 97, 15 S. W. 346.

In a suit to set aside deed on the ground of fraud on the part of grantee, by taking advantage of confidential relations between himself and the grantor, where these relations are admitted, the answer must set forth facts going to show that the deed did not result from such confidential relations, and it should also appear that the grantor had independent advice. An answer stating that defendant does not know whether grantor "yielded to the persuasions or solicitations or directions, so fraudulently, as alleged, made by said Van B. De Lashmutt on account of, or by reason of her said alleged confidence in him," etc., is to be construed as an admission that the conveyance was made as a result of the confidential relations, persuasions, etc. German Sav., etc., Soc. *v.* De Lashmutt, 83 Fed. 33; Starr *v.* De Lashmutt, 76 Fed. 907.

Where, in a suit for cancellation by vendor on ground of fraud, the defense was that the defendant had made improvements on the land, it was held that the improvements should have been described and their value alleged, and that failing in this the answer was bad. Roy *v.* Haviland, 12 Ind. 364.

In a suit by a vendee for rescission of the contract of purchase on the ground of the vendor's defective title, the answer of the vendor should set forth his title. Topp *v.* White, 12 Heisk. (Tenn.) 165.

24. So, where a plea may be construed as a plea of affirmance of a contract sought to be avoided, by the election to affirm the same by adopting remedies inconsistent with its disaffirmance, or as a plea of laches and of acquiescence in the contract; and such plea was filed under leave given to file several pleas, leave to file a plea of laches and general acquiescence being refused by the court, it will be construed as a plea of affirmance by election of inconsistent remedies. Emma Silver Min. Co. *v.* Emma Silver Min. Co. of New York, 7 Fed. 401.

25. Where affirmative relief sought is cancellation, a cross-bill for that purpose is necessary. Bay *v.* Shrader, 50 Miss. 326.

In action to cancel deed, where defendant pleads no counter-claim, and prays only that the case be dismissed, it is error to give him a judgment for money expended on the premises, where he merely pleaded such expenditure in connection with other facts which he alleged estopped plaintiff to deny the validity of the deed. Walker *v.* Walker, 93 Iowa 643, 61 N. W. 930.

26. S. L. Sheldon Co. *v.* Mayers, 81 Wis. 627, 51 N. W. 1082.

Counter-claim for cancellation.— Where plaintiff sues on coupons, a counter-claim asking cancellation of both bonds and coupons on the ground of fraud is "a cause of action arising out of the contract which is the foundation of plaintiff's claim." Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263.

Effect of dismissal of the complaint.—In an action to foreclose a mortgage, the answer prayed for cancellation of the mortgage, but gave no description of the notes and mortgage. Held, that while, after a trial and finding for the defendant the record would suffice to support a decree of cancellation, no such decree could be made when the plaintiff dismissed his complaint upon the filing of the answer. Union Nat. Bank *v.* Carr, 49 Iowa 359.

the rule in some jurisdictions, persons who are not parties in the original bill cannot be introduced in a cross-bill seeking cancellation.[27]

E. Amendments. The rules relating to amendments under equity practice generally control amendments of pleadings in actions to cancel instruments.[28] Under the code provisions, amendments to pleadings have been allowed which conform the pleadings to the proof and do not substantially change the claim or defense.[29]

F. Variance — 1. In General. On a bill, complaint, or petition, to cancel an instrument on the single ground of the grantor's mental unsoundness and incom-

Counter-claim and cross complaint in action for cancellation.— In a suit to set aside a deed as being a security for a usurious loan, and for an accounting for rents, defendant may set up a counter-claim for rents due from the plaintiff for the use of part of the premises, while the defendant held under such deed; as such counter-claim "tends to diminish the plaintiff's recovery," and "arises out of the transaction set forth as the foundation of the plaintiff's claim," viz., the execution of the deed and contract, and is "connected with the subject of the action," viz.: the real estate in question. Barnes *v.* Gilmore, 6 N. Y. Civ. Proc. 286.

In a suit to cancel a note and mortgage, and for the recovery of personal property a cross complaint seeking to settle title to real estate to which no claim is made, and the title to which cannot be affected by any judgment which can be properly rendered, is not a proper pleading. Washburn *v.* Roberts, 72 Ind. 213.

27. Shaw *v.* Millsaps, 50 Miss. 380; and see EQUITY.

28. See, generally, EQUITY; PLEADING. A petition for the cancellation of a deed on the ground of a breach of a promise by the grantee forming the consideration of the deed is not amendable so as to make a case for cancellation either on the ground that the grantor was mentally incapable of contracting, or was induced by fraud to execute the conveyance. Brand *v.* Power, 110 Ga. 522, 36 S. E. 53. Where the original bill prayed to have a mortgage canceled, as inoperative and void, an amendment asking, in the alternative, for an account and redemption under the mortgage cannot be allowed. Tatum *v.* Walker, 77 Ala. 563.

A bill to cancel two mortgages as having been made in evasion of a statute should be amended, before or at the final hearing, to conform to proofs showing the validity of one of the mortgages because the mortgagee had no notice of the attempted evasion. Allen *v.* McCullough, 99 Ala. 612, 12 So. 810.

An amendment was properly allowed before final decree, which simply made the complainants technically aver a fact which everybody admitted without controversy, and which abundantly appeared in the whole case. Hill *v.* Nash, 73 Miss. 849, 19 So. 707.

Leave asked, many years after an administrator's sale, to amend a bill to set it aside by introducing new matter presenting a new ground of relief, which would require a rehearing on a new answer, and further testimony, properly refused. Goodbody *v.* Goodbody, 95 Ill. 456.

The action by the original complainant set up duress by threats to take the complainant's life; an amendment to a supplemental bill by his administrator to show that the threats were carried out is improper, as such killing is only admissible as evidence to establish the allegations of the original bill, and should not be pleaded. Lyster *v.* Stickney, 4 McCrary (U. S.) 109, 12 Fed. 609. In the same case an amendment showing that the original complainant was insolvent and that the conveyance in question was void against his creditors, who are now represented by the administrator, was allowed.

Under a rule prohibiting amendment of the bill after replication filed, except upon proof that the proposed amendment could not, with reasonable diligence, have been sooner introduced into the bill, plaintiff in a bill to enforce a resulting trust after replication filed was not permitted to amend so as to set up that the deed for the property in question was fraudulent, and to pray for its cancellation, as this was to introduce a new and inconsistent cause of action. Toomey *v.* Hughes, 8 Pa. Co. Ct. 384.

29. See, generally, PLEADING.

Though complaint to cancel note and mortgage did not state an equitable cause of action, or that plaintiff had no adequate remedy at law, yet, if the proof showed such facts, the answer not having denied them, the trial court could conform the pleadings to the proofs, and grant the relief sought. Palmer *v.* Jones, 69 Hun (N. Y.) 240, 23 N. Y. Suppl. 584, 53 N. Y. St. 355.

Where complaint was based on undue influence, and the proofs disclosed that the relation of attorney and client existed between defendant and grantor, an amendment was permitted in order to show this. Carter *v.* West, 93 Ky. 211, 14 Ky. L. Rep. 191, 19 S. W. 592. And in a suit based on undue influence an amendment alleging that the plaintiff was a person of weak understanding, and at the time of the transaction was in financial distress, does not materially change the issue or plead a new cause of action or ground of relief. Clough *v.* Adams, 71 Iowa 17, 32 N. W. 10.

Where complaint was grounded on mistake by the plaintiff and fraudulent representations by the defendant, and the proof showed the defendant's misrepresentations to have been made innocently, an amendment to conform to the proofs does not change the plain-

petency no other question, such as the question of non-delivery of the deed[30] or of undue influence[31] can be considered.[32] A decree based on evidence of usury in the instrument is not warranted by a complaint praying for cancellation on the ground of failure of consideration,[33] or of full compliance with the obligations of the instrument.[34]

2. Where Fraud Is Ground Alleged. When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief the complainant is not, in general, entitled to a decree by establishing some one or more of the facts, quite independent of fraud, which might by themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally.[35] Thus, a bill for rescission on the ground of fraud, it is held, is not sustained by evidence which shows only an honest mistake or innocent misrepresentations.[36] The plaintiff cannot rely on other misrepresentations than those

tiff's claim, as the plaintiff's right to a rescission is precisely the same whether the defendant's misrepresentations were made honestly or dishonestly. Knapp *v.* Fowler, 30 Hun (N. Y.) 512.

30. Snodgrass *v.* Knight, 43 W. Va. 294, 27 S. E. 233.

31. Averments that grantor was of unsound mind, and that the grantees, by means of false representations, took advantage thereof and caused him to execute the instrument, can raise no issue as to undue influence. Snider *v.* Wilson, (Iowa 1899) 78 N. W. 802.

32. A bill to set aside a partnership partition on the ground of the complainant's mental unsoundness does not warrant a decree in his favor upon evidence that the partition was so unequal as, in connection with the complainant's incapacity, to raise a presumption of fraud. Doughty *v.* Doughty, 7 N. J. Eq. 643.

33. Bang *v.* Phelps, etc., Windmill Co., 96 Tenn. 361, 34 S. W. 516.

34. Schell *v.* Equitable Loan, etc., Assoc., 150 Mo. 103, 51 S. W. 406. See, generally, Pleading.

Variance as to instrument sought to be canceled.— In the following cases such variance was held to be fatal: On a bill to set aside a deed, where, by the findings and decree, the instrument is found to be a mortgage made to secure a debt to third persons (Cole *v.* Bean, 1 Ariz. 364, 25 Pac. 537); on a bill to set aside a mortgage as fraudulent, where neither the mortgage nor the bill nor the answer contained any reference to the accompanying note, the existence of such note was not involved in the issue, and evidence with respect to it, which was objected to when taken, must be disregarded at the hearing (Bloomer *v.* Henderson, 8 Mich. 395, 77 Am. Dec. 453). In the following cases the variance was immaterial: Where a bill for rescission of a purchase of land alleged a conveyance to two of the complainants, while the deed, which was made an exhibit to the bill, conveyed the lands to one of the complainants only. Lanier *v.* Hill, 25 Ala. 554. A bill to set aside an assignment of judgment on the ground that it was given as security for a debt and alleging that defendant's title was fraudulent because of inadequacy of consideration was held sufficient to support a decree setting aside the assignment on the latter ground, and findings that the sale was absolute, since the bill may be treated as having a double aspect. Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241.

Variance as to relief prayed, and relief authorized by the general prayer see *infra*, XI, A, 1, and note.

35. *District of Columbia.*— Bailor *v.* Daly, 7 Mackey (D. C.) 175.

New Jersey.— Hoyt *v.* Hoyt, 27 N. J. Eq. 399 [*affirmed* in 28 N. J. Eq. 485].

New York.— Patterson *v.* Patterson, 1 Rob. (N. Y.) 184.

North Carolina.—McCraw *v.* Gwin, 42 N. C. 55.

England.— Montesquieu *v.* Sandys, 18 Ves. Jr. 302, 11 Rev. Rep. 197; 1 Daniell Ch. Pr. 328.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 96.

"Plaintiffs are not in general allowed to fall back upon any secondary equity — Adams Eq. 164, (176) and they are never allowed to do so, unless such secondary equity is distinctly set out in the bill and relied on as an alternative, so as to give to the defendant full notice and an opportunity to meet the bill in both of its aspects." McCraw *v.* Gwin, 42 N. C. 55.

If the bill charges fraud and the charge fails there can be no relief under the prayer for general relief. But when the bill (to set aside a trustee's sale) also has such serious allegations as would if true establish that there was no legal sale at all the court may consider such allegations. Bailor *v.* Daly, 7 Mackey (D. C.) 175.

Where bill was to cancel conveyances for fraud, proof that they constitute a mortgage from which the plaintiff has a right to redeem is a fatal variance. Patterson *v.* Patterson, 1 Rob. (N. Y.) 184.

Compare Hoagland *v.* Titus, 16 N. J. Eq. 44, where a bill charging fraud was retained for the purpose of reargument on the ground of surprise.

36. Porter *v.* Collins, 90 Ala. 510, 8 So. 80; Williams *v.* Sturdevant, 27 Ala. 598; Belknap *v.* Sealey, 14 N. Y. 143, 67 Am. Dec. 120 [*af-*

alleged in the bill,[37] and a bill filed to declare a deed false, forged, or counterfeit is not sustained by evidence that it was procured by fraud.[38]

IX. PROOF.[39]

A. Burden of Proof — **1. In General.** The rule that the burden to prove a fact is upon him who alleges it applies to proof in actions to cancel instruments.[40] Where, however, the plaintiff grounds his right to relief upon a negative allegation, it is a disputed question whether the *onus probandi* is upon him or upon defendant.[41]

2. As to Fraud, Mistake, or Undue Influence. Where no confidential relations existed between the parties, the burden of proving that the contract or conveyance was obtained by fraud, mistake, duress, or undue influence rests upon the party attacking it.[42]

firming 2 Duer (N. Y.) 570 (but the variance not considered on appeal, where the objection was not properly taken at the trial)]; Grabush *v.* Goodman, 1 N. Y. Suppl. 864, 16 N. Y. St. 910. *Contra,* Lanier *v.* Hill, 25 Ala. 554; Powell *v.* Plant, (Miss. 1898) 23 So. 399; St. Francis Church *v.* Hargous, 39 N. J. Eq. 339.

37. Touchstone *v.* Staggs, (Tex. Civ. App. 1897) 39 S. W. 189; Wren *v.* Moncure, 95 Va. 369, 28 S. E. 588, and cases cited. But see Miller *v.* Bedell, 21 La. Ann. 573, for the rule under the Louisiana practice.

38. Stafford *v.* Stafford, 1 N. J. Eq. 525.

Variance as to nature of mistake.— A complainant alleged that he was induced to execute certain deeds by the false representations of the defendants, and also through his own ignorance of the fact that the lands had been owned by his mother, and devised by her to him. The evidence utterly failed to substantiate the bill. It was held that he could not be allowed to claim relief on the ground that, although he voluntarily executed the deeds to the defendants, he did so under a mistake as to the extent of his interest in the lands conveyed. Pasman *v.* Montague, 30 N. J. Eq. 385 [*citing* Midmer *v.* Midmer, 27 N. J. Eq. 548; Hoyt *v.* Hoyt, 27 N. J. Eq. 399; Brantingham *v.* Brantingham, 12 N. J. Eq. 160; Hickson *v.* Lombard, L. R. 1 H. L. 324; Ferraby *v.* Hobson, 16 L. J. Ch. 499, 2 Phil. 255, 22 Eng. Ch. 255; Glascott *v.* Lang, 11 Jur. 642, 16 L. J. Ch. 429, 2 Phil. 310, 22 Eng. Ch. 310; Montesquieu *v.* Sandys, 18 Ves. Jr. 302, 11 Rev. Rep. 197; Wilde *v.* Gibson, 1 H. L. Cas. 605, 12 Jur. 527; Archbold *v.* Ireland Charitable Donation, etc., Comrs., 2 H. L. Cas. 440].

39. See, generally, Evidence.

40. As to burden of proof generally see Evidence.

Where failure of consideration is the ground for cancellation of a deed made in consideration of the support and maintenance of the grantor the burden of proof is on plaintiff. McCartney *v.* Bolyard, 22 W. Va. 641.

Non-delivery of deed — Burden of proving the grantee's wrongful possession of the deed is on the grantor. Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542.

Burden of proof is on one claiming to be a bona fide purchaser to establish his defense. Colton Imp. Co. *v.* Richter, 26 Misc. (N. Y.) 26, 55 N. Y. Suppl. 486 [*citing* Pomeroy Eq. Jur. § 785]. See also, generally, Notice.

Statute of limitations.— Whether the burden of proof is on the defendant interposing the defense of the statute to show that the plaintiff had knowledge of the fraud for longer than the statutory period before the commencement of the action (Shannon *v.* White, 6 Rich. Eq. (S. C.) 96, 60 Am. Dec. 115), or is on the plaintiff to show that the fraud was not discovered until within the statutory period (Baldwin *v.* Martin, 14 Abb. Pr. N. S. (N. Y.) 9) is a question that is differently answered in different jurisdictions. See, generally, Limitations of Actions. The burden of proof that the case is within an exception to the statute, relating to the defendant's non-residence, is on the party who invokes the aid of the exception. Evans *v.* Montgomery, 50 Iowa 325.

Admissions in the answer.— While the general rule of equity pleading is that an answer puts complainant to the proof of those facts which it does not admit, there may be an implied as well as an express admission, dispensing with proof by the plaintiff. Thus, where the bill by a grantee alleged that the grantor had no title, and that he made false representations that he had a perfect title, and the answer did not deny the allegation that the defendant had no title, but relied on the defense that no representations of title were made, the complainant was not obliged to introduce evidence of the negative fact of want of title. Shook *v.* Proctor, 27 Mich. 377.

41. Thus, when it was part of the plaintiff's cause of action that a deed was never executed, it was incumbent on him to prove the non-execution. Kerr *v.* Freeman, 33 Miss. 292. While in a suit by vendee to rescind a contract to purchase lands of a prescribed quality, to be chosen by the vendee, the burden was on the vendor to show that he owned lands of such quality. Lynch *v.* Johnson, 2 Litt. (Ky.) 98.

42. *Arkansas.*— Blanks *v.* Clark, 68 Ark. 98, 56 S. W. 1063.

Illinois.— Arnhorst *v.* National Union, 179

3. In Case of Fiduciary Relations. Where a fiduciary relation existed between the parties to the transaction, the party who held the position of superiority and influence by virtue of the relation has the burden of proving the compliance of the transaction with equitable requisites.[43]

4. As to Mental Incompetency. The burden of proving a grantor's mental incompetency is on those who assail the conveyance.[44] Where the incapacity was not continuous there is a conflict of authority as to the shifting of the burden of proof; some cases holding that it remains on the plaintiff to show the incapacity at the time the instrument was executed, if the deed is in itself reasonable and proper;[45] others holding that the burden is shifted as soon as it is shown that the

Ill. 486, 53 N. E. 988 [*reversing* 74 Ill. App. 482].

Iowa.— Oaks *v.* Harrison, 24 Iowa 179.

Kentucky.— Wicks *v.* Dean, 103 Ky. 69, 19 Ky. L. Rep. 1708, 44 S. W. 397.

Louisiana.— Couder *v.* Oteri, 34 La. Ann. 694.

Massachusetts.— Taylor *v.* Buttrick, 165 Mass. 547, 43 N. E. 507, 52 Am. St. Rep. 530.

Missouri.— Hatcher *v.* Hatcher, 139 Mo. 614, 39 S. W. 479; Taylor *v.* Crockett, 123 Mo. 300, 27 S. W. 620; Brown *v.* Foster, 112 Mo. 297, 20 S. W. 611. See also Fry *v.* Piersol, 166 Mo. 429, 66 S. W. 171, duress.

New York.— Spicer *v.* Spicer, 54 N. Y. Super. Ct. 280; Sims *v.* May, 1 N. Y. Suppl. 671, 16 N. Y. St. 780.

Ohio.— Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

Pennsylvania.— Williams *v.* Thomas, 7 Kulp (Pa.) 371.

Wisconsin.— Cooper *v.* Reilly, 90 Wis. 427, 63 N. W. 885.

United States.— Teakle *v.* Bailey, 2 Brock. (U. S.) 43, 23 Fed. Cas. No. 13,811.

England.— Harrison *v.* Guest, 6 De G., M. & G. 424, 2 Jur. N. S. 911, 25 L. J. Ch. 544, 4 Wkly. Rep. 585, 55 Eng. Ch. 331.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 100.

Extent of rule.— The burden of proof rests upon a complainant to prove fraud alleged in the bill as a ground for setting aside a conveyance, notwithstanding the fact that because of want of personal knowledge by defendants the answer lacks the probative force of an answer under oath made upon actual knowledge. De Roux *v.* Girard, 112 Fed. 89, 50 C. C. A. 136.

43. In support of the general principle see the following cases:

Alabama.— Burke *v.* Taylor, 94 Ala. 530, 10 So. 129, principal and agent.

Illinois.— Thomas *v.* Whitney, 186 Ill. 225, 57 N. E. 808 [*affirming* 83 Ill. App. 247].

Indiana.— Givan *v.* Masterson, 152 Ind. 127, 51 N. E. 237.

Michigan.—Whiteley *v.* Whiteley, 120 Mich. 30, 78 N. W. 1009, gift from parent to child.

New York.— Ten Eyck *v.* Whitbeck, 156 N. Y. 341, 50 N. E. 963 [*reversing* 91 Hun (N. Y.) 636, 35 N. Y. Suppl. 1013, 70 N. Y. St. 672, deed from parent to child]; Disbrow *v.* Disbrow, 31 N. Y. App. Div. 624, 52 N. Y. Suppl. 471; Anderson *v.* Carter, 24 N. Y. App. Div. 462, 49 N. Y. Suppl. 255; Hayes *v.* Kerr, 19 N. Y. App. Div. 91, 45 N. Y. Suppl. 1050; Marden *v.* Dorthy, 12 N. Y. App. Div. 176, 42 N. Y. Suppl. 834, client and attorney.

North Dakota.— Brummond *v.* Krause, 8 N. D. 573, 80 N. W. 686, parent to child.

Pennsylvania.— Stepp *v.* Frampton, 179 Pa. St. 284, 36 Atl. 177.

Virginia.— Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517, parent to child.

Wisconsin.— Doyle *v.* Welch, 100 Wis. 24, 75 N. W. 400; Cole *v.* Getzinger, 96 Wis. 559, 71 N. W. 75, deed from dependent father to daughter.

United States.— Starr *v.* De Lashmutt, 76 Fed. 907.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 100.

What relations are fiduciary, and what equitable requisites of fairness, independent advice, etc., must be proved in order that the transaction may stand, are questions foreign to the scope of this article. See Pomeroy Eq. Jur. §§ 956, ff.; and *supra*, II, B, 3, b, (III).

That the mere relation of parent and child does not of itself give rise to a presumption against the validity of a deed from the former to the latter see Hatcher *v.* Hatcher, 139 Mo. 614, 39 S. W. 479; Doherty *v.* Noble, 138 Mo. 25, 39 S. W. 458. *Compare* Whiteley *v.* Whiteley, 120 Mich. 30, 78 N. W. 1009, where the gift was set aside on what appears to have been very slight evidence of an actual fiduciary relation.

44. *Alabama.*— Chancellor *v.* Donnell, 95 Ala. 342, 10 So. 910.

Indiana.— Achey *v.* Stephens, 8 Ind. 411.

Michigan.— Gibbons *v.* Dunn, 46 Mich. 146, 9 N. W. 140; Brown *v.* Brown, 39 Mich. 792.

New Jersey.— Swayze *v.* Swayze, 37 N. J. Eq. 180.

North Carolina.—Smith *v.* Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

Ohio.— Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 100.

Intoxication.— The burden of proof is on the person alleging intoxication as a ground for cancellation. Conant *v.* Jackson, 16 Vt. 335.

45. Trimbo *v.* Trimbo, 47 Minn. 389, 50 N. W. 350; Stewart *v.* Flint, 59 Vt. 144, 8 Atl. 801.

party was insane prior to the date of the contract, and that those claiming under the contract must prove that it was executed during a lucid interval.[46]

B. Sufficiency of Proof — 1. In General. The cancellation of an executed contract is an exertion of the most extraordinary power of a court of equity, which ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear.[47] Similarly, cancellation on

46. Achey *v.* Stephens, 8 Ind. 411; McNett *v.* Cooper, 13 Fed. 586. See also, generally, Insane Persons.

That the preliminary action of the court in appointing next friends to conduct an action to set aside a power of attorney for mental incapacity of the person executing it does not shift from the plaintiff the burden of proving the insanity see Smith *v.* Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

47. Atlantic Delaine Co. *v.* James, 94 U. S. 207, 24 L. ed. 112. See also the following cases:

Alabama.— Johnson *v.* Rogers, 112 Ala. 576, 20 So. 929.

Illinois.— Condit *v.* Dady, 56 Ill. App. 545.

Indiana.— Sherrin *v.* Flinn, 155 Ind. 422, 58 N. E. 549.

Iowa.— Coughlin *v.* Richmond, 77 Iowa 188, 41 N. W. 613.

Maryland.— Goodwin *v.* White, 59 Md. 503.

Michigan.— Hunter *v.* Hopkins, 12 Mich. 227.

Minnesota.— McCall *v.* Bushnell, 41 Minn. 37, 42 N. W. 545.

Mississippi.—Hall *v.* Thompson, 1 Sm. & M. (Miss.) 443.

Missouri — Jackson *v.* Wood, 88 Mo. 76; Bryan *v.* Hitchcock, 43 Mo. 527.

New Jersey.— Freeman *v.* Staats, 9 N. J. Eq. 816.

New York.— Taylor *v.* Fleet, 4 Barb. (N. Y.) 95.

Ohio.— Christmas *v.* Spink, 15 Ohio 600; Steele *v.* Worthington, 2 Ohio 182.

Pennsylvania.— Campbell *v.* Patterson, 95 Pa. St. 447; Schmidt *v.* Baizley, 6 Pa. Dist. 36, 19 Pa. Co. Ct. 83; *In re* Yohn, 17 Lanc. L. Rev. 52; Simon's Estate, 9 Pa. Dist. 59.

Tennessee.— Mayberry *v.* Nichol, (Tenn. Ch. 1896) 39 S. W. 881; Walton *v.* Blackman, (Tenn. Ch. 1896) 36 S. W. 195.

Wisconsin.— Lavassar *v.* Washburne, 50 Wis. 200, 6 N. W. 516.

United States.— Lenox *v.* Notrebe, Hempst. (U. S.) 251, 15 Fed. Cas. No. 8246*c*; Morgan *v.* New Orleans, etc., R. Co., 2 Woods (U. S.) 244, 17 Fed. Cas. No. 9,804.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 102.

The cases abound in emphatic expressions as to the necessity of strong evidence to justify cancellation. Many such are collected in Mayberry *v.* Nichol, (Tenn. Ch. 1896) 39 S. W. 881. A few quotations are given simply as examples. "To justify a court in rescinding a contract . . . upon the ground that it was procured by fraud, the testimony must be of the strongest and most cogent character, and the case a clear one." Condit *v.* Dady, 56 Ill. App. 545. "It is inexpedient, upon grounds of public policy, that a solemnly executed instrument, known at the time to have been executed for the very purpose of embodying and evidencing the agreements and accomplishing the purposes of the parties, should be set aside upon the ground of fraud, unless the proof be clear and strong." McCall *v.* Bushnell, 41 Minn. 37, 42 N. W. 545, citing cases. The evidence must be "clear and convincing . . . ; a court of equity cannot grant such relief upon a probability, nor even upon a mere preponderance of the evidence." Johnson *v.* Rogers, 112 Ala. 576, 20 So. 929. The fraud must be established "beyond controversy," or by "the clearest and most satisfactory evidence" or "to the entire satisfaction of the court." Mayberry *v.* Nichol, (Tenn. Ch. 1896) 39 S. W. 881. It has been said that the evidence must "bring the mind to the conclusion, without a rational doubt," that the fraudulent representations were made. Coughlin *v.* Richmond, 77 Iowa 188, 41 N. W. 613. But it may be questioned whether this expression is not too strong. See Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 45 N. Y. St. 778, 30 Am. St. Rep. 642, 16 L. R. A. 561, reviewing a great number of cases on the analogous question of the degree of proof necessary to warrant reformation of an instrument. It has been held that cancellation will not be decreed on the plaintiff's own uncorroborated testimony. Simon's Estate, 9 Pa. Dist. 59; Schmidt *v.* Baizley, 6 Pa. Dist. 36, 19 Pa. Co. Ct. 83.

That the degree of proof required is the same as in an action to reform an instrument for mistake see Lavassar *v.* Washburne, 50 Wis. 200, 6 N. W. 516. *Contra*, Martin *v.* Hill, 41 Minn. 337, 43 N. W. 337, where it was declared that no greater amount of evidence is required to establish the facts, in an action to rescind a contract on the ground of false representations, than is required to establish similar facts in any other kind of action; that herein the action for rescission differs from that for reformation and from the action to declare a deed absolute on its face to be a mortgage.

To obtain cancellation of an instrument on the ground of its alteration since execution, the plaintiff must prove the fact of alteration; he cannot rest his case upon a technical presumption arising from suspicious circumstances. Putnam *v.* Clark, 33 N. J. Eq. 338.

Sufficiency of proof of duress.— Where, in an action to set aside and cancel a deed, plaintiff shows that the deed was executed

the ground of mistake will not be decreed except upon strong and conclusive proof.[48] In general, to justify the cancellation of a contract requires a stronger case than is required to resist a specific performance.[49]

2. EFFECT OF DELAY. When there has been a long delay on the plaintiff's part in the assertion of his rights, the courts are emphatic in their declarations that he must "make out a case plain, clear and decisive," [50] especially where important witnesses have in the meantime died.[51]

X. QUESTIONS OF LAW AND FACT.

The following have been held to be proper questions of fact for the jury: [52] Whether the instrument was made because the defendant's representations were believed by the plaintiff; [53] whether the defendant at the time of making promises alleged to be fraudulent had no intention of performing them; [54] and whether a contract was ratified by plaintiff after discovery of the fraud.[55] The question whether an offer to rescind was made within a reasonable time after the discovery of the fraud, where there are no facts involved, except the simple fact of the length of time that has elapsed, is a question of law; but where disputed facts involving questions of excuse, of time of discovery of the fraud, etc., are to be passed upon, the question is a mixed one of law and fact.[56]

by her without consideration other than an agreement not to prosecute her husband for an alleged crime, and under threats of prosecution and punishment if she did not sign it, a sufficient case is made to put defendant on his defense, and a motion for a nonsuit should be denied. Gorringe *v.* Read, 23 Utah 120, 63 Pac. 902.

Insufficiency of evidence of fraud to warrant submission to jury.— See Cutler *v.* Roanoke R., etc., Co., 128 N. C. 477, 39 S. E. 30, discussing also the question of plaintiff's negligence in relying on the misrepresentation.

48. *Maine.*— Stover *v.* Poole, 67 Me. 217.
Maryland.— Beall *v.* Greenwade, 9 Md. 185.
New York.—Taylor *v.* Fleet, 4 Barb. (N. Y.) 95.
Texas.— Hirsch *v.* Jones, (Tex. Civ. App. 1897) 42 S. W. 604.
West Virginia.— Weidebusch *v.* Hartenstein, 12 W. Va. 760.
See 8 Cent. Dig. tit. "Cancellation of Instruments," § 102.

49. Stearns *v.* Beckham, 31 Gratt. (Va.) 379.

50. *Iowa.*— Robinson *v.* Gould, 26 Iowa 89.
Michigan.— Richardson *v.* Medbury, 107 Mich. 176, 65 N. W. 4.
Missouri.— Davis *v.* Fox, 59 Mo. 125.
Pennsylvania.— Richard's Appeal, 100 Pa. St. 51; Waterman *v.* Brown, 31 Pa. St. 161.
West Virginia.— Weidebusch *v.* Hartenstein, 12 W. Va. 760.
United States.— See Jenkins *v.* Pye, 12 Pet. (U. S.) 241, 9 L. ed. 1070; Lenox *v.* Notrebe, Hempst. (U. S.) 251, 15 Fed. Cas. No. 8,246c.
See 8 Cent. Dig. tit. "Cancellation of Instruments," § 103; and, generally, *supra*, III, C, 3.

51. Robinson *v.* Gould, 26 Iowa 89; Richardson *v.* Medbury, 107 Mich. 176, 65 N. W. 4; Jenkins *v.* Pye, 12 Pet. (U. S.) 241, 9 L. ed. 1070.

52. See, generally, as to the functions of a jury in suits in equity, EQUITY; TRIAL.
Generally, neither party can demand a jury trial as a matter of right, but the court may, in its discretion, order any issue or issues of fact to be tried by a jury. Maclellan *v.* Seim, 57 Kan. 471, 46 Pac. 959. The verdict is generally merely advisory. Goodloe *v.* McLanathan, 6 T. B. Mon. (Ky.) 310. That a general verdict will not support a decree in a suit for cancellation on the ground of fraud see Crow *v.* Holland, 12 N. C. 481.
Proper submission.— Where the chancellor in a suit to rescind a sale and conveyance of real estate submits hypothetical statements of facts which the evidence tends to establish, and states the law applicable thereto, it is not error to submit the issue whether the sale and conveyance were fraudulent, though such issue raises a mixed question of law and fact. McElya *v.* Hill, 105 Tenn. 319, 59 S. W. 1025.
Refusal to submit, when proper.— Where suit is brought to rescind the sale and conveyance of real estate for the fraud of the vendor, it is not error to refuse to submit issues which attempt to make each separate fact tending to show fraud the basis of a separate issue. McElya *v.* Hill, 105 Tenn. 319, 59 S. W. 1025.

53. McCormick Harvesting Mach. Co. *v.* Mays, (Tex. Civ. App. 1896) 33 S. W. 883.

54. Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

55. Evans *v.* Goggan, 5 Tex. Civ. App. 129, 23 S. W. 854.

56. Gatling *v.* Newell, 9 Ind. 572.
A petition to cancel a deed of homestead, alleging that such deed, in connection with a contemporaneous agreement to reconvey, is in effect a mortgage, and therefore void, but not averring that it was intended as a security, rests entirely on the legal effect of the instruments, and presents no question for

XI. RELIEF GRANTED.

A. To Complainant — 1. Cancellation or Rescission — a. In General. A general prayer for relief will authorize cancellation.[57]

b. And Discharge of Record. When a deed is set aside, the decree may, as a matter of public convenience, direct that the fact be entered on the margin of the deed books where these instruments are recorded.[58]

c. And Reconveyance. Where a deed is set aside, it is usual to direct a reconveyance from the party claiming under it, with covenants against his own acts.[59]

d. And Surrender of Instrument. Surrender or delivery up of the instrument is usually an incident of cancellation, but a decree adjudging the instrument to be null and void as against the plaintiff, and leaving it in the defendant's hands, may sometimes be the more appropriate relief.[60]

the jury. Kuhn *v.* Foster, 16 Tex. Civ. App. 465, 41 S. W. 716.

Issues which only involved matters of evidence bearing on the main issue were submitted erroneously, as such issues tended to obscurity and confusion. Timmons *v.* Westmoreland, 72 N. C. 587.

57. Laverty *v.* Sexton, 41 Iowa 435 (action to quiet title); Bolware *v.* Craig, 1 Litt. Sel. Cas. (Ky.) 407 (action by vendee for discovery of vendor's title and recovery of purchase-money); Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114; Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773 (bill *quia timet*; void tax deed under which defendant claimed, canceled under the general prayer for relief); Clagett *v.* Hall, 9 Gill & J. (Md.) 80. In a suit by a grantor to cancel the deed, under the prayer for general relief it is proper to order a deed made by one defendant to a co-defendant to be canceled also. McClun *v.* McClun, 176 Ill. 376, 52 N. E. 928.

Damages not specially prayed for.—The absence from a complaint, to cancel a conveyance for fraud, of a formal demand for judgment for an amount claimed to be due plaintiffs from defendant will not prevent a judgment from being rendered therefor on the law side of the court, where the complaint contains other allegations sufficient to warrant its rendition. Sires *v.* Sires, 43 S. C. 266, 21 S. E. 115. See also Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113.

Decree treating deed as a mortgage.—An issue tendered by the plaintiff and accepted by defendant, as to the invalidity of a deed on the grounds of fraud, undue influence, and insanity of the grantor, does not support a decree based on the ground that the deed was valid as a mortgage, and directing a sale of the land. Ross *v.* Ross, 81 Mo. 84. On a bill to set aside a deed on the ground of fraud, with no allegation that the deed was a mortgage, nor prayer to redeem, a decree fixing a time within which complainant must redeem or leave the deed absolute is far more favorable to complainant than it was entitled to receive under the allegations of its bill, and it has no just ground of complaint that the decree did not order the premises sold, with the statutory right of redemption. Chicago, etc., Rolling Mill Co. *v.* Scully, 141 Ill. 408, 30 N. E. 1062 [*affirming* 43 Ill. App. 622].

In an action to set aside a mortgage for fraud, where the evidence shows merely that plaintiff had been fraudulently induced to create a greater liability than was intended, plaintiff is entitled to relief against such excess. Ritter *v.* Devine, 80 Hun (N. Y.) 303, 30 N. Y. Suppl. 155, 62 N. Y. St. 29.

On a petition to cancel a note and trust deed securing it for fraud, asking merely for the cancellation of the note, where the note and deed had been transferred by the defendant to a *bona fide* purchaser, who is not a party, a money judgment against the defendant for the amount of the note and interest was held to be unwarranted. Crawford *v.* Aultman, 139 Mo. 262, 40 S. W. 952.

The proper decree where a mortgagor files a bill to cancel a mortgage past due, which his adversary is seeking to foreclose, and the court finds the mortgage to be valid, is a decree for redemption. Every such bill is regarded as in the alternative a bill to redeem, upon the principle that a complainant seeking equity must be prepared to do equity. Goodenow *v.* Curtis, 33 Mich. 505.

58. Fenton *v.* Way, 44 Iowa 438; Jones *v.* Porter, 59 Miss. 628.

59. Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182; Clark *v.* Malpas, 4 De G., F. & J. 410, 65 Eng. Ch. 310.

Otherwise when the title did not pass to the defendant, the deed being void in its inception; in such case the decree should be that the deed be delivered up and canceled. Upton *v.* Archer, 41 Cal. 85, 10 Am. Rep. 266.

When a bill is filed by a prior purchaser of real estate to avoid a subsequent conveyance by his vendor made in fraud of his rights it is not proper to require the subsequent purchaser to convey his title to the complainant. The proper decree is to declare the title of the subsequent purchaser void, and the complainant must look to his vendor alone for a conveyance. Coari *v.* Olsen, 91 Ill. 273.

60. As in a suit by one whose name has been forged to a negotiable instrument against the indorsee, where the decree left the note in the defendant's hands, in order to

e. Partial Cancellation or Rescission. It is a general rule, subject to some exceptions,[61] that a court of equity will not decree a partial rescission of an entire contract.[62]

2. Additional or Alternative Relief — a. In General. Where the court has obtained jurisdiction to cancel an instrument or rescind a contract, it may and often does give complete relief in the premises.[63] Thus the court may in a proper case award an injunction,[64] direct an accounting,[65] order a sale of property.[66] So

enable him to enforce whatever rights he might have against his indorser. Huston *v.* Roosa, 43 Ind. 517.

61. Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114. See *infra*, XI, A, 2, b, c.

Cancellation as to one of the complainants. — A decree setting aside a deed *in toto* for defect in the acknowledgment of the wife, and vesting her with all the rights of the grantee, was held to be erroneous, the proper decree being simply to set aside the deed as to her. Mays *v.* Pryce, 95 Mo. 603, 8 S. W. 731. Where a mortgage by husband and wife of the wife's separate property was obtained by duress practised on the wife, or was defectively acknowledged by her, it is error to cancel the instrument entirely, but it should be left operative as to the husband's interest. Ferebee *v.* Hinton, 102 N. C. 99, 8 S. E. 922; Ware *v.* Nesbit, 94 N. C. 664.

Cancellation as to several tracts of land. — Where plaintiffs sued to cancel a deed to a certain part of a tract of land, alleging that tract to have been unintentionally included with a tract which the grantor intended to convey, a decree canceling the deed as to both tracts was erroneous. Benn *v.* Pritchett, 163 Mo. 560, 63 S. W. 1103.

62. Gatling *v.* Newell, 9 Ind. 572; Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114; Step *v.* Alkire, 2 A. K. Marsh. (Ky.) 257; Johnston *v.* Mitchell, 1 A. K. Marsh. (Ky.) 225, 10 Am. Dec. 727; York *v.* Gregg, 9 Tex. 85; Bailey *v.* James, 11 Gratt. (Va.) 468, 62 Am. Dec. 659.

A contract must be rescinded, if at all, in toto; and though its rescission cannot leave the parties in every respect as they were at the making of the contract, yet, as to the contract itself they may be so — that is, as not being contracting parties, nor under any liabilities on account of having been such. Gatling *v.* Newell, 9 Ind. 572. See also *supra*, IV, B, 1. But see Paquin *v.* Milliken, 163 Mo. 79, 63 S. W. 417, 1092; in this case a partnership engaged in the manufacture of anti-toxine for tuberculosis, and the conducting of experiments therefor, was dissolved; the withdrawing partner agreeing not to engage in the same business or experiments for a year thereafter, and receiving notes as part of the consideration for his interest in the firm. In a suit to cancel the notes, and for an accounting, for the fraud of the withdrawing partner in having experimented for the discovery of such anti-toxine, made during the year after the dissolution, a decree canceling the notes was entered. It was held that such decree was not erroneous as not rescinding the contract *in toto*, and restoring defendant to the *status quo* existing when the contract was made, as such rescission and restoration were rendered impossible by the nature of the circumstances and defendant's fraud.

63. As to jurisdiction of courts of equity see, generally, EQUITY.

Contracts in general. — A court of equity, when it has jurisdiction to cancel a contract, has power to order repayment of the consideration of the contract. Cohen *v.* Ellis, 16 Abb. N. Cas. (N. Y.) 320.

Lien of municipal assessment. — Where the court has obtained jurisdiction to cancel such lien as a cloud on plaintiff's title to real estate it will grant all the relief in the premises to which the plaintiff is entitled. Sewall *v.* St. Paul, 20 Minn. 511.

Sheriff's deed. — Where land equitably belonging to the separate estate of a married woman was sold under execution against her husband, equity having jurisdiction to cancel the deed, will give full and complete relief by decreeing possession to the wife. Woodsworth *v.* Tanner, 94 Mo. 124, 7 S. W. 104 [*citing* Pomeroy Eq. Jur. § 177].

Sale of chattels. — When the court took jurisdiction to rescind the contract on the ground of the defendant's refusal to comply with his part of the agreement, the vendor could recover no more than the real value of the articles delivered under the contract. Steele *v.* Nashville, 10 Yerg. (Tenn.) 295. Under the Kentucky act of 1838, authorizing bills in equity to rescind fraudulent sales of chattels, or for compensation, if the property purchased be so changed that it cannot be restored in kind, a decree may be made for the payment of full compensation in money. Bohannon *v.* Kerr, 1 B. Mon. (Ky.) 87.

64. See, generally, INJUNCTIONS.

Injunction. — Where the court has obtained jurisdiction to cancel a mortgage on the ground of payment of the note secured thereby, it may give complete relief by enjoining the collection of a judgment tortiously obtained upon the note. Rickle *v.* Dow, 39 Mich. 91.

65. See, generally, ACCOUNTS AND ACCOUNTING.

Accounting. — Where the plaintiff obtains a decree from a court of equity setting aside a release of his interest in the estate of defendant's intestate, the court will give complete relief by ordering an accounting and will not turn the plaintiff over to the surrogate. Busch *v.* Busch, 12 Daly (N. Y.) 476.

66. See, generally JUDICIAL SALES.

in a proper case, the court may order a partition of realty where it has obtained jurisdiction to cancel or rescind a conveyance.[67]

b. Awarded to Grantor or Vendor—(I) *COMPENSATION WHERE GRANTEE CANNOT RECONVEY.* Where the grantee has conveyed the property, or part of it, to another, or for other reason cannot restore it, the plaintiff is entitled to a money judgment for the value of the land, the restoration of which is thus impossible;[68] such relief being given on the principle that the court having obtained jurisdiction will retain the case for the purpose of giving complete relief.

(II) *WHERE INSTRUMENT WAS MADE IN CONSIDERATION OF SUPPORT.* In several cases, where grounds for the cancellation of deeds made by aged parents to their children in consideration of maintenance and support were not established sufficiently to warrant a decree of cancellation, the defendants were ordered to pay a suitable allowance for the support of the grantors,[69] or other suitable arrangements were directed to be made for that purpose through the intervention of a master.[70]

(III) *RECOVERY OF RENTS AND PROFITS.* Where the grantor is entitled to cancellation of the deed on the ground of fraud, he is also entitled to the rents and profits of the land for the time that the grantee was wrongfully in possession.[71] But when the ground for cancellation was mutual mistake, and no demand was made by the grantor previous to filing his bill, rents and profits were decreed to the plaintiff only from that time.[72]

Sale of trust property.— The court, having taken jurisdiction to set aside a release of a debt secured by a trust deed, granted full relief by entering a personal decree against the debtor for the unpaid balance of the debt, and ordering a sale of the trust property to pay such balance. Fleshman *v.* Hoylman, 27 W. Va. 728.

67. See, generally, PARTITION.

Partition.— A bill sought to set aside, for fraud, a deed of partition and to have a new partition made, not only of the land embraced in such deed, but also of other land owned in common by the plaintiff and defendant. The charge of fraud was not established. Held that the bill would be retained to make a partition of the land not embraced in the deed. Masterson *v.* Finnigan, 2 R. I. 316.

68. *Alabama.*— Bullock *v.* Tuttle, 90 Ala. 435, 8 So. 69.

Georgia.— Atlanta, etc., R. Co. *v.* Hodnett, 36 Ga. 669.

Illinois.— Long *v.* Fox, 100 Ill. 43; Hopkins *v.* Snedaker, 71 Ill. 449; Underwood *v.* West, 52 Ill. 397.

Minnesota.— Erickson *v.* Fisher, 51 Minn. 300, 53 N. W. 638.

New York.— Daiker *v.* Strelinger, 28 N. Y. App. Div. 220, 50 N. Y. Suppl. 1074; Valentine *v.* Richards, 13 N. Y. Suppl. 417, 35 N. Y. St. 641.

Tennessee.— Coleman *v.* Satterfield, 2 Head (Tenn.) 259.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 115.

This rule applies, where a part or all of the land has been conveyed to a *bona fide* purchaser (Hopkins *v.* Snedaker, 71 Ill. 449; Underwood *v.* West, 52 Ill. 397; Valentine *v.* Richards, 13 N. Y. Suppl. 417, 35 N. Y. St. 641; Coleman *v.* Satterfield, 2 Head (Tenn.) 259); or where the grantee has made extensive improvements on the land, and a restoration of *status quo* is therefore impossible (Bullock *v.* Tuttle, 90 Ala. 435, 8 So. 69).

In a suit by the donor of a right of way to a railroad to cancel the conveyance for fraudulent representations, the judgment confirmed the title in the railroad company, and allowed the plaintiff the value of the property when originally taken, together with damages for the use and occupation. Atlanta, etc., R. Co. *v.* Hodnett, 36 Ga. 669.

In a suit against an insane person's grantee who mortgaged the land to a *bona fide* mortgagee a personal decree that the grantee pay the mortgage is proper. Long *v.* Fox, 100 Ill. 43.

What compensation secured by lien.— Where the plaintiff received as compensation a cash payment and an interest in other lands, and proves fraudulent representations as to the latter, but rescission of the exchange was impossible, the decree directed a reconveyance of the interest in the lands received by plaintiff, and that a vendor's lien for the estimated value of such interest be declared in plaintiff's favor on the lands which he had originally conveyed to the defendant. Bullock *v.* Tuttle, 90 Ala. 435, 8 So. 69. See also Hopkins *v.* Snedaker, 71 Ill. 449.

69. Fitz Patrick *v.* Fitz Patrick, 91 Mich. 394, 51 N. W. 1058; Patton *v.* Nixon, 33 Oreg. 159, 52 Pac. 1048 (such allowance made a charge on the property conveyed); Keeler *v.* Baker, 1 Heisk. (Tenn.) 639.

70. Keltner *v.* Keltner, 6 B. Mon. (Ky.) 40.

71. Atlanta, etc., R. Co. *v.* Hodnett, 36 Ga. 669; Mosely *v.* Miller, 13 Bush (Ky.) 408; Wampler *v.* Wolfinger, 13 Md. 337; Hack *v.* Norris, 46 Mich. 587, 10 N. W. 104. See also Fabrice *v.* Von der Brelie, 190 Ill. 460, 60 N. E. 835.

72. Irick *v.* Fulton, 3 Gratt. (Va.) 184.

(iv) *Where Vendor Seeks to Cancel Contract of Sale.* Where the vendor seeks cancellation of the contract of sale on the ground of the vendee's default in payment of the purchase-money, it is proper for the court to make a decree canceling the contract unless, within a reasonable time fixed by the court, payment shall be made of all which may be due at such time, including a sum not due at the time the decision is made.[73]

c. Awarded to Grantee or Vendee — (i) *Compensation in Place of Rescission.* Where a defect in the land or title was fraudulently concealed by the vendor,[74] it was held that the vendee might either have the whole contract set aside, or have compensation for the defect.[75] Where the title to a portion of the land was defective, and that portion was not of such consequence relatively to the whole that the plaintiff would not have bought the land at all without it, he was entitled to a diminution of the price only;[76] but where the vendor could not give title to a part which formed a principal inducement to the purchase, the contract should be rescinded altogether and not enforced with a ratable deduction of the purchase-money.[77]

(ii) *Vendee's Lien.* Where rescission is decreed at the suit of the vendee, the court may declare a lien on the land for the repayment of the purchase-money, and order a sale of the land if the money is not repaid by a specified day.[78]

(iii) *Cancellation of Purchase-Money Notes.* Cancellation of the purchase-money notes which are still outstanding,[79] or injunction against their collection, unless they have passed into the hands of a *bona fide* holder in the course of trade,[80] as well as recovery of the portion of the purchase-money already paid,[81] is proper relief to be awarded on a decree for rescission at the suit of the vendee.

(iv) *Where Consideration Consists of Personalty.* Where the consid-

73. Nelson *v.* Hanson, 45 Minn. 543, 48 N. W. 410.

Where vendor has exercised the right, conferred on him by the contract, to terminate the vendee's equitable estate in the land for default in payments, his only remedy is cancellation, and not a decree for the sale of such equitable estate. Derickson *v.* Chicago South Branch Dock Co., 18 Ill. App. 531.

74. But where the representation as to the condition of the land were innocently made, and a small sum of money would supply the defect, payment of that sum was decreed in place of rescission. Downes *v.* Bristol, 41 Conn. 274.

75. Jopling *v.* Dooley, 1 Yerg. (Tenn.) 289, 24 Am. Dec. 450.

76. Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108; Sadler *v.* Wilson, 40 N. C. 296.

77. York *v.* Gregg, 9 Tex. 85. And see Bailey *v.* James, 11 Gratt. (Va.) 468, 62 Am. Dec. 659.

Alternative relief.— In an action to foreclose a mortgage, defendants pleaded fraud in the sale to them of the mortgaged premises, consisting of a farm devoted to grape culture, and asked damages and for a rescission of the sale. The defendants had destroyed a considerable portion of the grape vines and the premises were not in as good condition as when purchased. It was held that a rescission should not be decreed, but that plaintiff should be given his option to accept the amount due on the mortgage, less the damages assessed, or to rescind, and return the purchase-money, less such sum as would compensate him for the deterioration in the value of the farm. Lurch *v.* Holder, (N. J. 1893) 27 Atl. 81. Where the plaintiff failed to establish a case for reformation or cancellation, it was held that the court had no jurisdiction to enter a pecuniary judgment in his favor for money advanced by him under the contract, or for damages resulting from the defendant's fraudulent representations and breach of warranty of title. Betts *v.* Gunn, 31 Ala. 219; Robertson *v.* Hogsheads, 3 Leigh (Va.) 667.

Rents and profits.— In a suit to rescind on the ground of vendor's delay in making a conveyance, where rescission was refused on account of the plaintiff's default in making payments, the defendant, who had retained possession of the land, was ordered to account for the rents and profits from the time when possession was to have been given to the plaintiff. Mason *v.* Chambers, 3 T. B. Mon. (Ky.) 318.

78. McWilliams *v.* Jenkins, 72 Ala. 480; Foster *v.* Gressett, 29 Ala. 393; Bibb *v.* Prather, 1 Bibb (Ky.) 313 (vendee entitled to hold the land subject to reimbursement of the money he has paid out); Pilcher *v.* Smith, 2 Head (Tenn.) 208.

79. Although there is a complete defense at law against the notes. Scruggs *v.* Driver, 31 Ala. 274.

80. Without regard to the vendor's solvency. Lanier *v.* Hill, 25 Ala. 554.

81. Although there is an adequate remedy at law for the recovery of the money. Lanier *v.* Hill, 25 Ala. 554.

eration consists of personal property, which the vendor is unable to restore, the vendee may recover its fair value.[82]

(v) *Improvements.* If the vendee was justified in retaining possession up to the final decree, he is entitled to a fair allowance for any improvements made by him upon the land, either before or after the filing of the bill, which were necessary to render the possession beneficial and profitable.[83]

3. Where Cancellation Has Become Impossible Since Suit Commenced. Where cancellation has become impossible since the suit was instituted, the court may retain jurisdiction to grant other relief, if sufficient remains to warrant equitable interference.[84]

B. To Defendant — 1. In General. The general principles relating to the restoration of the *status quo* have been already treated.[85]

2. Accounting of Rents and Profits. If the complainant is a vendee, seeking rescission of his contract of purchase, he must account to his vendor for his use and occupation of the land from the time when he received possession,[86] and for any waste committed by him.[87]

3. Allowance For Improvements and Expenditures. In a suit for rescission by the vendor, the vendee is generally entitled to an allowance for the value of permanent and valuable improvements placed by him upon the land [88] and to the

82. Smade *v.* Mann, (Ark. 1890) 14 S. W. 1095 (such compensation decreed as alternative to a return of the chattels, together with the value of their use, and damages done to them beyond the ordinary wear); Harper *v.* Terry, 70 Ind. 264.

83. Foster *v.* Gressett, 29 Ala. 393. But *compare* Peyton *v.* Butler, 3 Hayw. (Tenn.) 140.

84. State *v.* McKay, 43 Mo. 594.

For further instances of damages given in place of cancellation see Edwards *v.* Hanna, 5 J. J. Marsh. (Ky.) 18; Carroll *v.* Rice, Walk. (Mich.) 373.

85. See *supra*, IV, B.

Illustrations of relief to defendant.—Where the decree in favor of complainant in a suit to cancel notes and a trust deed requires the complainant to pay the money received thereon, it is erroneous if it fails to require the payment of interest thereon. Chandler *v.* Ward, 83 Ill. App. 315 [*reversed* on other grounds in 188 Ill. 322, 58 N. E. 919]. Complainant deeded a farm to a son, in consideration of his agreement to pay his parents' debts, care for them during life, and pay certain sums to his brothers in ten years, for which he gave notes. After complying satisfactorily with the conditions for some years, the son died, leaving his wife, the defendant, but no children. His brothers quitclaimed their interest as his heirs to the complainant, who sued to determine defendant's interest in the farm and recover the title. The court granted such relief on condition that defendant be paid five hundred dollars, and plaintiff restore to her the notes given by her husband to his brothers. It was held that such condition was proper and equitable. Coe *v.* Dickerson, (Mich. 1901) 87 N. W. 1028, 8 Detroit Leg. N. 838. Where a bill to rescind transfers of realty and personalty prayed that defendant be ordered to deliver the personal property he received as far as possible, defendant, on decree against him, is entitled to deliver up any particular property found to have been wrongfully obtained, and receive credit for the amount charged against him on account of those particular articles. Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401.

86. *Connecticut.*— Penfield *v.* Penfield, 41 Conn. 474.

Illinois.— Underwood *v.* West, 52 Ill. 397.

Indiana.— Axtel *v.* Chase, 77 Ind. 74.

Mississippi.— Shipp *v.* Wheeless, 33 Miss. 646.

North Carolina.— Wood *v.* Wheeler, 106 N. C. 512, 11 S. E. 590; Reed *v.* Exum, 84 N. C. 430.

South Carolina.— Adams *v.* Kibler, 7 S. C. 47.

West Virginia.—Worthington *v.* Collins, 39 W. Va. 406, 19 S. E. 527.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 123.

But see Halley *v.* Winchester Diamond Lodge, 97 Ky. 438, 17 Ky. L. Rep. 293, 30 S. W. 999.

The vendee may be held to account for the actual annual rental value of the land, whether rented or not, from the time when he came into possession. Worthington *v.* Campbell, 8 Ky. L. Rep. 416, 1 S. W. 714.

The amount paid by the vendee for taxes may be deducted from the rents and profits (Worthington *v.* Collins, 39 W. Va. 406, 19 S. E. 527); but not his counsel fees in the suit for rescission (Garner *v.* Leverett, 32 Ala. 410).

When the vendor is proceeding independently at law to recover the rents and profits, the vendee is not required to account for them in the suit for rescission. Tennell *v.* Roberts, 2 J. J. Marsh. (Ky.) 577.

87. Worthington *v.* Collins, 39 W. Va. 406, 19 S. E. 527; Adams *v.* Kibler, 7 S. C. 47.

88. *District of Columbia.*— McIntire *v.* Pryor, 10 App. Cas. (D. C.) 432.

Georgia.— Macon *v.* Huff, 60 Ga. 221, reimbursement to lessee.

reimbursement of money expended by him in good faith in order to protect the title.[89]

4. Lien in Favor of Defendant. In a decree rescinding a sale of land at the suit of the grantor or vendor, a lien is frequently declared on the land to secure the repayment of the purchase-money[90] or the allowance for improvements;[91] and in canceling a mortgage it may be allowed to stand as security for the mortgagee's actual advances and charges.[92]

Illinois.— Oard *v.* Oard, 59 Ill. 46. See also Fabrice *v.* Von der Brelie, 190 Ill. 460, 60 N. E. 835.

Maryland.— Smith *v.* Townshend, 27 Md. 368, 92 Am. Dec. 637.

Missouri.— McClure *v.* Lewis, 72 Mo. 314.

Oregon.— Tyler *v.* Cate, 29 Oreg. 515, 45 Pac. 800.

Texas.— Chaney *v.* Coleman, 77 Tex. 100, 13 S. W. 850.

United States.—McAlister *v.* Barry, Brunn. Col. Cas. (U. S.) 24, 15 Fed. Cas. No. 8,656.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 124.

But see Moore *v.* Giesecke, 76 Tex. 543, 13 S. W. 290; Knox *v.* Earbee, (Tex. Civ. App. 1896) 35 S. W. 186; Prickett *v.* Muck, 74 Wis. 199, 42 N. W. 256.

In case of fraud on the vendee's part in obtaining the conveyance, some authorities hold that he is entitled to no allowance for improvements. Ames *v.* Witbeck, 179 Ill. 458, 53 N. E. 969; Mosely *v.* Miller, 13 Bush (Ky.) 408; Linthicum *v.* Thomas, 59 Md. 574. But *compare* Fabrice *v.* Von der Brelie, 190 Ill. 460, 60 N. E. 835.

In case of grantor's mental incapacity.— The grantee in a deed which is vacated on the ground of the grantor's want of mental capacity is not entitled to repayment of the consideration named in the deed and cost of his improvements, when no consideration was in fact paid, and the improvements do not exceed in value the rent for his use of the land. Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881. The grantee in a deed, which is set aside for the grantor's mental incapacity, is not entitled to compensation for his improvements, when made in bad faith, and their value is fully covered by his use of the land. Lillard *v.* Coffee, (Tenn. Ch. 1901) 61 S. W. 1037.

Set off for improvements.— A number of cases assert a right on the vendee's part merely to have the value of the improvements set off against the rents and profits (Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271; McIntire *v.* Pryor, 10 App. Cas. (D. C.) 432; Reed *v.* Exum, 84 N. C. 430); unless the improvements have been made on the faith of the vendor's acquiescence in the vendee's claim (Walker *v.* Beauchler, 27 Gratt. (Va.) 511).

Value of improvements.— It is held that the sum to be allowed the defendant for improvements is not their cost, but the amount by which they have actually increased the permanent value of the land. Thornton *v.* Ogden, 41 N. J. Eq. 345, 7 Atl. 619; Reed *v.* Exum, 84 N. C. 430; Smithson *v.* Inman, 2 Baxt. (Tenn.) 88.

Where there was no counter-claim, and facts as to the improvements were pleaded in the answer merely to show that the plaintiff was estopped to deny the validity of the deed, it was held that compensation and a lien for the improvements should not be awarded. Walker *v.* Walker, 93 Iowa 643, 61 N. W. 930.

89. *Alabama.*—Kennedy *v.* Kennedy, 2 Ala. 571.

Connecticut.— Penfield *v.* Penfield, 41 Conn. 474, taxes and interest on a mortgage.

Illinois.— Stone *v.* Wood, 85 Ill. 603, judgment and costs which were a lien on the land.

Mississippi.—White *v.* Trotter, 14 Sm. & M. (Miss.) 30, 53 Am. Dec. 112.

New Jersey.— Warnock *v.* Campbell, 25 N. J. Eq. 485, taxes.

See 8 Cent. Dig. tit. "Cancellation of Instruments," § 124.

In an action against A and B, B is not entitled to an allowance for taxes paid by A, who has ceased to be a party to the suit. Seymour *v.* Shea, 62 Iowa 708, 16 N. W. 196.

In a suit for cancellation of a mortgage the mortgagee must be reimbursed for such expenditures as he has made, and indemnified as to such liabilities as in good faith he has incurred, on the faith of such mortgage. Miller *v.* Gunderson, 48 Nebr. 715, 67 N. W. 769.

90. Barbour *v.* Morris, 6 B. Mon. (Ky.) 120; Costen *v.* McDowell, 107 N. C. 546, 12 S. E. 432; Futrill *v.* Futrill, 58 N. C. 61; Wright *v.* Dufield, 2 Baxt. (Tenn.) 218; Wiley *v.* Heidell, 12 Heisk. (Tenn.) 98; Work *v.* Walker, 1 Tenn. Ch. 487. *Compare* Domling *v.* Domling, (Mich. 1901) 87 N. W. 788, 8 Detroit Leg. N. 786.

Extent of rule.— Where a deed is set aside on the ground of fraud, the consideration for such deed will be declared a lien on the land, but a sale therefor will not be directed. Jones *v.* Galbraith, (Tenn. Ch. 1900) 59 S. W. 350.

91. Murray *v.* Hill, 60 Ill. App. 80; Tyler *v.* Cate, 29 Oreg. 515, 45 Pac. 800.

92. Gates *v.* Cornett, 72 Mich. 420, 40 N. W. 740; Harding *v.* Handy, 11 Wheat. (U. S.) 103, 6 L. ed. 429; Harding *v.* Wheaton, 2 Mason (U. S.) 378, 11 Fed. Cas. No. 6,051.

Where the evidence of fraud was not so convincing as to justify a decree declaring void a deed made in pursuance of an improvident sale, yet the court might direct that the deed stand as security for the defendant's indemnity, in respect to the sum actually due. Dunn *v.* Chambers, 4 Barb. (N. Y.) 376; Friedman *v.* Hirsch, 18 N. Y. Suppl. 85, 87, 44 N. Y. St. 199; Boyd *v.* Dunlap, 1 Johns. Ch. (N. Y.) 478.

XII. EFFECT OF DECREE.

A decree vacating a title to land virtually condemns all titles derived therefrom after service of process.[93] It defeats contingent remainders depending on estates determined by the decree.[94] Whether a decree canceling a deed has the effect of a reconveyance from the defendant to the plaintiff[95] or not[96] is a matter as to which the practice in different jurisdictions varies.[97] A decree rescinding a purchase of land, in favor of the vendee, rescinds a mortgage given to secure the purchase-money.[98] A decree *pro confesso* against one of two co-defendants does not authorize the complainant to take the allegations of the bill as true against the other defendant, who has answered.[99]

XIII. COSTS.[1]

To entitle plaintiff to costs in a suit to set aside a conveyance by him for fraud on the part of the grantee, he must show a tender before suit of the consideration paid, or a valid excuse for failure to make such tender.[2] Costs have also been imposed upon the complainant where by his unbusiness-like methods he had made a suit necessary to determine the ownership of the instruments;[3] where the defendant before the filing of the bill offered the complainant all the relief which the court decreed, and the complainant refused to accept it;[4] and where the mortgage sought to be canceled was held to be good as to the greater part of the amount secured by it, though void as to the residue.[5]

93. The commissioner's deed, pursuant to the decree, relates back to such service. Shotwell *v.* Lawson, 30 Miss. 27, 64 Am. Dec. 145. See LIS PENDENS. But a judgment canceling a deed for fraud does not affect the title of one who purchased the land conveyed before the suit was brought, if he purchased without notice of the fraud. Burt, etc., Lumber Co. *v.* Bailey, 22 Ky. L. Rep. 1264, 60 S. W. 485. See *supra*, VI.

94. Campbell *v.* Watson, 8 Ohio 498.

95. That such decree has the effect of a quitclaim deed from the defendant to plaintiff see Hoyt *v.* Jones, 31 Wis. 389.

96. That the court must appoint a commissioner to make conveyance to the plaintiff, upon failure of the defendant to convey see Walker *v.* Williams, 30 Miss. 165.

97. See, generally, EQUITY.

98. Hence it is error for the decree to subject the mortgaged premises to sale for any damages resulting to the vendor from the rescission, as a defendant in execution has the right to select what land seized under the execution shall first be sold. Coffman *v.* Huck, 19 Mo. 435.

99. Holloway *v.* Moore, 4 Sm. & M. (Miss.) 594.

1. See, generally COSTS.

For the power of the court to review a referee's decision as to costs under N. Y. Code Civ. Proc. § 3230 see Couch *v.* Millard, 8 N. Y. Civ. Proc. 431.

2. Dunbar *v.* Severance, 50 Kan. 395, 31 Pac. 1055; Fares *v.* Gleason, 14 Wash. 657, 45 Pac. 314. *Compare* Gray *v.* Bowman, (N. J. 1888) 14 Atl. 905, holding that absence of demand before suit, while not decisive, is influential in determining question of costs.

So in a suit to set aside a tax deed as a cloud on title, in order to relieve himself from the payment of the costs of suit, complainant must, before suit, have made a tender of the taxes, costs, and interest. Gage *v.* Goudy, 141 Ill. 215, 30 N. E. 320; Cotes *v.* Rohrbeck, 139 Ill. 532, 28 N. E. 1110; Mecartney *v.* Morse, 137 Ill. 481, 24 N. E. 576, 26 N. E. 376 [*following* Gage *v.* Arndt, 121 Ill. 491, 13 N. E. 138]; Springer *v.* Bartle, 46 Iowa 688; Corning Town Co. *v.* Davis, 44 Iowa 622.

3. Plaintiff had left the notes in question for safe-keeping with a person whose administrator claimed them as evidence of debt against the maker. Andrews *v.* Hunt, 7 Mackey (D. C.) 311.

4. Gallagher *v.* Witherington, 29 Ala. 420; Daniell Ch. Pr. 1532.

5. Rood *v.* Winslow, 2 Dougl. (Mich.) 68.

Intoxication of plaintiff's ancestor being ground for a cancellation of the deed obtained by defendants, they were charged with the costs of suit. Prentice *v.* Achorn, 2 Paige (N. Y.) 30. But where a grantee had not connived at the grantor's intoxication, but had sought, as a relative to the grantor by marriage, to save the property from being squandered, the complainant was not allowed costs on cancellation of the deed. Warnock *v.* Campbell, 25 N. J. Eq. 485.

In an action by grantor to set aside sale for fraud of vendees' agent who made the purchase, the vendees, by setting up a defense, make the conduct of the agent their own, and are not therefore entitled to a decree for

XIV. REVIEW.[6]

The findings of the trial court upon controverted questions of fact, where the evidence is conflicting and the decision is not clearly against the weight of evidence, will not be disturbed upon appeal.[7]

CANDIDATE.[1] One who seeks or aspires to some office or privilege, or who offers himself for the same;[2] a person offering himself to the suffrage of the electors;[3] one put forward for election, whether with or against his own will.[4] (Candidate: Nomination of, see ELECTIONS.)

CANDLEMAS-DAY. A festival appointed by the church to be observed on the second day of February in every year, in honor of the purification of the Virgin Mary, being forty days after her miraculous delivery.[5]

CANFARA. A trial by hot iron, formerly used in England.[6]

CANON. A law, rule, or ordinance in general,[7] and of the church in particular;[8] a residentiary member of a cathedral chapter;[9] the annual charge or rent which is paid in recognition of the *dominium utile* by the person who holds the *dominium utile*.[10] (Canon: Law, see CANON LAW.)

CANON LAW. A collection of ecclesiastical constitutions for the regulation of the polity and discipline of the church of Rome.[11] In England there is also a kind of national canon law, composed of legatine and provincial constitutions enacted therein prior to the reformation, and adapted to the exigencies of the English church and kingdom;[12] but this system never became a part of American law.[13]

CANONS OF DESCENT or OF INHERITANCE. Rules by which inheritances are regulated and according to which estates are transmitted by descent from the ancestor to the heir.[14] (See, generally, DESCENT AND DISTRIBUTION.)

CANT. A mode of dividing estates held in common; LICITATION,[15] *q. v.* (See, generally, PARTITION.)

CANTRED. A district containing a hundred villages; a hundred.[16]

costs against him. Williams *v.* Kerr, 152 Pa. St. 560, 25 Atl. 618.

6. See, generally, APPEAL AND ERROR, 2 Cyc. 474; REVIEW.

7. See Henry *v.* Mayer, (Ariz. 1898) 53 Pac. 590; Smith *v.* Smith, 138 Ill. 41, 27 N. E. 857; Hoobler *v.* Hoobler, 128 Ill. 645, 21 N. E. 571; Bahan *v.* Turnbull, 86 Mich. 347, 48 N. W. 959; Moran *v.* Moran, 19 N. Y. Suppl. 673, 46 N. Y. St. 554; and, generally, APPEAL AND ERROR, XVII, G [3 Cyc. 345].

1. **Distinguished from "nominee."** — "The persons voted for are called 'candidates,' or, with reference to their selection as 'candidates,' 'nominees.'" Century Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170].

2. Leonard *v.* Com., 112 Pa. St. 607, 624, 4 Atl. 220 [*quoting* Webster Dict.].

3. Morris *v.* Burdett, 2 M. & S. 212, 217, 14 Rev. Rep. 639.

4. Reg. *v.* Chisholm, 5 Ont. Pr. 328, 331.

5. Wharton L. Lex.

"**This festival is no day in court,** for the judges sit not; and it is the grand day in that term of all the inns of court, whereon the judges anciently observed many ceremonies, and the societies seemed to vie with each other, in sumptuous entertainments, accompanied with music, and almost all kinds of diversions." Jacob L. Dict.

6. Burrill L. Dict.

7. See Jardine *v.* Reichert, 39 N. J. L. 165, 170.

8. Burrill L. Dict.

9. Wharton L. Lex.

10. Esriche Dict. [*quoted* in Hart *v.* Burnett, 15 Cal. 530, 556].

11. Burrill L. Dict.

The Corpus Juris Canonici consists in the collections called the *Decretum Gratiani* (1139–1142); *Decretalia Gregorii* (1234); the Sext (1298); the Clementines (1317); and the Extravagants (1500). Pollock & M. Hist. Eng. L. 112–114.

12. 1 Bl. Comm. 82.

The authority of the canon law in England depends upon 25 Hen. VIII, c. 19, revised and confirmed by 1 Eliz. c. 1, which enacted that a review should be had of the canon law; and that until such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. No such review has ever been perfected. 1 Bl. Comm. 83.

13. Andrews Am. L. § 214.

14. 2 Bl. Comm. 208.

15. Hayes *v.* Cuny, 9 Mart. (La.) 87, 89.

16. Black L. Dict.

CANVASS. To go about (a region or district) to solicit votes, orders, subscriptions, or the like; traverse (a district or region) for inquiry, or in the effort to obtain something;[17] to examine thoroughly; to search or scrutinize;[18] to examine searchingly; ascertain the number or the facts concerning each, going over in detail; scrutinize; sift;[19] a close inspection to know the state of;[20] an official scrutiny;[21] the act of examining the returns of votes for public officers;[22] all the proceedings for determining the result of an election from the closing of the polls to the formal declaration of who are elected.[23] (Canvass: Of Votes, see ELECTIONS.)

CANYON. A deep gorge, ravine or gulch between high, steep banks, worn by water-courses.[24]

CAPACITY. Strength;[25] ability; power; qualification or competency of persons, natural or artificial, for the performance of civil acts depending on their state and condition as defined or fixed by law.[26] (Capacity: Contractual, see BONDS; COMMERCIAL PAPER; CONTRACTS; DEEDS; INFANTS; INSANE PERSONS. Fiduciary, see TRUSTS. Testamentary, see WILLS.)

CAPAX DOLI. Capable of committing crime.[27]

CAPAX NEGOTII. Capable of transacting affairs.[28]

CAPE. A garment or part of a garment used for covering the shoulders of the wearer; a neck or narrow strip or point of land exteuding some distance into a body of water;[29] a point of land extending into a lake; projecting into the water; a headland; a piece of land jutting into the lake beyond the rest of the coast line; a promontory;[30] the coping of a wall; ears of corn broken off in threshing;[31] a judicial writ concerning lands or tenements, formerly in use in England, and so termed from the emphatic word with which it began.[32] It is also employed as an adjective descriptive of a kind of wine made at the Cape of Good Hope.[33]

CAPIAS AD AUDIENDUM JUDICIUM. Literally, "You take to hear judgment." In English practice, a writ which is awarded and issued to bring in a defendant who has been found guilty of a misdemeanor, to receive his judgment.[34]

CAPIAS AD COMPUTANDUM. Literally, "You take to account." A writ to compel a defendant to appear personally before auditors and make his accounts

In Wales the counties were divided into cantreds as in England into hundreds. Burrill L. Dict.

17. Standard Dict. [*quoted* in Price Co. *v.* Atlanta, 105 Ga. 358, 366, 31 S. E. 619].

18. Webster Dict. [*quoted* in Bowler *v.* Eisenhood, 1 S. D. 577, 580, 48 N. W. 136, 12 L. R. A. 705]. See also State *v.* Nerland, 7 S. C. 241, 259 [*quoted* in *Ex p.* Mackey, 15 S. C. 322, 332], where it is said: "'Canvassing' implies 'search,' 'scrutiny,' 'investigation,' 'examination.'"

19. Standard Dict. [*quoted* in Clark *v.* Tracy, 95 Iowa 410, 412, 64 N. W. 290].

20. Webster Dict. [*quoted* in owler *v.* Eisenhood, 1 S. D. 577, 580, 48 N. W. 136, 12 L. R. A. 705].

21. Standard Dict. [*quoted* in Clark *v.* Tracy, 95 Iowa 410, 412, 64 N. W. 290].

22. Bouvier L. Dict. [*quoted* in Bowler *v.* Eisenhood, 1 S. D. 577, 580, 48 N. W. 136, 12 L. R. A. 705].

23. Bowler *v.* Eisenhood, 1 S. D. 577, 580, 48 N. W. 136, 12 L. R. A. 705.

24. Webster Dict. [*quoted* in Montana Cent. R. Co. *v.* Helena, etc., R. Co., 6 Mont. 416, 433, 12 Pac. 916].

25. Hamilton *v.* Myles, 24 U. C. C. P. 309, 320.

26. Bouvier L. Dict. [*quoted* in Hronek *v.* People, 134 Ill. 139, 152, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837].

27. Wharton L. Lex.

28. Black L. Dict.

29. Waller *v.* People, 175 Ill. 221, 222, 51 N. E. 900.

30. U. S. *v.* McNelly, 28 Fed. 609, 611.

31. Waller *v.* People, 175 Ill. 221, 222, 51 N. E. 900, where it is said: "No such meanings are given the word except in certain restricted localities in the northern part of England."

32. Burrill L. Dict.

It was divided into *cape magnum*, or the grand cape, which lay before appearance to summon the tenant to answer the default, and also over to the demandment; the *cape ad valentiam* was a species of grand cape; and *cape parvum*, or petit cape, after appearance or view granted, summoning the tenant to answer the default only. Wharton L. Lex.

33. Waller *v.* People, 175 Ill. 221, 222, 51 N. E. 900.

34. Burrill L. Dict.

in the action of account render, after judgment of *quod computet*.[35] (See, generally, ACCOUNTS AND ACCOUNTING.)

CAPIAS AD RESPONDENDUM. Literally, "You take to answer." The writ by which an ordinary action was commenced under the old practice in common-law actions.[36] (See, generally, ARREST.)

CAPIAS AD SATISFACIENDUM. Literally, "You take to satisfy." A judicial writ of execution, which issues out on the record of a judgment and by which the sheriff is commanded to take the body of the defendant in execution, and him safely to keep, so that he have his body in court at the return of the writ to satisfy the plaintiff his debt and damages.[37] It is usually termed for brevity a *ca. sa.*[38] (See, generally, EXECUTIONS.)

CAPIAS IN WITHERNAM. Literally, "You take in withernam." A writ which lies where cattle or goods distrained have been driven or carried out of the county, so that the sheriff cannot take them on a writ of replevin, commanding him to take other cattle or goods of the distrainor, as a second or reciprocal distress, in lieu of the distress formerly taken and withheld.[39] (See, generally, REPLEVIN.)

CAPIAS PRO FINE. Literally, "You take for the fine." In English practice, a writ by which a party condemned to pay a fine to the king was taken and imprisoned until he paid it.[40]

CAPITA. Heads; persons individually considered, without relation to others, as distinguished from *stirpes* or stocks of descent.[41] (Capita: Taking Per, or Per Stirpes, see DESCENT AND DISTRIBUTION; WILLS.)

CAPITAL. The sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership;[42] the fund of money or property on which a merchant or voluntary association of persons for conducting a business does business;[43] the fund dedicated to a business to support its credit, to provide for contingencies, to suffer diminution from losses, and to derive accretion from gains and profits;[44] property taken from other investments or uses and set apart for and invested in the special business, and in the increase, proceeds or earnings of which property, beyond expenditures incurred in its use, consists the profits made in the business;[45] the actual estate, whether in money or property, which is owned by an individual or a corporation.[46] As used with respect to corporations, it signifies the aggregate of the sums subscribed for, and either paid in or agreed to be paid in by the stock-holders;[47] but

35. Black L. Dict.

36. Sweet L. Dict.

37. People *v.* Hoffman, 97 Ill. 234, 236 [*citing* Jacob L. Dict.].

38. Burrill L. Dict.

39. Burrill L. Dict.

40. Burrill L. Dict.

This writ was abolished in trespass, ejectment, assault, and false imprisonment by 5 & 6 Wm. III, c. 12. Lyndsey *v.* Clerke, 5 Mod. 285.

41. Burrill L. Dict.

42. Bouvier L. Dict. [*quoted* in Pearce *v.* Augusta, 37 Ga. 597, 599; People *v.* Feitner, 167 N. Y. 1, 10, 60 N. E. 265, 82 Am. St. Rep. 698 [*affirming* 56 N. Y. App. Div. 280, 284, 67 N. Y. Suppl. 893].

"It is called 'capital' from the Latin *caput*, a head, because it is the chief thing — the head, beginning and basis of an undertaking or enterprise." San Francisco *v.* Spring Valley Water Works, 63 Cal. 524, 530 [*citing* Burrill L. Dict.].

43. San Francisco *v.* Spring Valley Water Works, 63 Cal. 524, 529 [*citing* Abbott L. Dict.; Burrill L. Dict.; Imperial Dict.; Webster Dict.; Worcester Dict.].

44. Lyon *v.* Zimmer, 30 Fed. 401, 410 [*quoted* in People *v.* Feitner, 167 N. Y. 1, 10, 60 N. E. 265, 82 Am. St. Rep. 698]. See also Webb *v.* Armistead, 26 Fed. 70, 71.

45. Bailey *v.* Clark, 21 Wall. (U. S.) 284, 286, 22 L. ed. 651 [*quoted* in San Francisco *v.* Spring Valley Water Works, 63 Cal. 524, 529; People *v.* Feitner, 56 N. Y. App. Div. 280, 284, 67 N. Y. Suppl. 893].

46. People *v.* New York, 23 N. Y. 192, 219. See also Christensen *v.* Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429.

47. State *v.* Norwich, etc., R. Co., 30 Conn. 290, 296; Wetherbee *v.* Baker, 35 N. J. Eq. 501, 505 [*citing* Boone Corp. § 105]; Iron R. Co. *v.* Lawrence Furnace Co., 49 Ohio St. 102, 30 N. E. 616; Bailey *v.* Clark, 21 Wall. (U. S.) 284, 286, 22 L. ed. 651 [*quoted* in San Francisco *v.* Spring Valley Water Works, 63 Cal. 524, 529]. See also People *v.* Roberts, 66 N. Y. App. Div. 157, 159, 72 N. Y. Suppl. 950, where it is defined as the "property of the corporation contributed by its sharehold-

it is also in general use as signifying the sums paid in by the subscribers, with the addition of all gains or profits realized, with such diminutions as have resulted from losses incurred in transacting business.[48] As an adjective the word "capital" signifies "punishable by death;[49] chief; principal."[50] (Capital: Offenses, see CRIMINAL LAW; HOMICIDE; PIRACY; RAPE; TREASON. Of — Banks, see BANKS AND BANKING; Corporations, Generally, see CORPORATIONS; Insurance Companies, see INSURANCE; Joint-Stock Companies, see JOINT-STOCK COMPANIES; Partnerships, see PARTNERSHIP; Railroad Companies, see RAILROADS. Stock, see CAPITAL STOCK. Taxation of, see TAXATION.)

CAPITAL STOCK.[51] The sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders, for the prosecution of the business of the corporation, and for the benefit of corporate creditors;[52] the nominal capital;[53] the actual property of the corporation contributed by the shareholders.[54]

ers or otherwise obtained by it to the extent required by its charter."

This is strictly capital stock (see *infra*, CAPITAL STOCK), and although the terms "capital" and "capital stock" are used convertibly (Kohl *v.* Lilienthal, 81 Cal. 378, 385, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; San Francisco *v.* Spring Valley Water Works, 63 Cal. 524, 530; Iowa State Sav. Bank *v.* Burlington, 98 Iowa 737, 739, 61 N. W. 851; New Orleans City Gas Light Co. *v.* Board of Assessors, 31 La. Ann. 475, 477; People *v.* Coleman, 126 N. Y. 433, 27 N. E. 818, 38 N. Y. St. 237, 12 L. R. A. 762; Christensen *v.* Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; People *v.* Feitner, 31 Misc. (N. Y.) 433, 434, 65 N. Y. Suppl. 523; Iron R. Co. *v.* Lawrence Furnace Co., 49 Ohio St. 102, 30 N. E. 616; State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 528; Foster *v.* Stevens, 63 Vt. 175, 182, 22 Atl. 78, 13 L. R. A. 166), there is a difference between them. "Capital stock," in its strict signification, exists only nominally (Hannibal, etc., R. Co. *v.* Shacklett, 30 Mo. 550, 558) and remains fixed, while the "capital" or actual property of the corporation varies in value, and is constantly increasing or diminishing in amount (State *v.* Morristown F. Assoc., 23 N. J. L. 195, 196; Tradesman Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634, 654, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593; Wells *v.* Green Bay, etc., Canal Co., 90 Wis. 442, 64 N. W. 69).

48. Wetherbee *v.* Baker, 35 N. J. Eq. 501, 505; People *v.* New York, 23 N. Y. 192, 219; Tradesman Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634, 653, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593.

49. *Ex p.* Dusenberry, 97 Mo. 504, 507, 11 S. W. 217; Walker *v.* State, 28 Tex. App. 503, 504, 13 S. W. 860 [*quoting* Bouvier L. Dict.].

50. Burrill L. Dict.

51. Distinguished from "capital" see CAPITAL.

52. Cook Stock & Stockh. [*quoted* in Commercial F. Ins. Co. *v.* Montgomery County, 99 Ala. 1, 4, 14 So. 490, 42 Am. St. Rep. 17; Security Co. *v.* Hartford, 61 Conn. 89, 101, 23 Atl. 699; American Pig Iron Storage Co. *v.* State Bd. of Assessors, 56 N. J. L. 389, 392, 29 Atl. 160; Tradesman Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634, 656, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593]. See also Farrington *v.* Tennessee, 95 U. S. 679, 686, 24 L. ed. 558.

Other definitions are: "The amount fixed upon by the partners or associates as their stake in the concern." Hightower *v.* Thornton, 8 Ga. 486, 500, 52 Am. Dec. 412 [*quoted* in Reid *v.* Eatonton Mfg. Co., 40 Ga. 98, 103, 2 Am. Rep. 563].

"The amount of money paid or promised to be paid for the purposes of the corporation." Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 111, 7 Pac. 68, 3 Am. St. Rep. 797.

"The amount of capital to be contributed by the stockholders for purposes of the corporation." State *v.* Morristown F. Assoc., 23 N. J. L. 195, 196 [*quoted* in People *v.* Roberts, 154 N. Y. 101, 107, 47 N. E. 980; Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 188].

"That money or property, which is put into a single corporate fund, by those, who by subscription therefor, become members of the corporate body." Burrall *v.* Bushwick R. Co., 75 N. Y. 211, 216.

"The fund or property belonging to a firm or corporation, and used to carry on its business." Com. *v.* Lehigh Ave. R. Co., 129 Pa. St. 405, 414, 18 Atl. 414, 498, 5 L. R. A. 367. See also State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 528, where the court, per Simpson, C. J., said: "In this general sense it is money invested in business operations, whether that business be conducted by a single individual, a partnership, a corporation, or government; and it makes no difference how the money is obtained, whether by labor, by borrowing, or otherwise."

53. Excelsior Water, etc., Co. *v.* Pierce, 90 Cal. 131, 140, 27 Pac. 44.

54. Excelsior Water, etc., Co. *v.* Pierce, 90 Cal. 131, 140, 27 Pac. 44; Christensen *v.* Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; Burrall *v.* Bushwick R. Co., 75 N. Y. 211, 216 [*quoted* in San Francisco *v.* Spring Valley Water Works, 63 Cal. 524, 529; Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 188]; Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280, 307 [*quoted* in Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 188]; Lee *v.* Sturges, 46 Ohio St. 153, 160, 19 N. E. 560, 2 L. R. A. 556; Jones *v.* Davis, 35 Ohio St. 474; State Bank *v.* Milwaukee, 18 Wis. 281, 284.

Occasionally, however, under the terms of taxation statutes which have been drawn without regard to the technical meaning of words, the courts will construe the capital stock to mean all the actual property of the corporation.[55] (See, generally, CAPITAL.)

CAPITATIM. By the head.[56]

CAPITATION or CAPITATION TAX.[57] A poll-tax or tax upon the person simply, without any reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow.[58] (Capitation Tax: For Highways, see STREETS AND HIGHWAYS. Generally, see TAXATION.)

CAPITE. See IN CAPITE.

CAPITULATION. The treaty which determines the conditions under which a place besieged is abandoned to the commanding officer of the besieging army.[59] (See, generally, WAR.)

CAPTATION. The act of one who succeeds in controlling the will of another, so as to become master of it.[60] (Captation: Effect of on Validity of — Contract, see CONTRACTS; Deed, see DEEDS; Gift, see GIFTS; Will, see WILLS.)

CAPTION. A taking, seizure, or arrest of a person; the title or heading of a legal document;[61] the heading of a legal document, in which is shown the time when, the place where, and the person by whose authority it was prepared or executed;[62] the title of an act of the legislature.[63] (Caption: Of Affidavit, see AFFIDAVITS. Of Bill — Of Exceptions, see APPEAL AND ERROR; In Equity, see EQUITY. Of Deposition, see DEPOSITIONS. Of Indictment, see INDICTMENTS AND INFORMATIONS.)

CAPTOR. In international law, one who takes or seizes property in time of war; one who takes the property of an enemy. In a stricter sense, one who takes a prize at sea.[64]

CAPTURE.[65] The act, specially applicable to a taking by men of war or by

55. *California.*— Martin *v.* Zellerbach, 38 Cal. 300, 309, 99 Am. Dec. 365 [*approved* in San Francisco *v.* Spring Valley Water Works, 63 Cal. 524, 531].

Connecticut.— Security Co. *v.* Hartford, 61 Conn. 89, 101, 23 Atl. 699 [*citing* Cook Stock & Stockh.]; New Haven *v.* City Bank, 31 Conn. 106, 109.

Illinois.— Ohio, etc., R. Co. *v.* Weber, 96 Ill. 443, 448; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602, 610 [*following* Porter *v.* Rockford, etc., R. Co., 76 Ill. 561].

New York.— Buffalo Mut. Ins. Co. *v.* Erie County, 4 N. Y. 442.

Tennessee.— Tradesman Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634, 656, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593 [*quoting* 1 Cook Stockh. § 9].

56. Burrill L. Dict.

Used in the expression "You cannot deliver *capitatim* to each individual," etc., per Lord Ellenborough, C. J., in Rex *v.* Commerell, 4 M. & S. 203, 206.

57. **The terms are used interchangeably.** Century Dict.

58. Gardner *v.* Hall, 61 N. C. 21, 22; Hylton *v.* U. S., 3 Dall. (U. S.) 171, 175, 1 L. ed. 556; The Head-Money Cases, 21 Blatchf. (U. S.) 460, 18 Fed. 135, 139.

59. Wharton L. Lex.

60. Zerega *v.* Percival, 46 La. Ann. 590, 606, 15 So. 476 [*citing* Bouvier L. Dict.], where it is said: "'Captation' takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those amenities, by those caresses, by those ready services, by those officious little presents, usual among friends, and by all those methods which, ordinarily, render us agreeable to others, and enable us to secure their good will."

"'Suggestion' is often used as a synonym for 'captation,' but it is applied specially to those means of persuasion employed to alter the will of a testator, and to prompt him to make a disposition different from that which he had in view." Zerega *v.* Percival, 46 La. Ann. 590, 606, 15 So. 476.

61. Burrill L. Dict.

62. Anth. [Anderson] Dict. L. 148 [*quoted* in Taylor *v.* Smith, (Tenn. Ch. 1896) 36 S. W. 970, 976].

63. Shelton *v.* State, 96 Tenn. 521, 526, 32 S. W. 967; State *v.* Yardley, 95 Tenn. 546, 557, 32 S. W. 481, 34 L. R. A. 656; State *v.* Runnels, 92 Tenn. 320, 322, 21 S. W. 665.

64. Burrill L. Dict.

65. **"Capture," "seizure," and "detention," distinguished.** — "These words, though sometimes used synonymously, differ in the extent of their meaning — each embracing the one that follows it, but not the one that precedes it. Every 'capture' is a 'seizure' and a 'detention,' and every 'seizure' is a 'detention.' But there may be a 'seizure,' as for some violation of revenue laws, which is not

privateers,[66] of taking or taking by force;[67] a seizure as prize, with the intent or expectation of obtaining a condemnation;[68] a taking by the enemy of vessel or cargo as prize, in time of open war, or, by way of reprisal, with intent to deprive the owner of it;[69] the taking of property by one belligerent from another.[70] (Captnre: Generally, see WAR. In Insurance Policies, see MARINE INSURANCE.)

CAR.[71] A vehicle running upon rails;[72] a vehicle adapted to the rails of a railroad;[73] a carriage for running on the rails of a railway;[74] any wheeled carriage used for carrying goods or passengers upon a railroad, whether the road be a tramway over the streets of a city, to be operated by horses, or a more extended road to be worked by steam tractors.[75] (Car: Trusts, see RAILROADS.)

CARBONACEOUS. Pertaining to carbon; made of carbon.[76]

CARDINAL. A dignitary of the Roman Catholic church, next in rank to the pope.[77]

CARDS. See GAMING.

CARE. Custody; charge; safe-keeping; preservation; security.[78]

CARELESSNESS.[79] NEGLIGENCE,[80] *q. v.*

CARGO. The lading of a ship or vessel,[81] of whatever it consists;[82] the lading or freight of a ship;[83] the goods, merchandise, or whatever is conveyed in a ship

a 'capture'; and there may be a 'detention,' as by an embargo, which is neither a 'capture' nor a 'seizure.'" Dole *v.* Merchants' Mut. Mar. Ins. Co., 51 Me. 465, 472.

Distinguished from "seizure."—"A 'capture,' in technical language, is a taking by military power; a 'seizure,' a taking by civil authority." U. S. *v.* Athens Armory, 35 Ga. 344, 351, 2 Abb. (U. S.) 129, 24 Fed. Cas. No. 14,473.

"The word 'prise' is used in the same sense as 'capture' in our language." Dole *v.* New England Mut. Mar. Ins. Co., 6 Allen (Mass.) 373, 388.

66. Fifield *v.* State Ins. Co., 47 Pa. St. 166, 187, 86 Am. Dec. 523.

67. Dole *v.* New England Mut. Mar. Ins. Co., 6 Allen (Mass.) 373, 386.

68. Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 109, 4 Am. Dec. 92.

69. Mauran *v.* Insurance Cos., 6 Wall. (U. S.) 1, 10, 18 L. ed. 836.

70. Whitfield's Case, 11 Ct. Cl. 444, 456.

71. "In definition a 'car,' or 'coach,' or 'stage,' or a 'stage coach,' is the same. They are vehicles that turn, or that run by turning on wheels. Place boards over or between wheels and we have a platform car adapted to freigbt; place benches or chairs upon the platform and we still have a car, but adapted to passengers, and then easily termed a carriage. Instead of benches or chairs put on the platform the body of a 'stage coach' and we have such a 'railroad car' as served at the inauguration of the earliest railroad in our state. It is plain that by adaptation and improvement 'the modern railway car has been evolved from the old-fashioned stage coach.' (The American Railway, 231.) In common language, a railroad carriage designed for passengers is called indifferently a 'coach' or 'car.' In every collection of words arranged according to the ideas which they express, these, and others with them, will be found classed together as having the same signification." New York *v.* Third Ave. R. Co., 117 N. Y. 404, 410, 22 N. E. 755, 27 N. Y. St. 170.

72. Century Dict. [*quoted* in Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 422, 11 So. 262].

73. Webster Dict. [*quoted* in Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 423, 11 So. 262]; Perez *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. 137, 139.

74. Webster Dict. [*quoted* in Nicholls *v.* State, 68 Wis. 416, 423, 32 N. W. 543, 60 Am. Rep. 870].

75. State *v.* Lang, 14 Mo. App. 247, 249.

76. Pittsburgh Reduction Co. *v.* Cowles Electric Smelting, etc., Co., 55 Fed. 301, 323.

77. Black L. Dict.

78. Ker *v.* People, 110 Ill. 627, 649, 51 Am. Rep. 706.

79. **Supplying criminal intent** in prosecution for injuring animal see ANIMALS, 2 Cyc. 434, note 67.

80. Steele *v.* Central R. Co., 43 Iowa 109, 112; Turner *v.* Cross, 83 Tex. 218, 228, 18 S. W. 578, 15 L. R. A. 262; Allen *v.* Dillingham, 60 Fed. 176, 184, 23 U. S. App. 167, 8 C. C. A. 544.

Distinguished from "misconduct."—"'Misconduct' is a violation of definite law; 'carelessness,' an abuse of discretion under an indefinite law. 'Misconduct' is a forbidden act; 'carelessness,' a forbidden quality of an act, and is necessarily indefinite." Citizens' Ins Co. *v.* Marsh, 41 Pa. St. 386, 394.

81. Flanagan *v.* Demarest, 3 Rob. (N. Y.) 173, 182; The Governor Cushman, 1 Abb. (U. S.) 14, 17, 1 Biss. (U. S.) 490, 10 Fed. Cas. No. 5,646, 5 Am. L. Reg. N. S. 286.

82. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354, 366.

83. Richardson Dict.; Webster Dict. [*quoted* in Kreuger *v.* Blanck, L. R. 5 Exch. 179, 183, 39 L. J. Exch. 160, 23 L. T. Rep. N. S. 128, 18 Wkly. Rep. 813].

or other merchant vessel;[84] the merchandise or wares contained and conveyed in a ship or vessel;[85] all the merchandises and effects which are laden on board a ship, exclusive of the soldiers, crew, rigging, ammunition, provisions, guns, etc.;[86] the entire quantity of goods loaded on board a vessel on freight for a particular voyage;[87] the entire load of the ship which carries it.[88] (Cargo: Generally, see SHIPPING. Insurance of, see MARINE INSURANCE.)

CARICATURE. See LIBEL AND SLANDER.

CARLISLE TABLES. Life and annuity tables, compiled at Carlisle, England, about 1780.[89] (Carlisle Tables: As Evidence, see DEATH; EVIDENCE.)

CARNALITER. In old criminal law, carnally.[90]

CARNAL KNOWLEDGE. Sexual intercourse;[91] sexual bodily connection by a man with a woman.[92] (See, generally, INCEST; RAPE.)

CARRIAGE. The act of carrying;[93] that in which anything is carried[94] or that which carries, especially on wheels;[95] that which carries or conveys on wheels;[96] that which is used for carrying or transporting, especially on or over a solid surface;[97] a vehicle,[98] especially for pleasure or for passengers, but sometimes for burdens;[99] a wheeled vehicle for the conveyance of persons;[1] any vehicle on wheels, especially a vehicle of pleasure, or for the conveyance of passengers;[2] manner of carrying one's self.[3]

CARRIED. Transported.[4]

84. Webster Dict. [*quoted* in Kreuger *v.* Blanck, L. R. 5 Exch. 179, 183, 39 L. J. Exch. 160, 23 L. T. Rep. N. S. 128, 18 Wkly. Rep. 813].

85. The Governor Cushman, 1 Abb. (U. S.) 14, 17, 1 Biss. (U. S.) 490, 10 Fed. Cas. No. 5,646, 5 Am. L. Reg. N. S. 286.

86. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429, 433 [*quoted* in Thwing *v.* Great Western Ins. Co., 103 Mass. 401, 406, 4 Am. Rep. 567].

87. Borrowman *v.* Drayton, 2 Ex. D. 15, 19, 46 L. J. Exch. 273, 35 L. T. Rep. N. S. 727, 24 Wkly. Rep. 194.

88. Pinckney *v.* Dambmann, 72 Md. 173, 182, 19 Atl. 450. See also Sargent *v.* Reed, 2 Str. 1228.

89. Black L. Dict.

90. Burrill L. Dict.

91. Noble *v.* State, 22 Ohio St. 541, 545; Burk *v.* State, 8 Tex. App. 336, 342 [*quoted* in Lujano *v.* State, 32 Tex. Crim. 414, 419, 24 S. W. 97].

92. Com. *v.* Squires, 97 Mass. 59, 61.

93. Anderson L. Dict.

94. Johnson Dict. [*quoted* in Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 98, 23 N. W. 425, 53 Am. Rep. 267].

95. Imperial Dict. [*quoted* in Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 98, 23 N. W. 425, 53 Am. Rep. 267]. *Compare* Conway *v.* Jefferson, 46 N. H. 521, 523, where the word is said "to include whatever carried the load, whether upon wheels or runners."

96. Webster Dict. [*quoted* in Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 98, 23 N. W. 425, 53 Am. Rep. 267].

97. Century Dict. [*quoted* in Davis *v.* Petrinovich, 112 Ala. 654, 657, 21 So. 344, 36 L. R. A. 615].

98. Imperial Dict.; Johnson Dict. [*quoted* in Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 98, 23 N. W. 425, 53 Am. Rep. 267].

99. Webster Dict. [*quoted* in Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 98, 23 N. W. 425, 53 Am. Rep. 267].

The word is understood to refer to vehicles for the conveyance of persons rather than for the transportation of property. Snyder *v.* North Lawrence, 8 Kan. 82, 84.

1. Century Dict. [*quoted* in Davis *v.* Petrinovich, 112 Ala. 654, 657, 21 So. 344, 36 L. R. A. 615].

2. Worcester Dict. [*quoted* in Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 98, 23 N. W. 425, 53 Am. Rep. 267].

3. Anderson L. Dict.

4. Ogdensburgh, etc., R. Co. *v.* Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827 [*quoted* in Dunbar *v.* Port Royal, etc., R. Co., 36 S. C. 110, 117, 15 S. E. 357, 31 Am. St. Rep. 860].

CARRIERS

By Emlin McClain
Associate Justice of Supreme Court of Iowa

CROSS-REFERENCES

For Matters Relating to:
Carriage:
By Water, see FERRIES; SHIPPING; TOWAGE.
Of Diseased Animals, see ANIMALS.
Of Mail, see POST-OFFICE.
Corporations Generally, see CORPORATIONS.
Prohibited Transportation Combinations, see MONOPOLIES.
Regulations of Commerce Affecting Carriers, see COMMERCE.
Rights as Between Carrier and Employee, see MASTER AND SERVANT.
Taxation of Carrier's Property, see TAXATION.
Telegraphs and Telephones, see TELEGRAPHS AND TELEPHONES.
Towage, see TOWAGE.
Traffic Arrangements in Restraint of Trade, see CONTRACTS.
See also, generally, RAILROADS; STREET RAILROADS.

I. INTRODUCTION.

A. Definition and Kinds of Carriers. A carrier is one who undertakes the transportation of persons or movable property,[1] and the authorities, both elementary and judicial, recognize two kinds or classes of carriers, viz., private carriers and common carriers.[2] While a common carrier has been defined as one who holds himself out to the public to carry persons or freight for hire,[3] the term did not, at the common law, embrace a carrier of passengers,[4] and is commonly confined to carriers of goods,[5] as distinguished from common carriers of passengers.[6] A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward.[7] A common carrier differs from a private carrier in two important respects: (1) In respect of duty, he being obliged by law to undertake the charge of transportation, which no other person, without a special agreement, is.[8] (2) In respect of risk, the former being regarded by the law as an insurer, the latter being liable like ordinary bailees.[9]

B. Applicability of Law of Bailments — 1. To Carriage of Goods. As already pointed out[10] the rules of liability applicable to private carriers of goods are those which are in general applicable to ordinary bailees, and the law as to common carriers of goods is a branch of the law covering the subject of bailments.[11] That is, the carrier of goods is a bailee, and, aside from any considerations of public policy which affect the liability of a carrier conducting a public employment, his duties and liabilities are in general those of an ordinary bailee;[12] but these considerations of public policy[13] have led to the recognition by the courts, from an early period in the history of the common law, of rules respecting the duty of the common carrier as to serving the public, and as to liability for goods intrusted to his care which do not apply to private carriers of goods.[14]

2. To Carriage of Passengers. A carrier of passengers is not, as to the person of the passenger, a bailee,[15] and in this respect the law of carriers of passengers is not a part of the subject of bailments; but inasmuch as those who hold themselves out as prosecuting the business of carrying passengers for hire are

1. Abbott L. Dict.
2. Varble *v.* Bigley, 14 Bush (Ky.) 698, 702, 29 Am. Rep. 435; Verner *v.* Sweitzer, 32 Pa. St. 208, 212.
3. Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468.
4. Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 672, 36 S. E. 202, 50 L. R. A. 673; Elkins *v.* Boston, etc., R. Co., 23 N. H. 275, 284 [*citing* Sharp *v.* Grey, 9 Bing. 457, 2 Moore & S. 621, 23 E. C. L. 659; Astor *v.* Heaven, 2 Esp. 533, 5 Rev. Rep. 750].
5. See *infra*, II, A, 1, a.
6. See *infra*, III, A, 1, a.
7. Pennewill *v.* Cullen, 5 Harr. (Del.) 238, 242. See also Varble *v.* Bigley, 14 Bush (Ky.) 698, 703, 29 Am. Rep. 435 [*quoting* Angell Carriers, § 46]; Fish *v.* Clark, 49 N. Y. 122; Allen *v.* Sackrider, 37 N. Y. 341, 4 Transcr. App. (N. Y.) 396; Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353; Coggs *v.* Bernard, 2 Ld. Raym. 909, 917.
8. Varble v. Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435 [*quoting* Angell Carriers, § 67].

Duty of common carrier to serve all see *infra*, II, B, 1; III, A, 2, a.

9. Varble *v.* Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435 [*quoting* Angell Carriers, § 67]; Fish *v.* Clark, 49 N. Y. 122; —— *v.* Jackson, 2 N. C. 19; Verner *v.* Sweitzer, 32 Pa. St. 208.

Common-law liability of common carrier see *infra*, II, D.

10. See *supra*, I, A.
11. Coggs *v.* Bernard, 2 Ld. Raym. 909, 917.
12. Thus the liability of common or public carriers with reference to goods received by them as such is the same as that of ordinary bailees where they carry without compensation (Treleven *v.* Northern Pac. R. Co., 89 Wis. 598, 62 N. W. 536. And see *infra*, II, C); where they hold the goods as warehousemen after their duties as common carriers have been performed (see *infra*, II, J, 4); or where they have lawfully limited their liability, so as to relieve themselves from the exceptional rules applicable to public carriers (see *infra*, II, E, 2).
13. **The common or public carrier of goods exercises a sort of public office,** and his business is therefore affected with a public interest. Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77.

Right of legislature to regulate rates by reason of the public nature of the business of common carrier see *infra*, II, N, 1, c.

14. See 11 Harv. L. Rev. 158.
15. See *infra*, III, A, 1, a.

regarded as undertaking a public duty, they are properly classed in this respect with public carriers of goods, and it is proper to treat them under the general heading of "Carriers." Moreover, public carriers of passengers are deemed common carriers as to the baggage accepted by them for transportation as a part of the business of transporting passengers.[16]

II. CARRIERS OF GOODS.

A. Who Are Common Carriers of Goods —1. Definition and General Nature —a. Definition. A common carrier has been defined as "one who undertakes for hire or reward, to transport the goods of such as choose to employ him from place to place."[17]

16. See *infra*, III, I, 2.

17. *Alabama.*— Babcock *v.* Herbert, 3 Ala. 392, 396, 37 Am. Dec. 695.

Illinois.— Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 95, 5 Am. Rep. 92.

Kentucky.— Robertson *v.* Kennedy, 2 Dana (Ky.) 430, 431, 26 Am. Dec. 466 [*quoted* in Hall *v.* Renfro, 3 Metc. (Ky.) 51, 53].

Massachusetts.— Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 53, 11 Am. Dec. 133 [*quoted* in Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 333; Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122; Allen *v.* Sackrider, 37 N. Y. 341, 342, 4 Transcr. App. (N. Y.) 396].

New Hampshire.— Shelden *v.* Robinson, 7 N. H. 157, 163, 26 Am. Dec. 726 [*quoting* Story Bailm. 322].

New York.— Alexander *v.* Greene, 7 Hill (N. Y.) 533, 544 [*quoting* Story Bailm. § 495].

Oregon.—Honeyman *v.* Oregon, etc., R. Co., 13 Oreg. 352, 353, 10 Pac. 628, 57 Am. Rep. 20.

Pennsylvania.—Beckman *v.* Shouse, 5 Rawle (Pa.) 179, 187, 28 Am. Dec. 653.

South Carolina.— Bamberg *v.* South Carolina R. Co., 9 S. C. 61, 67, 30 Am. Rep. 13.

Wisconsin.— Doty *v.* Strong, 1 Pinn. (Wis.) 313, 326, 40 Am. Dec. 773.

United States.— The Neaffie, 1 Abb. (U. S.) 465, 467, 17 Fed. Cas. No. 10,063.

Other definitions, slightly differing in language, are: "One who undertakes to transport from place to place for hire, the goods of such persons as think fit to employ him." Fish *v.* Chapman, 2 Ga. 349, 352, 46 Am. Dec. 393.

"A person who undertakes to transport from place to place for hire, the goods of those who choose to employ him." Elkins *v.* Boston, etc., R. Co., 23 N. H. 275, 284; Spears *v.* Lake Shore, etc., R. Co., 67 Barb. (N. Y.) 513, 517.

"Every person who undertakes to carry, for a compensation, the goods of all persons indifferently." Mershon *v.* Hobensack, 22 N. J. L. 372, 377; Orange Bank *v.* Brown, 3 Wend. (N. Y.) 158, 161 [*quoted* in Allen *v.* Sackrider, 37 N. Y. 841, 342, 4 Transcr. App. (N. Y.) 396].

"One who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him." Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 38, 52 N. E. 665, 70 Am. St. Rep. 432.

"One who undertakes for hire to carry from place to place the goods of all persons indifferently." Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 188, 35 Am. Rep. 748.

"One who makes it a business to transport goods, either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire." The Huntress, 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914, 24 Am. Jur. 486, 4 Hunt. Mer. Mag. 83, 4 West. L. J. 38.

"One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage." The Neaffie, 1 Abb. (U. S.) 465, 467, 17 Fed. Cas. No. 10,063.

"Any man undertaking for hire to carry the goods of all persons indifferently." Gisbourn *v.* Hurst, 1 Salk. 249, 250 [*quoted* in Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 543, 39 Am. Dec. 398; Allen *v.* Sackrider, 37 N. Y. 341, 342, 4 Transcr. App. (N. Y.) 396; Gordon *v.* Hutchinson, 1 Watts & S. (Pa.) 285, 286, 37 Am. Dec. 464].

"One whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him." Bouvier L. Dict. [*quoted* in Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 672, 36 S. E. 202, 50 L. R. A. 673].

"Any person undertaking to carry goods, either by land or by water, of all persons indifferently." 2 Chitty Bl. (Am. ed. 1830) 451, note 22 [*quoted* in Alexander *v.* Greene, 7 Hill (N. Y.) 533, 564].

"One who undertakes as a business, for hire or reward, to carry from one place to another the goods of all persons who may apply for such carriage." Hutchinson Carriers, § 47 [*quoted* in Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 673, 36 S. E. 202, 50 L. R. A. 673].

"A person who undertakes to carry the goods of all persons indifferently for hire." 1 Leigh N. P. 507 [*quoted* in Alexander *v.* Greene, 7 Hill (N. Y.) 533, 564].

"One who offers to carry goods for any person between certain termini, or on a certain route." 1 Parsons Shipping & Adm.

b. Must Be a Holding Out to Carry as a Public Employment — (i) *In General.* A common carrier is one who holds himself out as ready to engage in the transportation of goods for hire as a public employment, and not as a casual occupation.[18] It is sometimes said that one who undertakes for a single occasion only to carry goods for any person who desires to employ him for that occasion is a common carrier for that transportation.[19] But the cases of this kind will be found to be those in which, whilst the business of carriage is not the exclusive or perhaps the principal business of the one sought to be charged as carrier, it is incidentally his business for the time being. In general the liability of carrier does not attach to one who does not hold himself out as pursuing that business, but in the particular case, and in each particular case, acts only in consequence of a special employment.[20]

245 [*quoted* in Varble *v.* Bigley, 14 Bush (Ky.) 698, 703, 29 Am. Rep. 435].

"A person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him." 1 Smith Lead. Cas. 101 [*quoted* in Alexander *v.* Greene, 7 Hill (N. Y.) 533, 564].

"One who undertakes for hire to transport the goods of such as choose to employ him, from place to place." Smith Merc. Law 168 [*quoted* in Alexander *v.* Greene, 7 Hill (N. Y.) 533, 564].

"One who, as a regular business, undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place." Story Bailm. § 495 [*quoted* in Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388, 389].

Questions of law and fact.— What constitutes a common carrier is a question of law. Whether the person comes under the definition is one of fact. Pennewill *v.* Cullen, 5 Harr. (Del.) 238. Whether a contract of carriage changes the relation of the carrier from that of a common carrier to that of a private carrier is one of law. Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567; Kentucky Bank *v.* Adams Express Co., 93 U. S. 174, 23 L. ed. 872. Whether the facts shown establish the legal position of common carrier is a question for the jury. Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716. Evidence that one sought to be charged did "business for years as a common carrier with all that called" held sufficient, *prima facie*, to show that he was a common carrier. Haslam *v.* Adams Express Co., 6 Bosw. (N. Y.) 235.

18. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Brind *v.* Dale, 8 C. & P. 207, 2 M. & Rob. 80, 34 E. C. L. 692; Roussel *v.* Aumais, 18 Quebec Super. Ct. 474.

As to duty to serve all persons see *infra*, II, B.

19. *Alabama.*— Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516.

Mississippi.— Harrison *v.* Roy, 39 Miss. 396.

Pennsylvania.— Gordon *v.* Hutchinson, 1 Watts & S. (Pa.) 285, 37 Am. Dec. 464.

Tennessee.—Moss *v.* Bettis, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1.

Texas.— Haynie *v.* Baylor, 18 Tex. 498; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

See 9 Cent. Dig. tit. "Carriers," § 462.

To make owner of vessel liable as a common carrier it is not essential that the trips should be regular between the same points, but it is enough if he is engaged in carrying for others generally to and from any point. Pennewill *v.* Cullen, 5 Harr. (Del.) 238.

Transportation beyond usual points of destination.—Where a common carrier by water agreed to carry to a point beyond his regular trip, it was held that he was a common carrier as to the additional transportation. Tuckerman *v.* Stephens, etc., Transp. Co., 32 N. J. L. 320.

So held also as to a city transfer company taking goods for a point beyond the usual range of its business. Farley *v.* Lavary, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383. As to acceptance by railroad companies for points beyond limits of line see *infra*, II, M, 2.

20. *Louisiana.*— Flautt *v.* Lashley, 36 La. Ann. 106.

New York.— Fish *v.* Clark, 49 N. Y. 122; Allen *v.* Sackrider, 37 N. Y. 341, 4 Transcr. App. (N. Y.) 396; Satterlee *v.* Groat, 1 Wend. (N. Y.) 272.

Ohio.— Samms *v.* Stewart, 20 Ohio 69, 55 Am. Dec. 445.

United States.—Sumner *v.* Caswell, 20 Fed. 249.

Canada.— Roussel *v.* Aumais, 18 Quebec Super. Ct. 474.

See 9 Cent. Dig. tit. "Carriers," § 468.

Public employment distinguished from special employment.— "We see no reason why the law applicable to a common carrier should be applied to a farmer who makes a personal application to a merchant for a load of goods on his return trip from market. . . . Nor do we suppose it would make any difference how many applications of this kind had been made by the party thus carrying, or to how many different persons they have been made." Samms *v.* Stewart, 20 Ohio 69, 55 Am. Dec. 445. But one who holds himself out to undertake employment as a common carrier becomes liable as such on his first trip as much as on his second or any subsequent trip. Fuller *v.* Bradley, 25 Pa. St. 120. Evidence of one transaction not in accordance with the usual course of business will not show that

(II) *With Respect to Particular Kinds of Goods*— (A) *In General.* A carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession.[21]

(B) *Money and Other Valuables.* It seems to have been thought at one time that, apart from some custom or contract, those who held themselves out for the transportation of goods and merchandise were not common carriers as to money and bank-bills;[22] but even as to such persons it was early determined that if such property was received with knowledge that the drivers of the coaches or the masters of the steamboats were in the habit of carrying parcels of money, bank-bills, or other valuable property for compensation, and that the persons intrusting such parcels had reason to suppose that the carriage was in behalf of the general carrier, the latter would be liable therefor as common carrier.[23]

as to such transaction the carrier was a common carrier. Levi *v.* Lynn, etc., R. Co., 11 Allen (Mass.) 300, 87 Am. Dec. 713; Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

21. Tunnel *v.* Pettijohn, 2 Harr. (Del.) 48; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Johnson *v.* Midland R. Co., 4 Exch. 367, 18 L. J. Exch. 366, 6 R. & Can. Cas. 61. So held where the master of a vessel engaged in carrying naval stores took in charge a box of jewelry. Pender *v.* Robbins, 51 N. C. 207. Thus a common carrier may refuse to become liable for articles of glass, or contained in glass. Toy *v.* Long Island R. Co., 26 Misc. (N. Y.) 792, 56 N. Y. Suppl. 182.

Dangerous articles.— The carrier may refuse to become carrier of dangerous articles, and one who induces the carriage of such articles by concealing their nature becomes liable for damage resulting to the carrier or others. California Powder Works *v.* Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648; Farrant *v.* Barnes, 11 C. B. N. S. 553, 8 Jur. N. S. 868, 31 L. J. C. P. 137, 103 E. C. L. 553; Alston *v.* Herring, 11 Exch. 822, 25 L. J. Exch. 177.

Live stock.— It is said that the obligation of a common carrier does not necessarily extend to the carriage of live stock, where that is not a part of the business which the carrier holds himself out to transact. Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275; Michigan Southern, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466. But one who received a dog for transportation for hire was held to be a common carrier with reference thereto. Southern Express Co. *v.* Ashford, 126 Ala. 591, 28 So. 732. That carriers of live stock are common carriers see *infra*, II, A, 9.

22. *Illinois.*— Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578.

Kentucky.— Lee *v.* Burgess, 9 Bush (Ky.) 652.

Louisiana.— Sulakowski *v.* Flint, 22 La. Ann. 6.

United States.— Kuter *v.* Michigan Cent. R. Co., 1 Biss. (U. S.) 35, 14 Fed. Cas. No. 7,955, 1 Pittsb. Leg. J. (Pa.) 30, 10 West. L. J. 416.

England.— Butler *v.* Basing, 2 C. & P. 613, 12 E. C. L. 764.

But a carrier may be a common carrier of money.— Allen *v.* Sewall, 2 Wend. (N. Y.) 327.

23. *Alabama.*— Garey *v.* Meagher, 33 Ala. 630; Hosea *v.* McCrory, 12 Ala. 349.

Massachusetts.—Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133.

Mississippi.— Powell *v.* Mills, 30 Miss. 231, 64 Am. Dec. 158.

Pennsylvania.— Beckman *v.* Shouse, 5 Rawle (Pa.) 179, 28 Am. Dec. 653.

England.— Syms *v.* Chaplin, 5 A. & E. 634, 5 Dowl. P. C. 429, 6 L. J. K. B. 25, 1 N. & P. 129, 31 E. C. L. 761.

See 9 Cent. Dig. tit. "Carriers," § 473.

Custom and usage.— Where the custom shown was to carry sealed packages of money without charge, when delivered to the clerk of the boat for that purpose, it was held that it might be properly left to the jury to say whether such package belonged to that class of goods which the owner of the boat undertook to carry for hire. Knox *v.* Rives, 14 Ala. 249, 48 Am. Dec. 97. Where the custom shown was to deliver packages of money to the master of the boat and to pay him individually a compensation therefor, it was thought that the general carrier was not liable. Sewall *v.* Allen, 6 Wend. (N. Y.) 335 [*overruling* 2 Wend. (N. Y.) 327; Citizens' Bank *v.* Nantucket Steam-boat Co., 2 Story (U. S.) 16, 5 Fed. Cas. No. 2,730]. The custom of allowing the captain of a boat to carry packages of money without compensation was held not to charge the owner as common carrier. Chouteau *v.* Steamboat St. Anthony, 16 Mo. 216. But it was thought the fact that the officer of a boat was allowed to retain the compensation would not necessarily relieve the owner from the liability of common carrier in such case. Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68. And that the usage which would render the owner of the boat liable must be such as had grown up with his knowledge. Cincinnati, etc., Mail Line Co. *v.* Boal, 15 Ind. 345. Accordingly it was said that one instance of transportation of goods by a passenger train, for which freight was paid to the baggage-master, was not sufficient evidence of a custom to thus transport goods, or of knowledge of such custom on the part of the railroad company. Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

2. **Railroad Companies.** Railroad companies are responsible as common carriers for goods delivered to them for transportation,[24] even though not specifically stated in their charters.[25] Even before the road is completed goods received for transportation on construction trains are deemed to have been received for transportation by the company as a common carrier.[26]

3. **Carriers by Boat or Vessel.** The owner of a general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier as to goods received for transportation in that manner.[27] This rule applies to steamboats on inland rivers.[28] It is also applicable to canal-boats.[29]

4. **Ferrymen.** The owners of public ferry-boats are common carriers as to goods received for transportation.[30] But one who keeps a ferry for his own use

An arrangement between the carrier and his servant, by which the latter is to be paid for the carriage of particular parcels, will not exempt the carrier from responsibility for the loss of them, unless such arrangement is known to the owner thereof. Mayall *v.* Boston, etc., R., 19 N. H. 122, 49 Am. Dec. 149.

As to delivery to servant as binding carrier see *infra*, II, F, 3.

24. *Alabama.*— South-Western R.. Co. *v.* Webb, 48 Ala. 585 [*citing* Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 694].

Georgia.— East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741.

Indiana.— Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

New York.— Heineman *v.* Grand Trunk R. Co., 31 How. Pr. (N. Y.) 430.

West Virginia.— Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

United States.— Helliwell *v.* Grand Trunk R. Co., 10 Biss. (U. S.) 170, 7 Fed. 68.

Carriers of mail.— A railroad company transporting mail cars under contract with the United States government is not liable as carrier for mail matter transported in such cars. Boston Ins. Co. *v.* Chicago, etc., R. Co., (Iowa 1902) 92 N. W. 88; Bankers' Mut. Casualty Co. *v.* Minneapolis, etc., R. Co., 117 Fed. 434 [*affirming* 113 Fed. 414].

25. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578.

26. Little Rock, etc., R. Co. *v.* Glidewell, 39 Ark. 487.

27. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788. And see the following cases:

Connecticut.— Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

Georgia.— Brown *v.* Clayton, 12 Ga. 564; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

New York.— Orange Bank *v.* Brown, 3 Wend. (N. Y.) 158; Allen *v.* Sewall, 2 Wend. (N. Y.) 327; Elliott *v.* Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306.

South Carolina.— Swindler *v.* Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732.

United States.— The Montana, 22 Blatchf. (U. S.) 372, 22 Fed. 715; The Gold Hunter, Blatchf. & H. (U. S.) 300, 10 Fed. Cas. No. 5,513.

See 9 Cent. Dig. tit. "Carriers," § 463; and, generally, Shipping; Towage.

This rule seems to have been doubted in Aymar *v.* Astor, 6 Cow. (N. Y.) 266.

Even where only a part of a ship is available to the public, by reason of the other portion being taken up by a cargo shipped under special charter, the owner is still a common carrier. Gage *v.* Tirrell, 9 Allen (Mass.) 299.

28. Bennett *v.* Filyaw, 1 Fla. 451; Faulkner *v.* Wright, Rice (S. C.) 107; Porterfield *v.* Humphreys, 8 Humphr. (Tenn.) 497.

29. Arnold *v.* Halenbake, 5 Wend. (N. Y.) 33; Spencer *v.* Daggett, 2 Vt. 92. See also, generally, Canals.

The same rule is applicable to boatmen.— Harrington *v.* Lyles, 2 Nott & M. (S. C.) 88.

30. *Alabama.*— Babcock *v.* Herbert, 3 Ala. 392, 37 Am. Dec. 695.

Arkansas.— Harvey *v.* Rose, 26 Ark. 3, 7 Am. Rep. 595.

California.— May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

Iowa.— Slimmer *v.* Merry, 23 Iowa 90; Whitmore *v.* Bowman, 4 Greene (Iowa) 148.

Massachusetts.— Le Barron *v.* East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. Dec. 717.

Missouri.— Pomeroy *v.* Donaldson, 5 Mo. 36.

Ohio.— Wilson *v.* Hamilton, 4 Ohio St. 722.

Pennsylvania.— Smith *v.* Seward, 3 Pa. St. 342.

Tennessee.— Sanders *v.* Young, 1 Head (Tenn.) 218, 73 Am. Dec. 175.

Texas.— Albright *v.* Penn, 14 Tex. 290.

England.— Walker *v.* Jackson, 12 L. J. Exch. 165, 10 M. & W. 161.

See 9 Cent. Dig. tit. "Carriers," § 467; and, generally, Ferries.

Extent and limits of rule.— The liability of a ferryman as common carrier attaches only to goods or merchandise put into his custody, and not retained under the control of the owner. If the owner takes his property with him upon the ferry-boat, not putting it into the custody of the officers of the boat, the ferryman is only bound to due care and diligence. White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155; New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631.

and for the convenience of his own customers, in connection with another business, and charges no ferriage, is liable only for gross negligence.[31]

5. CARTMEN, DRAYMEN, TRUCKMEN, LIGHTERMEN, ETC. Persons who engage in the business of draymen or truckmen for transportation of goods and merchandise within a city are common carriers.[32] One who employs messengers to deliver parcels is a common carrier as to goods received for delivery in that way.[33] So the proprietor of a line of omnibuses and baggage wagons is a common carrier as to baggage received for transportation.[34] Similarly lightermen and hoymen may be common carriers.[35] But where the carriage is in pursuance of a special contract to serve one person only, the employment being therefore private and not public, the person so employed is not liable as common carrier for the goods transported.[36]

6. EXPRESS AND TRANSPORTATION COMPANIES. An express company is a common carrier of the goods which it receives and undertakes to transport.[37] So called

31. Self *v.* Dunn, 42 Ga. 528, 5 Am. Rep. 544.

But even the owner of a private ferry, operated to accommodate those passing over a road which is not a public highway, may, by undertaking for hire to carry all persons indifferently, render himself liable as a common carrier. Hall *v.* Renfro, 3 Metc. (Ky.) 51; Littlejohn *v.* Jones, 2 McMull. (S. C.) 365, 39 Am. Dec. 132.

32. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Robertson *v.* Kennedy, 2 Dana (Ky.) 430, 26 Am. Dec. 466; Cayo *v.* Pool, 21 Ky. L. Rep. 1600, 55 S. W. 887, 49 L. R. A. 251; Farley *v.* Lavary, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383; Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432; Robinson *v.* Cornish, 13 N. Y. Suppl. 577.

A regular tariff of charges is not essential to render such person a common carrier. Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.

33. Feiber *v.* Manhattan Dist. Tel. Co., 15 Daly (N. Y.) 62, 3 N. Y. Suppl. 116, 4 N. Y. Suppl. 555, 20 N. Y. St. 95, 22 Abb. N. Cas. (N. Y.) 121.

34. *Georgia.*— Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.— Parmelee *v.* Lowitz, 74 Ill. 116, 24 Am. Rep. 276; Parmelee *v.* McNulty, 19 Ill. 556.

New York.— Cole *v.* Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

Ohio.— Jones *v.* Voorhees, 10 Ohio 145.

Pennsylvania.—Beckman *v.* Shouse, 5 Rawle (Pa.) 179, 28 Am. Dec. 653.

A city express company carrying parcels and packages is a common carrier. Richards *v.* Westcott, 2 Bosw. (N. Y.) 589.

35. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Liver Alkali Co. *v.* Johnson, L. R. 9 Exch. 338, 43 L. J. Exch. 216, 31 L. T. Rep. N. S. 95; Ingate *v.* Christie, 3 C. & K. 61; Maving *v.* Todd, 4 Campb. 225, 1 Stark. 72, 16 Rev. Rep. 779, 2 E. C. L. 37; Dale *v.* Hall, Wils. Ch. 281; Trent, etc., Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127, 1 T. R. 28 note, 26 E. C. L. 479.

36. Faucher *v.* Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

So where one as warehouseman undertakes to receive property for storage and return it, the transportation being merely incidental to the business of warehouseman, he does not become liable as common carrier. Armfield *v.* Humphrey, 12 Ill. App. 90.

37. This is so for the reason that the business of an express company, as usually conducted, involves continuous custody of goods received as bailee from the time of their receipt until their final delivery, although the transportation thereof is to be effected by means of vehicles belonging to and controlled by others; the person furnishing the transportation being an employee in that respect of the express company.

Alabama.— Southern Express Co. *v.* Hess, 53 Ala. 19; Southern Express Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140.

District of Columbia.— Galt *v.* Adams Express Co., MacArthur & M. (D. C.) 124, 48 Am. Rep. 742.

Georgia.— Southern Express Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Illinois.— Gulliver *v.* Adams Express Co., 38 Ill. 503.

Indiana.— American Express Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691.

Massachusetts.— Buckland *v.* Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68.

Minnesota.— Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

Missouri.— Kirby *v.* Adams Express Co., 2 Mo. App. 369.

New York.— Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Landsberg *v.* Dinsmore, 4 Daly (N. Y.) 490; Place *v.* Union Express Co., 2 Hilt. (N. Y.) 19.

Ohio.— U. S. Express Co. *v.* Backman, 28 Ohio St. 144.

United States.— Southern Express Co. *v.* St. Louis, etc., R. Co., 3 McCrary (U. S.) 147, 10 Fed. 210, 869.

See 9 Cent. Dig. tit. "Carriers," §§ 1, 465.

Considered as forwarders merely.— It has been said that in such a case the express

transportation or dispatch companies or fast freight lines which contract for through transportation of goods in cars which are taken upon various lines of road to the destination of the goods are common carriers.[38]

7. Forwarding Agents. A mere forwarding agent, who does not receive goods into his custody, but as agent for the shipper merely contracts for their transportation by carriers, and who has no interest in the freight, but receives compensation from the shipper as his agent, is not a common carrier.[39] But where a carrier undertakes to transport goods to their destination, deliver them to a purchaser, and return the money received therefor to the consignor, he is a carrier as to the transportation of the goods and an agent as to the sale, and a carrier again as to the money while transporting it to such consignor, and for loss of the money he is liable therefore, not only in case of negligence, but under the same conditions that would charge liability upon a carrier.[40]

8. Tugboats, Special Trains, Etc. It is evident that motive power in connection with the transportation of goods may be furnished by others who have no custody of the goods, and therefore, not being bailees, are not common carriers. It is therefore held that owners of tugboats are not common carriers of the goods on vessels which they tow,[41] and a railroad company which furnishes men

company may be considered only a forwarder. Hersfield *v.* Adams, 19 Barb. (N. Y.) 577. But this is contrary to the weight of authority, and it has been held that such a company cannot, by calling itself an express forwarder, avoid liability as a common carrier. Buckland *v.* Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68. See also *infra*, II, A, 7.

An agreement between a railroad and an express company for transportation of light freight on passenger trains held not to relieve the company from liability as a common carrier to one who had no notice that the business was not being done by the railroad company. Langworthy *v.* New York, etc., R. Co., 2 E. D. Smith (N. Y.) 195.

Statutory provisions.— In Indiana express companies are by statute made common carriers. American Express Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691. And failure of such company to comply with the provision of the act will not relieve it from responsibility. U. S. Express Co. *v.* Rush, 24 Ind. 403.

38. Read *v.* Spaulding, 5 Bosw. (N. Y.) 395; Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith (N. Y.) 115; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847.

39. Roberts *v.* Turner, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311.

Where, however, the goods are received by the carrier for transportation and delivered to a connecting carrier, the first carrier is not a mere forwarding agent. Buckland *v.* Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68; Simmons *v.* Law, 3 Keyes (N. Y.) 217, 4 Abb. Dec. (N. Y.) 241; Teall *v.* Sears, 9 Barb. (N. Y.) 317; Read *v.* Spaulding, 5 Bosw. (N. Y.) 395; Pontifex *v.* Hartley, 62 L. J. Q. B. 196, 4 Reports 245. A carrier undertaking to transport from a place within to a place without the realm held a common carrier. Crouch *v.* London, etc., R. Co., 14 C. B. 255, 2 C. L. R. 188, 18 Jur. 148, 23 L. J. C. P. 73, 7 R. & Can. Cas. 717, 2 Wkly. Rep. 166, 78 E. C. L. 255. See also *infra*, II, M, 3.

40. Kemp *v.* Coughtry, 11 Johns. (N. Y.) 107; Harrington *v.* McShane, 2 Watts (Pa.) 443, 27 Am. Dec. 321.

But with reference to custody of goods at destination, such person may be bailee only. Williams *v.* O'Daniels, 35 Tex. 542.

The carrier will not be liable for the failure of its agent to account for the money, unless it appears that he had authority to act in that capacity. Taylor *v.* Wells, 3 Watts (Pa.) 65.

As to carriage C. O. D. see, generally, *infra*, II, L, 7.

41. *Illinois.*—Knapp *v.* McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290.

Kentucky.— Varble *v.* Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435.

Maryland.— Pennsylvania, etc., Steam Nav. Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

New York.— Wells *v.* Steam Nav. Co., 2 N. Y. 204; Emiliusen *v.* Pennsylvania R. Co., 30 N. Y. App. Div. 203, 51 N. Y. Suppl. 606; Caton *v.* Rumney, 13 Wend. (N. Y.) 387. To same effect see Alexander *v.* Greene, 3 Hill (N. Y.) 9, concerning which the court in Wells *v.* Steam Nav. Co. said: "It is true that the judgment . . . was reversed by the court of errors. (7 Hill (N. Y.) 533.) But what particular point or principle of law was decided by the court or what the majority of the members thought upon any particular question of law no one can tell."

Pennsylvania.— Leonard *v.* Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587.

United States.— The Neaffie, 1 Abb. (U. S.) 465, 17 Fed. Cas. No. 10,063; The Oconto, 5 Biss. (U. S.) 460, 18 Fed. Cas. No. 10,421; The Stranger, 1 Brown Adm. (U. S.) 281, 23 Fed. Cas. No. 13,525, 4 Am. L. T. Rep. 161, 3 Chic. Leg. N. 217, 13 Int. Rev. Rec. 150.

Contra.— Bussey *v.* Mississippi Valley Transp. Co., 24 La. Ann. 165, 13 Am. Rep.

and motive power for the transportation of special trains, such as a circus train, belonging to the person for whom the service is rendered,[42] is not a common carrier with reference to the property transported on such train.[43] So a bridge company, owning a bridge and its approaches, which is used by a railway company, is not a common carrier as to goods hauled over the bridge by the railway company.[44]

9. Carriers of Live Stock. In view of the fact that animals have some volition and propensities of their own which may lead to loss or damage regardless of the control exercised by those who undertake their transportation, it has been held in some cases that carriers of live stock are not liable as common carriers, but are only bound to transport with ordinary care and skill.[45] But the decided weight of authority is that a carrier receiving live stock for transportation does so under the usual liabilities which attach to the carriers of goods,[46] subject to the rule applicable in case of other goods, that he is not accountable for loss resulting from the inherent nature of the property, and not due to any negligence or fault on his part.[47]

10. Receivers and Trustees. A receiver appointed by the court to operate a

120; Smith *v.* Pierce, 1 La. 349; Walston *v.* Myers, 50 N. C. 174. See also White *v.* Steam-Tug Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180; Vanderslice *v.* The Superior, 28 Fed. Cas. No. 16,843, 4 Pa. L. J. Rep. 388, 2 Am. L. J. N. S. 347, 13 Law Rep. 399.

See, generally, Towage.

42. But the mere fact that the car in which the property is being transported belongs to the owner of the property will not relieve the railroad company from the ordinary liability of a carrier. Fordyce *v.* McFlynn, 56 Ark. 424, 19 S. W. 961. Although a special contract between the company and the owner of the property as to liability for loading and unloading may be valid. Central R., etc., Co. *v.* Anderson, 58 Ga. 393; East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

If a railroad company hires or charters cars to any one absolutely, the hirer cannot look to the company for damages in case of injury to his property as a common carrier. His remedy for injuries must be on contract of hire, and the implied undertaking of the company, that the hired cars are substantial and will be duly carried to their point of destination. East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741.

43. Coup *v.* Wabash, etc., R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567; Chicago, etc., R. Co. *v.* Wallace, 66 Fed. 506, 24 U. S. App. 589, 14 C. C. A. 257, 30 L. R. A. 161.

It has been held otherwise in a case where cars of the person for whom the service was being rendered were injured while the train in which they were being hauled was under the control of the conductor as agent of the railroad company, and were injured in the operation of the road. Mallory *v.* Tioga R. Co., 39 Barb. (N. Y.) 488.

A railroad company engaged in switching cars for the purpose of transferring them to or from its own line may be a common carrier (Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899); but not where the service is being rendered for other carriers, and not in consequence of the duty of the railroad company as carriers of the goods (Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289).

44. Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

45. Heller *v.* Chicago, etc., R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541; Baker *v.* Louisville, etc., R. Co., 10 Lea (Tenn.) 304.

Rule stated and criticized.— "The liability of a carrier of animals is essentially different from that of a carrier of merchandise or other inanimate property." Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 204, 10 Am. Rep. 355. The common-law duty of a carrier to transport goods has been held not to require transportation of cattle for which special arrangements were necessary. Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275; Michigan Southern, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466. This theory was perhaps adopted in analogy to that under which a carrier of slaves was held not to be a common carrier of goods, inasmuch as slaves had volition and were not under the complete control of the carrier. Boyce *v.* Anderson, 2 Pet. (U. S.) 150, 7 L. ed. 379.

46. *Kansas.*— Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494.

Nebraska.— Chicago, etc., R. Co. *v.* Williams, 61 Nebr. 608, 85 N. W. 832; Atchison, etc., R. Co. *v.* Washburn, 5 Nebr. 117.

Ohio.— Wilson *v.* Hamilton, 4 Ohio St. 722.

Oregon.— See Honeyman *v.* Oregon, etc., R. Co., 13 Oreg. 352, 10 Pac. 668, 57 Am. Rep. 20.

Pennsylvania.— Ritz *v.* Pennsylvania R. Co., 3 Phila. (Pa.) 82, 15 Leg. Int. (Pa.) 75.

Vermont.— Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

See 9 Cent. Dig. tit. "Carriers," § 920.

47. See, generally, *infra*, II, D, 2, c, (II).

railroad is a common carrier, the same as the corporation which he represents, so far as he transacts the business of carrying goods,[48] and the same rule applies to trustees taking possession of a railroad and operating it under a trust deed or mortgage.[49]

B. Public Employment; Duty to Serve All — 1. In General. Common carriers owe to the public the duty of carrying indifferently for all who may employ them, and in the order in which the application is made, and without discrimination as to terms.[50] They may, however, restrict their business so as to exclude particular classes of goods, and they are not bound to receive dangerous articles, such as nitro-glycerine, dynamite, gunpowder, oil of vitriol, matches, etc.[51] But as to kinds of property which the carrier is in the habit of carrying in the prosecution of his business, he is bound to serve all customers alike.[52]

2. Duty to Furnish Cars — a. In General. A railroad company, engaged in the business of transporting freight as a common carrier, is bound to furnish suitable cars as required by customers,[53] upon reasonable notice,[54] whenever it can

48. Paige *v.* Smith, 99 Mass. 395; Newell *v.* Smith, 49 Vt. 255; Beers *v.* Wabash, etc., R. Co., 34 Fed. 244. And see, as cases where a receiver has been held liable as common carrier of goods or passengers, Nichols *v.* Smith, 115 Mass. 332; Bartlett *v.* Kein, 50 N. J. L. 260, 13 Atl. 7; Melendy *v.* Barbour, 78 Va. 544. See also, generally, Receivers.

49. Rogers *v.* Wheeler, 43 N. Y. 598; Faulkner *v.* Hart, 44 N. Y. Super. Ct. 471. See also, generally, Trusts.

50. State *v.* Cincinnati, etc., R. Co., 47 Ohio St. 130, 138, 23 N. E. 928, 7 L. R. A. 319. And see Ayres *v.* Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226; Doty *v.* Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. ed. 291; Walker *v.* Jackson, 10 M. & W. 161, 16 L. J. Exch. 165.

Carriers are bound to receive and transport all freight tendered, according to the custom and usage of their business. Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

It is the specific duty of carriers to serve all alike. Favors and preferences are to be avoided. A common carrier cannot carry for one and refuse to carry for another. A railroad is without right to grant privileges where the public is concerned. Cumberland Telephone, etc., Co. *v.* Texas, etc., R. Co., 52 La. Ann. 1850, 28 So. 284.

One railroad company is not justified in refusing to permit the owner of a coal mine to ship coal over its road because such owner also ships coal from the same mine over the road of another railroad company. It is the duty of a railroad company to carry any freight that is offered, provided its legal charges for such carriage are paid. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 287, 21 N. E. 824.

It is not necessary to prove any special undertaking in an action for refusal to carry goods. Doty *v.* Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773.

The action for refusal to carry, being founded on a public duty and not on special contract, arises *ex delicto*. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

Under Texas statute, apparently stating the common-law rule, held that a carrier was liable for receiving the goods of one shipper after rejecting those of a prior applicant. Houston, etc., R. Co. *v.* Smith, 63 Tex. 322.

A railway company is not bound to receive goods at a point on its line where it has no facilities for receiving them for transportation. Oxlade *v.* North Eastern R., 15 C. B. N. S. 680, 109 E. C. L. 680; Johnson *v.* Midland R. Co., 4 Exch. 367, 18 L. J. Exch. 366, 6 R. & Can. Cas. 61.

51. Therefore carriers may impose conditions with reference to the carriage of such articles which amount to a discrimination as between them and ordinary goods and merchandise. California Powder Works *v.* Atlantic & P. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648. So held as to fragile goods, such as glassware. People *v.* Babcock, 16 Hun (N. Y.) 313.

52. Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

If the goods cannot lawfully be transported in the state, as, for instance, intoxicating liquors, which are subject to police regulation, a refusal to transport will be justified. Milwaukee Malt Extract Co. *v.* Chicago, etc., R. Co., 73 Iowa 98, 34 N. W. 761; State *v.* Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706; Bluthenthal *v.* Southern R. Co., 84 Fed. 920.

53. It is reasonable accommodation for goods ready for shipment which the railroad is required to furnish, and it is not bound to provide cars for coal not yet mined, into which the shipper may hoist his coal as dug (Illinois, etc., R. Co. *v.* People, 19 Ill. App. 141), or cars for live stock not yet ready for loading within a reasonable time before the departure of the train (Frazier *v.* Kansas City, etc., R. Co., 48 Iowa 571).

54. It is entitled to reasonable time in which to furnish cars after requisition is made by the shipper. Huston *v.* Wabash R. Co., 63 Mo. App. 671.

After cars have been provided, in response

do so with reasonable diligence without jeopardizing its other business,[55] and it cannot discriminate between shippers at points where it competes with other lines and those at points where there is no such competition.[56] But it is not bound to provide in advance for extraordinary occasions or an unusual influx of freight on its road.[57]

b. Excuses For Not Furnishing Cars. In accordance with the principles already stated it is clear that inability to furnish cars,[58] except by undue interference with the general business of the railroad company, and the rights of other shippers, will constitute a defense in an action for failure to furnish cars when requested,[59] unless otherwise provided by statute.[60]

3. Elevator and Stock-Yard Cases. A railroad company cannot discriminate between elevators which may be reached from its line, and by agreement undertake to deliver grain in bulk at one elevator while refusing to accept it for delivery at another.[61] So a railroad company may be compelled by mandamus to deliver cattle at stock-yards which are accessible over its line.[62]

to notice from the shipper, the carrier will not be relieved from liability for refusing to accept the property offered for transportation in such cars, on the ground that there is an unusual and unprecedented demand at that time and place by others. Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846.

55. Newport News, etc., Co. *v.* Mercer, 96 Ky. 475, 16 Ky. L. Rep. 555, 29 S. W. 301; Ayres *v.* Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.

A reasonable tender of cars is all that can be required of a railroad company. Cumberland Telephone, etc., Co. *v.* Texas, etc., R. Co., 52 La. Ann. 1850, 28 So. 284.

56. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

Mandamus.— The duty to furnish cars without discrimination may be enforced by mandamus. Cumberland Telephone, etc., Co. v. Texas, etc., R. Co., 52 La. Ann. 1850, 28 So. 284; Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128, 11 S. Ct. 128, 35 L. ed. 73. See also, generally, MANDAMUS.

57. Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574. See also Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846.

58. Strikes.— Interference with the business of a railroad company by strikers, who have quit the company's employ, may also constitute an excuse. Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63. So if, by reason of a strike, the company has been compelled to take the coal trains usually used for accommodating shippers of coal in order to haul coal to supply its own engines, this will constitute a defense. Louisville, etc., R. Co. *v.* Queen City Coal Co., 99 Ky. 217, 18 Ky. L. Rep. 126, 35 S. W. 626. But a reduction in wages which causes a strike, and which disables the company from carrying on its business, will not excuse the company for failure to furnish accommodations. Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

That railroad has been placed under military control will excuse it for failure to furnish accommodations to those who have not a military permit. Phelps *v.* Illinois Cent. R. Co., 94 Ill. 548; Illinois Cent. R. Co. *v.* Hornberger, 77 Ill. 457.

59. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Newport News, etc., Co. *v.* Mercer, 96 Ky. 475, 16 Ky. L. Rep. 555, 29 S. W. 301.

Negligence a question for jury.— Whether the company is negligent, in view of its general business, in not furnishing cars as requested, is for the jury. Hastings *v.* New York, etc., R. Co., 3 Silv. Supreme (N. Y.) 422, 6 N. Y. Suppl. 836, 25 N. Y. St. 249. So is the question as to whether the negligence of the shipper in receiving previous shipments at point of destination is an excuse to the carrier for refusing subsequent shipments. Cobb *v.* Illinois Cent. R. Co., 38 Iowa 601.

60. The liability of a carrier for failure to furnish transportation is founded in general on his refusal to make the facilities which he has available to all without discrimination, and not on the inadequacy of his accommodations to enable him to supply facilities as required. But by statute in Texas a railroad company is required to furnish reasonable facilities, and it is liable in damages for not doing so. Texas, etc., R. Co. *v.* Fambrough, (Tex. Civ. App. 1900) 55 S. W. 188; Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225; Davis *v.* Texas, etc., R. Co., 91 Tex. 505, 44 S. W. 822; Galveston, etc., R. Co. *v.* Schmidt, (Tex. Civ. App. 1894) 25 S. W. 452; Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80.

Statute strictly construed.— Such a statute, being penal in its nature, will be strictly construed. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

61. Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631.

A company may refuse to receive grain for an elevator which cannot be reached from its line of road, or which can be reached only by arrangements with other railroads. People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631; Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

62. And this is true, notwithstanding the railroad company has a contract with another stock-yard company to deliver to the latter all live stock transported to that place.

4. Prepayment of Charges as Condition to Right to Have Transportation. A carrier may make prepayment of freight a condition of furnishing transportation.[63]

5. Special Privileges to Express Companies. It is not the duty of a railroad company as common carrier to carry the goods of an express company and the messengers in charge of them.[64] Such privileges are acquired by the express company, if at all, as the result of special contract, and therefore a railroad company is not bound to furnish equal facilities to all express companies who do business over its line of road.[65]

6. Transportation to Points Beyond Line. A railroad company cannot be required to transport goods to a point beyond its line,[66] unless it holds itself out to do so.[67]

7. What Constitutes Refusal to Transport. In order that there be a refusal which will render a carrier liable in damages there must be a tender of goods for shipment.[68] Refusal by an agent will render the carrier liable if the agent is permitted by the carrier to hold himself out as authorized to receive freight in such manner as to justify the belief that he has such authority.[69] If there is a regulation as to the time when goods should be tendered it must be reasonable.[70]

It cannot by such contract restrict itself to delivery to a particular company furnishing facilities for the handling of live stock. Covington Stock Yards Co. *v.* Keith, 139 U. S. 128, 11 S. Ct. 128, 35 L. ed. 73.

63. Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; Wilder *v.* St. Johnsbury, etc., R. Co., 66 Vt. 636, 30 Atl. 41.

But unless prepayment is required, failure to tender charges in advance will not be an excuse for refusing to transport. Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

If bill of lading provides for payment of charges at end of transportation, failure to tender such charges in advance will not be a defense for refusal to receive. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

64. Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93.

65. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Sargent *v.* Boston, etc., R. Corp., 115 Mass. 116; Memphis, etc., R. Co. *v.* Southern Express Co., 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. ed. 791. And see Old Colony R. Co. *v.* Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661. *Contra,* New England Express Co. *v.* Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31; McDuffee *v.* Portland, etc., R. Co., 52 N. H. 430, 13 Am. Rep. 72.

As to special privileges at depots and on trains, in connection with the carriage of passengers see *infra,* III, B, 3.

Rule does not apply to telegraph companies.— But it is said that a contract between a railroad company and a telegraph company, by which the railroad gives special privileges to the telegraph company with reference to the transportation and distribution of poles and other material along its line, and whereby it agrees not to give similar special privileges to another telegraph company, is against public policy and void. Cumberland Telephone, etc., Co. *v.* Morgan's Louisiana, etc., R. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442.

66. People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631; Cobb *v.* Illinois Cent. R. Co., 38 Iowa 601.

67. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

If an express company establishes limits in a city beyond which it will not call for nor deliver packages, one outside the limits thus reasonably fixed cannot complain, although in another direction the limits extend further from the company's office. Bullard *v.* American Express Co., 107 Mich. 695, 65 N. W. 551, 61 Am. St. Rep. 358, 33 L. R. A. 66.

Branch line operated under lease.— The duty of a railroad company to transport to points on its line does not necessarily extend to a branch line operated under a lease. Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716.

68. Little Rock, etc., R. Co. *v.* Conatser, 61 Ark. 560, 33 S. W. 1057.

To constitute a tender it is not essential that the shipper prepare and offer his freight ready for shipment after the company has refused to furnish him transportation. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

69. Seasongood, etc., Co. *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270.

Refusal by the agent, on the ground of personal animosity between himself and the shipper, will render the carrier liable. Lanning *v.* Sussex R. Co., 1 N. J. L. J. 21.

70. Alsop *v.* Southern Express Co., 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271.

So as to regulations as to employment of workmen see Johnson *v.* Three Hundred and Eighteen Tons of Coal, 44 Conn. 548, 14 Blatchf. (U. S.) 453, 23 Fed. Cas. No. 14,010, 4 Law & Eq. Rep. 105.

8. What Damages Recoverable For Refusal to Receive. The damages for which a carrier is liable for refusal to receive property for transportation include loss occasioned by the necessary delay in securing transportation, and the cost of keeping the goods during the delay,[71] also the difference between the value of the property where it was tendered for transportation and its value at the place to which it was to be taken, less expense of transportation;[72] also reasonable profits that could have been earned in the shipper's business, of which he has been deprived by inability to secure transportation;[73] also loss of the benefit of a contract which the shipper was undertaking to perform by shipment of the goods in question.[74] The carrier wrongfully refusing to accept property for transportation is liable to the shipper for the expense of protecting such property, as well as the proximate damages for delay in its transportation,[75] and for deterioration of the property during such delay, and proximately resulting therefrom.[76] So the carrier is liable for the expense of delivering the property a second time for transportation,[77] and for loss of the property by theft, where the shipper has had no reasonable opportunity to make a safe disposition of the goods refused.[78] But refusal of a carrier to receive goods for a particular consignee gives rise to a right of action by the shipper, and not by the consignee, and the latter cannot recover for damages suffered.[79] If the refusal is the result of ill-will, or wilful disregard of the rights of the person tendering the goods for transportation, exemplary damages may be given.[80]

C. Transportation Must Be For Hire. No person is a common carrier in the sense of the law who performs the service without hire.[81] But it is not necessary that there be an express contract for compensation.[82] Nor is it neces-

71. Houston, etc., R. Co. *v.* Smith, 63 Tex. 322.

72. People *v.* New York, etc., R. Co., 22 Hun (N. Y.) 533; Inman *v.* St. Louis Southwestern R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37.

Evidence of fluctuations in market price is admissible. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320. If the refusal is not of specific property, but generally to transport a particular kind of property for complainant, market value is immaterial. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457. In such a case loss to complainant's business may be shown. Central R. Co. *v.* Logan, 77 Ga. 804, 2 S. E. 465.

73. Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

74. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225, also holding it to be immaterial whether the carrier had knowledge of such contract.

75. St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

76. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

77. Inman *v.* St. Louis Southwestern R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37.

78. Seasongood, etc., Co. *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270.

79. Lafaye *v.* Harris, 13 La. Ann. 553. So failure of a carrier to provide facilities for the shipment of a commodity, whereby the party is prevented from selling such commodity to others for shipment, does not give rise to a right of action against the carrier. Little Rock, etc., R. Co. *v.* Conatser, 61 Ark. 560, 33 S. W. 1057.

80. Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716.

81. Choteau *v.* Steamboat St. Anthony, 16 Mo. 216; Citizens' Bank *v.* Nantucket Steam Boat Co., 2 Story (U. S.) 16, 5 Fed. Cas. No. 2,730.

One who carries property gratuitously is liable for gross negligence only. Louisville, etc., R. Co. *v.* Gerson, 102 Ala. 409, 14 So. 873; Dudley *v.* Camden, etc., Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501.

Where a carrier receives a special class of property, which he is not bound to carry, only on condition that no charge shall be made therefor and no responsibility incurred, he does not become liable as common carrier in case of loss. Fay *v.* Steamer New World, 1 Cal. 348.

The definition already given involves the element of transportation for hire, and the liability of common carrier does not arise as to goods transported without compensation. Payment of freight on the part of the shipper, or at any rate the right of the carrier to sue for and recover compensation, lies at the foundation of the carrier's liability. Knox *v.* Rives, 14 Ala. 249, 48 Am. Dec. 97. See also *supra*, II, A, 1.

82. If by reason of usage, or the general nature of the business, the right to compensation arises by implication, the carrier is liable as a carrier for hire. Gray *v.* Missouri River Packet Co., 64 Mo. 47; Kirtland *v.* Montgomery, 1 Swan (Tenn.) 452.

That carrier intended to carry goods gratuitously, without having indicated that in-

sary that compensation be provided for under an express or implied agreement to pay for the particular service.[83]

D. Liability in General, Aside From Contract — 1. General Rule; Insurer. The general rule as to the common carrier's liability with reference to the goods in his possession as carrier, and regardless of any contractual exceptions, is that he is liable for all loss or destruction of or injury to such goods,[84] not occasioned by the act of God[85] or the public enemy.[86] Therefore, where the loss is not due to the excepted cases, proof of negligence is immaterial,[87] and the carrier cannot escape liability by proving reasonable care and diligence.[88] In the English cases, by which the rule of exceptional liability was first established, it was said that the carrier was an insurer of the goods as against all loss or injury not resulting from the excepted cases,[89] and in some of the cases in the United States the term "insurer" is used;[90] but nothing more is meant by this expression than that the carrier is absolutely liable, with only the exceptions recognized in the rule as above stated. The general rule as to the carrier's liability is illustrated by cases holding the carrier liable for loss of goods by fire,[91]

tention to the shipper, will not relieve the carrier from his usual liability. Gray *v.* Missouri River Packet Co., 64 Mo. 47.

83. If the transportation is a part of an undertaking on the part of the carrier for which there is a valid consideration, it will be a carriage for hire, although it is agreed that in connection with the general advantage resulting to the carrier from the entire transaction this particular part of the service is to be rendered without charge. Spears *v.* Lake Shore, etc., R. Co., 67 Barb. (N. Y.) 513; Pierce *v.* Milwaukee, etc., R. Co., 23 Wis. 387.

So where it was customary for the carrier to transport baggage free for his employees, held that the transportation of such baggage was not gratuitous in such sense as to relieve the carrier from his common-law liability. Gott *v.* Dinsmore, 111 Mass. 45.

84. *California.*— Bohannan *v.* Hammond, 42 Cal. 227; Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268.

Connecticut.— Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235.

Georgia.— Central R., etc., Co. *v.* Hines, 19 Ga. 203.

Illinois.— U. S. Express Co. *v.* Hutchins, 67 Ill. 348; Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92.

Louisiana.— Thomas *v.* Ship Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509.

Massachusetts.— Gage *v.* Tirrell, 9 Allen (Mass.) 299.

Minnesota.— Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

Mississippi.—Powell *v.* Mills, 30 Miss. 231, 64 Am. Dec. 158.

Missouri.— Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327; Wolf *v.* American Express Co., 43 Mo. 421, 97 Am. Dec. 406.

New Hampshire.—Moses *v.* Norris, 4 N. H. 304.

North Carolina.— Harrell *v.* Owens, 18 N. C. 273.

Pennsylvania.— Gordon *v.* Little, 8 Serg. & R. 533, 11 Am. Dec. 632.

South Carolina.—Porcher *v.* North Eastern R. Co., 14 Rich. (S. C.) 181; Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; Campbell *v.* Morse, Harp. (S. C.) 468.

Tennessee.— Watson *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 255; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Craig *v.* Childress, Peck (Tenn.) 270, 14 Am. Dec. 751.

Texas.— Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617.

Virginia.—Murphy *v.* Staton, 3 Munf. (Va.) 239.

Wisconsin.— Klauber *v.* American Express Co., 21 Wis. 21, 91 Am. Dec. 452.

England.— Riley *v.* Horne, 5 Bing. 217, 2 M. & P. 331, 30 Rev. Rep. 576, 15 E. C. L. 549; Nugent *v.* Smith, 1 C. P. D. 423, 45 L. J. C. P. 697, 34 L. T. Rep. N. S. 827, 25 Wkly. Rep. 117; Trent, etc., Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127, 1 T. R. 28 note, 26 E. C. L. 479; Oakley *v.* Portsmouth, etc., Steam-packet Co., 11 Exch. 618, 25 L. J. Exch. 99, 4 Wkly. Rep. 236.

See 9 Cent. Dig. tit. "Carriers," § 481.

85. See *infra*, II, D, 2, a.

86. See *infra*, II, D, 2, b.

87. McCall *v.* Brock, 5 Strobh. (S. C.) 119.

88. Agnew *v.* Steamer Contra Costa, 27 Cal. 425, 87 Am. Dec. 87; Mershon *v.* Hobensack, 22 N. J. L. 372; Bearse *v.* Ropes, 1 Sprague (U. S.) 331, 2 Fed. Cas. No. 1,192, 19 Law Rep. 548.

89. Riley *v.* Horne, 5 Bing. 217, 2 M. & P. 331, 30 Rev. Rep. 576, 15 E. C. L. 549; Harris *v.* Packwood, 3 Taunt. 264, 272, 15 Rev. Rep. 755. But in the latter of these cases it is said by Lawrence, J., that the word "insurance," used in this connection, "is a very foolish word."

90. Hooper *v.* Wells, 27 Cal. 11, 85 Am. Dec. 211; Costigan *v.* Michael Transp. Co., 33 Mo. App. 269.

91. *Illinois.*— Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286.

Kentucky.— Farley *v.* Lavary, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383.

Maine.— Parker *v.* Flagg, 26 Me. 181, 45 Am. Dec. 101.

Missouri.— McFadden *v.* Missouri Pac. R.

water,[92] or other accidental cause,[93] or by negligence or wrong of the carrier's servants or third persons.[94] However, in the fuller development of the rule of carrier's liability it has been held that he is not liable for loss or damage due to the intrinsic qualities of the goods carried,[95] or the act or fault of the shipper,[96] and therefore the rule might now be more fully stated as being that the common carrier is liable for all loss or injury not due to the act of God or the public enemy, the inherent nature or qualities of the goods, or the act or fault of the owner or shipper,[97] it being understood that as to all of these excepted cases the carrier may be liable by reason of his own negligence or that of his agents, servants, or employees.[98] This general rule of liability is applicable to carriers by water as well as those who carry by land transportations.[99]

2. EXCEPTIONS — a. Act of God. The term "act of God," used to express a cause of loss or damage, for the consequences of which the carrier will not be liable, means some casualty not due to human agency.[1] The terms "inevitable accident" and "unavoidable accident" are sometimes used as synonymous with "act of God,"[2] but they lack the suggestion that the loss is due to other than

Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

New York.— Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes (N. Y.) 64.

Ohio.— Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month. 75.

See 9 Cent. Dig. tit. "Carriers," § 481.

92. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Campbell *v.* Morse, Harp. (S. C.) 468; Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654; The Zenobia, Abb. Adm. (U. S.) 80, 30 Fed. Cas. No. 18,209.

93. Brousseau *v.* Ship Hudson, 11 La. Ann. 427.

94. Mershon *v.* Hobensack, 22 N. J. L. 373; Howe *v.* Oswego, etc., R. Co., 56 Barb. (N. Y.) 121; Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 170, 5 Am. Dec. 206.

95. Hall *v.* Renfro, 3 Metc. (Ky.) 51; Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42. And see *infra*, II, D, 2, d.

96. See *infra*, II, D, 2, c.

97. Clark *v.* Richards, 1 Conn. 54.

98. As to the liability of a carrier for negligence in the excepted cases of loss see *infra*, II, E, 2, b.

99. *Alabama.*— Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

Connecticut.— Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Richards *v.* Gilbert, 5 Day (Conn.) 415.

Missouri.— Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439.

South Carolina.— Harrington *v.* Lyles, 2 Nott & M. (S. C.) 88; McClures *v.* Hammond, 1 Bay (S. C.) 99, 1 Am. Dec. 598.

United States.— The Ship Maggie Hammond *v.* Morland, 9 Wall. (U. S.) 435, 19 L. ed. 772; The Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7, 16 L. ed. 41; Tompkins *v.* The Dutchess of Ulster, 24 Fed. Cas. No. 14,087*a*.

See 9 Cent. Dig. tit. "Carriers," § 482.

Thus the owners of a steamboat are liable for loss of goods by robbery (The Steamboat Belfast *v.* Boon, 41 Ala. 50; Boon *v.* Steamboat Belfast, 40 Ala. 184, 88 Am. Dec. 761), or theft (Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 170, 5 Am. Dec. 206). But this was denied in two earlier cases in this country. Aymer *v.* Astor, 6 Cow. (N. Y.) 266; Eveleigh *v.* Sylvester, 2 Brev. (S. C.) 178.

Under the civil law in force in Louisiana the common carrier was not held to the same strict liability as under the common law. Hunt *v.* Morris, 6 Mart. (La.) 676.

Carriers on inland waters.— The general rule of liability applies to carriers navigating inland waters. Steamboat Belfast *v.* Boon, 41 Ala. 50; McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

Usage.— Some cases suggest a limitation of the liability of carriers by water, growing out of established usage, but in none of them is it held that any such usage is shown. Singleton *v.* Hilliard, 1 Strobh. (S. C.) 203; Patton *v.* Magrath, Dudley (S. C.) 159, 31 Am. Dec. 552; Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422, 9 N. Y. Leg. Obs. 281.

1. It means the action of the forces of nature, in opposition to the act of man, such as lightning, storms, earthquakes, and the like.

Colorado.— Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615.

Georgia.— Central Line of Boats *v.* Lowe, 50 Ga. 509; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Virginia.—Friend *v.* Woods, 6 Gratt. (Va.) 189, 52 Am. Dec. 119.

United States.—Dibble *v.* Morgan, 1 Woods (U. S.) 406, 7 Fed. Cas. No. 3,881; Tompkins *v.* The Dutchess of Ulster, 24 Fed. Cas. No. 14,087*a*.

England.— Forward *v.* Pittard, 1 T. R. 27, 1 Rev. Rep. 142.

See 9 Cent. Dig. tit. "Carriers," § 523; and, generally, ACT OF GOD, 1 Cyc. 758.

2. Walpole *v.* Bridges, 5 Blackf. (Ind.) 222; Neal *v.* Saunderson, 2 Sm. & M. (Miss.) 572, 41 Am. Dec. 609; Fowler *v.* Davenport, 21 Tex. 626. See also, generally, ACT OF GOD, 1 Cyc. 758.

human agency, and therefore their use is not satisfactory. Indeed, it has been said that "act of God" is distinguishable from "inevitable accident."[3] In the civil law the carrier is said to be excused by "*vis major*," and also by "*casus fortuitous*,"[4] but the rule of carrier's liability by the civil law is not the same as by the common law,[5] and these terms are not equivalent to "act of God." To constitute act of God the casualty must be not only the direct result of natural causes, but one which is in no way contributed to by human agency.[6] Thus, a loss due to collision,[7] or the stranding of a vessel,[8] will not come within the exception. So where loss is due to the vessel in which the goods are being carried striking a hidden anchor,[9] or mast,[10] the carrier is liable. But the striking of a vessel on a rock or snag not generally known, and not actually known to the master of the vessel, has been held to be act of God.[11] Cases of this kind are, however, doubtful, and some of them are to be explained as having reference to an exception in the bill of lading of "perils of navigation," or like clause.[12] The general rule undoubtedly is that for injuries due to the vessel running against rocks on the shore, no matter how the officers may have been misled, the carrier is liable.[13] In accordance with the general rule it has uniformly been held that the carrier is liable for loss by fire (due to some human agency, and not lightning, spontaneous combustion, or some other operation of nature), even though originating outside of the premises controlled by the carrier, and not due to any act or fault of the carrier or his servants, and of such nature that by no human skill or foresight on the part of the carrier or his servants could the loss have been avoided.[14] A flood, however, of such extraordinary character that it could not have been seen or provided against is an act of God, and the carrier is not responsible for loss of goods in his possession resulting therefrom.[15] So it is said that a snow-storm which blocks up a railway and prevents the moving of trains

3. Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292; Proprietors Trent, etc., Nav. Co. *v.* Wood, 4 Dougl. 297, 3 Esp. 127, 1 T. R. 28 note, 26 E. C. L. 479.

4. Brousseau *v.* Ship Hudson, 11 La. Ann. 427.

5. Hunt *v.* Morris, 6 Mart. (La.) 676.

6. New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292.

7. Mershon *v.* Hobensack, 22 N. J. L. 372; Hays *v.* Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627.

8. McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

9. Trent, etc., Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127, 1 T. R. 28 note, 26 E. C. L. 479.

10. Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292.

11. Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235; Smyrl *v.* Nielson, 2 Bailey (S. C.) 421, 23 Am. Dec. 146; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515.

12. Friend *v.* Woods, 6 Gratt. (Va.) 189, 52 Am. Dec. 119. And see Hays *v.* Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627.

13. Ferguson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582; McArthur *v.* Sears, 21 Wend. (N. Y.) 190; Craig *v.* Childress, Peck (Tenn.) 270, 14 Am. Dec. 751.

14. Gilmore *v.* Carman, 1 Sm. & M. (Miss.) 279, 40 Am. Dec. 96; Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes (N. Y.) 64; Parsons *v.* Monteath, 13 Barb. (N. Y.) 353; Gould *v.* Hill, 2 Hill (N. Y.) 623; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639; Forward *v.* Pittard, 1 T. R. 27, 1 Rev. Rep. 142. And see *supra*, II, D, 1.

The great Chicago fire.— Thus it was held that goods in the hands of carriers destroyed in the great Chicago fire of 1871 were not lost by act of God, and that the carriers were liable therefor. Merchants' Despatch Co. *v.* Smith, 76 Ill. 542.

15. Smith *v.* Western R. Co., 91 Ala. 455, 8 So. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619; Wallace *v.* Clayton, 42 Ga. 443; Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426.

Johnstown flood.— Thus destruction of goods in the carriers' possession by the catastrophe known as the "Johnstown Flood" was held not to render the carriers liable. Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 53 Am. St. Rep. 332, 35 L. R. A. 356; Long *v.* Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741. It is true that the immediate cause of this catastrophe was the breaking of a dam, which let loose a great volume of water, sweeping away the railway trains on tracks in the valley below the dam, but the cause of the breaking of the dam was a flood in the stream above, and this brought the case within the exception. It is said that accidents arising from the breaking of dams on canals by reason of a flood are of such exceptional nature as to be denominated act of God. Morrison *v.* McFadden, 10 Pa. L. J. Rep. 462.

is an act of God.[16] The carrier is not liable for the results of a tornado of unprecedented and unforeseen violence,[17] nor for loss due to an earthquake.[18]

b. Act of the Public Enemy — (i) *ARMED FORCES.* Destruction by the military forces of a public enemy, or by pirates, who are deemed to be public enemies of all nations, are universally mentioned as within the exceptions to the carrier's liability.[19] But the question of the liability of a railroad company for loss of goods, due to the seizure of the road by the military power and its operation for military purposes, depends on other principles. In such a case it is said that the railroad company ceases to be a common carrier, and the seizure of the goods by the military authorities relieves it from further liability therefor.[20]

(ii) *MOBS.* Where the loss is due to depredations or acts of violence of mobs, rioters, strikers, or other bodies of men not organized and operating as a military force against the government, the carrier is liable. Such bodies of men do not come within the description of "the public enemy."[21]

c. Acts or Negligence of Shipper — (i) *IN GENERAL.* A common carrier is not responsible for injury to or destruction of the property while in course of transportation, caused by some act of the owner.[22] Of course the carrier is not liable for loss of the goods due to the negligent or wrongful act of the shipper, or a violation by him of reasonable rules made by the carrier and brought to his

16. Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Black *v.* Chicago, etc., R. Co., 30 Nebr. 197, 46 N. W. 428. These cases do not, however, involve liability for loss of goods but for damage to stock due to delay in transportation.

17. Gulf, etc., R. Co. *v.* Compton, (Tex. Civ. App. 1896) 38 S. W. 220.

So where an express car was blown from the track by a gale, and as a consequence thereof took fire, and the goods therein were destroyed, the carrier was held not liable. Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615. In a rather doubtful case it was said that where the officer navigating a vessel became unable to control her by reason of the sudden cessation of the wind, and she was wrecked on the shore, the owners were not liable, the loss being due to act of God. Colt *v.* McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200. The fact that an accidental fire is so driven by the wind as to reach goods in the hands of the carrier, which but for the wind would have escaped, will not relieve the carrier from liability for the loss. Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes (N. Y.) 64.

18. Slater *v.* South Carolina R. Co., 29 S. C. 96, 6 S. E. 936.

19. Morse *v.* Slue, 2 Keb. 866, 3 Keb. 72, 112, 135, 2 Lev. 69, 1 Mod. 85, T. Raym. 220, 1 Vent. 190, 238. And see cases stating the general rule of carrier's liability *supra*, II, D, 1.

Illustrations.— But few actual adjudications applying this exception are found, save those arising out of the destruction of goods in the carrier's possession by military operations during the Civil War in the United States. In these cases it was held that as to goods in the possession of a common carrier operating within territory under the control of the Federal government, destruction by the Confederate forces was a destruction by the public enemy, for which the carrier would not be responsible. Frank *v.* Keith, 2 Bush (Ky.) 123; Bland *v.* Adams Express Co., 1 Duv. (Ky.) 233, 85 Am. Dec. 623; Hubbard *v.* Harnden Express Co., 10 R. I. 244; Lewis *v.* Ludwick, 6 Coldw. (Tenn.) 368, 98 Am. Dec. 454. Likewise it was held that destruction by the Federal troops of goods in the possession of a carrier operating within Confederate lines was destruction by the public enemy. Nashville, etc., R. Co. *v.* Estis, 7 Heisk. (Tenn.) 622; Southern Express Co. *v.* Womack, 1 Heisk. (Tenn.) 256. On the other hand it was held that destruction by the Confederate military authorities of goods received by a carrier within the Confederate lines for transportation was not destruction by the public enemy. Patterson *v.* North Carolina R. Co., 64 N. C. 147; Nashville, etc., R. Co. *v.* Estes, 10 Lea (Tenn.) 749; Nashville, etc., R. Co. *v.* Estis, 7 Heisk. (Tenn.) 622. So of course destruction by the Federal military authorities of goods held by the carrier within the Federal lines would not be a destruction by the public enemy. Seligman *v.* Armijo, 1 N. M. 459.

20. Nashville, etc., R. Co. *v.* Estes, 10 Lea (Tenn.) 749; East Tennessee, etc., R. Co. *v.* Hurst, 11 Heisk. (Tenn.) 625; Nashville, etc., R. Co. *v.* Estis, 7 Heisk. (Tenn.) 622.

As to delay due to military control see *infra*, II, I, 3, e, (v).

21. Missouri Pac. R. Co. *v.* Nevill, 60 Ark. 375, 30 S. W. 425, 46 Am. St. Rep. 208, 28 L. R. A. 80; Gulf, etc., R. Co. *v.* Levi, (Tex. 1889) 12 S. W. 677; Sherman *v.* Pennsylvania R. Co., 21 Fed. Cas. No. 12,769, 8 Wkly. Notes Cas. (Pa.) 269.

Strikes as preventing the furnishing of cars see *supra*, II, B, 2, b.

22. There is no consideration of policy which demands that he should be held to account for an injury occasioned by the own-

knowledge.[23] If in case of shipment of animals the shipper accompanies them, by arrangement with the carrier, for the purpose of giving them necessary care, the carrier is not liable for loss or injury due to the shipper's own fault.[24]

(II) *Concealment of Nature or Value of Goods.* A fraudulent concealment by the shipper of the nature and value of the goods, for the purpose of avoiding payment of increased reasonable charges for transportation, will relieve the carrier from liability.[25] And while the carrier should no doubt make inquiry as to the value, if material to him,[26] yet, if by label or description the shipper dissuades the carrier from further inquiry, and thereby actively misleads the carrier as to the nature and value to his prejudice, the shipper is precluded from recovery.[27]

(III) *Improper Packing.* If goods are insufficiently packed,[28] and the defect is not known to the carrier,[29] he is not liable for loss due to such defect, if himself without fault.[30]

(IV) *Misdirection.* If loss of the goods is due to improper marking or direction as to their destination, the carrier is not liable.[31] But such fault on the part of the shipper is available to excuse delay or injury due to the inherent nature of the goods resulting from the delay, rather than to excuse the carrier from liability for loss of the goods by misdelivery or their destruction.[32]

(V) *Negligence in Loading and Unloading.* In general the loading and

er's own act, and it is immaterial whether such act of the owner causing the injury amounts to negligence or not. Hart *v.* Chicago, etc., R. Co., 69 Iowa 485, 29 N. W. 597. And see Choate *v.* Crowninshield, 3 Cliff. (U. S.) 184, 5 Fed. Cas. No. 2,691.

23. Pratt *v.* Ogdensburg, etc., R. Co., 102 Mass. 557.

24. Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; Hart *v.* Chicago, etc., R. Co., 69 Iowa 485, 29 N. W. 597; Heller *v.* Chicago, etc., R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541; Wilsons *v.* Hamilton, 4 Ohio St. 722.

Interference of owner.— The carrier is not liable for injuries to animals occasioned by improper interference of the owner with the carrier's management of the transportation. Roderick *v.* Baltimore, etc., R. Co., 7 W. Va. 54.

As to care of stock during transportation see *infra*, II, I, 2.

25. Magnin *v.* Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Richards *v.* Westcott, 2 Bosw. (N. Y.) 589; Relf *v.* Rapp, 3 Watts & S. (Pa.) 21, 37 Am. Dec. 528; Gibbon *v.* Paynton, 4 Burr. 2298; Bradley *v.* Waterhouse, 3 C. & P. 318, M. & M. 154, 14 E. C. L. 587; Clay *v.* Willan, 1 H. Bl. 298; Walker *v.* Jackson, 10 M. & W. 161, 12 L. J. Exch. 165.

26. Phillips *v.* Earle, 8 Pick. (Mass.) 182; Sewall *v.* Allen, 6 Wend. (N. Y.) 335.

27. Relf *v.* Rapp, 3 Watts & S. (Pa.) 21, 37 Am. Dec. 528. And see *infra*, II, E, 4, c.

The reasonable basis of the rule in this respect is that by reason of the active concealment and misrepresentation of the shipper the carrier has in fact not accepted or undertaken to carry the goods delivered to him. Charleston, etc., R. Co. *v.* Moore, 80 Ga. 522, 5 S. E. 769.

28. **The owner is not required to cover the goods** so as to make them safe against external injuries, such as rain, wind, or fire. Klauber *v.* American Express Co., 21 Wis. 21, 91 Am. Dec. 452.

29. But if the improper condition of the goods, for the purpose of shipment, is apparent or observable in the exercise of reasonable care, then the carrier should refuse to receive the goods, and, having received them, he is liable for the loss. The David & Caroline, 5 Blatchf. (U. S.) 266, 7 Fed. Cas. No. 3,593. Hence, in general it is said that the fact that the goods were not properly packed does not relieve the carrier from liability. Union Express Co. *v.* Graham, 26 Ohio St. 595.

30. *Iowa.*— Thompson *v.* Chicago, etc., R. Co., 27 Iowa 561.

Minnesota.—Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353.

New York.— Nelson *v.* Stephenson, 5 Duer (N. Y.) 538.

Oregon.— Goodman *v.* Oregon R., etc., Co., 22 Oreg. 14, 28 Pac. 894.

Wisconsin.— Klauber *v.* American Express Co., 21 Wis. 21, 91 Am. Dec. 452.

United States.—Zerega *v.* Poppe, Abb. Adm. (U. S.) 397, 30 Fed. Cas. No. 18,213.

See 9 Cent. Dig. tit. "Carriers," § 533.

31. Erie R. Co. *v.* Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Southern Express Co. *v.* Kaufman, 12 Heisk. (Tenn.) 161; Congar *v.* Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164; The Huntress, 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914, 24 Am. Jur. 486, 4 Hunt. Mer. Mag. 83, 4 West. L. J. 38.

32. Forsythe *v.* Walker, 9 Pa. St. 148; The Huntress, 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914, 24 Am. Jur. 486, 4 Hunt. Mer. Mag. 83, 4 West. L. J. 38.

If carrier's agent is aware of the proper destination, or of the defective direction, the carrier will be liable. O'Rourke *v.* Chicago, etc., R. Co., 44 Iowa 526; Downing *v.* Outerbridge, 79 Fed. 931, 25 C. C. A. 244.

unloading of the goods are under the carrier's control, and he is responsible for any loss or injury incident thereto.[33] But if the shipper assumes the responsibility of loading and unloading, the carrier is thereby relieved from liability for loss in that connection.[34]

d. Loss From Inherent Nature of the Goods — (I) *In General.* Where the destruction of or injury to the goods is due to their inherent nature and qualities, or defects therein, the carrier is not liable if his own negligence did not occasion or contribute to the injury.[35] And perhaps it may be stated as a general proposition that the carrier is not liable for loss happening from the operation of natural causes.[36]

(II) *Live Stock.* In general, as already stated, a common carrier of live stock is subject to the same rule of liability as a common carrier of other goods or property,[37] but if there is loss or injury due to the peculiar nature and propensities of the animals, then, under the principle stated in the preceding paragraph, the carrier is excused,[38] unless the loss or injury could have been prevented

33. As to live stock see *infra*, II, I, 2, d.

34. *Alabama.*— McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29.

Illinois.— Pennsylvania Co. *v.* Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215.

Massachusetts.— Loveland *v.* Burke, 120 Mass. 139, 21 Am. Rep. 507.

New York.— Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.

Vermont.— Ross *v.* Troy, etc., R. Co., 49 Vt. 364, 24 Am. Rep. 144.

Wisconsin.— Miltimore *v.* Chicago, etc., R. Co., 37 Wis. 190.

See 9 Cent. Dig. tit. "Carriers," § 533.

But if the improper loading was apparent to the carrier's servant from ordinary observation, the carrier will be liable. McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29.

Concurrent negligence.— There seems to be a conflict in the cases on the question as to whether in case of concurrent negligence of the shipper and the carrier the former can recover. It is apparently held in Ross *v.* Troy, etc., R. Co., 49 Vt. 364, 24 Am. Rep. 144, that the negligence of the shipper will defeat his recovery, although the servants of the carrier are also negligent; while in McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, it seems to be thought that if the servants of the carrier are negligent, the concurring contributory negligence of the shipper will be immaterial. But if the consignee, after discovering the carrier's negligence, fails to use reasonable care to avoid injury resulting therefrom, he cannot recover. Belcher *v.* Kansas, etc., R. Co., 92 Tex. 593, 50 S. W. 559.

35. Brown *v.* Clayton, 12 Ga. 564; Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42; The Ship Howard *v.* Wissman, 18 How. (U. S.) 231, 15 L. ed. 363; Lamb *v.* Parkman, 1 Sprague (U. S.) 343, 14 Fed. Cas. No. 8,020, 20 Law Rep. 186; Janney *v.* Tudor Co., 3 Fed. 814.

Decayed fruit.— Thus a carrier is not liable for decay of fruit in transportation without his fault, fruit being inherently subject to decay. Lawrence *v.* Denbreens, 1 Black (U. S.) 170, 17 L. ed. 89.

36. Faucher *v.* Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431 [*citing* as an analogous case, Farrar *v.* Adams, Bull. N. P. 69].

Fermentation.— Accordingly it was held that the carrier was not liable for the bursting of a hogshead of molasses due to fermentation. Faucher *v.* Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

Freezing weather, such as is likely to cause injury to fruit, vegetables, fruit-trees, and like property is not deemed an act of God, but the carrier will not be liable for loss from such cause unless by some fault or negligence on his part. Vail *v.* Pacific R. Co., 63 Mo. 230; Wolf *v.* American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Wing *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 235; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; The Aline, 19 Fed. 875.

Warm weather.— So the shipper of lard in the summer months takes the risk of loss occasioned by heat incident to the season, unless there is some neglect or fault on the part of the carrier. Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97. But where a consignment of butter was injured by reason of warm weather, held that the connecting carrier, having impliedly undertaken to transport it safely, was liable for failure to put it in a refrigerator car, it having been shipped over the line of the first carrier in such a car. Beard *v.* St. Louis, etc., R. Co., 79 Iowa 527, 44 N. W. 803; Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 18 Am. St. Rep. 381, 7 L. R. A. 280.

37. Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240. See *supra*, II, A, 9.

38. *Alabama.*— South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578.

Georgia.— Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240.

Iowa.— McCoy *v.* Keokuk, etc., R. Co., 44 Iowa 424.

Massachusetts.—Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19.

Minnesota.— Lindsley *v.* Chicago, etc., R.

by the exercise of reasonable foresight, vigilance, and care on the part of the carrier.[39]

e. Proximate Cause — (i) *In General.* Where the carrier relies on one of the exceptions to his common-law liability, it must appear, in order to excuse him, that the exceptional cause, such as act of God, or the like, was the immediate or proximate, and not the remote, cause of the loss.[40] If the proximate cause of the loss is act of God, the carrier is not liable, although, preceding the loss, he has

Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692.

Missouri.— Cash *v.* Wabash R. Co., 81 Mo. App. 109.

New York.— Mynard *v.* Syracuse, etc., R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 204, 10 Am. Rep. 355; Clarke *v.* Rochester, etc., R. Co., 14 N. Y. 570, 67 Am. Dec. 205.

South Carolina.— Bamberg *v.* South Carolina R. Co., 9 S. C. 61, 30 Am. Rep. 13.

Tennessee.— Felton *v.* Clarkson, 103 Tenn. 457, 53 S. W. 733.

See 9 Cent. Dig. tit. "Carriers," § 929.

Fright.— Carrier is not liable for damage caused from the fright or nervousness of the animal. Coupland *v.* Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Nugent *v.* Smith, 1 C. P. D. 423, 45 L. J. C. P. 697, 34 L. T. Rep. N. S. 827, 25 Wkly. Rep. 117.

Viciousness.— Carrier is not liable for damages caused by an animal's own viciousness, or the viciousness of other animals shipped with it.

Illinois.— Illinois Cent. R. Co. *v.* Brelsford, 13 Ill. App. 251.

Kentucky.— Hall *v.* Renfro, 3 Metc. (Ky.) 51.

Massachusetts.—Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19.

Mississippi.— Illinois Cent. R. Co. *v.* Scruggs, 69 Miss. 418, 13 So. 698; Louisville, etc., R. Co. *v.* Bigger, 66 Miss. 319, 6 So. 234.

England.— Blower *v.* Great Western R. Co., L. R. 7 C. P. 655, 41 L. J. C. P. 268, 26 L. T. Rep. N. S. 883, 20 Wkly. Rep. 776; Kendall *v.* London, etc., R. Co., L. R. 7 Exch. 373, 41 L. J. Exch. 184, 26 L. T. Rep. N. S. 735, 20 Wkly. Rep. 886.

See 9 Cent. Dig. tit. "Carriers," § 929.

Want of vitality.— Loss or injury due to death or sickness of the animal, resulting from its want of vitality, is not chargeable to the carrier, unless he has been in some way at fault. Southern Express Co. *v.* Ashford, 126 Ala. 591, 28 So. 732; Chicago, etc., R. Co. *v.* Harmon, 12 Ill. App. 54; Indianapolis, etc., R. Co. *v.* Jurey, 8 Ill. App. 160; Hayman *v.* Philadelphia, etc., R. Co., 8 N. Y. St. 86.

In the transportation of mares with foal the carrier incurs no liability for loss by reason of their condition, unless the condition is known to the carrier or he is chargeable with knowledge thereof, and he fails to exercise reasonable and necessary care. Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75; Missouri Pac. R. Co. *v.* Fagan, (Tex. Civ. App. 1894) 27 S. W. 887.

39. Kinnick *v.* Chicago, etc., R. Co., 69 Iowa 665, 29 N. W. 772.

Duty and care required.— In general the carrier of live stock is bound to furnish cars of sufficient strength and skilful employees, and to exercise that degree of care which the nature of the property requires. Burke *v.* U. S. Express Co., 87 Ill. App. 505. Where it appeared that hogs being transported were killed by crowding together toward the doors of the car where there was better ventilation than in other portions of the car, and this crowding happened while the cars were not in motion, the carrier was liable for not anticipating this danger from the natural propensities of the animals and providing against it. Kinnick *v.* Chicago, etc., R. Co., 69 Iowa 665, 29 N. W. 772. In such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation and exercised that degree of care which the nature of the property requires. Cragin *v.* New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559.

40. *Alabama.*— Sprowl *v.* Kellar, 4 Stew. & P. (Ala.) 382; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

Maryland.— Ferguson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582; Boyle *v.* McLaughlin, 4 Harr. & J. (Md.) 291.

New Jersey.— New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292.

Tennessee.— Adams Express Co. *v.* Jackson, 92 Tenn. 326, 21 S. W. 666.

United States.— King *v.* Shepherd, 3 Story (U. S.) 349, 14 Fed. Cas. No. 7,804, 7 Law Rep. 275, 2 West. L. J. 424.

See 9 Cent. Dig. tit. "Carriers," § 525.

Rule applied.— The same principle is applicable where the loss is from a cause as to which the carrier has by valid contract exempted himself from liability. Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853. If the negligence of the carrier is the occasion of loss by act of God then he is not excused. Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802; Campbell *v.* Morse, Harp. (S. C.) 468; St. Louis, etc., R. Co. *v.* Bland, (Tex. Civ. App. 1896) 34 S. W. 675. If the original cause of the loss is an accidental fire, for which, therefore, the carrier is liable, the fact that the destruction of the goods by such fire resulted from a wind which drove the fire in such direction that the goods were lost will not relieve the carrier from lia-

been negligent, and but for that negligence the goods would not have been exposed to the peril resulting in their destruction. Thus it has been held, by a decided preponderance of authority, that negligent delay in transporting or delivering the goods will not render the carrier liable for subsequent loss thereof by act of God, where the peril was not reasonably to have been anticipated.[41] But there are cases the other way, and the question is a mooted one.[42] And it is said that even if the loss is caused by act of God, if the negligence of the carrier mingles with it as an active and coöperative cause, the carrier is still liable.[43] Of course it must be true, as a general proposition, that though the carrier is in some way negligent, if such negligence does not contribute to the loss, which is due to an excepted cause, the carrier is not liable.[44] On the other hand, although there is a delay or interruption in the transportation, due to an excepted cause, yet for loss subsequently occurring by reason of an independent cause the carrier will be liable.[45] In general the burden of proof is on the carrier to show that the loss was due to act of God, or other excepted cause, rather than fault on the part of the carrier.[46]

(II) *Loss Occurring During Deviation.* If the carrier in transporting the goods unnecessarily deviates from the usual and ordinary route contemplated in the undertaking he will be liable for any loss occurring during such deviation, although such loss is within the recognized exception to the carrier's liability.[47] Indeed, it is said that in departing from the established route the carrier is guilty of misfeasance, and is liable for the value of the goods on the theory of conversion.[48] The carrier is equally liable where, having expressly contracted for a

bility. Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes (N. Y.) 64.

41. In such case it is said that there is no relation of cause and effect between the negligent delay and the destruction of the goods by the excepted cause.

Louisiana.— Dalzell *v.* Steamboat Saxon, 10 La. Ann. 280.

Massachusetts.— Denny *v.* New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645.

Mississippi.— Yazoo, etc., R. Co. *v.* Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543.

Missouri.— Clark *v.* Pacific R. Co., 39 Mo. 184, 90 Am. Dec. 458.

Pennsylvania.— Morrison *v.* Davis, 20 Pa. St. 171, 57 Am. Dec. 695.

Tennessee.— Lamont *v.* Nashville, etc., R. Co., 9 Heisk. (Tenn.) 58.

United States.— Memphis, etc., R. Co. *v.* Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; Thomas *v.* Lancaster Mills, 71 Fed. 481, 34 U. S. App. 404, 19 C. C. A. 88; Scott *v.* Baltimore, etc., Steam Boat Co., 19 Fed. 56.

See 9 Cent. Dig. tit. "Carriers," § 525.

42. Louisville, etc., R. Co. *v.* Gidley, 119 Ala. 523, 24 So. 753; Hernsheim *v.* Newport News, etc., Co., 18 Ky. L. Rep. 227, 35 S. W. 1115; Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158; Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Dunson *v.* New York Cent. R. Co., 3 Lans. (N. Y.) 265.

43. Wolf *v.* American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Caldwell *v.* Southern Express Co., 1 Flipp. (U. S.) 85, 4 Fed. Cas. No. 2,303, 3 Centr. L. J. 416.

44. Hill *v.* Sturgeon, 35 Mo. 212, 86 Am. Dec. 149; Hill *v.* Sturgeon, 28 Mo. 323; Chalk *v.* Charlotte, etc., R. Co., 85 N. C. 423; Hart *v.* Allen, 2 Watts (Pa.) 114.

45. Lang *v.* Pennsylvania R. Co., 154 Pa. St. 342, 26 Atl. 370, 35 Am. St. Rep. 346, 20 L. R. A. 360. But it is only negligence of the carrier in not avoiding the threatened loss which will thus render him liable. Scott *v.* Allegheny Valley R. Co., 172 Pa. St. 646, 33 Atl. 712.

46. Davis *v.* Wabash, etc., R. Co., 13 Mo. App. 449; Chicago, etc., R. Co. *v.* Manning, 23 Nebr. 552, 37 N. W. 462; The Majestic, 166 U. S. 375, 17 S. Ct. 597, 41 L. ed. 1039.

As to proximate cause in case of contract limiting liability see *infra*, II, E, 3, f.

47. Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745; Powers *v.* Davenport, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903. So where a railroad company, in carrying goods to the destination designated, took them through Chicago, which was not the usual route, and they were destroyed by the Chicago fire, held that the carrier was liable, irrespective of whether or not the loss was by act of God. Merchants' Despatch Transp. Co. *v.* Kahn, 76 Ill. 520.

This is on the theory that the carrier, being in the wrong and it being impossible to certainly determine that the loss would have occurred had the usual course been followed, he must answer for the consequences. Davis *v.* Garrett, 6 Bing. 716, 8 L. J. C. P. O. S. 253, 4 M. & P. 540, 31 Rev. Rep. 524, 19 E. C. L. 321.

48. Georgia R. Co. *v.* Cole, 68 Ga. 623; Phillips *v.* Brigham, 26 Ga. 617, 71 Am. Dec. 227; Sleat *v.* Fagg, 5 B. & Ald. 342, 24 Rev. Rep. 407, 7 E. C. L. 191.

particular route, mode, or manner of transportation, he transports goods otherwise than as stipulated, and they are lost or damaged.[49] Thus, if a carrier leaves goods at a point short of their destination, he becomes absolutely liable for loss or injury.[50] It may become necessary for the carrier, by reason of some emergency not contemplated at the time of shipment, to change the route or method of transportation, and if so he will not be liable for subsequent loss or injury for which he is in general not responsible by law or contract.[51] But if it is practicable in such case, without risk to the goods, to notify the shipper, the carrier should do so rather than to depart from the terms of the contract, and await further directions.[52] There is some uncertainty as to whether, when a deviation from the usual or stipulated route or method of transportation is shown, the carrier may excuse himself by proof that subsequent loss or damage for which he would not, but for the deviation, have been liable, would have occurred had there been no deviation. But at any rate it is incumbent on the carrier to clearly and satisfactorily establish that fact, which usually he will be unable to do.[53]

(III) *Negligence in Not Avoiding Loss or Injury.* It is clear from what has already been said[54] that if the carrier might, by reasonable care or foresight, have avoided loss by act of God, or other excepted cause, he will be liable. The duty also rests upon him, as far as possible, to avoid or lessen the damage resulting from such cause, and negligence in not doing so will render him liable.[55]

49. *Illinois.*— Dunseth *v.* Wade, 3 Ill. 285.

Louisiana.—Levy *v.* Louisville, etc., R. Co., 35 La. Ann. 615.

Michigan.— Merrick *v.* Webster, 3 Mich. 268.

Minnesota.— Brown, etc., Co. *v.* Pennsylvania Co., 63 Minn. 546, 65 N. W. 961.

New York.— Hinckley *v.* New York Cent., etc., R. Co., 56 N. Y. 429; Maghee *v.* Camden, etc., R. Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124; Goodrich *v.* Thompson, 44 N. Y. 324; Johnson *v.* New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415.

Tennessee.— Adams Express Co. *v.* Jackson, 92 Tenn. 326, 21 S. W. 666.

United States.— Campion *v.* Canadian Pac. R. Co., 43 Fed. 775, 11 L. R. A. 128.

See 9 Cent. Dig. tit. "Carriers," § 488.

Illustrations.— Thus, if the contract is for transportation by rail, without change of cars, and the carrier transfers the goods without necessity into other cars than those in which they are shipped, and the goods are subsequently, in course of transportation, destroyed, the carrier is liable without regard to exceptions. Robinson *v.* Merchants' Despatch Transp. Co., 45 Iowa 470; Galveston, etc., R. Co. *v.* Allison, 59 Tex. 193. If the carrier takes the goods by a more hazardous route than that indicated by the shipper, he is guilty of negligence with reference to subsequent injury due to the more hazardous transportation. U. S. Express Co. *v.* Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457.

50. Cassilay *v.* Young, 4 B. Mon. (Ky.) 265, 39 Am. Dec. 505; Watts *v.* Steamboat Saxon, 11 La. Ann. 43; S. D. Seavey Co. *v.* Union Transit Co., 106 Wis. 394, 82 N. W. 285; Marande *v.* Texas, etc., R. Co., 102 Fed. 246, 42 C. C. A. 317.

51. Johnson *v.* New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Hand *v.* Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

52. Goodrich *v.* Thompson, 44 N. Y. 324; Louisville, etc., R. Co. *v.* Odil, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. Rep. 820.

53. Maghee *v.* Camden, etc., R. Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124; Davis *v.* Garrett, 6 Bing. 716, 8 L. J. C. P. O. S. 253, 4 M. & P. 540, 31 Rev. Rep. 524, 19 E. C. L. 321.

As to deviation under contract limiting liability see *infra*, II, E, 3, e.

54. See *supra*, II, D, 2, a, b, c, d.

55. *Georgia.*— Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

Missouri.— Bird *v.* Cromwell, 1 Mo. 81, 13 Am. Dec. 470.

Nebraska.— Black *v.* Chicago, etc., R. Co., 30 Nebr. 197, 46 N. W. 428.

South Carolina.— Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; Charleston, etc., Steam Boat Co. *v.* Bason, Harp. (S. C.) 262.

Texas.— St. Louis, etc., R. Co. *v.* Bland, (Tex. Civ. App. 1896) 34 S. W. 675.

United States.—Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 403, 30 Fed. Cas. No. 18,006; Caldwell *v.* Southern Express Co., 1 Flipp. (U. S.) 85, 4 Fed. Cas. No. 2,303, 3 Centr. L. J. 416.

Applications of rule.—Thus it was held that where grain in the course of transportation became wet by inevitable accident, it was the duty of the carrier to dry it on board the boat if he could do so, by proper exertions, without delaying the voyage. Steamboat Lynx *v.* King, 12 Mo. 272, 49 Am. Dec. 135. So held also as to furs which had become wet. Chouteaux *v.* Leech, 18 Pa. St. 224, 57 Am. Dec. 602. So if the delay is caused without

E. Common-Law Liability as Affected by Contract — 1. Extending Common-Law Liability. By a special contract the carrier may extend his common-law liability so as to be answerable for loss or damage for which he would not be accountable under the common-law rule.[56]

2. Limiting Common-Law Liability — a. In General — (1) *Contract Sustained.* While considerations of public policy have been potent in determining the courts to recognize a rule of liability in the case of common carriers much stricter than that recognized as applying in the case of ordinary bailees, the courts have not thought it necessary to deny the parties to a contract of carriage the right to exonerate the carrier from his extraordinary liability, and the general proposition has been almost universally recognized that by special agreement, or by notice to the shipper acquiesced in by him, the common carrier may limit his liability to that of a private carrier.[57] It is therefore stated as a general proposition in

fault of the carrier he will still be liable for negligence in regard to the custody of the goods during such delay. Lipford *v.* Charlotte, etc., R. Co., 7 Rich. (S. C.) 409.

That contracts limiting liability for negligence are not valid see *infra*, II, E, 2, b.

56. Gaither *v.* Barnet, 2 Brev. (S. C.) 488; Southern Express Co. *v.* Glenn, 16 Lea (Tenn.) 472, 1 S. W. 102. The implication of exception from loss occasioned by inevitable accident may be repelled by evidence that the carrier, by advertisements and circulars, held himself out to insure the safe delivery without exception. Morrison *v.* Davis, 20 Pa. St. 171, 57 Am. Dec. 695.

Rule applied.— The mere fact that by the bill of lading one only of the common-law exceptions is preserved will not give rise to the inference that other exceptions are not to be relied on. Gage *v.* Tirrell, 9 Allen (Mass.) 299. Where in the bill of lading receipt of the goods in good order and well conditioned was acknowledged, and it was agreed that they were to be delivered "in like good order and condition . . . (unavoidable damages of fire, navigation and collision only excepted)," it was held that the common-law liability of the carrier was thereby extended to all loss not covered by the exceptions specified. McCauley *v.* Davidson, 10 Minn. 418, 13 Minn. 162. General language as to deducting damage or deficiency from the charges to be collected should be limited to such damage as the carrier would be liable for under the common law, and not to constitute an extension of the carrier's liability. Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645. An agreement in the bill of lading to deliver the goods at destination, no exception being made, will not cut off the common-law exemptions. Neal *v.* Saunderson, 2 Sm. & M. (Miss.) 572, 41 Am. Dec. 609.

57. *Kansas.*— Kallman *v.* U. S. Express Co., 3 Kan. 205.

Louisiana.—Thomas *v.* Ship Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509.

Pennsylvania.— Farnham *v.* Camden, etc., R. Co., 55 Pa. St. 53; American Express Co. *v.* Sands, 55 Pa. St. 140.

Tennessee.— Louisville, etc., R. Co. *v.* Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162.

Vermont.—Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

United States.— New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

See 9 Cent. Dig. tit. "Carriers," § 637.

Rule upheld.— Thus in New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627, the court say: "As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, etc., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded."

There have been a few expressions of opinion contrary to this proposition, as in Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393, where it is said that the common carrier is liable at all events but for the act of God and the king's enemy, and he cannot limit or vary that liability; and in Gould *v.* Hill, 2 Hill (N. Y.) 623, where it is said that a common carrier cannot limit his common-law liability by contract [but this case has been departed from in that state since the decision by the supreme court of the United States in New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Moore *v.* Evans, 14 Barb. (N. Y.) 524;

many cases that the common carrier may by contract limit his liability, except for damages or loss resulting from the negligence of the carrier or his agents or servants.[58]

(11) *In Case of Loss by Fire.* In accordance with the general rule announced in the preceding paragraph it is well settled that a contract exempting the carrier from liability for loss or damage by fire, not due to the carrier's negligence, is valid.[59]

Parsons *v.* Monteath, 13 Barb. (N. Y.) 353]. In Wilson *v.* Shulkin, 51 N. C. 375, the validity of a contract limiting the carrier's common-law liability was doubted.

58. *Alabama.*— Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578.

Illinois.—Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43; Illinois Cent. R. Co. *v.* Jonte, 13 Ill. App. 424.

Indiana.— Bartlett *v.* Pittsburgh, etc., R. Co., 94 Ind. 281; Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Indianapolis, etc., R. Co. *v.* Forsythe, 4 Ind. App. 326, 29 N. E. 1138.

Louisiana.— Newman *v.* Smoker, 25 La. Ann. 303; Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183.

Mississippi.—Southern Express Co. *v.* Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385.

Missouri.— Craycroft *v.* Atchison, etc., R. Co., 18 Mo. App. 487; Kirby *v.* Adams Express Co., 2 Mo. App. 369.

New York.— Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 204, 10 Am. Rep. 355; Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125; Stedman *v.* Western Transp. Co., 48 Barb. (N. Y.) 97; Moore *v.* Evans, 14 Barb. (N. Y.) 524; Sunderland *v.* Westcott, 2 Sweeny (N. Y.) 260, 40 How. Pr. (N. Y.) 468; Stoddard *v.* Long Island R. Co., 5 Sandf. (N. Y.) 180; Landsberg *v.* Dinsmore, 4 Daly (N. Y.) 490; Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith (N. Y.) 115; Slocum *v.* Fairchild, 7 Hill (N. Y.) 292.

Ohio.— Pittsburgh, etc., R. Co. *v.* Barrett, 36 Ohio St. 448; Gaines *v.* Union Transp., etc., Co., 28 Ohio St. 418; Davidson *v.* Graham, 2 Ohio St. 131.

Pennsylvania.— Farnham *v.* Camden, etc., R. Co., 55 Pa. St. 53; Bingham *v.* Rogers, 6 Watts & S. (Pa.) 495, 40 Am. Dec. 581.

South Carolina.— Swindler *v.* Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732.

West Virginia.— Baltimore, etc., R. Co. *v.* Skeels, 3 W. Va. 556.

Wisconsin.— Ullman *v.* Chicago, etc., R. Co., 112 Wis. 150, 88 N. W. 41.

United States.—Seller *v.* The Pacific, Deady (U. S.) 17, 21 Fed. Cas. No. 12,644, 1 Oreg. 409; Leitch *v.* Union R. Transp. Co., 15 Fed. Cas. No. 8,224, 7 Chic. Leg. N. 291; Ormsby *v.* Union Pac. R. Co., 8 McCrary (U. S.) 48, 4 Fed. 706.

See 9 Cent. Dig. tit. "Carriers," § 637.

Doctrine explained — Reason of rule.— In York Mfg. Co. *v.* Illinois Cent. R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170, the supreme court of the United States says that it perceives no good reason on principle why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only, it involves simply rights of property, and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in the face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire. In Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285, the reason of the general rule of the common carrier's exceptional liability is stated at length, and it is held that considerations of public policy do not prevent the conclusion that the stipulation expressly assented to by the shipper, limiting the carrier's liability for loss not due to his own negligence, is valid, inasmuch as it affects only the rights and interests of the owner of the goods. In Camp *v.* Hartford, etc., Steamboat Co., 43 Conn. 333, the rule is announced, as supported by the decisions of the American courts generally, that a contract which does not attempt to exempt the carrier from the consequences of his own negligence will be sustained. The duty of the carrier to deliver at the place designated may be limited by contract. Field *v.* Chicago, etc., R. Co., 71 Ill. 458. And so may the liability for goods sent C. O. D. Pacific Express Co. *v.* Wallace, 60 Ark. 100, 29 S. W. 32.

The burden is upon the carrier relying on such contract as a defense to show himself free from negligence. South, etc., Alahama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Adams Express Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571, 63 S. W. 619. *Contra,* Insurance Co. of North America *v.* Lake Erie, etc., R. Co., 152 Ind. 333, 53 N. E. 382.

The shipper need not sue on the special contract, but may leave the carrier to set it up in defense and show that the loss is within the exemption. Southern Pac. R. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17. And see *infra,* II, R, 2.

The question of the reasonableness of the contract and its invalidity when the effect is to limit liability for negligence will be hereafter considered. See *infra,* II, E, 2, b.

59. *Alabama.*— Louisville, etc., R. Co. *v.* Oden, 80 Ala. 38.

Arkansas.—Little Rock, etc., R. Co. *v.* Talbot, 39 Ark. 523.

Louisiana.— Levy *v.* Pontchartrain R. Co., 23 La. Ann. 477; New Orleans Mut. Ins. Co.

(III) *In Case of Transportation by Water.* In accordance with the same principle the carrier by water may exempt himself from liability for casualties of navigation not due to his negligence or that of his servants.[60]

(IV) *Injuries to Live Stock.* The exceptional nature of the property and of the loss or damage which may result during its transportation are held to particularly justify a contract by a carrier of live stock limiting his liability, except for such loss or damage as may result from his own negligence or that of his agents or servants.[61]

b. Not Valid as Against Negligence of Carrier or His Servants — (I) *Car-*

v. New Orleans, etc., R. Co., 20 La. Ann. 302; Oakey *v.* Gordon, 7 La. Ann. 235.

Massachusetts.— Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

Michigan.— Smith *v.* American Express Co., 108 Mich. 572, 66 N. W. 479.

New Hampshire.— Rand *v.* Merchants Dispatch Transp. Co., 59 N. H. 363.

New York.— New York Cent., etc., R. Co. *v.* Standard Oil Co., 87 N. Y. 486; Germania F. Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Parsons *v.* Monteath, 13 Barb. (N. Y.) 353.

North Carolina.—Hornthal *v.* Roanoke, etc., Steamboat Co., 107 N. C. 76, 11 S. E. 1049.

Pennsylvania.— Colton *v.* Cleveland, etc., R. Co., 67 Pa. St. 211, 5 Am. Rep. 424.

Tennessee.— Dillard *v.* Louisville, etc., R. Co., 2 Lea (Tenn.) 288.

Vermont.— Davis *v.* Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

Wisconsin.— Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042.

United States.— Van Schaak *v.* Northern Transp. Co., 3 Biss. (U. S.) 394, 28 Fed. Cas. No. 16,876, 7 Am. L. Rev. 565, 5 Chic. Leg. N. 181, 4 Leg. Op. (Pa.) 537; York Mfg. Co. *v.* Illinois Cent. R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170.

Canada.— McMorrin *v.* Canadian Pac. R. Co., 1 Ont. L. Rep. 561.

See 9 Cent. Dig. tit. "Carriers," § 656.

Thus, where a shipping receipt was stamped "at owner's risk of fire" held that the carrier was not liable for the loss of the goods by fire while in his possession, if the persons in charge of the train took all reasonable precautions in the management and conduct of the train, and if the car containing the goods was reasonably tight and suitable for their transportation. Levering *v.* Union Transp., etc., Co., 42 Mo. 88, 97 Am. Dec. 320.

60. Adams Express Co. *v.* Fendrick, 38 Ind. 150; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632.

Illustrations.— Liability for loss from collision (Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78), from leakage and breakage (The Jefferson, 31 Fed. 489), from rust or corrosion (Wolff *v.* The Vanderland, 18 Fed. 733), from heating (The New Orleans, 26 Fed. 44), from improper stowage, unless negligent (Glengoil Steamship Co. *v.* Pilkington, 28 Can. Supreme Ct. 146; Trainor *v.* Black Diamond Steamship Co., 16 Can. Supreme Ct. 156), and by thieves or robbers (The Saratoga, 20 Fed. 869) may thus be excepted.

As to negligence in these cases see *infra*, II, E, 2, b.

61. *Alabama.*— South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578.

Georgia.— Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240; Central R. Co. *v.* Bryant, 73 Ga. 722; Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81.

Missouri.— St. Louis, etc., R. Co. *v.* Cleary, 77 Mo. 634, 46 Am. Rep. 13.

New York.— Steiger *v.* Erie R. Co., 5 Hun (N. Y.) 345.

Wisconsin.— Morrison *v.* Phillips, etc., Constr. Co., 44 Wis. 405, 28 Am. Rep. 599; Betts *v.* Farmers' L. & T. Co., 21 Wis. 80, 91 Am. Dec. 460.

England.— McCance *v.* London, etc., R. Co., 3 H. & C. 343, 10 Jur. N. S. 1058, 34 L. J. Exch. 39, 11 L. T. Rep. N. S. 426, 12 Wkly. Rep. 1086.

See 9 Cent. Dig. tit. "Carriers," § 933.

Illustrations.— Thus a carrier of animals may, for a good consideration, stipulate with the shipper for exemption from liability by reason of overloading, suffocation, heat, fire, and the like, disconnected and apart from the running of its trains. Mitchell *v.* Georgia R. Co., 68 Ga. 644; Georgia R. Co. *v.* Beatie, 66 Ga. 438, 42 Am. Rep. 75. But he cannot exempt himself from all liabilities of a carrier of live stock not resulting from defective trucks, wheels, or axles. Union Pac. R. Co. *v.* Rainey, 19 Colo. 225, 34 Pac. 986. The carrier may by contract provide that the shipper shall go with the stock and take care of it, and see to the loading and unloading of the same. Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. 706.

By statute.— Even where there is a statute forbidding a carrier to relieve himself by contract from his common-law liability he may provide that the shipper assumes the duty of caring for the stock and thus escape liability for any loss resulting from improper care, provided such loss is not due to failure to furnish proper facilities. Burgher *v.* Chicago, etc., R. Co., 105 Iowa 335, 75 N. W. 192; Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; Texas, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1897) 40 S. W. 167; Texas, etc., R. Co. *v.* Stribling, (Tex. Civ. App. 1896) 34 S. W. 1002.

Further as to care of stock see *infra*, II, I, 2.

RIER'S OWN NEGLIGENCE. The proposition amplified in the last subdivision that a common carrier may by contract reduce his liability to that of a bailee for hire is not to be extended so as to authorize him as such bailee for hire to exempt himself from liability for negligence. Whatever may be the rule as to ordinary bailees, it is well settled that it is contrary to public policy to allow a common carrier to relieve himself in any capacity from liability for negligence or misconduct.[62] A different conclusion has been reached by the New York courts, and it has been held in a line of cases which are out of harmony with the great current of authority that, inasmuch as the shipper has a right to insist on the common-law liability of the carrier if he sees fit, a contract exempting the carrier from liability for his own negligence will be sustained.[63] Outside of New York the current of authorities is almost unbroken that for reasons of public policy carriers cannot exempt themselves by any contract, notice, or stipulation from liability for the consequences of their own negligence.[64]

62. Levering *v.* Union Transp., etc., Co., 42 Mo. 88, 97 Am. Dec. 320; York Mfg. Co. *v.* Illinois Cent. R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170; Glengoil Steamship Co. *v.* Pilkington, 28 Can. Supreme Ct. 146.

Common carrier distinguished from ordinary bailee.— In New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 376, 21 L. ed. 627, it is said: "The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. . . . A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. . . . But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its charter powers, it is a common carrier, and a special contract about its responsibility does not devest it of the character."

Reason for rule — Public policy.—In South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578, it is said that the common carrier may by special contract with the shipper limit his common-law liability, but no limitation can relieve him from liability for loss or injury resulting from his own negligence. Such a limitation would be adverse to the policy of the law fixing his liability, and cannot be regarded as just and reasonable when the relative position of the carrier and shipper is considered. "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy." The Kensington, 183 U. S. 263, 268, 22 S. Ct. 102, 46 L. ed. 190.

63. Cragin *v.* New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Campe *v.* Weir, 58 N. Y. Suppl. 1082, 28 Misc. (N. Y.) 243.

Qualification of New York rule.— Even the courts of New York regard the rule they have adopted as so anomalous that they qualify it by the further rule that a general contract of exemption from loss, even from loss of a particular description, will not be interpreted as an exemption from loss due to the carrier's own negligence unless it is expressly so stipulated. Wilson *v.* New York Cent., etc., R. Co., 97 N. Y. 87; Holsapple *v.* Rome, etc., R. Co., 86 N. Y. 275; Mynard *v.* Syracuse, etc., R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Stoddard *v.* Long Island R. Co., 5 Sandf. (N. Y.) 180. In Nicholas *v.* New York Cent., etc., R. Co., 89 N. Y. 370, 372, the New York doctrine is thus stated: "The practice of common carriers making special acceptances, exempting them from their ordinary responsibility, though contrary to the policy of the common law, liable to abuse, and productive of inconvenience, has obtained too long to be now questioned. In this State it has been extended so as to authorize a special acceptance, exempting them from liability for their own negligence. But a contract exempting a bailee for hire from the obligation of care on his part, in respect to the goods in his custody, is, to say the least, unreasonable, and, while the law does not go to the extent of making it void on that ground, yet the qualification that to have that effect it must be plainly and distinctly expressed, so that it cannot be misunderstood by the shipper, is so obviously just, in view of the methods of business, and the want of knowledge of the force and construction of contracts, on the part of the great mass of persons dealing with the transportation lines of the country, that it ought not to be relaxed." And *compare*, as in line with the weight of authority elsewhere, Gleadell *v.* Thomson, 56 N. Y. 194; Lamb *v.* Camden, etc., R., etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; Dorr *v.* New Jersey Steam Nav. Co., 4 Sandf. (N. Y.) 136.

64. *Alabama.*—South, etc., Alabama R. Co. *v.* Henlein, 56 Ala. 368; Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49.

(II) *Negligence of Servants.* The rule prohibiting limitation by contract against negligence is often stated as a prohibition of any contract relieving the carrier from loss or damage caused by his own negligence or misfeasance or that of his servants,[65] and it is specially decided in many cases that no contract limitation will relieve the carrier from liability for the consequences of the negligence,

District of Columbia.— Galt *v.* Adams Express Co., MacArthur & M. (D. C.) 124, 48 Am. Rep. 742.

Georgia.— Georgia R. Co. *v.* Gann, 68 Ga. 350; Berry *v.* Cooper, 28 Ga. 543.

Illinois.— Adams Express Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Cleveland, etc., R. Co. *v.* Newlin, 74 Ill. App. 638; Chicago, etc., R. Co. *v.* Chapman, 30 Ill. App. 504.

Indiana.— Rosenfeld *v.* Peoria, etc., R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Parrill *v.* Cleveland, etc., R. Co., 23 Ind. App. 638, 55 N. E. 1026.

Kentucky.— Louisville, etc., R. Co. *v.* Plummer, 18 Ky. L. Rep. 228, 35 S. W. 1113; Louisville, etc., R. Co. *v.* Rogers, 10 Ky. L. Rep. 726; Louisville, etc., R. Co. *v.* Spalding, 8 Ky. L. Rep. 355; Louisville, etc., R. Co. *v.* Betz, 7 Ky. L. Rep. 606; Crawford *v.* Adams Express Co., 7 Ky. L. Rep. 362; Adams Express Co. *v.* Marshall, 6 Ky. L. Rep. 291.

Louisiana.— Newman *v.* Smoker, 25 La. Ann. 303; Simon *v.* Steamship Fung Shuey, 21 La. Ann. 363.

Maine.— Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Massachusetts.— Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97.

Minnesota.— Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

Mississippi.—Mobile, etc., R. Co. *v.* Weiner, 49 Miss. 725; Southern Express Co. *v.* Moon, 39 Miss. 822.

Missouri.— Ketchum *v.* American Merchants Union Express Co., 52 Mo. 390; D. Klass Commission Co. *v.* Wabash R. Co., 80 Mo. App. 164; Kirby *v.* Adams Express Co., 2 Mo. App. 369.

New Jersey.— Ashmore *v.* Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180.

North Carolina.— Gardner *v.* Southern R. Co., 127 N. C. 293, 37 S. E. 328.

Ohio.— Pittsburgh, etc., R. Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

Pennsylvania.— Pennsylvania R. Co. *v.* Raiordan, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. Rep. 670; Grogan *v.* Adams Express Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360; Goldey *v.* Pennsylvania R. Co., 30 Pa. St. 242, 72 Am. Dec. 703; Camden, etc., R. Co. *v.* Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Ritz *v.* Pennsylvania R. Co., 3 Phila. (Pa.) 82, 15 Leg. Int. (Pa.) 75.

South Carolina.— Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19.

Texas.— International, etc., R. Co. *v.* Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541.

Vermont.— Urann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398.

United States.— U. S. Express Co. *v.* Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457; Thomas *v.* Wabash, etc., R. Co., 63 Fed. 200; May *v.* Steam-Ship Powhatan, 5 Fed. 375; Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. 706.

See 9 Cent. Dig. tit. "Carriers," § 654.

Rule applied.— Where the stipulation was that the carrier should not be liable for unavoidable dangers of navigation, held that the exemption should be limited to dangers unavoidable by the carrier in the exercise of all the precaution, care, and skill that the law usually demands of common carriers. Hays *v.* Kennedy, 3 Grant (Pa.) 351. The carrier cannot by special contract defeat an action in tort for loss due to the failure to use diligence. Clark *v.* St. Louis, etc., R. Co., 64 Mo. 440. A stipulation against the presumption of negligence which would arise from proof of certain facts is unreasonable as an abrogation of the rules of evidence. Southern Pac. Co. *v.* Phillipson, (Tex. Civ. App. 1897) 39 S. W. 958.

65. *Alabama.*— Southern Express Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140.

Arkansas.— St. Louis, etc., R. Co. *v.* Lesser, 46 Ark. 236.

Colorado.— Overland Mail, etc., Co. *v.* Carroll, 7 Colo. 43, 1 Pac. 682.

Kentucky.— Louisville, etc., R. Co. *v.* Brownlee, 14 Bush (Ky.) 590.

Maine.— Little *v.* Boston, etc., R. Co., 66 Me. 239; Willis *v.* Grand Trunk R. Co., 62 Me. 488.

Massachusetts.— Medfield School Dist. *v.* Boston, etc., R. Co., 102 Mass. 552, 3 Am. Rep. 502.

Minnesota.— Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

Missouri.— Schureman *v.* Chicago, etc., R. Co., 88 Mo. App. 183; Kirby *v.* Adams Express Co., 2 Mo. App. 369.

New Hampshire.— Durgin *v.* American Express Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453.

New York.— Stedman *v.* Western Transp. Co., 48 Barb. (N. Y.) 97.

North Carolina.— Phifer *v.* Carolina Cent. R. Co., 89 N. C. 311, 45 Am. Rep. 687.

Pennsylvania.—Pennsylvania R. Co. *v.* Butler, 57 Pa. St. 335; American Express Co. *v.* Sands, 55 Pa. St. 140; Farnham *v.* Camden, etc., R. Co., 55 Pa. St. 53.

West Virginia.— Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

United States.— New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; May *v.* Steam-Ship Powhatan, 5 Fed. 375; Rintoul *v.* New York Cent., etc., R. Co., 21 Blatchf. (U. S.) 439, 17 Fed. 905; Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. 706.

See 9 Cent. Dig. tit. "Carriers," § 654.

unskilfulness, or carelessness of its employees.[66] It is as to exemptions from liability for servants' negligence that the New York courts have most clearly departed from the weight of authority, by holding that such a contract is valid.[67]

66. *Alabama.*— Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667.

Iowa.— Hudson *v.* Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550.

Louisiana.— Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183.

Missouri.— Doan *v.* St. Louis, etc., R. Co., 38 Mo. App. 408.

United States.— Stevens *v.* Navigazione Generale Italiana, 39 Fed. 562; The Montana, 22 Blatchf. (U. S.) 372, 22 Fed. 715; The Colon, 9 Ben. (U. S.) 354, 6 Fed. Cas. No. 3,023.

See 9 Cent. Dig. tit. "Carriers," § 654.

Rule explained and applied.— In New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627, the following pertinent language is used on this subject: "But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties — an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms. Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law." A provision that when the carrier furnishes the shipper with laborers to assist in loading and unloading they shall be deemed the shipper's servants while so engaged, and that the carrier shall not be responsible for their acts is an attempt to release the carrier from responsibility for the negligence of his own servants, and is void. Missouri Pac. R. Co. *v.* Smith, (Tex. 1891) 16 S. W. 803. Where a carrier contracts for transportation over a connecting line it cannot relieve itself from liability for the negligence of such contracting line, as such a stipulation would be with reference to the negligence of a servant of the contracting carrier in performing its obligation for transportation. Craycroft *v.* Atchison, etc., R. Co., 18 Mo. App. 487; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847. So a stipulation by an express company that it will not be liable for any loss or damage by fire will not relieve it from liability for the result by fire due to the negligence of a railroad company transporting the goods under contract with the express company. Muser *v.* American Express Co., 17 Blatchf. (U. S.) 412, 1 Fed. 382; Kentucky Bank *v.* Adams Express Co., 93 U. S. 174, 23 L. ed. 872. But it is said that a railroad company contracting for the transportation of cotton may by contract relieve itself from liability for negligence of a compress company to which the cotton is delivered to be prepared for transportation. Deming *v.* Merchants', etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518. A clause in the bill of lading exempting the carrier from liability for loss from perils of the sea will not relieve it from liability for such loss occasioned by a peril to which the negligence of its servants contributes. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788. Nor will a stipulation in a bill of lading be valid which exempts a ship-owner from the consequences of the negligence of master or mariners. The Saratoga, 20 Fed. 869; The Montana, 17 Fed. 377.

67. Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579; Magnin *v.* Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Heineman *v.* Grand Trunk R. Co., 1 Sheld. (N. Y.) 95; Knell *v.* U. S., etc., Steamship Co., 33 N. Y. Super. Ct. 423; and New York cases cited *supra*, note 63.

In Michigan some such doctrine seems to have been recognized also in an early case in which it is said that a carrier may by contract restrict his liability for the misconduct of subordinate agents. McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

In England it is held that a limitation of liability is valid as to wrongful acts of servants outside the scope of their authority. Shaw *v.* Great Western R. Co., [1894] 1

(III) *Negligence in Transportattion of Live Stock.* The attempt on the part of carriers to limit their liability as against their own negligence or that of their servants has been particularly persistent where the contract of transportation is with reference to live stock, but such limitations have been uniformly held ineffectual.[68] Nor can the carrier by stipulation relieve himself from liability for loss of or damage to stock due to defective cars or appliances for loading and unloading.[69]

(IV) *Gross Negligence, Misconduct, and Fraud.* Some courts which have been inclined to recognize the validity of contracts relieving carriers from liability for negligence have drawn a distinction between ordinary negligence and gross negligence, and have sustained exemptions so far as they did not exonerate the carrier from gross or wilful neglect or fraud on his own part or on the part of his servants.[70] This assumed distinction is by the best authorities unequivo-

Q. B. 373, 58 J. P. 318, 70 L. T. Rep. N. S. 218, 10 Reports 85, 42 Wkly. Rep. 285.

Qualification of New York rule.—Here also the New York courts have practically qualified their own peculiar rule by holding that a general exemption will not be sufficient to relieve the carrier from the consequences of its servants' negligence, and that a stipulation to have this effect must specifically refer to the servants' negligence as such. Mynard *v.* Syracuse, etc., R. Co., 71 N. Y. 180, 27 Am. Rep. 28.

68. Boehl *v.* Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333; Chicago, etc., R. Co. *v.* Witty, 32 Nebr. 275, 49 N. W. 183, 29 Am. St. Rep. 436; Atchison, etc., R. Co. *v.* Washburn, 5 Nebr. 117; Powell *v.* Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

Loading and unloading at shipper's risk.—A special contract by which the shipper assumed all risk of loss and injury to the animals shipped in loading and unloading, conveying and otherwise, whether arising from the negligence, default, or misconduct on the part of defendant's servants, agents, or officers was held not to relieve the carrier from liability for injury resulting from defective cars. Hawkins *v.* Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179. A stipulation for loading and unloading at shipper's risk is not to be construed as relieving the carrier from liability for his servant's negligence. Candee *v.* New York, etc., R. Co., (Conn. 1901) 49 Atl. 17.

Refusing opportunity to feed and water.—Where the stipulation was against liability for injuries to the stock, though caused by the negligence of the carrier's servants, held that the carrier was liable for injury to the stock due to the refusal of the trainmen to allow the person in charge of the stock opportunity to seasonably feed and water the animals. Abrams *v.* Milwaukee, etc., R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55.

Statutes authorizing a railroad company to contract specially for the transportation of live stock are held not to authorize a contract relieving the carrier from liability for negligence in such transportation. Louisville, etc., R. Co. *v.* Hedger, 9 Bush (Ky.) 645, 15 Am. Rep. 740.

69. *Arkansas.*— St. Louis, etc., R. Co. *v.* Lesser, 46 Ark. 236.

Kentucky.— Rhodes *v.* Louisville, etc., R. Co., 9 Bush (Ky.) 688.

Maine.— Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Mississippi.— Kansas City, etc., R. Co. *v.* Holland, 68 Miss. 351, 8 So. 516.

Missouri.— Potts *v.* Wabash, etc., R. Co., 17 Mo. App. 394.

Ohio.— Welsh *v.* Pittsburg, etc., R. Co., 10 Ohio St. 65, 75 Am. Dec. 490.

Pennsylvania.— Goldey *v.* Pennsylvania R. Co., 30 Pa. St. 242, 72 Am. Dec. 703.

Virginia.—Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

Wisconsin.— Leonard *v.* Whitcomb, 95 Wis. 646, 70 N. W. 817; Loeser *v.* Chicago, etc., R. Co., 94 Wis. 571, 69 N. W. 372.

See 9 Cent. Dig. tit. "Carriers," § 943.

70. *District of Columbia.*— Galt *v.* Adams Express Co., MacArthur & M. (D. C.) 124, 48 Am. Rep. 742.

Georgia.— Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240.

Illinois.— Wabash R. Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273; Chicago, etc., R. Co. *v.* Chapman, 133 Ill. 96, 24 N. E. 417, 23 Am. St. Rep. 587, 8 L. R. A. 508; Adams Express Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Illinois Cent. R. Co. *v.* Morrison, 19 Ill. 136; U. S. Express Co. *v.* Council, 84 Ill. App. 491; Chicago, etc., R. Co. *v.* Miller, 79 Ill. App. 473; Chicago, etc., R. Co. *v.* Grimes, 71 Ill. App. 397.

Kansas.— St. Louis, etc., R. Co. *v.* Tribbey, 6 Kan. App. 467, 50 Pac. 458; Kallman *v.* U. S. Express Co., 3 Kan. 205.

Kentucky.— Adams Express Co. *v.* Spalding, 10 Ky. L. Rep. 540; Mount *v.* Louisville, etc., R. Co., 2 Ky. L. Rep. 221.

New York.—Root *v.* New York, etc., R. Co., 83 Hun (N. Y.) 111, 31 N. Y. Suppl. 357, 63 N. Y. St. 841.

Pennsylvania.— Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526.

England.— Knox *v.* Great Northern R. Co., [1896] 2 Ir. R. 632.

See 9 Cent. Dig. tit. "Carriers," §§ 654, 934.

cally repudiated, and all attempted exemptions from liability on account of negligence, whether gross or ordinary, are held to be ineffectual.[71] Possibly the suggestion of gross negligence which the carrier cannot exempt himself from liability for by contract grew out of the use of that expression by the English courts.[72]

3. Validity and Effect of Contracts Limiting Liability — a. In General. Where the express language or evident purpose of the stipulation relieving the carrier from common-law liability is to exempt him from liability for his own

In a New York case it is said that a railroad company may limit its liability as carrier by express contract so as not to be liable for casualties not arising from fraud, wilfulness, recklessness, or gross neglect. Boswell *v.* Hudson River R. Co., 5 Bosw. (N. Y.) 699, 10 Abb. Pr. (N. Y.) 442.

In a West Virginia case this language was used: "It is competent for a common carrier to diminish and restrict his common law liabilities by special contract, and he may by express stipulations, also absolve himself from all liability resulting from any and every degree of negligence however gross, (if it fall short of misfeasance or fraud,) provided the terms and language of the contract are so clear and definite as to leave no doubt that such was the understanding and intention of the parties." Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 106, 88 Am. Dec. 664. And see Zouch *v.* Chesapeake, etc., R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116.

In a Wisconsin case it is said to be well settled that a common carrier of persons or property cannot by any agreement, however plain and explicit, wholly relieve itself from liability for injury resulting from its gross negligence or fraud, and that in order to exempt the carrier from liability, or to limit the extent of its liability for injury caused by its own negligence of any kind, the contract must expressly so provide. Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713.

71. *Alabama.*— Louisville, etc., R. Co. *v.* Grant, 99 Ala. 325, 13 So. 599; Alabama Great Southern R. Co. *v.* Thomas, 83 Ala. 343, 3 So. 802.

Indiana.— Michigan Southern, etc., R. Co. *v.* Heaton, 37 Ind. 448, 10 Am. Rep. 89; Baltimore, etc., R. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. 1106.

Kentucky.—Orndorff *v.* Adams Express Co., 3 Bush (Ky.) 194, 96 Am. Dec. 207.

Minnesota.— Moulton *v.* St. Paul, etc., R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353.

Mississippi.— Johnson *v.* Alabama, etc., R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534.

Nebraska.— Atchison, etc., R. Co. *v.* Washburn, 5 Nebr. 117.

New York.— Parsons *v.* Monteath, 13 Barb. (N. Y.) 353.

See 9 Cent. Dig. tit. "Carriers," §§ 654, 934.

Better doctrine explained.— In New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627, the court uses this language: "The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter. We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of the inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities." In East Tennessee, etc., R. Co. *v.* Johnston, 75 Ala. 596, 605, 51 Am. Rep. 489, the court says: "A carrier can not, by contract, relieve himself of the degree of care and diligence exacted by the common law. Any want of such care and diligence is negligence. He can exempt himself only from liability for loss or injury, not caused by his own or his servant's negligence."

Amount of proof.— The carrier cannot evade responsibility by stipulation as to amount of proof required to fix his liability. Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97.

The burden is on the carrier to show the existence of a contract limiting his liability. Bonfiglio *v.* Lake Shore, etc., R. Co., 125 Mich. 476, 84 N. W. 722.

72. Riley *v.* Horne, 5 Bing. 217, 2 M. & P. 331, 30 Rev. Rep. 576, 15 E. C. L. 549.

Gross negligence is simply failure to use reasonable care and skill. Beal *v.* South Devon R. Co., 3 H. & C. 337, 11 L. T. Rep. N. S. 184, 12 Wkly. Rep. 1115. See also, generally, Bailments, V, A, 2, c [5 Cyc. 181]; Negligence.

But even in England it has been said that there is no distinction between negligence and

negligence or that of his servants or agents, the stipulation is against public policy, and is therefore void and of no effect.[73] Therefore, if the stipulation is against all liability, it is invalid, for the manifest purpose of such a general stipulation must be to relieve from negligence as well as from other grounds of loss.[74] But if the contract provides for exemption from certain forms of loss which do not necessarily involve negligence of the carrier or his servants, it will not be held to be totally void, but simply ineffectual, where the loss appears to have been due to negligence. Thus a contract exempting the carrier from liability for loss by fire, though in general valid, will not exempt him from loss by fire due to the failure to use ordinary diligence and care in protecting the goods intrusted to him.[75] So a stipulation against liability for leakage or breakage will not relieve the carrier from liability for losses of this character due to the carrier's negligence.[76] And the same general rule applies to exemption from liability for loss

gross negligence, the latter being the same thing as the former, "with the addition of a vituperative epithet." Wilson *v.* Brett, 12 L. J. Exch. 264, 11 M. & W. 113.

73. *California.*— Pierce *v.* Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350.

Connecticut.— Welch *v.* Boston, etc., R. Co., 41 Conn. 333.

Indiana.— Michigan, Southern, etc., R. Co. *v.* Heaton, 37 Ind. 448; Indianapolis, etc., R. Co. *v.* Allen, 31 Ind. 394.

Missouri.— Vaughn *v.* Wabash R. Co., 62 Mo. App. 461; Blanchard *v.* Chicago, etc., R. Co., 60 Mo. App. 267; Potts *v.* Wabash, etc., R. Co., 17 Mo. App. 394.

Nebraska.—Atchison, etc., R. Co. *v.* Lawler, 40 Nebr. 356, 58 N. W. 968.

New York.— Dorr *v.* New Jersey Steam Nav. Co., 4 Sandf. (N. Y.) 136.

Pennsylvania.— Willock *v.* Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; Armstrong *v.* U. S. Express Co., 159 Pa. St. 640, 28 Atl. 448.

Tennessee.— Bird *v.* Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. Rep. 856.

Texas.— Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286.

United States.— The Guildhall, 58 Fed. 796; The Iowa, 50 Fed. 561; The Hadji, 20 Fed. 875.

See 9 Cent. Dig. tit. "Carriers," § 637 *et seq.*

74. Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80; Woodburn *v.* Cincinnati, etc., R. Co., 40 Fed. 731. And see *supra*, II, E, 2, b (1).

75. *Alabama.*— Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

Arkansas.— Little Rock, etc., R. Co. *v.* Talbot, 47 Ark. 97, 14 S. W. 471.

Connecticut.— Lawrence *v.* New York, etc., R. Co., 36 Conn. 63.

Georgia.— Berry *v.* Cooper, 28 Ga. 543.

Indiana.— Insurance Co. of North America *v.* Lake Erie, etc., R. Co., 152 Ind. 333, 53 N. E. 382.

Louisiana.— Maxwell *v.* Southern Pac. R. Co., 48 La. Ann. 385, 19 So. 287.

New York.— Lamb *v.* Camden, etc., R. Co., 46 N. Y. 271, 7 Am. Rep. 327.

Ohio.—Erie R. Co. *v.* Lockwood, 28 Ohio St. 358.

South Carolina.— Swindler *v.* Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732.

Texas.— Houston, etc., R. Co. *v.* Davis, 11 Tex. Civ. App. 24, 31 S. W. 308.

United States.— New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Liverpool, etc., Ins. Co. *v.* McNeill, 89 Fed. 131, 59 U. S. App. 499, 32 C. C. A. 173; Insurance Co. of North America *v.* St. Louis, etc., R. Co., 9 Fed. 811; Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 477, 30 Fed. Cas. No. 18,007; Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 403, 30 Fed. Cas. No. 18,006; Scruggs *v.* Baltimore, etc., R. Co., 5 McCrary (U. S.) 590, 18 Fed. 318.

See 9 Cent. Dig. tit. "Carriers," § 656.

Fire caused by sparks from locomotive.— If the goods are destroyed by fire kindled from sparks from the locomotive the railroad company is not relieved if it has been negligent in failing to apply to the locomotive apparatus known and actually in use which would prevent the emission of sparks. But it is not necessary that the company use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation from such danger. Steinweg *v.* Erie R. Co., 43 N. Y. 123, 3 Am. Rep. 673. In New Orleans, etc., R. Co. *v.* Faler, 58 Miss. 911, it seems to have been thought that it was the duty of the railroad company under such circumstances to use the best appliances to arrest the escape of fire and to employ cars constructed to afford the greatest protection to the goods transported. There is no conflict, however, as to the general duty to place the goods in cars such as are commonly in use for transporting goods of that kind, and if they are liable to be set on fire by sparks, then to place them in an open car instead of a box car, such as is generally used, would be negligence. New Orleans, etc., R. Co. *v.* Faler, 58 Miss. 911.

76. *Alabama.*— Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49.

Kansas.— Missouri Valley R. Co. *v.* Caldwell, 8 Kan. 244.

Kentucky.— Reno *v.* Hogan, 12 B. Mon. (Ky.) 63, 54 Am. Dec. 513.

due to dangers of navigation,[77] and other causes.[78] The general principle that a contract relieving the carrier from liability for negligence will not be valid is applicable also where it is sought to escape responsibility for goods held for delivery, or the like.[79] An attempt by the carrier to determine the measure of damage by fixing the place as to which the value of the goods shall be estimated

New York.— Hutkoff *v.* Pennsylvania R. Co., 29 Misc. (N. Y.) 770, 61 N. Y. Suppl. 254; Morris *v.* Wier, 20 Misc. (N. Y.) 586, 46 N. Y. Suppl. 413.

United States.— The Svend, 1 Fed. 54; Nelson *v.* National Steamship Co., 7 Ben. (U. S.) 340, 17 Fed. Cas. No. 10,112; The David & Caroline, 5 Blatchf. (U. S.) 266, 7 Fed. Cas. No. 3,593; Merriman *v.* The May Queen, Newb. Adm. (U. S.) 464, 17 Fed. Cas. No. 9,481; Dedekam *v.* Vose, 3 Blatchf. (U. S.) 44, 7 Fed. Cas. No. 3,729.

Canada.— Glengoil Steamship Co. *v.* Pilkington, 28 Can. Supreme Ct. 146.

See 9 Cent. Dig. tit. "Carriers," § 654½.

77. Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Davidson *v.* Graham, 2 Ohio St. 131. See also, generally, SHIPPING.

78. A special contract exempting the carrier from liability will not prevent the shipper maintaining an action of tort based on the carrier's legal duty and a breach thereof by negligence. Nicoll *v.* East Tennessee, etc., R. Co., 89 Ga. 260, 15 S. E. 309. Where the shipper failed to comply with a statutory requirement to give notice of the nature of the goods, if consisting of pictures contained in any package or trunk, held that he could recover nevertheless if the loss was due to the carrier's negligence. Wheeler *v.* Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 34 N. Y. St. 866, 21 Am. St. Rep. 729.

Damage done by vermin.— The exemption of liability for damage done by vermin does not exonerate the carrier from liability for injuries by rats due to negligence in omitting to fumigate the ship before loading. Stevens *v.* Navigazione Generale Italiana, 39 Fed. 562.

Delay due to mobs, etc.— A provision that the shipper assumes all risk of damage by reason of delay due to mobs, strikes, or threatened violence will not exempt the carrier from liability for negligence in that respect. Louisville, etc., R. Co. *v.* Bell, 13 Ky. L. Rep. 393.

Failure to seal package.— Where it appeared to be the custom of express companies to seal valuable packages, it was held that such a company would be liable for loss due to failure to comply with this custom, notwithstanding a general limitation of liability. Overland Mail, etc., Co. *v.* Carroll, 7 Colo. 43, 1 Pac. 682.

Loss by sweating.— Where the exception was as to damage by reason of sweating, or otherwise, it was held that the carrier was liable for negligently stowing the goods away in such manner as to subject them to such damage. Paturzo *v.* Compagnie Francaise, 31 Fed. 611.

Loss by theft.— The exception against loss by thieves or robbers will not relieve the carrier from liability for theft due to the failure to use reasonable vigilance in protecting the property. The Saratoga, 20 Fed. 869.

Loss by water, accidental decay, etc.— Stipulations against liability for loss occasioned by water, accidental decay, etc., in case of fruit, will not relieve the carrier from liability for such loss due to negligence. Merchants' Dispatch, etc., Co. *v.* Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Giles *v.* Fargo, 60 N. Y. Super. Ct. 117, 17 N. Y. Suppl. 476, 43 N. Y. St. 65.

Loss of market.— A stipulation that the carrier shall not be liable for loss of market does not exempt him from liability where the loss of market is caused by negligence. Jennings *v.* Grand Trunk R. Co., 52 Hun (N. Y.) 227, 5 N. Y. Suppl. 140, 23 N. Y. St. 15.

Surrender to attaching officer.—Where loss of the goods was due to the act of the carrier in surrendering them to a person claiming to be an officer authorized to seize them under an attachment, but it did not appear that such person had any authority to make the levy, held that the surrender was negligence on the part of the carrier for which he was liable. Nickey *v.* St. Louis, etc., R. Co., 35 Mo. App. 79.

Where carrier had option of two routes, one of which was peculiarly dangerous on account of being infested with predatory bodies of Confederate soldiers, held that he was liable for the loss due to such peculiar danger, although such danger was expressly excepted. U. S. Express Co. *v.* Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457.

79. Western R. Co. *v.* Little, 86 Ala. 159, 5 So. 563; Pacific Express Co. *v.* Wallace, 60 Ark. 100, 29 S. W. 32; Aaronson *v.* Pennsylvania R. Co., 23 Misc. (N. Y.) 666, 52 N. Y. Suppl. 95; Tarbell *v.* Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. 721, 17 N. Y. St. 153, 6 Am. St. Rep. 350; Springs *v.* South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

Illustrations.— A carrier may by contract determine the character under which it shall hold the goods when in its warehouse at the place of delivery, so long as it does not attempt to relieve itself from liability for negligence. Feige *v.* Michigan Cent. R. Co., 62 Mich. 1, 28 N. W. 685. A stipulation exempting the carrier from loss while the property is at the place of transshipment will not relieve the carrier if the loss is occasioned by negligent exposure during delay in transportation. Thomas *v.* Lancaster Mills, 71 Fed. 481, 34 U. S. App. 404, 19 C. C. A. 88. But a limitation of liability for the goods after they have reached their destination will not apply to a case where goods are held for delivery to a connecting carrier. Ayres *v.* Western R. Corp., 14 Blatchf. (U. S.) 9, 2 Fed. Cas. No. 689.

will not be valid in case of a loss due to negligence on the part of the carrier or his servants.[80]

b. As Forwarder and Special Carrier. The attempt has sometimes been made to escape liability by a stipulation that the carrier shall be liable as a forwarder only, but such a stipulation is of no avail as against a loss due to negligence.[81] As has already been indicated[82] a railroad company supplying only motive power for transportation of special cars furnished and controlled by the owner of the goods contained therein is not a common carrier, and therefore a contract in such a case, providing that the railroad company does not assume liability as a common carrier, will be valid, but even under such circumstances the company will be liable for loss due to negligence.[83] It seems, however, that as to goods which the carrier is under no obligation to transport, because of a class which he is justified in refusing to receive because outside of the scope of his business, he may even limit his liability for negligence.[84]

c. Consideration. Inasmuch as the carrier is by law bound to carry at a reasonable rate for all who may apply without any limitation of common-law liability, a stipulation relieving him to any extent from the liability imposed by law will not be valid unless supported by some consideration, which is usually sought to be furnished by the granting of a reduced rate of charge in return for the exemption acceded to by the shipper. Without some such consideration the stipulation will not be valid.[85] The shipper must have an opportunity to accept

80. Illinois Cent. R. Co. *v.* Bogard, 78 Miss. 11, 27 So. 879; Erie Dispatch *v.* Johnson, 87 Tenn. 490, 11 S. W. 441.

81. Hooper *v.* Wells, 27 Cal. 11, 85 Am. Dec. 211; Galt *v.* Adams Express Co., MacArthur (D. C.) 124, 48 Am. Rep. 742; Kallman *v.* U. S. Express Co., 3 Kan. 205; Christenson *v.* American Express Co., 15 Minn. 270. 2 Am. Rep. 122.

Further as to liability of carrier as forwarder see *infra*, II, M, 3, c.

82. See *supra*, II, A, 8.

83. Coup *v.* Wabash, etc., R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567; Chicago, etc., R. Co. *v.* Wallace, 66 Fed. 506, 24 U. S. App. 589, 14 C. C. A. 257, 30 L. R. A. 161.

84. So held as to transportation of gunpowder (California Powder Works *v.* Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648); and as to glassware (Toy *v.* Long Island R. Co., 26 Misc. (N. Y.) 792, 56 N. Y. Suppl. 182). And see *supra*, II, A, 1, b, (II).

A railway company may as private carrier require exemption from liability for negligence as a condition to undertaking the transportation of express matter for express companies. Pittsburgh, etc., R. Co. *v.* Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L. R. A. 101.

85. *Alabama.*— Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602; Louisville, etc., R. Co. *v.* Odin, 80 Ala. 38.

Georgia.— Georgia R., etc., Co. *v.* Reid, 91 Ga. 377, 17 S. E. 934.

Illinois.— Baltimore, etc., R. Co. *v.* Crawford, 65 Ill. App. 113.

Massachusetts.— Squire *v.* New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Gage *v.* Tirrell, 9 Allen (Mass.) 299.

Missouri.— Paddock *v.* Missouri Pac. R. Co., 60 Mo. App. 328; Duvenick *v.* Missouri Pac. R. Co., 57 Mo. App. 550; Crow *v.* Chicago, etc., R. Co., 57 Mo. App. 135; Hance *v.* Wabash Western R. Co., 56 Mo. App. 476.

New York.— Nelson *v.* Hudson River R. Co., 48 N. Y. 498; Jennings *v.* Grand Trunk R. Co., 52 Hun (N. Y.) 227, 5 N. Y. Suppl. 140, 23 N. Y. St. 15; Rubens *v.* Ludgate Hill Steamship Co., 20 N. Y. Suppl. 481, 48 N. Y. St. 732; Lee *v.* Marsh, 43 Barb. (N. Y.) 102, 28 How. Pr. (N. Y.) 275.

North Carolina.— Gardner *v.* Southern R. Co., 127 N. C. 293, 37 S. E. 328.

Tennessee.— Dillard *v.* Louisville, etc., R. Co., 2 Lea (Tenn.) 288.

West Virginia.— Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

United States.— York Mfg. Co. *v.* Illinois Cent. R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170.

England.— Wyld *v.* Pickford, 8 M. & W. 443.

See 9 Cent. Dig. tit. "Carriers," § 643.

Presumption as to consideration.— If the charges and services rendered as a rule are the same in all respects without, as with, the special contract, such contract is void for want of consideration; but the presumption is that the rates of charge are made having regard to the risks assumed, and that the rate specified in the special contract when made was intended to support the entire contract. Hence the want of consideration to support the limitation of liability must be affirmatively established by the party seeking to avoid it. Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042.

Receiving and undertaking to carry no consideration.— The receipt of and undertaking to carry goods being a duty imposed on the carrier by law do not constitute a consideration to support the special contract; there

the limited liability at a reduced rate or have his goods transported without limitation of liability at a lawful and reasonable rate.[86]

d. Must Be Reasonable. The validity of stipulations limiting the carrier's liability is to be determined by their reasonableness and their conformity to the sound public policy, in accordance with which the obligations of the carrier to the public are settled.[87]

e. Deviation. If the carrier deviates from the course or method of shipment

must be some other. That is generally furnished by some concession in rates. Wehmann *v.* Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546. This doctrine was not, however, recognized in the earlier case of Hutchinson *v.* Chicago, etc., R. Co., 37 Minn. 524, 35 N. W. 433, where it was held that delivery and acceptance of animals for carriage was a sufficient mutual consideration to sustain an agreement as to the extent of defendant's liability.

Reduced rate.— If the carrier seeks to evade liability on the ground that a reduced rate was made in return for a limitation of liability, it must be made to appear that the carrier had another and higher rate for those not acceding to the limitation. Paddock *v.* Missouri Pac. R. Co., 60 Mo. App. 328.

The recital in the special contract of a reduced rate is merely *prima facie* evidence of that fact, and may be contradicted or explained by parol evidence. Bowring *v.* Wabash R. Co., 77 Mo. App. 250. If the shipping contract containing the limitation is blank as to the rate to be paid the limitation will be void. Kellerman *v.* Kansas City, etc., R. Co., 68 Mo. App. 255. Although the special contract recites that it is given in consideration of a special rate, yet, if the evidence shows that the rate charged was the regular rate, the limitation will be invalid. Ward *v.* Missouri Pac. R. Co., 158 Mo. 226, 58 S. W. 28.

Where by reason of the establishment of a tariff of joint rates by connecting carriers for interstate commerce, deduction from such established rates would be prohibited by the interstate commerce law, there can be no consideration for the limitation of liability. Wehmann *v.* Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546.

86. Stewart *v.* Cleveland, etc., R. Co., 21 Ind. App. 218, 52 N. E. 89; Atchison, etc., R. Co. *v.* Dill, 48 Kan. 210, 29 Pac. 148; Kansas Pac. R. Co. *v.* Reynolds, 17 Kan. 251; Atchison, etc., R. Co. *v.* Mason, 4 Kan. App. 391, 46 Pac. 31; Illinois Cent. R. Co. *v.* Lancashire Ins. Co., 79 Miss. 114, 30 So. 43; Paddock *v.* Missouri Pac. R. Co., 155 Mo. 524, 56 S. W. 453; McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; Paddock *v.* Missouri Pac. R. Co., 60 Mo. App. 328.

87. *Alabama.*— Louisville, etc., R. Co. *v.* Oden, 80 Ala. 38.

Louisiana.— Berje *v.* Texas, etc., R. Co., 37 La. Ann. 468.

Maryland.— McCoy *v.* Erie, etc., Transp. Co., 42 Md. 498.

Missouri.— Potts *v.* Wabash, etc., R. Co., 17 Mo. App. 394.

North Carolina.— Gardner *v.* Southern R. Co., 127 N. C. 293, 37 S. E. 328.

Texas.— Missouri, etc., R. Co. *v.* Graves, (Tex. App. 1890) 16 S. W. 102.

United States.— Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135.

England.— Peck *v.* North Staffordshire R. Co., 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 8 L. T. Rep. N. S. 768, 11 Wkly. Rep. 1023.

In order that the contract be reasonable and fair, and therefore not against public policy, it is necessary that the shipper have the option to enter into it if he sees fit, or if he does not see fit, have his goods carried without other limitations of liability than those recognized by the common law. If no such option is afforded him, and he is practically compelled to accept the terms of the contract limiting liability, or refrain from employing the common carrier in the business involved in his public calling, then the contract is invalid.

Arkansas.— Little Rock, etc., R. Co. *v.* Cravens, 57 Ark. 112, 20 S. W. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527.

Kansas.— Atchison, etc., R. Co. *v.* Mason, 4 Kan. App. 391, 46 Pac. 31.

Mississippi.— Illinois Cent. R. Co. *v.* Lancashire Ins. Co., 79 Miss. 114, 30 So. 43.

Tennessee.— Illinois Cent. R. Co. *v.* Craig, 102 Tenn. 298, 52 S. W. 164; Louisville, etc., R. Co. *v.* Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162.

England.— Lewis *v.* Great Western R. Co., 3 Q. B. D. 195, 47 L. J. Q. B. 131, 37 L. T. Rep. N. S. 774, 26 Wkly. Rep. 255; McNally *v.* Lancashire, etc., R. Co., 8 L. R. Ir. 81; Manchester, etc., R. Co. *v.* Brown, 8 App. Cas. 703, 48 J. P. 388, 53 L. J. Q. B. 124, 50 L. T. Rep. N. S. 281, 32 Wkly. Rep. 207.

It is for the court to determine whether a carrier's special contract restricting liability is reasonable. South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578.

Unreasonable stipulation.— The rule that stipulations insisted on by carriers or other persons who stand in such a position toward their customers as enables them to compel compliance with their demand or destroy their customers' business should be judged of by their fairness and be held void whenever they are unreasonable or oppressive is one of general acceptance. Public policy compels its acceptance in all civilized countries. Willock *v.* Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228.

stipulated for in the contract he will deprive himself of the benefit of any exemption from liability found in such contract.[88]

f. Exempt Cause Must Be Proximate. The loss must be the proximate result of a cause as to which the carrier has exempted himself from liability in order that he shall be relieved under such exemption,[89] and the excepted cause of liability must be the sole cause of the loss, for if the negligence of the carrier mingles with it as an active and coöperative cause, the carrier will be responsible.[90]

g. Requiring Shipper to Insure. Another method sometimes resorted to for the purpose of avoiding liability for negligence is that of requiring the shipper to take insurance upon the property as against loss. It is true that a contract of insurance taken by the carrier on goods in his custody will be valid, and under it the carrier may recover against an insurance company for loss due to negligence,[91] and a stipulation in the bill of lading by which the carrier shall have the advantage of any insurance held by the shipper will be valid, and will cut off any right of subrogation on the part of the insurance company to the claim of the shipper against the carrier.[92] But to require as a condition of acceptance of the goods that the shipper shall insure them against all loss is to throw the burden of liability for the carrier's negligence upon the shipper, and such a contract is invalid.[93]

h. Where Statutes Prohibit Contract. In some of the states carriers are expressly prohibited from limiting their liability by contract, and any attempted limitation will therefore be void.[94]

88. *Illinois.*— Dunseth *v.* Wade, 3 Ill. 285.
Michigan.— Merrick *v.* Webster, 3 Mich. 268.
New York.— Robertson *v.* National Steamship Co., 139 N. Y. 416, 34 N. E. 1053, 54 N. Y. St. 689; Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; Maghee *v.* Camden, etc., R. Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124; Uptegrove *v.* Central R. Co., 16 Misc. (N.) 14, 37 N. Y. Suppl. 650, 73 N. Y. St. 278; Robertson *v.* National Steamship Co., 14 N. Y. Suppl. 313.
Pennsylvania.— Hand *v.* Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.
United States.— Hostetter *v.* Park, 137 U. S. 30, 11 S. Ct. 1, 34 L. ed. 568.
Canada.— Grand Trunk R. Co. *v.* Fitzgerald, 5 Can Supreme Ct. 204.
See 9 Cent. Dig. tit. "Carriers," § 718½.
If the carrier stipulates for through transportation without change of cars he will be liable for loss by fire, notwithstanding a limitation of liability from that danger. Robinson *v.* Merchants' Despatch Transp. Co., 45 Iowa 470. And under similar contract for transportation without change of cars, held that the carrier could not avail himself of a stipulation against responsibility for damage beyond his own line, where there had been a change of cars after the goods left the possession of the contracting carrier. Galveston, etc., R. Co. *v.* Allison, 59 Tex. 193.
Where a carrier transported property by freight instead of by passenger train, as provided in the contract of shipment, held that he was not entitled to the exemption in the contract. Pavitt *v.* Lehigh Valley R. Co., 153 Pa. St. 302, 25 Atl. 1107.
In general as to deviation see *supra*, II, D, 2, e, (II).

89. Reid *v.* Evansville, etc., R. Co., 10 Ind. App. 385, 35 N. E. 703.

90. Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Condict *v.* Grand Trunk R. Co., 54 N. Y. 500.
If by negligence of the carrier the goods have been subjected to the special peril the carrier will be liable. Pierce *v.* Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; U. S. Express Co. *v.* Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457; The Tan Bark Case, Brown Adm. (U. S.) 131, 23 Fed. Cas. No. 13,742.
As to proximate cause in general see *supra*, II, D, 2, e.

91. Copeland *v.* New England Mar. Ins. Co., 2 Metc. (Mass.) 432; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 29 L. ed. 873; Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213, 9 L. ed. 691; Walker *v.* Maitland, 5 B. & Ald. 171, 24 Rev. Rep. 320, 7 E. C. L. 101.

92. Jackson Co. *v.* Boylston Mut. Ins. Co., 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728; Wager *v.* Providence Ins. Co., 150 U. S. 99, 14 S. Ct. 55, 37 L. ed. 1013; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 6 S. Ct. 750, 1176, 29 L. ed. 873.

93. Willock *v.* Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; The Hadji, 16 Fed. 861 [*affirmed* in 20 Fed. 875]. But it is said that a clause exempting the carrier from liability for any damage capable of being covered by insurance is valid. The Titania, 19 Fed. 101.

94. *Iowa.*— Davis *v.* Chicago, etc., R. Co., 83 Iowa 744, 49 N. W. 77; Stewart *v.* Merchants' Despatch Transp. Co., 47 Iowa 229, 29 Am. Rep. 476; McCoy *v.* Keokuk, etc., R. Co., 44 Iowa 424; Brush *v.* Sabula, etc., R. Co., 43 Iowa 554.
Kansas.— St. Louis, etc., R. Co. *v.* Tribbey, 6 Kan. App. 467, 50 Pac. 458.

4. LIMITATION OF LIABILITY TO STIPULATED AMOUNT OR AGREED VALUATION — a. Stipulated Amount. There is a great diversity of view as to the validity of a contract stipulating that the carrier shall not be liable for loss of or damage to the goods beyond an amount named. Of course, so far as a contract limiting common-law liability is valid, such restriction might take the form of a limitation of the amount of liability, as well as of an entire exemption from liability. But the difficulty has arisen in regard to the question whether, in cases where liability cannot be entirely evaded, as, for instance, where the loss is due to negligence of the carrier or his servants, a partial evasion of liability, by limiting its extent to an amount less than the value of the goods, will be valid. In some cases it has been said that a limitation to a sum or value specified in the bill of lading or shipping receipt will be valid, even in case of loss by negligence, provided, of course, the contract is reasonable and based on a valid consideration or inducement for the restricted liability.[95] But in a great majority of the cases in which the question

Mississippi.—Mobile, etc., R. Co. *v.* Franks, 41 Miss. 494.

Nebraska.— Pennsylvania Co. *v.* Kennard Glass, etc., Co., 59 Nebr. 435, 81 N. W. 372; St. Joseph, etc., R. Co. *v.* Palmer, 38 Nebr. 463, 56 N. W. 957, 22 L. R. A. 335; Missouri Pac. R. Co. *v.* Vandeventer, 26 Nebr. 222, 41 N. W. 998, 3 L. R. A. 129.

Texas.— Missouri Pac. R. Co. *v.* International Mar. Ins. Co., 84 Tex. 149, 19 S. W. 459; Missouri Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; International, etc., R. Co. *v.* Parish, 18 Tex. Civ. App. 130, 43 S. W. 1066; Gulf, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1895) 30 S. W. 715.

United States.— The City of Clarksville, 94 Fed. 201.

See 9 Cent. Dig. tit. "Carriers," § 637.

Consideration immaterial.—As against the statutory prohibition it is immaterial that there is a consideration for the limitation of liability in a reduced rate of transportation. Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 18 S. Ct. 289, 42 L. ed. 688.

By what law governed.— The contract for limitation of liability will be construed in accordance with the law of the place where it is made, and if there it is prohibited by statute it will be invalid, even though it relates to interstate commerce. Solan *v.* Chicago, etc., R. Co., 95 Iowa 260, 63 N. W. 692, 58 Am. St. Rep. 430, 28 L. R. A. 718; McDaniel *v.* Chicago, etc., R. Co., 24 Iowa 412; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 18 S. Ct. 289, 42 L. ed. 688. If, however, the contract is valid where made, it will be recognized in any other state into which the goods are transported, even though by the laws of the latter a special contract is prohibited. Robinson *v.* Merchants' Despatch Transp. Co., 45 Iowa 470.

Notwithstanding such statutory prohibition a contract for the shipment of stock, by which the shipper is to accompany the stock and take care of them, and the carrier is not to be liable in damages for failing to feed, water, and care for the stock in the cars is valid, so far as such loss is not the result of negligence of the carrier. Burgher *v.* Chicago, etc., R. Co., 105 Iowa 335, 75 N. W. 192; Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192.

The statutory prohibition does not extend to a contract exempting a railroad company from liability for buildings erected on its right of way by its permission and destroyed by negligence in the operation of its road. Griswold *v.* Illinois Cent. R. Co., 90 Iowa 265, 57 N. W. 843, 24 L. R. A. 647.

The fact that by charter a railroad company is made liable as common carrier does not prevent a limitation of its liability by contract. Michigan Southern, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466; McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243; Michigan Cent. R. Co. *v.* Ward, 2 Mich. 538.

The Texas statute is applicable only to carriers within the state. Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571, 63 S. W. 619; Missouri Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; Atchison, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1894) 28 S. W. 98.

The English statute requires the limitation to be reasonable. Peek *v.* North Staffordshire R. Co., 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 8 L. T. Rep. N. S. 768, 11 Wkly. Rep. 1023; Grand Trunk R. Co. *v.* Vogel, 11 Can. Supreme Ct. 612.

95. *Arkansas.*— St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104.

Indiana.— Rosenfeld *v.* Peoria, etc., R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500.

Missouri.— Duvenick *v.* Missouri Pac. R. Co., 57 Mo. App. 550; Brown *v.* Wabash, etc., R. Co., 18 Mo. App. 568.

New York.— Zimmer *v.* New York Cent., etc., R. Co., 137 N. Y. 460, 33 N. E. 642, 51 N. Y. St. 269.

Virginia.— Richmond, etc., R. Co. *v.* Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849.

West Virginia.— Zouch *v.* Chesapeake, etc.,

has arisen the courts have looked upon an arbitrary limitation of value, where the carrier has sought to invoke it as against a loss due to negligence, as merely an attempt to evade to some extent a liability which cannot be entirely evaded, and have held the carrier liable to the full value of the property lost by negligence, regardless of the limitation inserted in the contract.[96] An arbitrary limitation of

R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116.

United States.— Metropolitan Trust Co. *v.* Toledo, etc., R. Co., 107 Fed. 628; Jennings *v.* Smith, 106 Fed. 139, 45 C. C. A. 249.

Canada.—Robertson *v.* Grand Trunk R. Co., 24 Can. Supreme Ct. 611.

See 9 Cent. Dig. tit. "Carriers," § 663.

In South Dakota by statute this is the rule. Hazel *v.* Chicago, etc., R. Co., 82 Iowa 477, 48 N. W. 926.

Rule applied and explained.— If there is a valid limitation of liability to a stipulated amount, as to the entire shipment, the carrier should have a *pro-rata* exemption as to a portion of the goods lost or damaged. St. Louis, etc., R. Co. *v.* Lesser, 46 Ark. 236; Goodman *v.* Missouri, etc., R. Co., 71 Mo. App. 460. Where one package was received containing three cases, and the limitation of liability was to fifty dollars on "the article forwarded," held that the shipper was not entitled to recover fifty dollars on each of the cases contained in the package. Wetzell *v.* Dinsmore, 54 N. Y. 496. But where the limitation in a receipt for a trunk was to "one hundred dollars upon any article," held that the carrier's liability under the receipt extended to one hundred dollars on each article in the trunk. Hopkins *v.* Westcott, 6 Blatchf. (U. S.) 64, 12 Fed. Cas. No. 6,692, 7 Am. L. Reg. N. S. 533. Where the stipulation was that the carrier should not be liable for goods of any description which were above the value of one hundred dollars per package, unless the value was expressed, etc., held that recovery was limited to one hundred dollars for each package of the entire quantity of goods shipped. Calderon *v.* Atlas Steamship Co., 64 Fed. 874. In Zouch *v.* Chesapeake, etc., R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116, it is said that such a stipulation is valid as against loss or damage by negligence, provided the negligence is not gross, wanton, or wilful. Liability as carrier otherwise than for negligence may be limited to a stipulated sum. Bermel *v.* New York, etc., R. Co., 62 N. Y. App. Div. 389, 70 N. Y. Suppl. 804.

96. *Alabama.*— Alabama Great Southern R. Co. *v.* Little, 71 Ala. 611; Southern Express Co. *v.* Armstead, 50 Ala. 350; Southern Express Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140.

Colorado.— Overland Mail, etc., Co. *v.* Carroll, 7 Colo. 43, 1 Pac. 682.

Georgia.— Georgia Cent. R. Co. *v.* Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; Savannah, etc., R. Co. *v.* Sloat, 93 Ga. 803, 20 S. E. 219.

Indiana.— Baltimore, etc., R. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. 1106.

Iowa.— Lucas *v.* Burlington, etc., R. Co., 112 Iowa 594, 84 N. W. 673.

Kansas.— St. Louis, etc., R. Co. *v.* Sherlock, 59 Kan. 23; Kansas City, etc., R. Co. *v.* Simpson, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104.

Kentucky.— Ohio, etc., R. Co. *v.* Tabor, 98 Ky. 503, 17 Ky. L. Rep. 568, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685; Baughman *v.* Louisville, etc., R. Co., 94 Ky. 150, 14 Ky. L. Rep. 775, 21 S. W. 757; Louisville, etc., R. Co. *v.* Owen, 93 Ky. 201, 14 Ky. L. Rep. 118, 19 S. W. 590; Adams Express Co. *v.* Hoeing, 88 Ky. 373, 10 Ky. L. Rep. 999, 11 S. W. 205; Orndorff *v.* Adams Express Co., 3 Bush (Ky.) 194, 96 Am. Dec. 207; Illinois Cent. R. Co. *v.* Radford, 23 Ky. L. Rep. 886, 64 S. W. 511; Cincinnati, etc., R. Co. *v.* Graves, 21 Ky. L. Rep. 684, 52 S. W. 961; Cincinnati, etc., R. Co. *v.* Grover, 11 Ky. L. Rep. 236; Adams Express Co. *v.* Hoeing, 9 Ky. L. Rep. 814; Adams Express Co. *v.* Crawford, 8 Ky. L. Rep. 619; Hoeing *v.* Adams Express Co., 8 Ky. L. Rep. 154; Southern Express Co. *v.* Gutman, 6 Ky. L. Rep. 587, 654.

Louisiana.— Kember *v.* Southern Express Co., 22 La. Ann. 158, 2 Am. Rep. 719.

Mississippi.— Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017.

Missouri.— Harvey *v.* Terre Haute, etc., R. Co., 74 Mo. 538; Harvey *v.* Terre Haute, etc., R. Co., 6 Mo. App. 585; Kirby *v.* Adams Express Co., 2 Mo. App. 369.

New York.— Vroman *v.* American Merchants' Union Express Co., 2 Hun (N. Y.) 512, 5 Thomps. & C. (N. Y.) 22; Magnin *v.* Dinsmore, 35 N. Y. Super. Ct. 182; Marquis *v.* Wood, 29 Misc. (N. Y.) 590, 61 N. Y. Suppl. 251.

North Carolina.— Gardner *v.* Southern R. Co., 127 N. C. 293, 37 S. E. 328.

Ohio.— U. S. Express Co. *v.* Backman, 28 Ohio St. 144; Jacobson *v.* Adams Express Co., 1 Ohio Cir. Ct. 381; Ambach *v.* Baltimore, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 467.

Pennsylvania.— Ruppel *v.* Allegheny Valley R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. Rep. 636; Weiller *v.* Pennsylvania R. Co., 134 Pa. St. 310, 19 Atl. 702, 19 Am. St. Rep. 700; Adams Express Co. *v.* Holmes, (Pa. 1887) 9 Atl. 166; Grogan *v.* Adams Express Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360.

Tennessee.—Louisville, etc., R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311.

Texas.— Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441; Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; Southern Pac. R. Co. *v.* Anderson, (Tex. Civ. App. 1900) 63 S. W. 1023; St. Louis, etc., R. Co. *v.* Robbins, (Tex. Civ. App. 1889) 14 S. W. 1075.

Virginia.— Virginia, etc., R. Co. *v.* Sayers, 26 Gratt. (Va.) 328.

Wisconsin.— Ullman *v.* Chicago, etc., R.

the amount of recovery is simply a form of contract reducing the carrier's common-law liability, and must therefore, like a general contract limiting common-law liability,[97] be supported by a special consideration, to be found in reduced rates, or the like.[98] But of course in states where such a limitation is not valid as against loss by negligence, the fact that a reduced rate is charged will not support the contract.[99]

b. Agreed Valuation. Although there has been difficulty in distinguishing between a *bona fide* agreed valuation, which is made the basis of the assumption of the duty to transport on the one hand, and the rate of consideration to be paid on the other, and an arbitrary limitation of liability to a stipulated amount, such a distinction manifestly exists.[1] And the weight of authority is in support of the proposition that a valuation mutually agreed upon as furnishing the basis of the liability assumed and the compensation to be paid is valid.[2] The rule thus strongly supported has not, however, been universally accepted, and there are a

Co., 112 Wis. 150, 88 N. W. 41; Abrams *v.* Milwaukee, etc., R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55; Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713.

United States.— Eells *v.* St. Louis, etc., R. Co., 52 Fed. 903; Scruggs *v.* Baltimore, etc., R. Co., 5 McCrary (U. S.) 590, 18 Fed. 318.

See 9 Cent. Dig. tit. "Carriers," § 663 *et seq.*

Where the relation is such that the carrier is bailee only and not carrier proper, for instance, where he is holding them as warehouseman, the limitation to a fixed value is immaterial as he will in such case only be liable for negligence in any event. Union Pac. R. Co. *v.* Moyer, 40 Kan. 184, 19 Pac. 639, 10 Am. St. Rep. 183; Rosenthal *v.* Weir, 170 N. Y. 148, 63 N. E. 65.

97. See *supra*, II, E, 3.

98. Adams Express Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214; Baughman *v.* Louisville, etc., R. Co., 94 Ky. 150, 14 Ky. L. Rep. 775, 21 S. W. 757; Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311, 50 S. W. 782; Kellerman *v.* Kansas City, etc., R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; Louisville, etc., R. Co. *v.* Levi, 18 Ohio Cir. Ct. 873, 8 Ohio Cir. Dec. 373.

99. U. S. Express Co. *v.* Backman, 28 Ohio St. 144.

1. The supreme court of the United States has recognized this distinction in holding that where the valuation of animals shipped is graded according to their nature, and the rate of compensation is agreed upon with reference to such valuation, and it does not appear that an unreasonable price would have been charged on a higher valuation, the owner is estopped by the terms of the contract thus entered into in good faith from recovering on the basis of a greater valuation than that fixed in the contract, such a stipulation being a proper and lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and to protect him against extravagant and fanciful valuations. Hart *v.* Pennsylvania R. Co., 112 U. S. 331, 5 S. Ct. 151, 28 L. ed. 717.

2. *Alabama.*— Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649; Louisville, etc., R. Co. *v.* Sherrod, 84 Ala. 178, 4 So. 29; South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578, 56 Ala. 368.

California.— Pierce *v.* Southern Pac. Co., (Cal. 1897) 47 Pac. 874.

Indiana.— Rosenfeld *v.* Peoria, etc., R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500.

Kentucky.— Adams Express Co. *v.* Hoeing, 9 Ky. L. Rep. 814.

Massachusetts.—Hill *v.* Boston, etc., R. Co., 144 Mass. 284, 10 N. E. 836; Graves *v.* Lake Shore, etc., R. Co., 137 Mass. 33, 50 Am. Rep. 282; Squire *v.* New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162.

Minnesota.— Alair *v.* Northern Pac. R. Co., 53 Minn. 160, 54 N. W. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764.

Ohio.— Evansville, etc., R. Co. *v.* Simon, 15 Ohio Cir. Ct. 123.

Pennsylvania.— Roos *v.* Philadelphia, etc., R. Co., 199 Pa. St. 378, 49 Atl. 344.

Rhode Island.— Ballou *v.* Earle, 17 R. I. 441, 22 Atl. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433.

South Carolina.— Johnstone *v.* Richmond, etc., R. Co., 39 S. C. 55, 17 S. E. 512.

Tennessee.— Louisville, etc., R. Co. *v.* Sowell, 90 Tenn. 17, 15 S. W. 837 [*distinguishing* Louisville, etc., R. Co. *v.* Wynne, 88 Tenn. 320, 14 S. W. 311, in which a contrary view is expressed].

Wisconsin.— Ullman *v.* Chicago, etc., R. Co., 112 Wis. 150, 88 N. W. 41; Loeser *v.* Chicago, etc., R. Co., 94 Wis. 571, 69 N. W. 372.

United States.— The Lydian Monarch, 23 Fed. 298; Hart *v.* Pennsylvania R. Co., 2 McCrary (U. S.) 333, 7 Fed. 630.

In case of partial loss of animals upon which an agreed valuation has been fixed, the carrier is liable to the total loss up to such agreed valuation, and not merely for the difference between the value of the animal after the injury and its stipulated value. Starnes *v.* Louisville, etc., R. Co., 91 Tenn. 516, 19 S. W. 675.

number of cases in which a contrary view is expressed, although it is believed that an examination of these cases will develop the fact that the real point involved in sustaining an agreed valuation has not been fairly apprehended.[3] Of course where the pretended agreed valuation is not such in fact, but is simply a cloak for a limitation of liability to a fixed sum, which is less than the real value, the contract will not be valid as against a loss due to negligence.[4] It is to be noticed that the doctrine of limitation to an agreed valuation is not based on the theory of reduction of liability by contract,[5] and therefore no new consideration for the agreement as to the value is essential. This view has been overlooked when it has been held that there must be a specific consideration for the limitation to an agreed value.[6]

c. Limitation of Liability to Invoice Price or Value at Place of Shipment. A regulation that the liability of the carrier in case of loss shall be limited to the invoice value of the goods is a reasonable regulation as to the damage to be recovered and is valid.[7] So a stipulation that the liability for loss shall be measured by the value at place of shipment is generally upheld.[8] But such a

3. Kansas City, etc., R. Co. *v.* Simpson, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017; Southern Express Co. *v.* Moon, 39 Miss. 822; Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; Houston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1895) 31 S. W. 556; Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713.

4. Georgia R., etc., Co. *v.* Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197.

Where the contract in terms purports to relieve the carrier from liability, and at the same time limits his liability to a certain price per head for the animals accepted for transportation, and it is apparent that it was not the purpose of the parties to liquidate the damages recoverable with reference to the value of the property consigned to the carrier, such limitation will not be effectual in case of loss from the carrier's negligence. Moulton *v.* St. Paul, etc., R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.

Where it is understood that the sum agreed on is less than the value of the goods, the limitation of liability to that amount, while it may be valid as a limitation of the carrier's liability for loss not due to negligence, is not available to him where the loss is due to negligence. U. S. Express Co. *v.* Backman, 28 Ohio St. 144.

Where there is fraud or gross negligence.— Values may be agreed upon, but they will not be binding on the shipper in case of perfidy or gross negligence of the carrier. Georgia Pac. R. Co. *v.* Hughart, 90 Ala. 36, 8 So. 62.

5. **Rests upon doctrine of estoppel.**— A limitation to an agreed valuation rests upon the doctrine of estoppel, and is supported on the same principle as that in accordance with which recovery is denied when the carrier has been misled as to the value of the goods by fraud or concealment of the shipper. See *supra*, II, E, 4, a.

6. See for instance McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

As to consideration for contract limiting liability to a stipulated sum see *supra*, II, E, 4, a.

7. Pierce *v.* Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; The Hadji, 18 Fed. 459.

Meaning of this limitation.— The limitation to the invoice value is to be applied to each article contained in the shipment, but the carrier is not to be allowed as to goods which are damaged the advantage of the actual value while he restricts the shipper to the invoice value. The true meaning of such a stipulation is that the carrier is not to be liable or accountable for more than the invoice value of the goods damaged or lost, and where there is a partial injury the damage is to be computed upon the basis of the invoice value of the goods damaged. Whatever is realized for the damaged goods must be credited upon the invoice value the same as though the goods were abandoned to the carrier, and the sale of the damaged goods were made by him. Pearse *v.* Quebec Steam-Ship Co., 24 Fed. 285. And if the shipper has received from the sale of the damaged goods the invoice price, after deducting the cost of importation, sale, etc., he cannot recover anything. The Lydian Monarch, 23 Fed. 298. Where the goods are damaged to an amount less than the invoice value, but after the damage are worth the invoice value with the cost of importation added, the carrier is not to be entirely relieved from liability, but the limitation as to value is applicable only, if at all, to restrict his liability in any event to the invoice price. Brown *v.* Cunard Steamship Co., 147 Mass. 58, 16 N. E. 717.

8. Louisville, etc., R. Co. *v.* Oden, 80 Ala. 38; Tibbits *v.* Rock Island, etc., R. Co., 49 Ill. App. 567; Chicago, etc., R. Co. *v.* Harmon, 17 Ill. App. 640; Rogan *v.* Wabash R. Co., 51 Mo. App. 665.

Delay or detention.— But such a stipulation is of no effect as against a claim for damages by reason of delay or detention. Albrecht *v.* Louisville, etc., R. Co., 10 Ky. L. Rep. 449; D. Klass Commission Co. *v.* Wabash R. Co., 80 Mo. App. 164.

stipulation is thought not to be good if so worded as to deny to the shipper any recovery in case of loss for freight paid in addition to the value of the goods.[9]

d. Limitation Where Value Not Stated. It has already been suggested that where by fraudulent concealment of the shipper for the purpose of avoiding payment of increased charges for transportation the carrier is induced to accept goods under the belief that they are of ordinary character and value, while in fact they are of such exceptional character or value as that a higher rate would have been charged if the facts had been known, the transaction constitutes such a fraud as to relieve the carrier from liability for the exceptional value.[10] And in accordance with this principle it is generally held competent for the carrier by contract or notice brought to the attention of the shipper to stipulate that he shall not be liable for the goods beyond a certain named sum, unless the value in excess of that sum is disclosed to the carrier and an increased compensation paid in accordance with the increased value, and such a stipulation will be valid, even in case of loss by negligence.[11] Under such circumstances it is not the duty of

9. Shea *v.* Minneapolis, etc., R. Co., 63 Minn. 228, 65 N. W. 458; Horner *v.* Missouri Pac. R. Co., 70 Mo. App. 285. But where the stipulation was that the liability for loss or damage should be computed at the value of the property at the place and time of shipment, held that it was valid, inasmuch as it did not exclude recovery of charges for transportation paid by the consignor or incurred by the consignee. Davis *v.* New York, etc., R. Co., 70 Minn. 37, 72 N. W. 823.

In Texas, however, a stipulation fixing the value at the place of shipment as the basis for estimating the measure of recovery is held to be a violation of the state statute prohibiting the carrier from making a contract limiting his liability. Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; Taylor, etc., R. Co. *v.* Sublett, (Tex. App. 1891) 16 S. W. 182; Taylor, etc., R. Co. *v.* Montgomery, (Tex. App. 1891) 16 S. W. 178; Gulf, etc., R. Co. *v.* Booton, (Tex. App. 1891) 15 S. W. 909; Houston, etc., R. Co. *v.* Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691. In cases of interstate shipment, to which the state statute is not applicable, a contract limiting the carrier's liability to the value at place of shipment is valid in case of loss not due to negligence. Southern Pac. Co. *v.* Phillipson, (Tex. Civ. App. 1897) 39 S. W. 958. But such a stipulation is unreasonable and invalid where the loss is due to negligence. Houston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1895) 31 S. W. 556. However, even in case of negligence, where there is such a stipulation the shipper should not be allowed as damages a greater amount than the price for which he has sold the property to the consignee. Gulf, etc., R. Co. *v.* Key, (Tex. App. 1891) 16 S. W. 106.

10. See *supra*, II, D, 2, c, (II).

11. *California.*— Michalitschke *v.* Wells, 118 Cal. 683, 50 Pac. 847.

Connecticut.— Lawrence *v.* New York, etc., R. Co., 36 Conn. 63.

District of Columbia.— Galt *v.* Adams Express Co., MacArthur & M. (D. C.) 124, 48 Am. Rep. 742.

Illinois.— Oppenheimer *v.* U. S. Express Co., 69 Ill. 62, 18 Am. Rep. 596.

Kansas.— Pacific Express Co. *v.* Foley, 46 Kan. 457, 26 Pac. 665, 26 Am. St. Rep. 107, 12 L. R. A. 799.

Louisiana.— Baldwin *v.* Collins, 9 Rob. (La.) 468.

Michigan.— Smith *v.* American Express Co., 108 Mich. 572, 66 N. W. 479.

Minnesota.— J. J. Douglas Co. *v.* Minnesota Transfer R. Co., 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860.

New Hampshire.— Durgin *v.* American Express Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453.

New York.— Magnin *v.* Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Huntington *v.* Dinsmore, 6 Thomps. & C. (N. Y.) 195; Ghormley *v.* Dinsmore, 51 N. Y. Super. Ct. 196; Toy *v.* Long Island R. Co., 26 Misc. (N. Y.) 792, 56 N. Y. Suppl. 182.

Rhode Island.— Ballou *v.* Earle, 17 R. I. 441, 22 Atl. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433.

Wisconsin.— Boorman *v.* American Express Co., 21 Wis. 152.

United States.— Calderon *v.* Atlas Steamship Co., 69 Fed. 574, 35 U. S. App. 587, 16 C. C. A. 332; The Bermuda, 23 Blatchf. (U. S.) 554, 29 Fed. 399; Muser *v.* American Express Co., 17 Blatchf. (U. S.) 412, 1 Fed. 382; Earnest *v.* Southern Express Co., 1 Woods (U. S.) 573, 8 Fed. Cas. No. 4,248. And see U. S. Rev. Stat. (1878), § 4281.

See 9 Cent. Dig. tit. "Carriers," § 665.

Failure of shipper to declare the real value constitutes a fraud on the carrier and deprives him of his adequate reward, misleading him as to the degree of care and security which he should provide in the custody and transportation of the property, and he is thereby relieved, even in case of negligence, from liability beyond the amount named in the contract or notice. Magnin *v.* Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442. Apparently *contra*, without a discussion of the failure of

the carrier to make inquiry as to the value, but the duty of the shipper to disclose the value if he seeks to hold the carrier liable beyond the stipulated sum.[12] But if it appears that the real value was known to the carrier to be in excess of the stipulated amount, then in case of negligence he will be liable for the real value, notwithstanding the stipulation.[13] But in a few cases a stipulation such as we have been considering has been held to be against public policy and void so far as its effect is to limit the carrier's liability for negligence.[14]

5. What Constitutes Contract Limiting Liability — a. Notice. In England a custom was early recognized on the part of carriers of limiting liability by special acceptance, effected by means of a general notice brought home to the shipper, and the shipper was held to be bound by the limitation contained in such general notice.[15] It may well be that the carrier can adopt reasonable regulations as to the method of doing his business, which, if made public in a general way, will bind those who deal with him, so that the shipper cannot complain if he has not taken the steps reasonably necessary under the well-known regulations of the carrier to charge the latter with a duty in reference to the goods.[16] But it was

the shipper to disclose as constituting fraud see Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

Such a stipulation is reasonable and consistent with public policy. Magnin *v.* Adams Express Co., 50 How. Pr. (N. Y.) 457. Nor is it in violation of a statute prohibiting a carrier from limiting his common-law liability. Mather *v.* American Express Co., 9 Biss. (U. S.) 293, 2 Fed. 49.

12. Kallman *v.* U. S. Express Co., 3 Kan. 205; Duntley *v.* Boston, etc., R. Co., 66 N. H. 263, 20 Atl. 327, 49 Am. St. Rep. 610, 9 L. R. A. 449.

13. Van Winkle *v.* Adams Express Co., 3 Rob. (N. Y.) 59.

So if the stipulation has reference to "packages, contents unknown," it will not be applicable to a shipment of goods in bulk, the nature of which is perfectly apparent and the value capable of estimation. Southern Express Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140; McCoy *v.* Erie, etc., Transp. Co., 42 Md. 498; Rosenstein *v.* Missouri Pac. R. Co., 16 Mo. App. 225.

Stipulation in the bill of lading that the weight, contents, and material are unknown to the carrier will not affect his liability in case of misdelivery of a part of the goods to one not the consignee. The Nora, 14 Fed. 429.

Stipulation that carrier shall not be liable for goods above the value of one hundred dollars per package, in the absence of a special agreement, does not exclude all liability for packages exceeding one hundred dollars in value, but merely limits the liability for each package to that amount. Calderon *v.* Atlas Steamship Co., 69 Fed. 574, 35 U. S. App. 587, 16 C. C. A. 332.

14. Conover *v.* Pacific Express Co., 40 Mo. App. 31; The City of Norwich, 4 Ben. (U. S.) 271, 5 Fed. Cas. No. 2,761.

Absence of fraud.— Where the failure to disclose the true nature and value of the goods appeared not to have been the result of fraud, and it was not pretended that a knowledge of the true contents would have induced a higher freight rate or a greater watchfulness, held that the attempted limitation was ineffectual. Fassett *v.* Ruark, 3 La. Ann. 694.

Fraud of consignor how affects consignee. — Where it appeared that the consignor had misdescribed the character of the goods, in order to get them carried at a lower rate, it was held that this did not defeat the consignee's right of action for loss of the goods, but that the carrier was entitled to an allowance of the amount of freight evaded. Rice *v.* Indianapolis, etc., R. Co., 3 Mo. App. 27.

15. Betson *v.* Donovan, 4 B. & Ald. 21, 22 Rev. Rep. 599, 6 E. C. L. 373; Riley *v.* Horne, 5 Bing. 217, 2 M. & P. 331, 30 Rev. Rep. 576, 15 E. C. L. 549; Brooke *v.* Pickwick, 4 Bing. 218, 5 L. J. C. P. O. S. 158, 12 Moore C. P. 447, 13 E. C. L. 475; Nicholson *v.* Willan, 5 East 507, 2 Smith K. B. 107, 15 Rev. Rep. 745; Leeson *v.* Holt, 1 Stark. 186, 18 Rev. Rep. 758, 2 E. C. L. 77; Maving *v.* Todd, 4 Campb. 225, 1 Stark. 72, 16 Rev. Rep. 779, 2 E. C. L. 37; Harris *v.* Packwood, 3 Taunt. 264, 15 Rev. Rep. 755.

16. Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

It is intimated in Judson *v.* Western R. Corp., 6 Allen (Mass.) 486, 493, 83 Am. Dec. 646, that common carriers may, by general notice brought home to the shipper, qualify and limit their responsibility to a certain extent and within certain limits, and the court says: "Doubtless they may by such notice require that information shall be given to them of the nature and value of property which they are required to carry, in order that they may exercise a needful degree of care in its transportation, and may ascertain and demand a reasonable sum for its carriage. So they may give notice that property above a certain amount in value will not be transported for ordinary rates of freight, but that the price for its carriage will be regulated by the nature of the articles and the aggregate value of each package. In like manner they may by a general notice protect themselves against

early settled in this country that not only must the notice be brought directly home to the shipper,[17] but also that limitation by notice will be ineffectual unless the shipper expressly assents thereto, so as to give rise to the mutual obligations necessary to constitute a contract.[18] And it may be regarded as the well-established American rule, that a notice of limitation of liability, even though brought directly home to the shipper, will not constitute a contract of limitation without the shipper's assent.[19]

b. Stipulation in Shipping Receipt. Where a stipulation for a valid limitation of the carrier's liability is embodied in a receipt, delivered by the carrier to the shipper, and accepted by the latter, the assent of the shipper to such stipulation is presumed, and the limitation thus embodied will be binding upon him as a

liability for loss or injury of merchandise, unless it is properly packed or arranged for transportation, so that it may with reasonable diligence and care be safely and securely carried. These and other similar notices would be reasonable and perfectly consistent with the nature of the employment of a common carrier, and the rules of law by which it is regulated, and they would be valid and binding on all to whom they were brought home, without any express assent."

As to fraudulent concealment of the nature of the goods see *supra*, II, D, 2, c, (II).

As to failure to disclose value when required see *supra*, II, E, 4, d.

17. *Connecticut.*— Peck *v.* Weeks, 34 Conn. 145; Derwort *v.* Loomer, 21 Conn. 245.

Georgia.— Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Illinois.— Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92.

Louisiana.— Baldwin *v.* Collins, 9 Rob. (La.) 468.

Maine.— Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Maryland.—Barney *v.* Prentiss, 4 Harr. & J. (Md.) 317, 7 Am. Dec. 670.

New Hampshire.— Moses *v.* Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222.

See 9 Cent. Dig. tit. "Carriers," § 675.

18. Judson *v.* Western R. Corp., 6 Allen (Mass.) 486, 83 Am. Dec. 646; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

This principle rests on the sound reason that the shipper has the right to have his goods transported by the carrier without limitation of liability, except so far as liability is limited by the common law itself, and that if the carrier seeks to impose additional limitations he must do so by the shipper's assent, which is not to be presumed from mere failure to object to the attempted limitation, for it is more reasonable to suppose that the shipper, not assenting, intended to insist on the carrier's full common-law duty, than that he intended to assent to a limitation of such duty. Judson *v.* Western R. Corp., 6 Allen (Mass.) 486, 83 Am. Dec. 646.

19. *Connecticut.*— Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398.

Georgia.— Rome R. Co. *v.* Sullivan, 14 Ga. 277.

Illinois.— Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Maine.— Fillebrown *v.* Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606.

Maryland.—Baltimore, etc., R. Co. *v.* Brady, 32 Md. 333.

Massachusetts.— Gott *v.* Dinsmore, 111 Mass. 45.

Michigan.— McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

Mississippi.— Mobile, etc., R. Co. *v.* Weiner, 49 Miss. 725.

New Hampshire.— Moses *v.* Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

New York.—Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125; Slocum *v.* Fairchild, 7 Hill (N. Y.) 292; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

Ohio.— Davidson *v.* Graham, 2 Ohio St. 131.

Texas.— Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589.

Vermont.— Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567; Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

West Virginia.— Brown *v.* Adams Express Co., 15 W. Va. 812.

See 9 Cent. Dig. tit. "Carriers," § 691.

The fact that consignor has previously accepted contracts restricting carrier's liability in a certain manner will not amount to a contract limiting liability in a particular case in the absence of express assent. McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

Even though notice is indorsed on the margin or back of a receipt or bill of lading for the goods, which is delivered to and received by the shipper, it will not become a part of the contract, in the absence of evidence that the shipper assented thereto. Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760; Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243; Fibel *v.* Livingston, 64 Barb. (N. Y.) 179; Limburger *v.* Westcott, 49 Barb. (N. Y.) 283; Prentice *v.* Decker, 49 Barb. (N. Y.) 21; Sunderland *v.* Wescott, 2 Sweeny (N. Y.) 260, 40 How. Pr. (N. Y.) 468; Knell *v.* U. S., etc., Steamship Co., 33 N. Y. Super. Ct. 423; Michigan Cent. R. Co. *v.* Mineral Springs

special contract, in the absence of any evidence of fraud, imposition, or deceit practised by the carrier.[20]

c. Stipulation in Bill of Lading. The nature of the bill of lading as constituting a contract between the carrier and the shipper will be discussed hereafter.[21] It is to be assumed for present purposes that the terms of shipment are usually embodied in such a bill of lading, if one be issued, and that a proper purpose of such instrument is to state the limitations, if any, under which the goods are received by the carrier for transportation. However, the contract may be oral, and it is open to the shipper to show that by such agreement a limitation was made.[22] If a formal bill of lading is executed by the carrier and delivered to the shipper, as evidence of the terms of shipment, valid stipulations embodied therein, limiting the carrier's liability, will be binding on the shipper, and no formal assent to the limitation of liability by signature to the bill of lading, or otherwise, is essential on the part of the shipper.[23] It is not necessary that the stipulation

Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; New York, etc., R. Co. *v.* Sayles, 87 Fed. 444, 58 U. S. App. 18, 32 C. C. A. 485; Ayres *v.* Western R. Corp., 14 Blatchf. (U. S.) 9, 2 Fed. Cas. No. 689; Seller *v.* The Pacific, Deady (U. S.) 17, 21 Fed. Cas. No. 12,644, 1 Oreg. 409; Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. 706.

20. *California.*— Michalitschke *v.* Wells, 118 Cal. 683, 50 Pac. 847.

Maryland.— Brehme *v.* Dinsmore, 25 Md. 328.

Missouri.— Snider *v.* Adams Express Co., 63 Mo. 376; Kirby *v.* Adams Express So., 2 Mo. App. 369.

New Hampshire.— Durgin *v.* American Express Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453.

New York.—Kirkland *v.* Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; McMahon *v.* Macy, 51 N. Y. 155; Springer *v.* Westcott, 78 Hun (N. Y.) 365, 29 N. Y. Suppl. 149, 60 N. Y. St. 713; Gibson *v.* American Merchants' Union Express Co., 1 Hun (N. Y.) 387; Giles *v.* Fargo, 60 N. Y. Super. Ct. 117, 17 N. Y. Suppl. 476, 43 N. Y. St. 65.

Wisconsin.— Boorman *v.* American Express Co., 21 Wis. 152.

United States.— Hopkins *v.* Westcott, 6 Blatchf. (U. S.) 64, 12 Fed. Cas. No. 6,692, 7 Am. L. Reg. N. S. 533.

See 9 Cent. Dig. tit. "Carriers," § 687.

Where the shipper relies on stipulations of a receipt as against the carrier, he is bound by limitations of liability found therein. Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78.

It is said, however, that the possession of a receipt by the shipper is but *prima facie* evidence of his assent to stipulations contained therein, and parol evidence is admissible to show that he never in fact accepted the paper as a contract between himself and the carrier. Walker *v.* Platt, 34 Misc. (N. Y.) 799, 69 N. Y. Suppl. 943; Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564; Boorman *v.* American Express Co., 21 Wis. 152.

Where a mere written receipt is given, the shipper will not be bound by terms usually embodied by the carrier in his formal receipts. Southern Express Co. *v.* Womack, 1 Heisk. (Tenn.) 256.

Of course, if by statute the carrier is prohibited from limiting his liability by notice or by entry on receipts given, the entry of a limitation upon a receipt will not constitute such a contract as will be binding on the shipper. Southern Express Co. *v.* Shea, 38 Ga. 519; Mosher *v.* Southern Express Co., 38 Ga. 37; Southern Express Co. *v.* Barnes, 36 Ga. 532.

As to how far a person accepting a formal instrument purporting to contain the terms of the contract of shipment is bound thereby see *infra*, II, E, 5, c.

Further as to shipping receipts see *infra*, II, G, 1.

21. See *infra*, II, G, 2.

22. Pittsburgh, etc., R. Co. *v.* Barrett, 36 Ohio St. 448.

If there is an oral contract as to terms, and a written receipt or bill of lading is subsequently delivered to the shipper, he has the right to assume that it embodies the terms of the oral agreement, and if additional limitations have been inserted therein without his knowledge he may avoid them on the ground of fraud. Boorman *v.* American Express Co., 21 Wis. 152.

23. *Alabama.*— Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49.

Connecticut.— Lawrence *v.* New York, etc., R. Co., 36 Conn. 63.

Illinois.— Chicago, etc., R. Co. *v.* Simon, 160 Ill. 648, 43 N. E. 596; Field *v.* Chicago, etc., R. Co., 71 Ill. 458; The Anchor Line *v.* Dater, 68 Ill. 369; Chicago, etc., R. Co. *v.* Montford, 60 Ill. 175; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Adams Express Co. *v.* Haynes, 42 Ill. 89.

Kansas.— Kallman *v.* U. S. Express Co., 3 Kan. 205.

Kentucky.— Louisville, etc., R. Co. *v.* Brownlee, 14 Bush (Ky.) 590.

Massachusetts.—Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

Michigan.— Hengstler *v.* Flint, etc., R. Co., 125 Mich. 530, 84 N. W. 1067; Smith *v.* American Express Co., 108 Mich. 572, 66 N. W. 479; Feige *v.* Michigan Cent. R. Co., 62 Mich. 1, 28 N. W. 685; McMillan *v.* Mich-

limiting the carrier's liability be expressly called to the shipper's attention. It will be presumed that the shipper was apprised of the contents of the instrument, and assented to its terms.[24] The rule applicable to other formal contracts is applied here, and the shipper who has accepted a bill of lading is conclusively presumed, in the absence of evidence of fraud, to have thereby assented to the terms of the instrument, and he will not be heard to say that stipulations therein limiting the carrier's liability were not known and assented to by him. He cannot show to defeat the exemption that he did not read the instrument.[25] This view, although supported by the great weight of authority, has not been accepted without opposition, and in some cases it has been held that it is incumbent on the carrier relying on an exemption from liability contained in a receipt or bill of lading to show that such exemption was brought to the attention of the shipper and expressly assented to by him.[26]

igan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

Minnesota.— Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

New York.— Landsberg *v.* Dinsmore, 4 Daly (N. Y.) 490; Wetzell *v.* Dinsmore, 4 Daly (N. Y.) 193.

United States.— Jennings *v.* Smith, 106 Fed. 139, 45 C. C. A. 249; The Santee, 7 Blatchf. (U. S.) 186, 21 Fed. Cas. No. 12,330.

See 9 Cent. Dig. tit. "Carriers," § 691 *et seq.*

Contemplated shipment.— Provisions of a bill of lading issued for a contemplated shipment will be binding if the shipment is made thereunder. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; The Bark Delaware *v.* Oregon Iron Co., 14 Wall. (U. S.) 579, 20 L. ed. 779; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57.

24. McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; East Tennessee, etc., R. Co. *v.* Brumley, 5 Lea (Tenn.) 401; Dillard *v.* Louisville, etc., R. Co., 2 Lea (Tenn.) 288.

Knowledge of fact that such stipulation is usually contained in the bill of lading or receipt issued by the carrier will affect the shipper with notice thereof in a particular case. Ghormley *v.* Dinsmore, 53 N. Y. Super. Ct. 36; Rubens *v.* Ludgate Hill Steamship Co., 20 N. Y. Suppl. 481, 48 N. Y. St. 732.

25. *Alabama.*—Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649; Jones *v.* Cincinnati, etc., R. Co., 89 Ala. 376, 8 So. 61.

Arkansas.— St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104.

Iowa.— Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514.

Massachusetts.—Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

Minnesota.— Hutchinson *v.* Chicago, etc., R. Co., 37 Minn. 524, 35 N. W. 433.

Missouri.— Kellerman *v.* Kansas City, etc., R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828.

New York.— Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Germania F. Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113.

North Carolina.— Phifer *v.* Carolina Cent. R. Co., 89 N. C. 311, 45 Am. Rep. 687.

South Carolina.— Johnstone *v.* Richmond, etc., R. Co., 39 S. C. 55, 17 S. E. 512.

Texas.— Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589.

Vermont.— Davis *v.* Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

United States.—Leitch *v.* Union R. Transp. Co., 15 Fed. Cas. No. 8,224, 7 Chic. Leg. N. 291.

See 9 Cent. Dig. tit. "Carriers," § 693.

The statutory provision that the carrier's liability cannot be limited by stipulations in a receipt will not prevent his being bound by the terms of a formal contract, such as a bill of lading. Jennings *v.* Smith, 99 Fed. 189.

26. Adams Express Co. *v.* Hoeing, 88 Ky. 373, 10 Ky. L. Rep. 999, 11 S. W. 205; Louisville, etc., R. Co. *v.* Owen, 12 Ky. L. Rep. 716; Southern Express Co. *v.* Moon, 39 Miss. 822; Pittsburgh, etc., R. Co. *v.* Blakemore, 1 Ohio Cir. Ct. 42; The Guildhall, 58 Fed. 796; Seller *v.* The Pacific, Deady (U. S.) 17, 21 Fed. Cas. No. 12,644, 1 Oreg. 409.

This is especially true in Illinois, where there is a line of decisions in which it is held that the mere acceptance by the shipper of a bill of lading containing limitations of liability will not be sufficient in itself to show assent, and that the burden is on the carrier to establish such assent by other evidence. Chicago, etc., R. Co. *v.* Callumet Stock Farm, 194 Ill. 9, 61 N. E. 1095; Chicago, etc., R. Co. *v.* Simon, 160 Ill. 648, 43 N. E. 596; Chicago, etc., R. Co. *v.* Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143; Boscowitz *v.* Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191; Erie, etc., Transp. Co. *v.* Dater, 91 Ill. 195, 33 Am. Rep. 51; Merchants' Despatch Transp. Co. *v.* Jœsting, 89 Ill. 152; Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43; Merchants' Despatch Transp. Co. *v.* Theilbar, 86 Ill. 71; Adams Express Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57; American Merchants' Union Express Co. *v.* Schier, 55 Ill. 140; Adams Express Co. *v.* Haynes, 42 Ill. 89; Wabash R. Co. *v.* Harris, 55 Ill. App. 159; Western Transit Co. *v.* Hosking, 19 Ill. App. 607; Lake Shore, etc., R. Co. *v.* Davis, 16 Ill. App. 425; Adams Express Co. *v.* King, 3 Ill. App. 316. But if the parties specially contract with reference to limitation of liability, the shipper is bound by the instrument, and can-

d. Stipulation in Bill of Lading or Receipt Delivered After Shipment. To be binding as a part of the contract of shipment the stipulation limiting liability must be embodied in the contract made at the time the goods are shipped. If without any receipt or bill of lading being issued the goods are accepted by the carrier for transportation his common-law liability attaches, and the subsequent delivery to and acceptance by the shipper or his agent of a receipt or bill of lading containing such stipulation will not constitute a part of a binding contract, for in such case there is no consideration for the subsequent agreement.[27] The doctrine that acceptance of a receipt or bill of lading containing stipulations limiting liability implies assent thereto has no application in such a case.[28] If, however, there is an understanding arising out of the course of business by which bills of lading are to be delivered for goods shipped which contain stipulations limiting liability, then it may be presumed that the shipment in such course of business is made on the terms of such a bill of lading, and the stipulations therein will be binding.[29]

not relieve himself from its terms by reason of ignorance thereof. Coles *v.* Louisville, etc., R. Co., 41 Ill. App. 607; Chicago, etc., R. Co. *v.* Hale, 2 Ill. App. 150.

In Georgia a somewhat similar result has been reached by reason of a statutory provision which prohibits the carrier from limiting the liability imposed upon him by law by reason of any notice or entry to that effect in the receipt or bill of lading, and it has been accordingly held in that state that such a limitation can only be made by special contract (Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81; Southern Express Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53; Southern Express Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783; Southern Express Co. *v.* Barnes, 36 Ga. 532; Purcell *v.* Southern Express Co., 34 Ga. 315), and that stipulations in a bill of lading with reference to exemption from liability must be expressly assented to (Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Central R. Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Georgia R. Co. *v.* Gann, 68 Ga. 350; Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81), and further, that a mere acceptance of the bill of lading containing such stipulation will not be sufficient to show assent. Central R. Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37. But where the shipper himself filled out the blanks in the bill and then tendered it to the carrier for signature, it was held that, when signed and delivered to the shipper, it created a special contract as to limitation of liability which was binding on the shipper. Wallace *v.* Matthews, 39 Ga. 617, 99 Am. Dec. 473.

In Dakota, the provisions of the civil code on the subject have received a similar interpretation. Hartwell *v.* Northern Pac. Express Co., 5 Dak. 463, 41 N. W. 732, 3 L. R. A. 342.

27. German *v.* Chicago, etc., R. Co., 38 Iowa 127; Southard *v.* Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442, 619.

28. *Alabama.*— Louisville, etc., R. Co. *v.* Meyer, 78 Ala. 597.

Georgia.— Central R. Co. *v.* Dwight Mfg. Co., 75 Ga. 609.

Illinois.— Merchants' Despatch Transp. Co. *v.* Furthman, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; Michigan Cent. R. Co. *v.* Boyd, 91 Ill. 268; American Express Co. *v.* Spellman, 90 Ill. 455.

Massachusetts.— Perry *v.* Thompson, 98 Mass. 249.

Nebraska.— Union Pac. R. Co. *v.* Marston, 30 Nebr. 241, 46 N. W. 485.

New York.— Lamb *v.* Camden, etc., R. Co., 4 Daly (N. Y.) 483.

Ohio.— Gaines *v.* Union Transp., etc., Co., 28 Ohio St. 418; Welsh *v.* Pittsburg, etc., R. Co., 10 Ohio St. 65, 75 Am. Dec. 490.

Texas.— Galveston, etc., R. Co. *v.* Botts, 22 Tex. Civ. App. 609, 55 S. W. 514; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

See 9 Cent. Dig. tit. "Carriers," § 696.

29. Shelton *v.* Merchants' Dispatch Transp. Co., 59 N. Y. 258; Ft. Worth, etc., R. Co. *v.* Wright, 24 Tex. Civ. App. 291, 58 S. W. 846. But the shipper will not be bound by mere usage to issue bills containing a limitation. See *infra*, II, E, 6.

In the absence of any such understanding the acceptance of a shipping receipt or bill of lading will not be deemed to be a merger of a previous oral agreement under which the goods were shipped, so as to preclude proof of such oral agreement in contradiction of the terms of the written instrument. Bostwick *v.* Baltimore, etc., R. Co., 45 N. Y. 712; Hamilton *v.* Western North Carolina R. Co., 96 N. C. 398, 3 S. E. 164.

Whether shipment was in pursuance of a prior oral contract, or under the terms of a written bill of lading which the shipper contends was supposed by him to be a mere memorandum as to the right of his agent to accompany the goods, should be determined as a question of fact. Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628.

Where shipper surrendered a shipping receipt while the goods were supposed to be in transit, and accepted a bill of lading containing a stipulation limiting liability for loss by fire, and it subsequently appeared that the goods had already been destroyed by fire, and that that fact was known to the carrier,

e. Owner Bound by Assent of Person Authorized to Act For Him — (I) *In General.* One who has authority to ship goods for another has thereby implied authority to make a contract for their shipment involving a limitation of the carrier's liability.[30] Even though the delivery to the carrier is by a cartman or teamster, if by the usual course of business between the shipper and the carrier it is customary for the cartman or teamster to accept the shipping contract, valid stipulations therein limiting the carrier's liability will be binding on the shipper.[31]

(II) *Consignor Contracting For Consignee.* Where the goods belong to the consignee, and the consignor in making the shipment acts under the consignee's direction in doing so, he may bind the consignee by a contract for the shipment which limits the carrier's liability.[32]

6. Custom as Affecting Carrier's Liability. A general usage which is known to the parties may be considered in determining the construction of stipulations limiting the carrier's liability, as, for instance, where it is shown that "dangers of the river" is understood as covering loss by fire.[33] But it is not competent by proof of usage or custom to impose a limitation of liability not provided for in

held that the stipulation in the bill of lading was not binding on the owner of the goods. Wilde *v.* Merchants' Despatch Transp. Co., 47 Iowa 247, 29 Am. Rep. 479.

30. Jennings *v.* Grand Trunk R. Co., 52 Hun (N. Y.) 227, 5 N. Y. Suppl. 140, 23 N. Y. St. 15; Soumet *v.* National Express Co., 66 Barb. (N. Y.) 284; Moriarty *v.* Harnden's Express, 1 Daly (N. Y.) 227; Meyer *v.* Harnden's Express Co., 24 How. Pr. (N. Y.) 290.

The power of the agent in such case to bind the owner by an agreement to limit the carrier's liability will be presumed. Craycroft *v.* Atchison, etc., R. Co., 18 Mo. App. 487.

Authority to deliver goods for transportation includes all the necessary and usual means of carrying it into effect. As it can only be executed by obtaining the consent of the carrier to receive them, the agent is authorized to stipulate for the terms of transportation. Nelson *v.* Hudson River R. Co., 48 N. Y. 498.

Where a shipper of live stock sends his agent in charge of the property, the agent stands in the position of the owner, and his contract limiting the liability of the carrier is binding on the owner, in the absence of fraud. Squire *v.* New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162.

31. Nelson *v.* Hudson River R. Co., 48 N. Y. 498; Shelton *v.* Merchants' Despatch Transp. Co., 59 N. Y. 258; Van Schaack *v.* Northern Transp. Co., 3 Biss. (U. S.) 394, 28 Fed. Cas. No. 16,876, 7 Am. L. Rev. 565, 5 Chic. Leg. N. 181, 4 Leg. Op. (Pa.) 537.

Absence of authority.— But if the person who purports to act for the shipper has no authority to do so of course the limitation is invalid. Ohio, etc., R. Co. *v.* Hamlin, 42 Ill. App. 441.

The burden of proof is on the carrier to show an agreement binding on the shipper. Merriman *v.* The May Queen, Newb. Adm. (U. S.) 464, 17 Fed. Cas. No. 9,481.

Where shipper and carrier have previously made a contract as to the transportation of goods, the person who delivers them to the carrier in pursuance of such contract is not to be presumed to have authority to waive its terms. Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, 40 N. Y. St. 318.

But in the absence of any knowledge on the part of the shipper that his employee has been in the habit of accepting receipts containing a stipulation limiting the carrier's common-law liability the shipper will not be bound thereby. Buckland *v.* Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68.

32. *Illinois.*— Brown *v.* Louisville, etc., R. Co., 36 Ill. App. 140.

Iowa.— Robinson *v.* Merchants' Despatch Transp. Co., 45 Iowa 470.

Kentucky.— Adams Express Co. *v.* Marshall, 6 Ky. L. Rep. 291.

Minnesota.— Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

New York.— Donovan *v.* Standard Oil Co., 155 N. Y. 112, 49 N. E. 678; Zimmer *v.* New York Cent., etc., R. Co., 137 N. Y. 460, 33 N. E. 642, 51 N. Y. St. 269; Nelson *v.* Hudson River R. Co., 48 N. Y. 498.

Pennsylvania.— Farnham *v.* Camden, etc., R. Co., 55 Pa. St. 53.

Texas.— Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589.

United States.— York Mfg. Co. *v.* Illinois Cent. R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170.

See 9 Cent. Dig. tit. "Carriers," § 685.

Even if bill of lading is issued in name of one who is neither consignor nor consignee, yet if it is issued under an agreement with the real owner limitations therein will be binding upon him. Fast *v.* Canton, etc., R. Co., 77 Miss. 498, 27 So. 525.

33. Boon *v.* Steamboat Belfast, 40 Ala. 184, 88 Am. Dec. 761; McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552; Hibler *v.* McCartney, 31 Ala. 501; Ezell *v.* Miller, 6 Port. (Ala.) 307; Sampson *v.* Gazzam, 6 Port. (Ala.) 123, 30 Am. Dec. 578.

the contract of shipment.[34] Nor will a general custom or usage on the part of the carrier to issue bills of lading with a stipulation therein for limitation of liability be sufficient to show that in a particular case in which no such contract is accepted by the shipper he is bound thereby.[35]

7. Construction of Contracts Limiting Liability. A contract relied on as limiting the carrier's common-law liability must be unequivocal and unambiguous;[36] and as restrictions of the carrier's liability in receipts or bills of lading, drawn up and executed by them, are for their benefit and are interposed for the purpose of escaping a liability which would otherwise be imposed by law, they are to be strictly construed as against the carrier and in favor of the shipper.[37] Furthermore, as a construction which interprets such a contract as a limitation of the liability of the carrier for negligence would render it invalid,[38] such a contract will not be construed so as to protect the carrier from the consequences of his own negligence, or that of his agents or servants, unless such construction is required by the language used.[39] Thus a stipulation that the goods are accepted by the carrier at the owner's risk is not to be construed as relieving the carrier from any liability for loss due to negligence.[40] And it may be said that in construing

Thus a general usage at the port in accordance with which goods after delivery and assortment on the wharf are at the owner's risk may be shown. Pickering *v.* Weld, 159 Mass. 522, 34 N. E. 1081.

34. *Illinois.*— Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

New York.— Robinson *v.* New York, etc., Steamship Co., 63 N. Y. App. Div. 211, 71 N. Y. Suppl. 424; Little *v.* Fargo, 43 Hun (N. Y.) 233.

Ohio.— Pittsburgh, etc., R. Co. *v.* Barrett, 36 Ohio St. 448.

Pennsylvania.— Coxe *v.* Heisley, 19 Pa. St. 243.

Tennessee.— Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515.

United States.— The Reeside, 2 Sumn. (U. S.) 567, 20 Fed. Cas. No. 11,657.

See 9 Cent. Dig. tit. "Carriers," § 681.

35. McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Reed *v.* Fargo, 4 Silv. Supreme (N. Y.) 174, 7 N. Y. Suppl. 185, 26 N. Y. St. 587; Singleton *v.* Hilliard, 1 Strobh. (S. C.) 203; Farmers', etc., Bank *v.* Champlain Transp. Co., 18 Vt. 131. Apparently *contra*, see Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468.

A bill of lading issued and accepted after shipment may be binding so far as it contains usual limitations if the shipper had knowledge of the usual terms. See *supra*, II, E, 5, d.

36. Hooper *v.* Wells, 27 Cal. 11, 85 Am. Dec. 211; Rosenfeld *v.* Peoria, etc., R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Edsall *v.* Camden, etc., R., etc., Co., 50 N. Y. 661. As to the New York cases see *supra*, II, E, 2.

37. *California.*— Hooper *v.* Wells, 27 Cal. 11, 85 Am. Dec. 211.

Indiana.— Rosenfeld *v.* Peoria, etc., R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; St. Louis, etc., R. Co. *v.* Smuck, 49 Ind. 302.

Missouri.— E. O. Stanard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704.

New Hampshire.— Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

New York.— Edsall *v.* Camden, etc., R., etc., Co., 50 N. Y. 661.

Wisconsin.— Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 23 N. W. 425, 53 Am. Rep. 267.

United States.— Menzell *v.* Chicago, etc., R. Co., 1 Dill. (U. S.) 531, 17 Fed. Cas. No. 9,429, 4 Am. L. T. Rep. 58, 5 West. Jur. 61.

See 9 Cent. Dig. tit. "Carriers," § 697.

38. See *supra*, II, E, 2, b.

39. *Alabama.*— Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

Connecticut.— Welch *v.* Boston, etc., R. Co., 41 Conn. 333.

Minnesota.— Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

New York.— Sherman *v.* Inman Steamship Co., 26 Hun (N. Y.) 107.

Pennsylvania.— Goldey *v.* Pennsylvania R. Co., 30 Pa. St. 242, 72 Am. Dec. 703.

United States.— The Colon, 9 Ben. (U. S.) 354, 6 Fed. Cas. No. 3,023; Dedekam *v.* Vose, 3 Blatchf. (U. S.) 44, 7 Fed. Cas. No. 3,729.

See 9 Cent. Dig. tit. "Carriers," § 699.

40. *Alabama.*— South, etc., Alabama R. Co. *v.* Wilson, 78 Ala. 587.

Massachusetts.— Medfield School Dist. *v.* Boston, etc., R. Co., 102 Mass. 552, 3 Am. Rep. 502.

Missouri.— McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

New York.—Moore *v.* Evans, 14 Barb. (N. Y.) 524.

Pennsylvania.— Empire Transp. Co. *v.* Wamsutta Oil Refining, etc., Co., 63 Pa. St. 14, 3 Am. Rep. 515.

Tennessee.— Nashville, etc., R. Co. *v.* Jackson, 6 Heisk. (Tenn.) 271.

West Virginia.— Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

United States.— New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

contracts limiting a carrier's liability the courts will apply such rules of interpretation as control the operation and effect of contracts in general.[41]

8. CONFLICT OF LAWS AS TO VALIDITY OF CONTRACTS LIMITING LIABILITY. The gen-

41. **Loss at place of transshipment.**— Exemption from liability for loss while in depot or place of transshipment is not applicable to loss at the depot where the goods have been received. Amory Mfg. Co. *v.* Gulf, etc., R. Co., 89 Tex. 419, 37 S. W. 856, 59 Am. St. Rep. 65; Gulf, etc., R. Co. *v.* Pepperell Mfg. Co., (Tex. Civ. App. 1896) 37 S. W. 965. But a stipulation limiting liability for loss by fire while the goods are awaiting transshipment releases the carrier from liability for loss by fire in a depot while awaiting transfer to another depot. Brown *v.* Louisville, etc., R. Co., 36 Ill. App. 140.

Loss awaiting delivery.— A limitation of liability for the goods while awaiting delivery does not apply to a loss after the goods have reached their destination, but before they have been placed in position for delivery to the consignee. McKinney *v.* Jewett, 90 N. Y. 267. A stipulation relieving the carrier from liability for negligence of the pilot master or mariners does not apply to negligence of the servants of the carrier while the goods are in his possession for delivery. Gleadell *v.* Thomson, 56 N. Y. 194.

Loss by fire.— "Dangers of fire and navigation" and "unavoidable accidents of navigation and fire" mean the same thing, and liability for loss by fire under such stipulation is not restricted to fire originating from the furnace of a boat. Swindler *v.* Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732. Exemption from liability for loss by fire does not cover loss by theft, although the car from which the goods were stolen was afterward burned. Merchants' Dispatch Transp. Co. *v.* Hoskins, 19 Ky. L. Rep. 799, 41 S. W. 31, 44 S. W. 362.

Loss by fire due to the action of a mob is within the exception of "loss by fire or other casualty." Hall *v.* Pennsylvania R. Co., 14 Phila. (Pa.) 414, 37 Leg. Int. (Pa.) 64; Hall *v.* Pennsylvania R. Co., 1 Fed. 226; Sherman *v.* Pennsylvania R. Co., 21 Fed. Cas. No. 12,769, 8 Wkly. Notes Cas. (Pa.) 269.

Loss by reason of leakage and breakage.— A bill of lading exempting a carrier from responsibility for leakage does not relieve him where a cask received in good order is broken during transportation. Brauer *v.* Barque Almoner, 18 La. Ann. 266. Leakage does not cover shortage due to some unknown cause. The Bellona, 4 Ben. (U. S.) 503, 3 Fed. Cas. No. 1,277. Leakage due to failure of the carrier to properly care for the casks is not covered by an exception of liability for leakage. Hunnewell *v.* Taber, 2 Sprague (U. S.) 1, 12 Fed. Cas. No. 6,880. A general exception of breakage does not cover the breaking of an animal's leg. Coupland *v.* Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

Loss caused by unavoidable dangers.— An exemption of liability for damages caused by unavoidable dangers and accidents does not restrict the carrier's general liability, as such exemption amounts to no more than the common-law limitation for act of God. Walpole *v.* Bridges, 5 Blackf. (Ind.) 222; Union Mut. Ins. Co. *v.* Indianapolis, etc., R. Co., 1 Disn. (Ohio) 480, 12 Ohio Dec. (Reprint) 745. But such an exemption does not cover damage due to goods falling from a boat into the water by reason of a defective rod intended to restrain the goods on deck. Central Line of Boats *v.* Lowe, 50 Ga. 509.

Loss due to climatic changes.— Where a carrier has failed to use a refrigerator car, as required by the contract, he cannot be relieved under a stipulation against liability for heat. Chicago, etc., R. Co. *v.* Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143. An exemption from loss occasioned by "effect of climate" does not exempt the carrier of fruit from liability for loss by temporary frost while the fruit is being discharged from the vessel. The Aline, 19 Fed. 875. Damage from humidity while the goods are being transported by a ship in a warm climate is within an exemption of heat and sweating. Mendelsohn *v.* The Louisiana, 3 Woods (U. S.) 46, 17 Fed. Cas. No. 9,421.

Loss during transit.— A stipulation that the carrier shall not be liable for loss or damage during transit does not relieve him from liability for non-delivery. Stafford *v.* Walter, 67 Ill. 83.

Loss from dangers of navigation.— An exception of "casualties of river navigation and of steam" covers loss due to explosion of a boiler. Adams Express Co. *v.* Fendrick, 38 Ind. 150. "Loss or damage on the lakes or rivers" does not cover loss by the sinking of a wharf-boat on which the goods have been placed awaiting their transfer to a steamer. St. Louis, etc., R. Co. *v.* Smuck, 49 Ind. 302. "Dangers of the river navigation" cover damage due to collision. Hays *v.* Kennedy, 3 Grant (Pa.) 351. A stipulation in a bill of lading issued by a railroad company that it should "not be liable for any damages by fire or collision on the rivers and sea" held to cover loss by fire occurring on the water only. Little Rock, etc., R. Co. *v.* Talbot, 39 Ark. 523.

Negligence of carrier employed by forwarder.— A carrier cannot by a stipulation that he is "not to be responsible except as forwarder" relieve himself from liability for negligence of employees of another carrier by whom the contract for transportation by the first carrier is performed. Hooper *v.* Wells, 27 Cal. 11, 85 Am. Dec. 211.

Other exceptional clauses.— A clause excusing the carrier from accountability for "weight, contents, packing, marks and damage" held to refer to damage of the goods at the time of their receipt, and not to injuries received subsequently on the voyage. The Tommy, 16 Fed. 601. An exemption from liability for loss due to accidents of boiler or machinery held not to cover damage caused by the breaking of a car axle, inasmuch as the general language of the exemption indicated

eral proposition that the validity of a contract is to be determined by the law of the place where the contract is made and not by that of the forum [42] is applied in the construction of contracts made in this country for transportation of goods to another country, and a limitation of liability which is invalid where the contract is made will not be given effect in our courts, although the provision would have been valid if made in the country to which the goods are shipped.[43] The converse of the general proposition is equally true, that if a limitation of liability is valid where the contract of shipment is made for transportation from that state or country to another state or country, the validity of such stipulation will be upheld in the courts of a state or country where such limitation would be invalid.[44] Thus, a limitation in a contract of shipment made in one state for transportation of goods from that state into another will be upheld in the courts of the latter state if valid where made, although, if the limitation had been made in the state of the forum, it would have been invalid by reason of statutory prohibition or of the general rule of construction with reference to such contracts.[45] And the fact that a contract limiting the liability of a railroad com-

that it was applicable only to machinery connected with the boiler and steam supplies. Fairbank *v.* Cincinnati, etc., R. Co., 81 Fed. 289, 47 U. S. App. 744, 22 C. C. A. 402. A general release from liability for damage from leakage, decay, breakage, or any other cause not the result of collision of trains held not to apply to and exempt the carrier from total loss by fire while the goods were stored in the carrier's warehouse awaiting transshipment. Menzell *v.* Chicago, etc., R. Co., 1 Dill. (U. S.) 531, 17 Fed. Cas. No. 9,429, 4 Am. L. T. Rep. 58, 5 West. Jur. 61. An exemption of liability for injuries to animals from certain specified causes, "or in any way," held not to cover injury due to collision of the engine with another train. Zimmer *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 631, 42 N. Y. St. 63. An exemption of liability for "all baggage" held not to cover loss of a package received for carriage for compensation. Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133. A shipping contract limiting the measure of recovery for "each horse, mule," etc., does not cover the loss of a "jack." Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311, 50 S. W. 782. Where the bill of lading contained clauses as to exemption from liability, with the further provision that "cotton is excepted from any clause herein on the subject of fire," held that cotton was thereby excluded from the clauses relating to exemption from liability from other causes. Texas, etc., R. Co. *v.* Callendar, 98 Fed. 538, 39 C. C. A. 154. An exemption from liability for carriages held not to cover loss of a street railway car. Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 23 N. W. 425, 53 Am. Rep. 267.

Two contracts.—Where a bill of lading for the transportation of animals and a stipulation as to the owner accompanying and taking care of them were separately signed, held that the stipulation in one of the contracts that any question arising under it should be determined by the law of a certain state did not govern in the construction of the other. Brockway *v.* American Express Co., 171 Mass. 158, 50 N. E. 626.

42. As to the application of this general principle to shipping contracts see *infra*, II, G, 4.

43. Liverpool, etc., R. Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788.

**This general principle is applied as rendering invalid in the courts of a state contracts made in that state for transportation of goods to another state containing stipulations contrary to the law of the state where the contract is made. McDaniel *v.* Chicago, etc., R. Co., 24 Iowa 412. It is also applied in the courts of other states than that in which the contract was made. Brockway *v.* American Express Co., 168 Mass. 257, 47 N. E. 87; Knowlton *v.* Erie R. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Pittman *v.* Pacific Express Co., (Tex. Civ. App. 1900) 59 S. W. 949. In a state where such limitation is prohibited, it will be presumed, in absence of proof to the contrary, that a contract in another state containing such stipulation is contrary to law. Southern Pac. Co. *v.* Anderson, (Tex. Civ. App. 1901) 63 S. W. 1023. Where by the law of the state where the contract is made special assent to a stipulation in the bill of lading or shipping receipt exempting the carrier from his common-law liability is necessary, a contract of shipment containing such a stipulation not specially assented to will not be recognized in the courts of another state. Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88. Where, however, the state statute prohibiting limitation of liability is applicable only to contracts for transportation within the state, such a limitation with reference to interstate shipments will be recognized as valid in other states. Otis Co. *v.* Missouri Pac. R. Co., 112 Mo. 622, 20 S. W. 676. For the Texas cases holding that a state statute prohibiting limitation of liability is not applicable to interstate shipments see *supra*, II, E, 3, h.

44. The Carib Prince, 63 Fed. 266.

45. *Georgia.*— Western, etc., R. Co. *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

Illinois.— Brown *v.* Louisville, etc., R. Co., 36 Ill. App. 140.

Iowa.— Hazel *v.* Chicago, etc., R. Co., 82

pany is invalid by statute in the state where the company is incorporated will have no effect in determining the validity of a contract by such company made in a state where the limitation of liability is valid with reference to transportation into another state than that where the company is incorporated.[46] Some countenance was given in an English case[47] to the idea that parties making a contract of shipment in one country might do so with reference to the law of another country, so that such contract would be construed with reference to the law of the latter country, rather than the law of the former, but the courts of this country have not countenanced the idea that the parties may thus select the law of some other country as determining the validity of a limitation of liability in a contract made here,[48] and it has been held that in contracts made in this country for transportation of goods to another country it cannot be stipulated that the validity of the contract shall be determined by the law of the "flag" under which the ship sails. Such a provision will not be effectual to incorporate the law of the ship's country into the contract so as to make it valid if it would not be valid where made.[49] The rule that the validity of limitations is to be determined by the law of the country where the contract of shipment is made seems to be subject to this qualification, that the courts of this country will not recognize as valid a limitation in such contract of shipment from another country to this, even though valid where the contract is made, if the limitation is contrary to the general policy of the law of this country.[50] And accordingly it has been said that a limitation of liability in a shipping contract, valid in the state where made, for transportation to another state, will not be recognized in the courts of the latter if contrary to the general policy of that state.[51]

F. Delivery and Acceptance to Charge Carrier — 1. Delivery and Acceptance Essential. In order that the carrier may be charged with reference to the custody, care, and transportation of goods, it is evidently essential that as bailee he shall have come into possession of the goods, which, of course, involves a delivery by the shipper and an acceptance by the carrier, and until there has been such delivery and acceptance, by which the possession of the goods has been transferred from the shipper to the carrier, no liability of the carrier with reference to such goods arises.[52]

Iowa 477, 48 N. W. 926; Talbott *v.* Merchant's Despatch Transp. Co., 41 Iowa 247, 20 Am. Rep. 589.

Pennsylvania.— Fairchild *v.* Philadelphia, etc., R. Co., 148 Pa. St. 527, 24 Atl. 79; Forepaugh *v.* Delaware, etc., R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508.

Texas.— Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589.

See 9 Cent. Dig. tit. "Carriers," § 650.

46. Tecumseh Mills *v.* Louisville, etc., R. Co., 22 Ky. L. Rep. 264, 57 S. W. 9, 49 L. R. A. 557; Thomas *v.* Wabash, etc., R. Co., 63 Fed. 200.

Where the statutes of the state where the contract is made prohibiting limitation of liability relate to contracts for shipment in that state, they will not be given any effect as to a contract made in the state with reference to transportation to another state. Platt *v.* Richmond, etc., R. Co., 108 N. Y. 358, 15 N. E. 393.

47. Robinson *v.* Bland, 1 W. Bl. 234, 2 Burr. 1077.

48. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788.

49. The Hugo, 57 Fed. 403; Lewisohn *v.* National Steamship Co., 56 Fed. 602; The Energia, 56 Fed. 124; The Iowa, 50 Fed. 561; The Brantford City, 29 Fed. 373. So where a contract of shipment was made in Massashusetts by a New York corporation, it was held that a limitation of liability therein was to be construed in accordance with the law of Massachusetts, regardless of the fact that the shippers also resided in New York and the goods were to be delivered in New York. Grand *v.* Livingston, 4 N. Y. App. Div. 589, 38 N. Y. Suppl. 490, 73 N. Y. St. 646.

50. The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. ed. 190.

51. Chicago, etc., R. Co. *v.* Gardiner, 51 Nebr. 70, 70 N. W. 508.

52. *Connecticut.*— Trowbridge *v.* Chapin, 23 Conn. 595; Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

Delaware.— Truax *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 233.

Georgia.— Southern Express Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Louisiana.— Williams *v.* Peytavin, 4 Mart. (La.) 304.

Massachusetts.—Pitlock *v.* Wells, 109 Mass. 452.

2. Actual or Constructive Delivery — a. What Constitutes Delivery. To constitute actual delivery it is not enough that the goods be placed in a position from which they might readily be taken by the agent of the carrier, but there must be notice to him of the delivery, with intention to place them in the care and custody of such carrier.[53] Even the placing of the goods on the vehicle of the carrier, whether it be a wagon or a car, ready for transportation, will not constitute sufficient delivery, where this is not done in pursuance of any previous understanding, and the agent has no notice from which an acceptance can be inferred.[54] But no formal acceptance is necessary where the agent has knowledge of the delivery of the goods with the intention that they be shipped, and makes no objection thereto. It is not essential that there be any written receipt or bill of lading.[55] The liability of the carrier as common carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading.[56]

b. Constructive Delivery. Actual knowledge on the part of the agent of the carrier that the goods have been delivered, ready for shipment, is not, however,

Michigan.—Michigan Southern, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466.

New York.— Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 6 Transcr. App. (N. Y.) 311, 5 Abb. Pr. N. S. (N. Y.) 345; Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388; Ball *v.* New Jersey Steamboat Co., 1 Daly (N. Y.) 491.

See 9 Cent. Dig. tit. "Carriers," § 100.

The deposit of goods along the line of a railway, made for the convenience of the owner, where the carrier has never assumed possession and control of the goods, nor accepted them for transportation, does not give rise to any liability on the part of the carrier with reference to such goods. Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

Where the shipper of fruit used the warehouse of a railway company for the purpose of assorting such fruit and preparing it for shipment, held that the carrier's liability for the fruit did not attach until the exclusive possession and control thereof for shipment had been delivered to the carrier. Reed *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 176.

Although carrier has taken possession of the goods, if freight is to be prepaid, he may refuse to carry them until payment is made. Stewart *v.* Bremer, 63 Pa. St. 268.

53. *Alabama.*— O'Bannon *v.* Southern Express Co., 51 Ala. 481; South Western R. Co. *v.* Webb, 48 Ala. 585.

New York.— Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 6 Transcr. App. (N. Y.) 311, 5 Abb. Pr. N. S. (N. Y.) 345.

North Carolina.—Wells *v.* Wilmington, etc., R. Co., 51 N. C. 47, 72 Am. Dec. 556.

Pennsylvania.—Spofford *v.* Pennsylvania R. Co., 11 Pa. Super. Ct. 97.

United States.— The Willie D. Sandhoval, 92 Fed. 286.

See 9 Cent. Dig. tit. "Carriers," § 102.

Roadside deposits at a place where there is no regular station and no agent will not charge the carrier until the goods are actually taken possession of. Wells *v.* Wilmington, etc., R. Co., 51 N. C. 47, 72 Am. Dec. 556.

The loading of goods upon a car at a switch where there is no agent or station, although the cars are placed there by request for the purpose of being loaded, will not constitute a delivery. Kansas City, etc., R. Co. *v.* Lilly, (Miss. 1891) 8 So. 644.

54. Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467; Yoakum *v.* Dryden, (Tex. Civ. App. 1894) 26 S. W. 312; Ft. Worth, etc., R. Co. *v.* Riley, (Tex. Civ. App. 1886) 1 S. W. 446; Glass *v.* Goldsmith, 22 Wis. 488.

55. Meloche *v.* Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301; Coyle *v.* Western R. Corp., 47 Barb. (N. Y.) 152; Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14.

Where an oil company furnished its tank cars to the carrier in which oil was regularly transported to the market, the cars being returned without additional charge, held that the carrier was liable for the cars, although no express contract had been made with reference thereto. Spears *v.* Lake Shore, etc., R. Co., 67 Barb. (N. Y.) 513.

56. *Arkansas.*— St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

Illinois.— Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

New York.— Lakeman *v.* Grinnell, 5 Bosw. (N. Y.) 625.

Texas.—Gulf, etc., R. Co. *v.* Compton, (Tex. Civ. App. 1896) 38 S. W. 220.

United States.—Snow *v.* Carruth, 1 Sprague (U. S.) 324, 22 Fed. Cas. No. 13,144, 19 Law Rep. 198; Brower *v.* The Water Witch, 4 Fed. Cas. No. 1,971, 19 How. Pr. (N. Y.) 241, 42 Hunt. Mer. Mag. 67, 16 Leg. Int. (Pa.) 349.

See 9 Cent. Dig. tit. "Carriers," § 102.

Thus where goods were in accordance with custom put on cars on a side-track, held that the company became liable therefor, although destroyed before issuance of a bill of lading. Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

Even where the statute provided that liability commences with issuance of bill of lading, actual delivery and acceptance are sufficient to bind the carrier. International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

always essential to charge the carrier. Delivery may be constructive.[57] By custom or usage the placing of the goods in the usual place for delivery to the carrier may amount to a sufficient delivery and acceptance, although no notice to the agent or assent by him is shown.[58] Constructive delivery may also be made by delivering to the carrier the receipt of a warehouseman or cotton press company, from whose custody the goods are to be taken by the carrier, and the issuance of a bill of lading by the carrier's agent in consequence thereof.[59]

c. When Carrier's Liability Attaches. If something remains to be done by the shipper after the goods are put into the hands of the agent of the carrier before they are to be transported, the carrier does not become liable as carrier until the goods are ready for shipment.[60] But if the thing to be done is something which it is the duty of the agent to do without further act on the part of the shipper, then the liability of the carrier attaches at once.[61] The risk of the carrier begins on receipt of the goods for immediate transportation.[62] After the carrier has received the goods for transportation he is liable as common carrier, not merely as warehouseman, though they have not yet been laden for immediate carriage.[63]

57. Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

58. *Alabama.*— Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54.

Connecticut.— Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

District of Columbia.— Bowie *v.* Baltimore, etc., R. Co., 1 MacArthur (D. C.) 94.

Indiana.— Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

Louisiana.— Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408.

Maine.— Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

Texas.— Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 35 S. W. 21.

See 9 Cent. Dig. tit. "Carriers," § 104.

59. Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

But the mere delivery of a warehouse receipt, with order for delivery of the goods to the carrier, is not a constructive delivery where the goods are destroyed in the warehouse before removal by the carrier. Stewart *v.* Gracy, 93 Tenn. 314, 27 S. W. 664.

Where cotton intended for shipment was destroyed while yet on the compress company's platform, held that the carrier was not liable, although a bill of lading had been issued. Amory Mfg. Co. *v.* Gulf, etc., R. Co., 89 Tex. 419, 37 S. W. 856, 59 Am. St. Rep. 65.

It is not negligence on the part of the shipper of goods by rail to leave the goods on the company's platform unguarded, so as to defeat recovery on an insurance policy covering the goods. St. Louis, etc., R. Co. *v.* Philadelphia F. Assoc., 55 Ark. 163, 18 S. W. 43.

60. Kansas City, etc., R. Co. *v.* Barnett, 69 Ark. 150, 61 S. W. 919; Dixon *v.* Georgia Cent. R. Co., 110 Ga. 173, 35 S. E. 369; Elkins *v.* Boston, etc., R. Co., 23 N. H. 275; Spade *v.* Hudson River R. Co., 16 Barb. (N. Y.) 383.

61. Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301; Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14. Thus, if the goods are put upon railroad cars with notice to the agent that they are ready for shipment, the delivery is as effectual as though made at a regular depot of the company. St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202; Dixon *v.* Georgia Cent. R. Co., 110 Ga. 173, 35 S. E. 369; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

Where delay in shipment was due to failure of the company to furnish cars it was held that the carrier was liable for the goods, though by the shipping contract the shipper was required to load the freight. London, etc., F. Ins. Co. *v.* Rome, etc., R. Co., 114 N. Y. 200, 39 N. E. 79, 63 N. Y. St. 73, 43 Am. St. Rep. 752.

Where a railroad company was under military control, held that the mere fact that the goods were allowed to be delivered on the cars of the company did not give rise to liability for them as common carrier, where permission to ship was necessary to be secured before the transporation could commence. Illinois Cent. R. Co. *v.* Hornberger, 77 Ill. 457; Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487. But the fact of military control alone will not relieve the railroad company accepting goods for transportation from liability therefor as common carrier. Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83.

62. *Arkansas.*— St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202.

Massachusetts.— Merritt *v.* Old Colony, etc., R. Co., 11 Allen (Mass.) 80.

New York.— O'Neill *v.* New York Cent., etc., R. Co., 60 N. Y. 138.

North Carolina.— Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14.

Tennessee.— Watson *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 255.

See 9 Cent. Dig. tit. "Carriers," § 110.

63. Greenwood *v.* Cooper, 10 La. Ann. 796; Barrett *v.* Salter, 10 Rob. (La.) 434; Fitchburg, etc., R. Co. *v.* Hanna, 6 Gray (Mass.) 539, 66 Am. Dec. 427.

3. Authority of Carrier's Agent to Receive. If there is a question as to whether the delivery in a particular instance was to the conductor of the train, or driver of the coach, or captain of the boat in his individual capacity, or as agent for his employer, then to charge the carrier it must appear that the goods were received by him with authority to act as agent of the employer, and with the understanding that he was acting in that capacity.[64] But where by custom or usage the person to whom the goods are intrusted is one recognized by the carrier as the proper person to receive such goods for transportation the carrier will be liable, no matter what particular relation the person may otherwise bear to the carrier.[65] Even though there is a freight agent authorized to receive goods for shipment, the captain of the boat on which they are to be shipped may also have authority by usage to accept the goods for carriage.[66] The same person may, however, act as agent for the carrier to receive, as well as agent for the shipper to deliver, and in such case the question of delivery will depend upon whether such person has acted in the capacity of agent for the carrier in receiving or not.[67] The agent may have authority to receive at another place than that ordinarily designated for the receipt of goods, and if he does receive within the scope of his authority the carrier will be bound, although the place of receipt is not the place where goods are usually delivered for transportation.[68]

As to liability of the carrier as warehouseman see *infra*, II, J, 4.

Sufficiency of delivery to charge the carrier see Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75; Louisville, etc., R. Co. *v.* Echols, 97 Ala. 556, 12 So. 304; South Western R. Co. *v.* Webb, 48 Ala. 585; Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72; Lewis *v.* Van Horn, 24 Misc. (N. Y.) 765, 53 N. Y. Suppl. 546; Abrams *v.* Platt, 23 Misc. (N. Y.) 637, 52 N. Y. Suppl. 153; Pacific Express Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830.

64. Elkins *v.* Boston, etc., R. Co., 23 N. H. 275; Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388; Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

Delivery must be made to an agent or servant authorized to receive goods and not to a servant engaged in other duties. Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388.

If the person to whom the delivery is made is not the person intrusted in general with the duty of receiving goods for transportation, delivery to him will not be sufficient *prima facie* to charge the carrier, especially in case of property such as the carrier is not in the habit of receiving for transportation, such as money and like goods of special value. Chouteau *v.* Steamboat St. Anthony, 16 Mo. 216.

Delivery to the individual master, driver, or conductor will not charge the carrier in the absence of some evidence of authority. Sewall *v.* Allen, 6 Wend. (N. Y.) 335; Pumphry *v.* Steamboat Parkersburgh, 2 Ohio Dec. (Reprint) 356, 2 West. L. Month. 491. And see *supra*, II, A, 1, b.

The mere delivery to deck hands of a steamboat has been held to be insufficient to charge the owner, in the absence of evidence that such persons were authorized to receive freight, or that there was some special contract or usage by which they had that authority. Ford *v.* Mitchell, 21 Ind. 54.

65. *Alabama.*— Hosea *v.* McCrory, 12 Ala. 349.

Missouri.— Chouteau *v.* Steamboat St. Anthony, 11 Mo. 226.

New Hampshire.— Mayall *v.* Boston, etc., R. Co., 19 N. H. 122, 49 Am. Dec. 149; Bean *v.* Sturtevant, 8 N. H. 146, 28 Am. Dec. 389.

New York.— Rogers *v.* Wheeler, 52 N. Y. 262; Ball *v.* New Jersey Steamboat Co., 1 Daly (N. Y.) 491; Rogers *v.* Long Island R. Co., 38 How. Pr. (N. Y.) 289.

South Carolina.— McClure *v.* Richardson, 1 Rice (S. C.) 215, 33 Am. Dec. 105.

Vermont.— Landon *v.* Proctor, 39 Vt. 78; Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

See 9 Cent. Dig. tit. "Carriers," §§ 104, 107.

Advertisement by a carrier that a special messenger is sent in charge of goods does not show authority of such messenger to contract for or receive freight. Thurman *v.* Wells, 18 Barb. (N. Y.) 500.

66. Witbeck *v.* Schuyler, 44 Barb. (N. Y.) 469, 31 How. Pr. (N. Y.) 97.

Where a driver was not authorized to receive goods, and there was no custom that he should do so, held that his act in accepting goods for transportation was not binding on the carrier. Jenkins *v.* Pickett, 9 Yerg. (Tenn.) 480.

67. Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289; The Guiding Star, 53 Fed. 936.

68. Phillips *v.* Earle, 8 Pick. (Mass.) 182; Cronkite *v.* Wells, 32 N. Y. 247; Thurman *v.* Wells, 18 Barb. (N. Y.) 500; Southern Express Co. *v.* McVeigh, 20 Gratt. (Va.) 264. But to render a railroad company liable as carrier for goods claimed to have been delivered to its agent at a distance from the line of the road, to be carried by him to the road and thence transported on its line, the authority of such agent to bind the company

G. Shipping Receipts, Bills of Lading, and Special Contracts — 1. Receipts. The validity of stipulations contained in shipping receipts by which it is attempted to limit the liability of the carrier has already been discussed.[69] In accordance with the general principles elaborated in that connection it is usually held that a receipt given by the carrier to the shipper, so far as it contains stipulations as to the transportation, constitutes the contract under which the goods are to be transported, and its terms are binding on both parties.[70] And therefore its terms cannot be varied or added to by parol evidence, as, for instance, that the goods were sent C. O. D.,[71] or that, where by the terms of the receipt the goods are sent C. O. D., it was not agreed between the parties that there should be any collection made before delivery,[72] or that the rate of transportation agreed upon was different from that named in the receipt.[73] But even in this light a carrier's receipt is not conclusive evidence of the contract,[74] for parol evidence is admissible to show that the written instrument never had any legal existing or binding force, and was given under such circumstances that it failed to state the agreement of the parties.[75] The fact is that so far as such an instrument is and purports to be only an acknowledgment of the receipt of the goods it is not a contract at all. If it purports to contain a stipulation with reference to the transportation it may of course constitute a contract and be binding, but if it purports to be a receipt only, even though it contains a memorandum as to the rate of freight, it will not be conclusive.[76] Where a receipt is delivered after shipment under an oral agreement, it will not supersede the agreement under which the shipment was made.[77] On the other hand, if the receipt indicates that a subsequent bill of lading is to be issued containing the contract, then it will be superseded by the bill of lading when issued, so far as its terms are different from those in the ordinary bill of lading.[78] As a receipt merely, showing the delivery of the goods to the carrier and reciting that they were received in apparent good

must be shown. Missouri Coal, etc., Co. *v.* Hannibal, etc., R. Co., 35 Mo. 84.

Authority of agents to make contracts will be hereafter considered. See *infra*, II, G, 5.

69. See *supra*, II, E, 5, b.

70. Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Huntington *v.* Dinsmore, 4 Hun (N. Y.) 66, 6 Thomps. & C. (N. Y.) 195; Soumet *v.* National Express Co., 66 Barb. (N. Y.) 284; Falkenan *v.* Fargo, 35 N. Y. Super. Ct. 332, 44 How. Pr. (N. Y.) 325.

Where the receipt was in the usual form, and stated that the goods were to be delivered at a point on another road, it was held that there was an implied agreement on the part of the carrier to take the goods to their destination. Landes *v.* Pacific R. Co., 50 Mo. 346. And see *infra*, II, G, 3.

71. Smith *v.* Southern Express Co., 104 Ala. 387, 16 So. 62.

Application of rules relating to bills of lading.— What is to be said hereafter as to varying bills of lading by parol so far as such instruments constitute receipts for the goods is applicable here (see *infra*, II, G, 2, b); and some of the questions discussed in this paragraph are further elucidated in a subsequent paragraph relating to carriers' contracts in general (see *infra*, II, G, 3).

72. American Express Co. *v.* Lesem, 39 Ill. 312.

Further as to transportation C. O. D. see *infra*, II, L, 7.

73. Niles *v.* Culver, 8 Barb. (N. Y.) 205.

74. Pereira *v.* Central Pac. R. Co., 66 Cal. 92, 4 Pac. 988.

75. Purcell *v.* Southern Express Co., 34 Ga. 315.

Ambiguous terms in the receipt may be explained by parol evidence (Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87); for instance, where the letters "C. O. D." are used parol evidence is admissible to explain their meaning (American Express Co. *v.* Lesem, 39 Ill. 312; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224).

76. Wood *v.* Steamboat Fleetwood, 22 Mo. 560.

Independent oral agreement.— It may be shown that there was an independent and collateral oral agreement outside of or superseding the terms of the receipt. The evidence as to the whole transaction should be considered in determining what the contract was. Union R., etc., Co. *v.* Riegel, 73 Pa. St. 72.

77. Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564.

78. Merchants' Despatch Transp. Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; Blanchard *v.* Page, 8 Gray (Mass.) 281.

Even if the receipt has the form of a bill of lading it will not constitute the contract of shipment if it was not understood to have been delivered and received with that intention. Flash *v.* New Orleans, etc., R. Co., 23 La. Ann. 353.

order, it is not conclusive, but constitutes merely an admission, subject to explanation.[79]

2. Bills of Lading — a. Nature; What Constitutes; Duty to Issue. An instrument issued by the carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination, is a bill of lading.[80] Of course it is not essential that a bill of lading be issued, for in the absence of any such instrument the rights of the shipper and the duty of the carrier are to be determined by the common law.[81]

b. Validity and Effect as Between the Parties; Construction — (i) *Delivery and Acceptance.* A bill of lading delivered by the carrier to the shipper and accepted by the latter, although without signature by him, is presumed to constitute the contract for carriage.[82] And the shipper receiving the bill of lading is conclusively presumed to have read it and acquiesced in its terms, in the absence of fraud, imposition, or mistake.[83]

79. Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116; Seller *v.* The Pacific, Deady (U. S.) 17, 21 Fed. Cas. No. 12,644, 1 Oreg. 409.

Hence it is always competent to show, as between the parties, that the quantity of goods actually delivered was less than that named in the receipt. Higley *v.* Burlington, etc., R. Co., 99 Iowa 503, 68 N. W. 829, 61 Am. St. Rep. 250; Dean *v.* King, 22 Ohio St. 118. Where a receipt for a sealed package recites that it was "said to contain" a certain sum of money, it was held that it was not even *prima facie* evidence of the amount actually inclosed. Fitzgerald *v.* Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341.

80. Freeman *v.* Kraemer, 63 Minn. 242, 65 N. W. 455; Bedell *v.* Richmond, etc., R. Co., 94 Ga. 22, 20 S. E. 262. See also, generally, Bill of Lading, 5 Cyc. 707.

But a paper signed by the consignor only and not purporting to bind the carrier, even though delivered to the master of the vessel on which the goods are to be transported, is not a bill of lading. Babcock *v.* Orbison, 25 Ind. 75; Covell *v.* Hill, 6 N. Y. 374; Gage *v.* Jaqueth, 1 Lans. (N. Y.) 207. Where the vendors of corn, intending to ship it in their own boats to the vendee, executed an instrument containing a recital of the shipment, its quantity, rate of freight, etc., it was held that this constituted a bill of lading binding on the owner of the corn as carrier. Dows *v.* Rush, 28 Barb. (N. Y.) 157.

81. Alabama Midland R. Co. *v.* Darby, 119 Ala. 531, 24 So. 713; Johnson *v.* Stoddard, 100 Mass. 306. But in Texas there is an express statute imposing a penalty on common carriers for refusing to give when demanded a bill of lading, stating the quantity, character, and condition of the goods received for transportation, and under such statute a railroad company incurs the penalty prescribed by giving a bill of lading describing the quantity as "a carload," when the shipper demands that the weight be stated. Texas, etc., R. Co. *v.* Cuteman, (Tex. App. 1889) 14 S. W. 1069. Failure of the carrier to give a receipt as required by statute does not affect his liability. Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54.

By act of congress relating to stamp taxes it is required of every carrier that he issue to the shipper or consignor "from whom any goods are accepted for transportation," a bill of lading, to which a revenue stamp shall be attached and canceled. But it is only when the carrier accepts the consignment for shipment that he is required to issue the stamped bill of lading. U. S. *v.* Wells, 96 Fed. 835.

The effect of the delivery and acceptance of a bill of lading embodying stipulations limiting the carrier's liability have already been discussed. See *supra*, II, E, 5, c.

82. Cincinnati, etc., R. Co. *v.* Berdan, 22 Ohio Cir. Ct. 326; Cleveland, etc., R. Co. *v.* La Tourette, 2 Ohio Cir. Ct. 279; Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353; Wells, etc., Express *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

By statute in some states assent to the bill of lading, so far as it contains special stipulations for the benefit of the carrier, must be shown by the shipper's signature thereto. Schroeder *v.* Schweizer Lloyd Transport Versicherung's Gesellschaft, 66 Cal. 294, 5 Pac. 478. And see *supra*, II, E, 5, c.

The effect of delivery and acceptance of a bill of lading subsequent to shipment of the goods has already been considered with reference to whether the shipper is bound by limitations of liability therein. See *supra*, II, E, 5, d.

The general subject of carriers' contracts is discussed in a subsequent paragraph. See *infra*, II, G, 3.

83. *Indiana.*— Stewart *v.* Cleveland, etc., R. Co., 21 Ind. App. 218, 52 N. E. 89.

Massachusetts.— Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97; Pemberton Co. *v.* New York Cent. R. Co., 104 Mass. 144.

Missouri.—O'Bryan *v.* Kinney, 74 Mo. 125; Patterson *v.* Kansas City, etc., R. Co., 56 Mo. App. 657.

New York.— Germania F. Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Bostwick *v.* Baltimore, etc., R. Co., 55 Barb. (N. Y.) 137.

Wisconsin.— Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042.

United States.— Wertheimer *v.* Pennsylva-

(II) *Construction of Bills of Lading.* So far as the bill of lading is a contract the language used therein is subject to the rules of construction which govern other contracts.[84] Therefore, where the terms employed have by usage acquired a particular signification, the parties will be presumed to have used them in that sense.[85] If there are no conditions as to the route, the fact that the bill is issued by a railroad company does not imply that the shipment is to be "all rail."[86] While the instrument is to be construed as a whole, invalid conditions will not necessarily render the whole contract invalid, and it may be enforced as far as it is valid.[87] In general, where the suit is for breach of contract, it is for the court to construe and determine the effect of the bill of lading, and a reference of the question to the jury is erroneous.[88]

(III) *Estoppel* — (A) *As to Transferee of Bill of Lading.* The bill of lading, however, may be something more than a contract between the carrier and the shipper. It usually is intended to constitute a representative of the goods, and stands for them, so that a transfer of the bill is a transfer of the goods themselves.[89] And therefore when the carrier issues a bill of lading containing a statement as to the quantity of goods received, with the understanding that the goods may be transferred by means of a transfer of the bill of lading, the transferee is justified in relying on the representations of the carrier made in the bill with reference to the quantity of goods received under it, and as to one who receives the bill in good faith, relying on the statement of quantity, and pays a consideration, the carrier is estopped from showing that he has not received the quantity of goods recited in the bill.[90] But the right of the consignee or transferee to rely on the recitals of the bill of lading in this respect depends on his having paid consideration by reason of recitals in the bill itself.[91] Nor does the estoppel apply to a case where the owner of the property did not purchase it while it was in the hands of the carrier, and therefore did not take title to it through the bill of lading, but the shipment was made by his agent.[92] One who takes property by transfer of the bill of lading in payment of an antecedent debt may rely on the bill of lading as against the carrier as effectually as may a purchaser for any other valuable consideration.[93] To guard against such estoppel the carrier may insert in the bill of lading "quantity, weight, and contents unknown," or some like clause qualifying his representation, and in that event he will not be liable to an assignee for value if he delivers all the goods received.[94] But the usual statement in the

nia R. Co., 17 Blatchf. (U. S.) 421, 1 Fed. 232.

Canada.— Dean *v.* Furness, 9 Quebec Q. B. 81.

See 9 Cent. Dig. tit. "Carriers," § 148; and also *supra*, II, E, 5, c, as to when the shipper will be bound by limitation of liability contained in the bill of lading.

84. Logan *v.* Mobile Trade Co., 46 Ala. 514.

85. Wayne *v.* Steamboat General Pike, 16 Ohio 421.

86. Hostetter *v.* Baltimore, etc., R. Co., (Pa. 1887) 11 Atl. 609.

87. Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192. And see *supra*, II, E, 7.

88. Wabash, etc., R. Co. *v.* Jaggerman, 115 Ill. 407, 4 N. E. 641.

89. See *infra*, II, G, 2, c.

90. *Illinois.*— Tibbits *v.* Rock Island, etc., R. Co., 49 Ill. App. 567.

Massachusetts.— Sears *v.* Wingate, 3 Allen (Mass.) 103.

Nebraska.— Sioux City, etc., R. Co. *v.* Fremont First Nat. Bank, 10 Nebr. 556, 7 N. W. 311, 35 Am. Rep. 488.

New York.— Dickerson *v.* Seelye, 12 Barb. (N. Y.) 99.

Pennsylvania.— Warden *v.* Greer, 6 Watts (Pa.) 424.

United States.— Bradstreet *v.* Heran, Abb. Adm. (U. S.) 209, 3 Fed. Cas. No. 1,792; The J. W. Brown, 1 Biss. (U. S.) 76, 14 Fed. Cas. No. 7,590.

See 9 Cent. Dig. tit. "Carriers," §§ 152, 171.

91. For instance, if he has an agreement with the shipper that he is only to pay for what he receives, unless he can recover of the master the difference between this amount and the amount named in the bill, he cannot maintain an action against the master for the portion of the goods named in the bill, never actually received by the master. Hall *v.* Mayo, 7 Allen (Mass.) 454.

92. Meyer *v.* Peck, 28 N. Y. 590.

93. Tiedeman *v.* Knox, 53 Md. 612.

94. The Querini Stamphalia, 19 Fed. 123. Before the bill comes into the consignee's hands the shipper may modify the contract between him and the carrier by written declaration as to the condition of the cargo at

bill of lading that contents and value are unknown will have no application to grain in bulk as to which the carrier has full opportunity to advise himself, and the quantity stated will be binding upon him.[95]

(B) *When No Goods Are Received.* The doctrine of the preceding section is fully recognized where there is a valid bill of lading and the only question is as to the quantity of goods received; but where the carrier contends that no goods were received, and that the bill of lading was therefore issued by its agent through fraud or mistake, another and more difficult question is involved, that is, whether the carrier is bound by the act of his agent in issuing a fraudulent or erroneous bill. If the circumstances are such as to authorize the agent to issue some bill of lading, then, as decided in the cases cited in the preceding section, the carrier is bound by the agent's error, for he is acting within the scope of his general authority, and by some courts the same reasoning is applied to a bill issued where no goods are received, and it is held that as the agent is authorized in general to issue bills of lading, the carrier will be bound by his acts in erroneously issuing a bill of lading where no goods are received, as fully as by his erroneous act in issuing a bill of lading for a greater quantity of goods than are received.[96] But the supreme court of the United States has reached the opposite conclusion, and holds that as the receipt of the goods lies at the foundation of the contract to carry and deliver, if no goods are actually received there can be no valid contract, and that the agent of the carrier, having no authority to issue a bill of lading without a receipt of the goods, cannot bind the carrier, even as to an innocent transferee for value of the bill of lading.[97] A number of the state courts have adopted the same course of reasoning, and hold that a carrier is not estopped by a bill of lading, even in the hands of a transferee for value, from showing that no goods whatever were actually received.[98]

variance with the bill of lading, and the consignee will be bound thereby. Hall *v.* Ship Chieftain, 9 La. 318.

95. Tibbits *v.* Rock Island, etc., R. Co., 49 Ill. App. 567.

96. *Kansas.*— St. Louis, etc., R. Co. *v.* Adams, 4 Kan. App. 305, 45 Pac. 920.

Missouri.— Smith *v.* Missouri Pac. R. Co., 74 Mo. 47. Apparently *contra*, see Louisiana Nat. Bank *v.* Laveille, 52 Mo. 380.

Nebraska.— Sioux City, etc., R. Co. *v.* Fremont First Nat. Bank, 10 Nebr. 556, 7 N. W. 311, 35 Am. Rep. 488.

New York.— Batavia Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Farmers', etc., Nat. Bank *v.* Erie R. Co., 72 N. Y. 188; Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Byrne *v.* Weeks, 4 Abb. Dec. (N. Y.) 657.

Pennsylvania.— Brooke *v.* New York, etc., R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235.

See 9 Cent. Dig. tit. "Carriers," § 171.

97. Pollard *v.* Vinton, 105 U. S. 7, 26 L. ed. 998. This case is based largely upon the English case of Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665, and follows The Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182, 15 L. ed. 34. See also King *v.* The Propeller Lady Franklin, 8 Wall. (U. S.) 325, 19 L. ed. 455; Robinson *v.* Memphis, etc., R. Co., 9 Fed. 129, 16 Fed. 57.

Extent of this rule.— Thus the fact that the shipper was allowed to fill out the bill of lading and leave a blank which afforded an opportunity for increasing the statement of the quantity of goods shipped was held not to render the common carrier liable for loss occasioned by forgery of the shipper in raising the bill of lading. Lehman *v.* Central R., etc., Co., 12 Fed. 595. On the same principle as that recognized in Pollard *v.* Vinton, 105 U. S. 7, 26 L. ed. 998, it was held that where, in pursuance to agreement in course of dealing between carrier and shipper, bills were issued for cotton which remained in the possession of a compress company as agent of the shipper, and was destroyed by fire before delivery to the carrier, the consignee of the bill of lading, even without notice of such agreement and course of dealing, could not recover from the carrier. Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 14 S. Ct. 990, 38 L. ed. 944. The case of Pollard *v.* Vinton, 105 U. S. 7, 26 L. ed. 998, has been followed, and its reasoning reaffirmed in Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 9 S. Ct. 570, 32 L. ed. 991. But it is distinguished from a case where the consignee was allowed to fill out bills of lading as the agent of the carrier and transfer them as collateral security to persons who had no knowledge of any irregularity, and in such case the carrier was held liable to the holder of the bill of lading. The distinction made is that the officers of the company had knowledge of the course of business which enabled the consignor to perpetrate the fraud, and were negligent in allowing it to continue. Walters *v.* Western, etc., R. Co., 56 Fed. 369.

98. *Louisiana.*— Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446.

(IV) *Parol Testimony to Vary*— (A) *Considered as a Contract.* Inasmuch as the bill of lading constitutes the contract of shipment, parol evidence is not admissible, in the absence of fraud or mistake, to vary its terms, or show that the contract was different from that shown by the instrument.[99] And a clean bill of lading, that is, one without modifications indorsed thereon in writing, imports the usual mode of shipment, to wit, in the case of ordinary goods that they shall be shipped between decks, and not on deck, and parol evidence is not admissible to show an agreement on the part of the shipper that the goods should be loaded on deck, in contradiction to the method of loading implied in the bill of lading itself.[1] So where the bill of lading was for shipment of goods by sea from San Francisco to New York, including transportation across the Isthmus of Panama, it was held that evidence of a custom of shippers known to the owner

Minnesota.— National Bank of Commerce *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263.

Mississippi.— Hazard *v.* Illinois Cent. R. Co., 67 Miss. 32, 7 So. 280.

North Carolina.— Williams *v.* Wilmington, etc., R. Co., 93 N. C. 42, 53 Am. Rep. 450.

Ohio.— Adams *v.* The Brig Pilgrim, 1 Ohio Dec. (Reprint) 477, 10 West. L. J. 141.

The consignee, and other persons, by relying on the bill of lading do so with notice of the limitation of power of the agent as to issuing bills of lading, and act at their own risk, both as respects the fact of shipment and the quantity of cargo purported by the bill of lading to be shipped. Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

Where the agent of a steamboat delivered a bill of lading for merchandise, which was subsequently delivered to a different boat from the one from which the bill of lading had been taken, held that the bill of lading was conditional, and did not bind the steamboat for which it was issued, there having been no actual delivery of the goods. Fearn *v.* Richardson, 12 La. Ann. 752.

The authority of an agent to bind the carrier by the issuance of bills of lading in general will be considered in a subsequent paragraph. See *infra*, II, G, 5.

99. *Alabama.*— Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145; McTyer *v.* Steele, 26 Ala. 487.

Indiana.— Indianapolis, etc., R. Co. *v.* Remmy, 13 Ind. 518.

Iowa.— Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761; Hewett *v.* Chicago, etc., R. Co., 63 Iowa 611, 19 N. W. 790; West *v.* Steamboat Berlin, 3 Iowa 532.

Missouri.— O'Bryan *v.* Kinney, 74 Mo. 125; Holten *v.* Kansas City, etc., R. Co., 61 Mo. App. 204.

New York.— Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Long *v.* New York Cent. R. Co., 50 N. Y. 76; Wolfe *v.* Myers, 3 Sandf. (N. Y.) 7.

Ohio.— May *v.* Babcock, 4 Ohio 334.

United States.— The Wellington, 1 Biss. (U. S.) 279, 29 Fed. Cas. No. 7,384, 2 West. L. Month. 523.

See 9 Cent. Dig. tit. "Carriers," § 148.

Bill of lading is not a mere memorandum, but it is a contract between the parties, and oral testimony is not receivable to show what the real contract was, in contradiction of the terms of the bill of lading. Hostetter *v.* Baltimore, etc., R. Co., (Pa. 1887) 11 Atl. 609.

That shipper was not consignor.— Parol evidence is incompetent to show that the shipper did not sustain the relation of consignor to the goods. Van Etten *v.* Newton, 15 Daly (N. Y.) 538, 8 N. Y. Suppl. 478, 25 N. Y. St. 751.

Antecedent agreement.— Where there was in a bill of lading for the shipment of fruit no provision for re-icing the refrigerator car in which the fruit was shipped, it was held that parol evidence of an antecedent agreement to see that the car was re-iced was not admissible. Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

Route.— Where there is no stipulation in the bill of lading as to the route over which the goods shall be transported, parol evidence that the goods were to be shipped by a particular route is not competent. Snow *v.* Indiana, etc., R. Co., 109 Ind. 422, 9 N. E. 702.

Time of shipment.— So where the stipulation of a bill of lading was that the goods were to be transported without unnecessary delay it was held that a parol agreement that the goods should be sent on the night of the day on which they were received could not be shown. Indianapolis, etc., R. Co. *v.* Remmy, 13 Ind. 518.

Where no time for delivery is specified, a reasonable time is presumed. Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

1. The Bark Delaware *v.* Oregon Iron Co., 14 Wall. (U. S.) 579, 20 L. ed. 779. "The rule is well settled, that, under the ordinary forms of bills of lading, the contract imports that goods are to be stowed under deck; and if carried on deck, the owners of the vessel will not be protected from liability for their injury or loss, by the usual exception of dangers of the sea." And it has been held that an express agreement in writing concerning the stowage of a portion of the articles shipped on deck gave rise to the presumption that other articles of the shipment were to be carried under deck, and that therefore parol evidence was not admissible to show an agreement as to the articles not expressly referred

to insure on the Isthmus, and that the carrier had refused to be liable as such during transportation across the Isthmus was inadmissible on the ground that it would vary the terms of the contract.[2] A custom founded on constant departure from the terms of the bill of lading is not available to control the contract.[3] There are a few apparent exceptions to the general proposition, but they are not real qualifications of the rule, which is too well established to be questioned.[4] Of course, as already indicated,[5] if the bill of lading is not received by the shipper until after the goods have been completely delivered to the carrier and accepted by him for transportation, it will not constitute a contract, for the relations of the parties have already been determined by acceptance without the bill of lading.[6] If the bill of lading is as to any element of the contract ambiguous, parol evidence is admissible to show what the agreement was in that respect.[7] While in general a bill of lading is conclusive as to the rate charged for transportation, it may be shown by parol that as a matter of fact the representation that the goods are being carried at a reduced rate in consideration of a limitation of liability is false.[8] No doubt also a subsequent modification of the terms of the written agreement, for instance that the goods are to be shipped by another boat than that named, may be established by parol.[9]

(B) *Considered as a Receipt.* A bill of lading is an instrument twofold in its character: it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument.[10] It states the terms of the shipment, and also specifies the quantity of goods received, and sometimes their condition. While it may not, as already stated, be varied by parol evidence so far as it embodies the terms of the contract, yet, so far as it constitutes a receipt, it is like other receipts or written acknowledgments, subject to be contradicted or explained by proof as to the facts. Thus a bill of lading is evidence of the receipt of the goods by the carrier,[11] but may be

to. Sayward *v.* Stevens, 3 Gray (Mass.) 97, 101. But in other cases parol evidence that the goods were to be stowed on deck was held admissible in the absence of any stipulation in the bill of lading. Doane *v.* Keating, 12 Leigh (Va.) 391, 37 Am. Dec. 671; Chubb *v.* Seven Thousand Eight Hundred Bushels of Oats, 5 Fed. Cas. No. 2,709, 26 Law Rep. 492.

2. Simmons *v.* Law, 3 Keyes (N. Y.) 217, 4 Abb. Dec. (N. Y.) 241.

3. Tallassee Falls Mfg. Co. *v.* Alabama Western R. Co., 128 Ala. 167, 29 So. 203; Bazin *v.* Liverpool Steamship Co., 3 Wall. Jr. (U. S.) 229, 2 Fed. Cas. No. 1,152, 5 Am. L. Reg. 459, Hunt. Mer. Mag. 449, 20 Law Rep. 129, 14 Leg. Int. (Pa.) 156.

4. Thus it is said that a bill of lading may be aided by parol evidence to show the relations in which the parties stood at the time of shipment in order to give effect to the terms of the instrument (Blanchard *v.* Page, 8 Gray (Mass.) 281); and that collateral agreements, not necessarily covered by the terms of the bill of lading, may be shown (Baltimore, etc., Steamboat Co. *v.* Brown, 54 Pa. St. 77). So, although the shipper is impliedly bound on the face of the bill to pay the freight, it may be shown by parol that the carrier received the goods under an agreement with a third person to pay the freight, at least where such third person has in fact made payment. Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335. And a stipulation in the bill of lading that the carrier shall not be liable for stock beyond the actual cash value, not exceeding one hundred dollars per head, does not preclude evidence of a parol agreed valuation of ten dollars per head. Harned *v.* Missouri Pac. R. Co., 51 Mo. App. 482.

5. See *supra*, II, E, 5, c.

6. Stoner *v.* Chicago, etc., R. Co., 109 Iowa 551, 80 N. W. 569; Shiff *v.* New York Cent., etc., R. Co., 16 Hun (N. Y.) 278; Galveston, etc., R. Co. *v.* House, 4 Tex. Civ. App. 263, 23 S. W. 332. And on this point see discussion as to contracts in general, *infra*, II, G, 3.

On similar principles, if the person accepting the bill of lading has no authority to bind the shipper, the terms of the bill of lading will not be controlling. Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 4 S. Ct. 566, 28 L. ed. 527.

7. Wolfert *v.* Pittsburg, etc., R. Co., 44 Mo. App. 330.

8. McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

9. Hedricks *v.* Steamship Morning Star, 18 La. Ann. 353.

10. Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761; Pollard *v.* Vinton, 105 U. S. 7, 26 L. ed. 998; The Bark Delaware *v.* Oregon Iron Co., 14 Wall. (U. S.) 579, 20 L. ed. 779.

11. Flower *v.* Downs, 12 Rob. (La.) 101; Chicago, etc., R. Co. *v.* Johnston, 58 Nebr. 236, 78 N. W. 499.

But it may be shown that the agent issu-

contradicted by evidence that no goods were received.[12] Authorities agree without dissent to the proposition that recitals in the bill of lading as to the quantity of goods received by the carrier may be contradicted as between the parties by parol evidence showing a less quantity to have been delivered.[13]

(v) *Recitals as to Condition of Goods.* It is usual to insert in the bill of lading that the goods were received in good condition, or apparent good condition. Even without any statement on the subject it is presumed, if no memorandum is made on the bill of lading to the effect that the goods are not in good condition, that so far as observable by inspection without opening the boxes, packages, or bundles in which the goods are shipped they were in good order.[14] It is usual, however, to insert in the bill of lading an express statement that the goods are received in good condition, or in apparent good order, or the like.[15] If the statement is that they are in apparent good condition, it is of course open to the carrier to show, as against a claim that the goods were damaged during transportation, that the damaged condition existed at the time of the receipt of the goods, but was not apparent on inspection. Such a statement relates only to external conditions,[16] and does not make out even a *prima facie* case against the carrier

ing the bill of lading was known to be without authority. Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44. Further as to authority of agent to accept see *supra*, II, F, 3.

12. Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326.

13. *Alabama.*— Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335.

Arkansas.—Little Rock, etc., R. Co. *v.* Hall, 32 Ark. 669.

Connecticut.—Relyea *v.* New Haven Rolling Mill Co., 42 Conn. 579.

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148; Great Western R. Co. *v.* McDonald, 18 Ill. 172; St. Louis Southwestern R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619; Wallace *v.* Long, 8 Ill. App. 504.

Iowa.— Chapin *v.* Chicago, etc., R. Co., 79 Iowa 582, 44 N. W. 820; Steamboat Wisconsin *v.* Young, 3 Greene (Iowa) 268.

Louisiana.— Kirkman *v.* Bowman, 8 Rob. (La.) 246.

Maine.— Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327; O'Brien *v.* Gilchrist, 34 Me. 554, 56 Am. Dec. 676.

Massachusetts.—Kelley *v.* Bowker, 11 Gray (Mass.) 428, 71 Am. Dec. 725; Shepherd *v.* Naylor, 5 Gray (Mass.) 591.

Missouri.— Steamboat Missouri *v.* Webb, 9 Mo. 193.

New York.— Abbe *v.* Eaton, 51 N. Y. 410; White *v.* Van Kirk, 25 Barb. (N. Y.) 16.

Ohio.— Dean *v.* King, 22 Ohio St. 118; Page *v.* Sandusky, etc., R. Co., 2 Ohio Dec. (Reprint) 716, 4 West. L. J. 644.

South Carolina.— Benjamin *v.* Sinclair, 1 Bailey (S. C.) 174.

Wisconsin.— Glass *v.* Goldsmith, 22 Wis. 488.

United States.— The Willie D. Sandhoval, 92 Fed. 286; Brouty *v.* Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves, 21 Fed. 590; Sutton *v.* Kettell, 1 Sprague (U. S.) 309, 23 Fed. Cas. No. 13,647, 18 Law Rep. 550; The J. W. Brown, 1 Biss. (U. S.) 76, 14 Fed. Cas. No. 7,590, 8 Phila. (Pa.) 130, 28 Leg. Int. (Pa.) 20; Hopkins *v.* Wood, 12 Fed. Cas. No. 6,693, 14 Int. Rev. Rec. 164; Cafiero *v.* Welsh, 4 Fed. Cas. No. 2,286, 1 Leg. Gaz. (Pa.) 121, 3 Leg. Gaz. (Pa.) 21.

See 9 Cent. Dig. tit. "Carriers," § 152.

In so far as the bill of lading operates as a contract it is conclusive as to the intention of the parties, and may not be varied by parol evidence, but in so far as it operates as a receipt merely it is open to explanation or rectification by parol evidence. But to make out a mistake in the recital of the bill in this respect, and show that a less quantity was delivered than stated, the proof of mistake should be clear and unquestionable in order to rebut the evidence afforded by the bill. Goodrich *v.* Norris, Abb. Adm. (U. S.) 196, 10 Fed. Cas. No. 5,545.

False bill of lading — Cargo never received.— The carrier cannot be charged because of a false bill of lading for non-delivery of a cargo never received. King *v.* The Propeller Lady Franklin, 8 Wall. (U. S.) 325, 19 L. ed. 455.

As to varying the terms of a receipt by parol evidence see *supra*, II, G, 1.

That the agent has no authority to bind the carrier by recitals in the bill of lading of the receipt of goods not actually delivered see *infra*, II, G, 2, c, (II).

14. Bond *v.* Frost, 8 La. Anr. 297; The Zone, 2 Sprague (U. S.) 19, 30 Fed. Cas. No. 18,220, 22 Law Rep. 725.

15. It is not important whether the words "in good order" or "well conditioned," or both, are used, the phrases being substantially synonymous. Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

16. *Arkansas.*— St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

Iowa.— West *v.* Steamboat Berlin, 3 Iowa 532.

Kentucky.—Keith *v.* Amende, 1 Bush (Ky.) 455; Gowdy *v.* Lyon, 9 B. Mon. (Ky.) 112.

Louisiana.— Curell *v.* Johnson, 12 La. 290, 32 Am. Dec. 117.

Massachusetts.—Barrett *v.* Rogers, 7 Mass. 297, 5 Am. Dec. 45.

with reference to damage not thus apparent.[17] But the recital of good condition does make out a *prima facie* case against the carrier that the goods were in apparent good condition so far as ordinary inspection without opening the packages would disclose.[18] The burden of proof is on the carrier to show that the goods were not in such apparent good condition when received.[19] And this he should do by clear and satisfactory evidence.[20] The rule as generally stated, however, is that the recital as to the condition of the goods is *prima facie* evidence only as to that fact, and the carrier may show the contrary.[21]

(VI) *Quantity of Goods Guaranteed.* The carrier may by stipulation guarantee the quantity of goods received so that the recital of the bill of lading will be conclusive, even as against mistake, and render the carrier liable for any shortage.[22]

United States.— Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97; Clark *v.* Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; The Olbers, 3 Ben. (U. S.) 148, 18 Fed. Cas. No. 10,477; The Columbo, 3 Blatchf. (U. S.) 521, 6 Fed. Cas. No. 3,040, 35 Hunt. Mer. Mag. 449, 19 Law Rep. 376, 13 Leg. Int. (Pa.) 361; Bradstreet *v.* Heran, 2 Blatchf. (U. S.) 116, 3 Fed. Cas. No. 1,792*a*; The California, 2 Sawy. (U. S.) 12, 4 Fed. Cas. No. 2,314, 5 Am. L. T. Rep. 132; The Oriflamme, 1 Sawy. (U. S.) 176, 18 Fed. Cas. No. 10,571.

See 9 Cent. Dig. tit. "Carriers," § 158 *et seq.*

17. Gulf, etc., R. Co. *v.* Holder, 10 Tex. Civ. App. 223, 30 S. W. 383; The Moravian, 2 Hask. (U. S.) 157, 17 Fed. Cas. No. 9,789. It is open to the carrier to show that the loss proceeded from some cause which existed, but was not apparent at the time he received the goods. Choate *v.* Crowninshield, 3 Cliff. (U. S.) 184, 5 Fed. Cas. No. 2,691. Where the bill of lading described the goods as "barrels of molasses" and ended with the clause, "contents and gauge unknown," it was held that the carrier could not deny knowledge of the nature of the contents, although he might prove want of knowledge of the quality. Nelson *v.* Stephenson, 5 Duer (N. Y.) 538. The recital of the bill of lading was held to be *prima facie* evidence that bales of cotton received were not wet, torn, and in bad external condition, but not that the bagging was not rotten or that the cotton was not damaged within. Benjamin *v.* Sinclair, 1 Bailey (S. C.) 174.

The carrier is not precluded by a recital of good condition from showing that leakage occurred by reason of the effect of heat (Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97) or by reason of insufficiency of the cask, case, etc., in which the goods were contained (Zerega *v.* Poppe, Abb. Adm. (U. S.) 397, 30 Fed. Cas. No. 18,213).

18. Ship Rappahannock *v.* Woodruff, 11 La. Ann. 698; International, etc., R. Co. *v.* Blanton, 63 Tex. 109; The Columbia, 3 Blatchf. (U. S.) 521, 6 Fed. Cas. No. 3,040, 35 Hunt. Mer. Mag. 449, 19 Law Rep. 376, 13 Leg. Int. (Pa.) 361; The Nith, 13 Sawy. (U. S.) 481, 36 Fed. 86.

But as to internal condition the recital of apparent good order does not relieve the consignor from the burden of proving that damage, not apparent, did exist at the time of the shipment. Chicago, etc., R. Co. *v.* Benjamin, 63 Ill. 283.

19. Bissel *v.* Price, 16 Ill. 408; Brooks *v.* Dinsmore, 6 N. Y. St. 281; The Ship Howard *v.* Wissman, 18 How. (U. S.) 231, 15 L. ed. 363; Zerega *v.* Poppe, Abb. Adm. (U. S.) 397, 30 Fed. Cas. No. 18,213; English *v.* Ocean Steam Nav. Co., 2 Blatchf. (U. S.) 425, 8 Fed. Cas. No. 4,490; The Oriflamme, 1 Sawy. (U. S.) 176, 18 Fed. Cas. No. 10,571.

20. Bond *v.* Frost, 6 La. Ann. 801; The Tan Bark Case, Brown Adm. (U. S.) 131, 23 Fed. Cas. No. 13,742.

21. *Iowa.*— Mitchell *v.* U. S. Express Co., 46 Iowa 214.

Louisiana.— McIntosh *v.* Gastenhofer, 2 Rob. (La.) 403; Kimball *v.* Brander, 6 La. 711.

Maine.—Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

Massachusetts.—Richards *v.* Doe, 100 Mass. 524.

Missouri.— Steamboat Missouri *v.* Webb, 9 Mo. 193.

New York.— Ellis *v.* Willard, 9 N. Y. 529.

North Carolina.— Burwell *v.* Raleigh, etc., R. Co., 94 N. C. 451.

Ohio.— Wood *v.* Perry, Wright (Ohio) 240.

Texas.— Missouri Pac. R. Co. *v.* Fennell, 79 Tex. 448, 15 S. W. 693.

Wisconsin.— Glass *v.* Goldsmith, 22 Wis. 488; Blade *v.* Chicago, etc., R. Co., 10 Wis. 4.

United States.— Bradstreet *v.* Heran, Abb. Adm. (U. S.) 209, 3 Fed. Cas. No. 1,792; Baxter *v.* Leland, 1 Blatchf. (U. S.) 526, 2 Fed. Cas. No. 1,125; The Martha, Olcott (U. S.) 140, 16 Fed. Cas. No. 9,145.

See 9 Cent. Dig. tit. "Carriers," § 158 *et seq.*

22. Rhodes *v.* Newhall, 126 N. Y. 574, 27 N. E. 947, 38 N. Y. St. 431, 22 Am. St. Rep. 859; Bissel *v.* Campbell, 54 N. Y. 353; Sawyer *v.* Cleveland Iron Min. Co., 69 Fed. 211, 35 U. S. App. 427, 16 C. C. A. 191; Merrick *v.* About Nineteen Thousand Five Hundred and Fourteen Bushels of Wheat, 3 Fed. 340.

Where the stipulation was that the full quantity of grain mentioned in the bill of lading should be delivered, any deficiency to be paid for by the carrier and "any excess in

c. Bill of Lading Representing the Goods; Negotiability and Transfer — (1) *Whether Negotiable.* The bill of lading stands for many purposes as a representative of the goods shipped, and the title to the goods while they are in the possession of the carrier as bailee may be transferred by the owner by means of a transfer of the bill of lading to a third person. In this sense it is sometimes said that the bill of lading is a negotiable instrument, but it is not negotiable in the same sense as promissory notes or bills of exchange, for those instruments stand for money, which passes by delivery, by which the person receiving it gets a good title, if acting in good faith and without notice of defect in the title of the person from whom it is received, while the delivery of goods in general passes to the person receiving them no better title than that of the one from whom they are received.[23] Therefore the transferee of a bill of lading has no higher title to the goods represented by it than the person by whom the transfer is made.[24] His rights are not greater than the rights which he would have acquired by delivery to him of the property itself, instead of the delivery of the bill of lading representing the property.[25] But just as the delivery of any other evidence of title may estop the owner from asserting his rights as against one who has dealt with the transferee on the faith of the evidence of title thus given, the owner may, by transferring the bill of lading or authorizing it to be put out, estop himself to claim the goods as against one who has innocently advanced value upon it.[26] In a general sense then the bill of lading is negotiable in that it may be transferred as representing the goods.[27] And statutes declaring bills of lading to be negotiable instruments have no other effect than to recognize the power of the holder of the bill of lading to transfer title to the property by means of a transfer of the bill of lading, and do not import into such bills of lading all the characteristics of bills of exchange or promissory notes.[28] Moreover, the transfer of the bill of lading is not a transfer of the contract itself, but only a transfer of the goods represented by it.[29]

the cargo to be paid for to the carrier by the consignees," it was held that the excess did not belong to the carrier, but that the consignee was bound to pay freight thereon. Ford *v.* Head, 34 Hun (N. Y.) 146.

23. Stollenwerck *v.* Thacher, 115 Mass. 224; St. Louis Merchants' Nat. Bank *v.* Shaw, 101 U. S. 557, 25 L. ed. 892.

24. National Commercial Bank *v.* Lackawanna Transp. Co., 59 N. Y. App. Div. 270, 69 N. Y. Suppl. 396; St. Louis Merchants' Nat. Bank *v.* Shaw, 101 U. S. 557, 25 L. ed. 892.

25. *Alabama.*— Voss *v.* Robertson, 46 Ala. 483.

Iowa.— Anchor Mill Co. *v.* Burlington, etc., R. Co., 102 Iowa 262, 71 N. W. 255.

Louisiana.— Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Wilson *v.* Churchman, 4 La. Ann. 452.

Ohio.— Pomeroy *v.* Will, 5 Ohio Dec. (Reprint) 34, 2 Am. L. Rec. 1.

Pennsylvania.— Empire Transp. Co. *v.* Steele, 70 Pa. St. 188.

See 9 Cent. Dig. tit. "Carriers," § 168.

26. Pollard *v.* Reardon, 65 Fed. 848, 21 U. S. App. 639, 13 C. C. A. 171.

27. *Alabama.*— Moore *v.* Robinson, 62 Ala. 537.

Georgia.— Coker *v.* Memphis First Nat. Bank, 112 Ga. 71, 37 S. E. 122; Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867; Tison *v.* Howard, 57 Ga. 410.

Louisiana.— Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Horrell *v.* Parish, 26 La. Ann. 6.

Maine.— Robinson *v.* Stuart, 68 Me. 61; Winslow *v.* Norton, 29 Me. 419, 50 Am. Dec. 601.

Maryland.— Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

Massachusetts.— Stollenwerck *v.* Thacher, 115 Mass. 224.

Missouri.— Robert C. White Live Stock Commission Co. *v.* Chicago, etc., R. Co., 87 Mo. App. 330.

New York.— Nicholson *v.* Conner, 9 Daly (N. Y.) 275.

South Carolina.—McCants *v.* Wells, 4 S. C. 381; Graff *v.* Caldwell, 9 Rich. (S. C.) 325.

United States.— St. Louis Merchants' Nat. Bank *v.* Shaw, 101 U. S. 557, 25 L. ed. 892; Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545; U. S. *v.* Delaware Ins. Co., 4 Wash. (U. S.) 418, 25 Fed. Cas. No. 14,942.

See 9 Cent. Dig. tit. "Carriers," § 168.

28. Turner *v.* Israel, 64 Ark. 244, 41 S. W. 806; St. Louis Merchants' Nat. Bank *v.* Shaw, 101 U. S. 557, 25 L. ed. 892.

On the other hand stamping a bill of lading as "not negotiable" does not destroy its character as a representative of the property and prevent its assignment. Midland Nat. Bank *v.* Missouri, etc., R. Co., 62 Mo. App. 531.

29. Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97; Falkenburg *v.* Clark, 11 R. I. 278.

(II) *Fraudulent and Fictitious Bills of Lading.* It follows from what is said in the preceding paragraph that if the bill of lading is fictitious, that is, if it does not represent any goods, then the transferee thereof acquires no rights under the transfer.[30] Where the carrier receives no goods, and the bill of lading is fraudulently issued by the agent, then the bill of lading represents nothing, and its transfer confers no rights to the transferee as to the goods which it appears to represent.[31] But if the carrier is negligent in issuing the bill of lading he may be liable to one injured by such negligence.[32] For the purpose, however, of preventing fraud it is provided in some states by statute that no bill of lading shall be issued unless the goods named therein have been actually delivered to the carrier, and that the carrier shall be liable to any one injured by the issuance of a fraudulent or fictitious bill of lading.[33]

(III) *Duplicate Bills of Lading.* It is not unusual for the carrier to issue duplicate or triplicate bills of lading, each being an original bill for all purposes.[34] Thus, if one of duplicate bills of lading as representing the goods is transferred to a holder, he can recover them, although the consignor retaining the other bill has ordered the carrier to return the goods.[35] But of course if the duplicate is issued without the carrier's authority he will not be bound thereby.[36] If issued with authority, the carrier will be liable to the holder of either, although the shipper who has received them fraudulently transfers both as originals.[37] In case of a variance between the duplicates, that one will be binding which is acted upon as representing the contract or the goods.[38]

(IV) *Substituted Bills of Lading.* So long as the bill of lading representing the goods is in the hands of the person to whom it was originally issued, there could of course be no objection to the substitution of another bill by agreement of the parties, but after it has passed from the person to whom issued into the hands of another, it would work a fraud for the carrier to issue a substituted bill of lading which may be used by the person to whom it is issued in making a pre-

30. Southern Express Co. *v.* Tupelo Bank, 108 Ala. 517, 18 So. 664, 54 Am. St. Rep. 191; Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75; Maybee *v.* Tregent, 47 Mich. 495, 11 N. W. 287; Tupelo Bank *v.* Kansas City, etc., R. Co., (Miss. 1892) 16 So. 572.

31. Miller *v.* Hannibal, etc., R. Co., 90 N. Y. 430, 43 Am. Rep. 179; Page *v.* Sandusky, etc., R. Co., 2 Ohio Dec. (Reprint) 716, 4 West. L. J. 644.

Transfer after delivery to consignee.— Likewise a carrier is not liable on its bill of lading to a transferee thereof from the consignee of the goods, if such transfer is made after the goods have been delivered to the consignee, for in such case the goods are no longer in the hands of the carrier as bailee, and the bill of lading no longer represents them. Adams *v.* Trent, 19 La. Ann. 262.

So if goods have been delivered to carrier in pursuance of a contract by which title has passed to the consignee, the subsequent issuance of a bill of lading for the goods to the shipper will not enable him to transfer any title to a third person. Hepburn *v.* Lee, 14 La. 76.

32. Stone *v.* Wabash, etc., R. Co., 9 Ill. App. 48.

33. Thompson *v.* Alabama Midland R. Co., 122 Ala. 378, 24 So. 931; Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75; Ætna Nat. Bank *v.* Water Power Co., 58 Mo. App. 532; The Guiding Star, 62 Fed. 407, 22 U. S. App. 344, 10 C. C. A. 454 [*affirming* 53 Fed. 936].

The effect of the issuance of a bill of lading without the receipt of goods, as to a consignee taking the bill in good faith and for value, has already been considered. See *supra*, II, G, 2, b, (III), (B).

34. Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220; Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

The explanation of the custom of issuing bills of lading in triplicate is said to be that one is to be sent to the consignee with the goods, another by mail or some other form of conveyance, and the third is to be retained by the shipper; or, one may be retained by the shipper, one by the master of the vessel by which the goods are shipped, and the third sent to the consignee. Abbott Shipp. 217.

35. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

36. Pomeroy *v.* Will, 5 Ohio Dec. (Reprint) 34, 2 Am. L. Rec. 1.

37. Wichita Sav. Bank *v.* Atchison, etc., R. Co., 20 Kan. 519.

38. Ontario Bank *v.* Hanlon, 23 Hun (N. Y.) 283; Costello *v.* Seven Hundred and Thirty-Four Thousand and Seven Hundred Laths, 44 Fed. 105.

tended sale or pledge of the property for which it stands, and in such a case, although the carrier has honored the second bill of lading, he will be responsible to a *bona fide* holder of the first bill for the goods.[39]

(v) *Transfer of Title by Bill of Lading.* The bill of lading in itself, when taken by the consignor in his own name, has no effect as showing title in him,[40] but by taking the bill of lading in the name of the consignee the shipper vests apparent title in him.[41] So also the indorsement to another of a bill of lading taken in the shipper's name constitutes presumptively a transfer of title,[42] subject, of course, to competent evidence as to the intention of the parties, for the transfer of the bill of lading, just as the delivery of the goods themselves might be for another purpose than that of transfering the title.[43] If the bill of lading provides for the delivery of the goods to a person named, or his order or assigns, or to bearer, or if the name of the person to whom the goods are to be delivered is left blank, then the transfer of the bill of lading by delivery only, without indorsement, will pass an apparent title.[44] If the bill of lading provides for delivery to the person named, or order, a transfer by such person without indorsement will also pass title.[45] And in general it may be said that a delivery of the bill of lading by the person who, according to the terms of the bill, is entitled to the goods will transfer his title.[46]

(vi) *Effect of Transfer.* Many difficult questions have arisen as to the relative rights of those claiming under a transfer of the bill of lading, and those claiming some right to or lien upon the goods as the property of the shipper. These questions are not proper for consideration here in detail. They depend upon the effect of transfer of title in general, and belong to the subject of sales. The carrier is not interested in these questions, except with reference to his duty to make delivery to the right person, which will be discussed hereafter.[47] But it may not be out of place to say here that where a bill of lading is accompanied by a draft on the consignee, and there is some reservation in the bill of lading of *jus disponendi*, the consignee does not become entitled to the possession of the goods until he accepts or pays the draft in accordance with the terms imposed by the shipper, and that an intermediate party, such as a banker, purchasing the

39. Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761; Hieskell *v.* Farmers', etc., Nat. Bank, 89 Pa. St. 155, 33 Am. Rep. 745; The Protection, 102 Fed. 516, 42 C. C. A. 489; Walters *v.* Western, etc., R. Co., 56 Fed. 369.

A new bill properly issued will be valid as against one who seeks to seize the property as belonging to the consignor (Sutherland *v.* Peoria Second Nat. Bank, 78 Ky. 250), and a bill of lading duly issued will be effectual as against any prior agreement for the transfer of title by the delivery to the carrier without the issuance of a bill of lading (Western, etc., R. Co. *v.* Ohio Valley Banking, etc., Co., 107 Ga. 512, 33 S. E. 821).

40. Dickson *v.* Chaffe, 34 La. Ann. 1133.

41. Laughlin *v.* Ganahl, 11 Rob. (La.) 140; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154; Litchfield Bank *v.* Elliott, 83 Minn. 469, 86 N. W. 454; Fry *v.* U. S., 3 Wall. (U. S.) 451, 18 L. ed. 197; Dixon *v.* Columbus, etc., R. Co., 4 Biss. (U. S.) 137, 7 Fed. Cas. No. 3,929: Merchants' Exch. Bank *v.* McGraw, 76 Fed. 930, 48 U. S. App. 55, 22 C. C. A. 622.

The presumption, however, may be rebutted.— Jones *v.* Sims, 6 Port. (Ala.) 138. If the consignee refuses to receive the goods it will be presumed that title has revested in consignor. Ezell *v.* English, 6 Port. (Ala.) 311.

42. People *v.* Midkiff, 71 Ill. App. 141; Peters *v.* Ballistier, 3 Pick. (Mass.) 495.

43. The Carlos F. Roses, 177 U. S. 655, 20 S. Ct. 803, 44 L. ed. 929.

44. Glidden *v.* Lucas, 7 Cal. 26; Allen *v.* Williams, 12 Pick. (Mass.) 297; Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545 [appeal *dismissed* in 79 Fed. 999, 39 U. S. App. 762, 24 C. C. A. 685].

45. Syracuse First Nat. Bank *v.* New York Cent., etc., R. Co., 85 Hun (N. Y.) 160, 32 N. Y. Suppl. 604, 66 N. Y. St. 112.

46. *Illinois.*— Lewis *v.* Springville Banking Co., 166 Ill. 311, 46 N. E. 743.

Missouri.— Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

New York.— Chicago Mar. Bank *v.* Wright, 46 Barb. (N. Y.) 45 [*affirmed* in 48 N. Y. 1].

Ohio.— Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; American Roofing Co. *v.* Memphis, etc., Packet Co., 5 Ohio N. P. 146.

Texas.— Campbell *v.* Alford, 57 Tex. 159.

Indorsement of the bill of lading without delivery will not pass title. Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115; Chicago Mar. Bank *v.* Wright, 48 N. Y. 1.

47. See *infra*, II, L, 4, b.

draft accompanied with the bill of lading, has a right to the goods as security until the consignee accepts or pays, as the case may be. Such a transaction passes to the transferee of the draft and bill of lading a special title in the goods, and he has a better right thereto than one claiming under a prior or subsequent agreement with the shipper, but without having obtained actual or constructive possession of the goods.[48] Likewise a consignee who advances money, on transfer to him of apparent title by the bill of lading, acquires a title to or a lien upon the goods regardless of the claims of those who, without having received actual or constructive possession, seek to assert their rights to such goods through the shipper.[49]

3. Special Contracts For Transportation — a. Bill Not Necessary; Parol Contract. It will be readily understood from the preceding discussion that no special contract is necessary, and that the delivery of the goods to the carrier and their acceptance by him for transportation give rise to duties which are determined by principles of law without any express agreement, and that, while limitations of liability may be agreed upon,[50] and stipulations inserted in the bill of lading or shipping receipt may be binding on the parties as a contract,[51] yet the mere receipt of the goods, marked with their destination, is sufficient to give rise to contractual obligations, without regard to the issuance of any shipping receipt or bill of lading.[52] If, however, there is a special contract between the shipper and carrier, the terms of such contract, so far as it is valid, will determine the rights and liabilities of the parties.[53] Moreover, the contract may be in parol. A bill of lading is not the only evidence of the terms of a special contract.[54] If, however, a written contract has been entered into, it is conclusive as to the matters covered thereby, and it is not open to either of the parties to say that there was a prior oral agreement inconsistent with the provisions of the writing.[55] Furthermore there may be a collateral parol agreement as to a matter

48. *Alabama.*— American Nat. Bank *v.* Henderson, 123 Ala. 612, 26 So. 498, 82 Am. St. Rep. 147.

California.— Dodge *v.* Meyer, 61 Cal. 405.

Colorado.— Denver First Nat. Bank *v.* Schmidt, 6 Colo. App. 216, 40 Pac. 479.

Georgia.—Boatmen's Sav. Bank *v.* Western, etc., R. Co., 81 Ga. 221, 7 S. E. 125.

Iowa.— Kansas City First Nat. Bank *v.* Mt. Pleasant Milling Co., 103 Iowa 518, 72 N. W. 689; Ayres, etc., Co. *v.* Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111, 63 Am. St. Rep. 376; Merchants', etc., Bank *v.* Hewitt, 3 Iowa 93, 66 Am. Dec. 49.

Kansas.— Halsey *v.* Warden, 25 Kan. 128.

Missouri.—Midland Nat. Bank *v.* Missouri, etc., R. Co., 62 Mo. App. 531; Dickson *v.* Merchants' Elevator Co., 44 Mo. App. 498.

New York.— Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Chicago Mar. Bank *v.* Wright, 48 N. Y. 1; Dows *v.* Rush, 28 Barb. (N. Y.) 157.

Vermont.— Tilden *v.* Minor, 45 Vt. 196.

West Virginia.— Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

United States.— Merchants' Exch. Bank *v.* McGraw, 76 Fed. 930, 48 U. S. App. 55, 22 C. C. A. 622; St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434; Lee *v.* Bowen, 5 Biss. (U. S.) 154, 15 Fed. Cas. No. 8,183; Curry *v.* Roulstone, Brunn. Col. Cas. (U. S.) 121, 6 Fed. Cas. No. 3,497, 2 Overt. (Tenn.) 110; The Mary Ann Guest, Olcott (U. S.) 498, 16 Fed. Cas. No. 9,197; U. S. *v.* Delaware Ins. Co., 4 Wash. (U. S.) 418, 25 Fed. Cas. No. 14,942; Ryberg *v.* Snell, 2 Wash. (U. S.) 294, 21 Fed. Cas. No. 12,789.

See 9 Cent. Dig. tit. "Carriers," § 186.

49. Newhall *v.* Central Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713; Starkville First Nat. Bank *v.* Meyer, 43 La. Ann. 1, 8 So. 433; Dows *v.* Greene, 24 N. Y. 638; Western Transp. Co. *v.* Marshall, 4 Abb. Dec. (N. Y.) 575, 4 Transcr. App. (N. Y.) 366, 6 Abb. Pr. N. S. (N. Y.) 280; Chandler *v.* Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Schumacher *v.* Eby, 24 Pa. St. 521.

50. See *supra*, II, E, 2, a, (I).

51. See *supra*, II, G, 2, b, (I).

52. Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120; Gulliver *v.* Adams Express Co., 38 Ill. 503; Shelton *v.* Merchants' Despatch Transp. Co., 36 N. Y. Super. Ct. 527; East Line, etc., R. Co. *v.* Hall, 64 Tex. 615; Texas Pac. R. Co. *v.* Nicholson, 61 Tex. 491.

53. Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243.

54. Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Dunn *v.* Branner, 13 La. Ann. 452.

55. Smith *v.* Southern Express Co., 104 Ala. 387, 16 So. 62; Leonard *v.* Chicago, etc., R. Co., 54 Mo. App. 293; Turner *v.* St. Louis, etc., R. Co., 20 Mo. App. 632; Long *v.* New York Cent. R. Co., 50 N. Y. 76; Bostwick *v.* Baltimore, etc., R. Co., 55 Barb. (N. Y.) 137; The Caledonia, 43 Fed. 681. And see *supra*, II, G, 2, b, (IV).

But whether the shipment was upon a bill

not covered by the bill of lading.[56] The bill of lading or other written contract will not, however, supersede a prior oral agreement, if the written contract is not entered into until the goods have already been accepted for transportation under the parol agreement.[57]

b. Contract Personal. Special agreements by the shipper are personal to him, and third persons have no right to avail themselves of the terms thereof.[58]

c. Contrary to Public Policy. A carrier cannot enter into a contract which will disable him from performing his duties to the public.[59]

d. Custom as Affecting Contract. A custom or usage known to the shipper, as to the manner or method of transportation, will be binding as a part of the contract when not contrary to its terms.[60]

e. Excuses For Non-Performance. The common law allows to the carrier certain excuses for delay in transportation, or for failure to deliver, and the like, but these may be waived, and by special agreement the carrier may obligate himself specifically with reference to the time of delivery, the furnishing of cars, and like matters, and if he does so he waives his common-law defenses and is bound as any other contracting party. In such case impossibility of performance will not be an excuse for a failure to carry out the terms of his agreement.[61]

of lading or under a prior parol contract with reference to future shipments may be a question of fact. St. Louis Southwestern R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619; Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583.

Parol contract which has already been broken by the carrier will not be merged in a subsequent written contract with reference to the shipment of the same property so as to defeat recovery for breach of the parol contract. Pittsburgh, etc., R. Co. *v.* Racer, 10 Ind. App. 503, 37 N. E. 280; Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318; McAbsher *v.* Richmond, etc., R. Co., 108 N. C. 344, 12 S. E. 892.

56. Merchants' Despatch Transp. Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265. And see *supra*, II, G, 2, b, (IV).

Where there was a parol contract for shipment, and at the time of shipment a receipt was given, not purporting to contain the terms of the contract of shipment, held that the agreement was not superseded. McCotter *v.* Hooker, 8 N. Y. 497.

57. *Illinois.*—Merchants' Despatch Transp. Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; Wabash R. Co. *v.* Lannum, 71 Ill. App. 84.

Indiana.— Louisville, etc., R. Co. *v.* Craycraft, 12 Ind. App. 203, 39 N. E. 523.

Kansas.— Missouri Pac. R. Co. *v.* Beeson, 30 Kan. 298, 2 Pac. 496.

Michigan.— Rudell *v.* Ogdensburg Transit Co., 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415.

New York.— Lowenstein *v.* Lombard, 164 N. Y. 324, 58 N. E. 44; Park *v.* Preston, 108 N. Y. 434, 15 N. E. 705; Schiff *v.* New York Cent., etc., R. Co., 52 How. Pr. (N. Y.) 91.

See *supra*, II, E, 5, d; and 9 Cent. Dig. tit. "Carriers," § 202.

If a railroad company, having received and loaded goods for shipment, thereupon refuses to transport them unless the shipper will accept a bill of lading, embodying stipulations not contemplated when the goods were delivered, such bill of lading will not be binding on the shipper. It must be looked upon as having been executed without consideration, and practically by duress. Southern Pac. Co. *v.* Anderson, (Tex. Civ. App. 1901) 63 S. W. 1023; Texas, etc., R. Co. *v.* Avery, 19 Tex. Civ. App. 235, 46 S. W. 897; Missouri, etc., R. Co. *v.* Withers, 16 Tex. Civ. App. 506, 40 S. W. 1073; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

58. East Tennessee, etc., R. Co. *v.* Montgomery, 44 Ga. 278; Wabash R. Co. *v.* Wright, 75 Ill. App. 243.

So where an arrangement was made between a railroad company and a committee of a peach-growers' convention to run a special train during the peach season, held that this was not such a contract as could be taken advantage of by a peach grower by way of recovery of damages for refusal of the company to receive and transport by such special train. Reed *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 176.

59. Chouteau *v.* Union R., etc., Co., 22 Mo. App. 286; Burlington, etc., R. Co. *v.* Northwestern Fuel Co., 31 Fed. 652.

Nevertheless there may be special contracts which are valid, notwithstanding the general obligation of the carrier to serve the public without discrimination. Bald Eagle Valley R. Co. *v.* Nittany Valley R. Co., 171 Pa. St. 284, 33 Atl. 239, 50 Am. St. Rep. 807, 29 L. R. A. 423; Thompson *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427.

60. Milroy *v.* Chicago, etc., R. Co., 98 Iowa 188, 67 N. W. 276; Shelton *v.* Merchants' Dispatch Transp. Co., 59 N. Y. 258.

61. Cowley *v.* Davidson, 13 Minn. 92; Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318; Shelby *v.* Missouri Pac. R. Co., 77 Mo. App. 205; Miller *v.* Chicago, etc., R. Co., 62 Mo. App. 252; Myres *v.* Diamond Joe

f. Mode of Shipment. If the contract gives the carrier an option as to the mode of transportation, or the route to be chosen, such option must be exercised with a view to the interest of the shipper, and it is a breach of the contract to exercise it to his disadvantage.[62]

g. Option to Ship. Contracts are sometimes made by which the shipper is given the option to ship at a specified rate, either without limit or up to a certain quantity, or not less than a certain quantity, and if the shipper avails himself of this option the carrier is bound by the agreement.[63]

h. To Furnish Cars. The carrier may bind himself by contract to furnish cars at specified times and places, and will be liable for damages to the shipper caused by failure or delay in carrying out such contract.[64]

i. To Transport to Point Beyond Line. The question whether a carrier who accepts goods marked to a destination beyond his line of transportation thereby becomes a carrier for the entire distance, or only to the end of his line with the duty to deliver to a connecting carrier, will be hereafter discussed.[65] But there is no question that the carrier may contract for through transportation and become bound as carrier therefor.[66] The mere fact that a through rate is agreed

Line, 58 Mo. App. 199; White *v.* Missouri Pac. R. Co., 19 Mo. App. 400; Spann *v.* Erie Boatman's Transp. Co., 11 Misc. (N. Y.) 680, 33 N. Y. Suppl. 566, 67 N. Y. St. 354; Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211, 27 S. W. 110; Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

But where a railroad company agreed to ship goods after a certain time, and before the time arrived its line had been seized by the Confederate government, held that it was thereby excused from performance. Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289.

62. Stewart *v.* Comer, 100 Ga. 754, 28 S. E. 461, 62 Am. St. Rep. 353; Blitz *v.* Union Steamboat Co., 51 Mich. 558, 17 N. W. 55.

See *infra*, II, M, 3, c.

Where the shipper received on request an all-rail rate, but afterward shipped without specifying that the goods were to be carried all-rail, held that the previous request did not show that the shipment was made on that condition. Hostetter *v.* Baltimore, etc., R. Co., (Pa. 1887) 11 Atl. 609.

If there is nothing in the bill of lading requiring that the transportation be by one route rather than another, such an obligation cannot be established by proof of a previous conversation on the subject. White *v.* Van Kirk, 25 Barb. (N. Y.) 16.

63. Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754; Harvey *v.* Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673; White *v.* Toncray, 9 Leigh (Va.) 347; Bigelow *v.* Chicago, etc., R. Co., 104 Wis. 109, 80 N. W. 95.

But if the offer is at a certain rate, with the understanding that the shipper shall stipulate in acceptance of the offer the amount of goods to be transported, the mere shipment in response to the offer does not give rise to a contract, as there is no consideration for giving the shipper an option to ship any quantity he pleases. Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240.

There may be a valid contract on the part of the shipper in consideration for a rate fixed to deliver to a carrier all or a certain proportion of the goods which the shipper shall ship during a specified time from a particular place. Perkins *v.* Ophir Silver Min. Co., 35 Cal. 11.

64. Baxley *v.* Tallassee, etc., R. Co., 128 Ala. 183, 29 So. 451; International, etc., R. Co. *v.* Young, (Tex. Civ. App. 1894) 28 S. W. 819; Nichols *v.* Oregon Short Line R. Co., 24 Utah 83, 66 Pac. 768.

Where the contract was to furnish cars on a particular day, held that delivery of the cars ready for loading at any hour of that day was a sufficient performance. McGrew *v.* Missouri Pac. R. Co., 109 Mo. 582, 19 S. W. 53.

It is immaterial whether a shipper making a contract for cars in the future for the transportation of stock has any such stock for transportation at the time when the contract is made. Pittsburgh, etc., R. Co. *v.* Racer, 5 Ind. App. 209, 31 N. E. 853. As against the obligation to furnish cars at a particular time fixed by contract, it is immaterial that the time allowed for furnishing the cars is not reasonable for that purpose. Galveston, etc., R. Co. *v.* Thompson, (Tex. Civ. App. 1898) 44 S. W. 8. Although by statute a penalty is imposed on a railroad company for failure to furnish cars on demand in writing, an action will lie for breach of an oral contract to furnish cars. Missouri Pac. R. Co. *v.* Harmonson, (Tex. App. 1890) 16 S. W. 539; Missouri, etc., R. Co. *v.* Graves, (Tex. App. 1890) 16 S. W. 102.

65. See *infra*, II, M, 2, b.

66. *Alabama.*— Alabama Great Southern R. Co. *v.* Mt. Vernon Co., 84 Ala. 173, 4 So. 356.

Iowa.— Aiken *v.* Chicago, etc., R. Co., 68 Iowa 363, 27 N. W. 281.

Kentucky.— Louisville, etc., R. Co. *v.* Foster, 13 Ky. L. Rep. 637.

Maine.— Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Missouri.— Moore *v.* Henry, 18 Mo. App.

upon will not in itself, however, show that the contract was for through transportation.[67] The use in the bill of lading of "through to destination," or other like terms, which under the circumstances indicate an undertaking to transport through, will make the carrier liable for the entire transportation.[68]

j. Terms, Time, Etc. Special contracts as to the rates to be charged, time of transportation, the facilities for loading and unloading, and like matters, may be made between the parties which will vary the common-law obligation of the carrier. These are but illustrations of the matters to which a special contract may relate.[69]

4. What Law Governs in Construction of Contract. The general rule that the validity of a contract of transportation is to be governed by the law of the place where it is made has already been illustrated in discussing the question as to what law governs in regard to the validity of limitations of liability.[70] The same principle is applicable here, as a general proposition, to wit, that the validity and construction of any contract for transportation is to be determined by the law of the place where the contract is made, although its performance is to be completed in another state.[71] It seems not to be competent for the parties to make a contract depend for its validity and interpretation on the law of some other place than that where it is made and partly executed, for instance, the law of a jurisdiction through which the goods are to be carried,[72] or that of the jurisdiction where the corporation entering into the contract is created, which is a different jurisdiction from that in which the transportation is undertaken.[73] The contract

35; Loomis *v.* Wabash, etc., R. Co., 17 Mo. App. 340.

New York.— Root *v.* Great Western R. Co., 45 N. Y. 524; Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269; Ogdensburg, etc., R. Co. *v.* Pratt, 49 How. Pr. (N. Y.) 84; Schroeder *v.* Hudson River R. Co., 5 Duer (N. Y.) 55.

North Carolina.— Phillips *v.* North Carolina R. Co., 78 N. C. 294.

Pennsylvania.— Baltimore, etc., Steamboat Co. *v.* Brown, 54 Pa. St. 77.

Vermont.— Morse *v.* Brainard, 41 Vt. 550; Noyes *v.* Rutland, etc., R. Co., 27 Vt. 110.

United States.— Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Camblos *v.* Philadelphia, etc., R. Co., 4 Fed. Cas. No. 2,331, 4 Brewst. (Pa.) 563, 9 Phila. (Pa.) 411, 30 Leg. Int. (Pa.) 149.

67. Bennitt *v.* Missouri Pac. R. Co., 46 Mo. App. 656; Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; Schneider *v.* Evans, 25 Wis. 241, 3 Am. Rep. 56.

68. Ætna Ins. Co. *v.* Wheeler, 5 Lans. (N. Y.) 480; Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 403, 30 Fed. Cas. No. 18,006, 1 Biss. (U. S.) 447, 30 Fed. Cas. No. 18,007.

69. Toledo, etc., R. Co. *v.* Roberts, 71 Ill. 540; Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269; New York Cent., etc., R. Co. *v.* Standard Oil Co., 20 Hun (N. Y.) 39.

Where a rate was quoted, but before shipment was made the shipper was notified that an error had been made and the rate was repudiated, and he then accepted a bill of lading specifying the higher rate, held that he had thereby waived any right under the original offer. Wabash R. Co. *v.* Wright, 75 Ill. App. 243.

Statements as to time will not constitute an express contract unless made and acted upon as such. International, etc., R. Co. *v.* Wentworth, 87 Tex. 311, 28 S. W. 277.

70. See *supra*, II, E, 8.

71. *Connecticut.*— Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398.

Illinois.—Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210; Merchants' Despatch Transp. Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; Michigan Cent. R. Co., *v.* Boyd, 91 Ill. 268; Milwaukee, etc., R. Co. *v.* Smith, 74 Ill. 197.

Iowa.— Robinson *v.* Merchants' Despatch Transp. Co., 45 Iowa 470; McDaniel *v.* Chicago, etc., R. Co., 24 Iowa 412.

Massachusetts.— Brockway *v.* American Express Co., 168 Mass. 257, 47 N. E. 87.

New York.— Toledo First Nat. Bank *v.* Shaw, 61 N. Y. 283.

South Dakota.— Meuer *v.* Chicago, etc., R. Co., 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L. R. A. 81.

See 9 Cent. Dig. tit. "Carriers," § 220.

72. Lazard *v.* Merchants', etc., Transp. Co., 78 Md. 1, 26 Atl. 897; Brockway *v.* American Express Co., 171 Mass. 158, 50 N. E. 626; Robertson *v.* National Steamship Co., 1 N. Y. App. Div. 61, 37 N. Y. Suppl. 69, 72 N. Y. St. 223.

A stipulation in the bill of lading for the transportation of goods from an American port in a British vessel is to be governed by the American law, and not by that of the flag, in the absence of any evidence that the parties intended that the law of Great Britain should govern. The Brantford City, 29 Fed. 373.

73. Lazard *v.* Merchants', etc., Transp. Co., 78 Md. 1, 26 Atl. 897.

for the entire transportation, and all the duties to be performed by the carrier with reference thereto under such contract, are to be deemed indivisible.[74] No doubt an action for tort may be maintained against the carrier in actual performance of the contract in another jurisdiction than that where the contract is made, and will be governed by the law of the place where the tort is committed, regardless of the place of contract.[75]

5. Authority of Agents to Make Contracts — a. In General. In determining whether a contract made for the carrier by an agent is binding, the principles of agency are applicable, and if the contract is within the general scope of authority of the agent, the carrier will be bound thereby, although the agent has acted beyond his instructions in the particular case.[76] A local freight agent or station agent of a railroad company is presumed to have authority to contract for shipment of goods over the lines of the company and to make any contract which the company itself could make.[77] Knowledge of limitation of the agent's general authority must be brought home to the shipper in order to defeat a contract made by him.[78] An agent having authority to contract for shipment may no doubt make any special contract with relation to carrying out the general pur-

74. Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210; Waldron *v.* Canadian Pac. R. Co., 22 Wash. 253, 60 Pac. 653.

75. Gray *v.* Jackson, 51 N. H. 9, 12 Am. Rep. 1.

76. Green *v.* Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370; Lowenstein *v.* Lombard, 164 N. Y. 324, 58 N. E. 44; Texas Pac. R. Co. *v.* Nicholson, 61 Tex. 491.

The methods of business of an agent which have been pursued for a number of years are presumed to be known to and to have been acquiesced in by the carrier. Springer *v.* Westcott, 166 N. Y. 117, 59 N. E. 693.

77. *Kentucky.*— Southern Pac. Co. *v.* Duncan, 16 Ky. L. Rep. 119.

Missouri.— Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527; Gelvin *v.* Kansas City, etc., R. Co., 21 Mo. App. 273.

Pennsylvania.— Baltimore, etc., Steamboat Co. *v.* Brown, 54 Pa. St. 77.

Tennessee.— Watson *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 255.

Texas.— Gulf, etc., R. Co. *v.* Short, (Tex. Civ. App. 1899) 51 S. W. 261.

See 9 Cent. Dig. tit. "Carriers," § 134.

But where the contract was to receive goods at a place on the company's road other than a regular station, held that it was for the shipper to show that the contract was made with an agent having authority to make it. Newport News, etc., R. Co. *v.* Reed, 10 Ky. L. Rep. 1020.

78. Schroeder *v.* Hudson River R. Co., 5 Duer (N. Y.) 55; International, etc., R. Co. *v.* True, 23 Tex. Civ. App. 523, 57 S. W. 977; San Antonio, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1900) 57 S. W. 883; Gulf, etc., R. Co. *v.* Hume, 6 Tex. Civ. App. 653, 24 S. W. 915; Galveston, etc., R. Co. *v.* House, 4 Tex. Civ. App. 263, 23 S. W. 332; Hansen *v.* Flint, etc., R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791.

Bills of lading signed by wharf-clerks who had authority to issue bills of lading held binding on the steamship line generally, although the special authority given to them was only with reference to issuing bills of lading for transportation by the next vessel. Goddard *v.* Mallory, 52 Barb. (N. Y.) 87.

If the shipper has reason to know that the authority of the agent is limited in a particular instance, he is bound by such limitation. Barnard *v.* Wheeler, 24 Me. 412.

Where the local agent of a railway company purported to act for an association of companies in making a special contract, held that the articles of agreement between the companies were not admissible to show want of power in the local agent to make such contract, as they were not binding on the agent or on the public. Erie, etc., Despatch *v.* Cecil, 112 Ill. 180.

Where the agent of a railway company attempts to make with himself as consignor an unauthorized contract for transportation of goods he is bound by any knowledge which he may have as to the limitations of his own authority. Georgia Cent. R. Co. *v.* Felton, 110 Ga. 597, 36 S. E. 93.

Violation of rules.—The agent cannot bind the carrier by a contract in violation of a rule known to the shipper. Angle *v.* Mississippi, etc., R. Co., 18 Iowa 555.

A contract of the agent for a carrier undertaking to transport goods into Canada, by which the company agreed to advance custom duties, held binding in the absence of knowledge on the part of the shipper that the agent had no such authority. Waldron *v.* Canadian Pac. R. Co., 22 Wash. 253, 60 Pac. 653.

A subagent, intrusted by the general agent with the power to make contracts, and customarily exercising such authority, will have authority to bind the common carrier. Harrell *v.* Wilmington, etc., R. Co., 106 N. C. 258, 11 S. E. 286.

In general a subagent, appointed or designated by a general agent, will bind the carrier by his contracts. Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1, 13 So. 283; Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221; Taylor *v.* Chicago, etc., R. Co., 74 Ill. 86.

pose of the transportation, such as a contract to give notice of arrival of the goods at their destination,[79] or as to the unloading of live stock.[80]

b. As to Cars. The station agent, having charge of a railroad company's business at a particular station, has implied authority to contract to furnish cars at particular times for the shipment of goods, and the company will be bound by such contracts, even though in violation of the company's directions to the agent, if the limitation of his authority is not known to the shipper.[81] But a station agent is not to be presumed, in the absence of evidence, to have authority to contract for furnishing cars to shippers at other stations than his own.[82]

c. As to Connecting Lines. We will see hereafter[83] that the weight of authority in this country is that the carrier receiving goods for transportation to a destination beyond his own line impliedly contracts as carrier only for his own line, and in jurisdictions where this is the rule it is evident that an agent attempting to contract for transportation over a connecting line is exceeding his ordinary authority as agent of the receiving carrier, and his principal is not bound by such contract, in the absence of express authority.[84] But such express authority may be inferred from the custom of the agent known to the principal, to make such contracts.[85] Where two or more railroad companies with connecting lines have

A general traveling freight agent may bind a railroad company with reference to privileges at a particular station. Missouri, etc., R. Co. *v.* De Bord, 21 Tex. Civ. App. 691, 53 S. W. 587.

An agent authorized only to solicit freight, and not generally exercising the power of making special contracts, held not to have apparent authority in a particular case to deviate from the terms of shipment publicly set out in circulars of the company. Lienkauf *v.* Lombard, 12 N. Y. App. Div. 302, 42 N. Y. Suppl. 391.

79. Tanner *v.* Oil Creek R. Co., 53 Pa. St. 411.

80. Lake Erie, etc., R. Co. *v.* Rosenberg, 31 Ill. App. 47.

But stipulations so extraordinary as not to be within the general scope of the power of an agent to contract for transportation will not be binding, in the absence of proof of actual authority. Thus, a guaranty that the price of the goods shipped shall be paid by the consignee is not presumed to be within the power of a general shipping agent. Weikle *v.* Minneapolis, etc., R. Co., 64 Minn. 296, 66 N. W. 963.

It cannot be assumed from the nature of his employment that a railroad agent in a town has authority to make a verbal agreement to feed and water stock in the company's stock-yards. Missouri Pac. R. Co. *v.* Carpenter, 44 Kan. 257, 24 Pac. 462.

A general freight agent, having authority to adjust claims for damages, may bind his principal to a certain sum in settlement of a claim. Chicago, etc., R. Co. *v.* Katzenbach, 118 Ind. 174, 20 N. E. 709.

81. *Indiana.*— Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Pittsburgh, etc., R. Co. *v.* Racer, 10 Ind. App. 503, 37 N. E. 280.

Iowa.— Wood *v.* Chicago, etc., R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861.

Kansas.— *Compare* Missouri Pac. R. Co. *v.* Stults, 31 Kan. 752, 3 Pac. 522.

Missouri.— Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318; Miller *v.* Chicago, etc., R. Co., 62 Mo. App. 252.

Texas.— Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211, 27 S. W. 110; Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583; Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Gulf, etc., R. Co. *v.* Wright, 1 Tex. Civ. App. 402, 21 S. W. 80; Missouri, etc., R. Co. *v.* Graves, (Tex. Civ. App. 1890) 16 S. W. 102.

See 9 Cent. Dig. tit. "Carriers," § 135.

82. Voorhees *v.* Chicago, etc., R. Co., 71 Iowa 735, 30 N. W. 29, 60 Am. Rep. 823; Missouri Pac. R. Co. *v.* Stults, 31 Kan. 752, 3 Pac. 522; Gulf, etc., R. Co. *v.* Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353; Gulf, etc., R. Co. *v.* Hodge, 19 Tex. Civ. App. 543, 30 S. W. 829.

83. See *infra*, II, M, 2, a.

84. Louisville, etc., R. Co. *v.* Owen, 12 Ky. L. Rep. 716; Grover, etc., Sewing Mach. Co. *v.* Missouri Pac. R. Co., 70 Mo. 672, 35 Am. Rep. 444; Minter *v.* Southern Kansas R. Co., 56 Mo. App. 282; Patterson *v.* Kansas City, etc., R. Co., 47 Mo. App. 570; Crouch *v.* Louisville, etc., R. Co., 42 Mo. App. 248; Turner *v.* St. Louis, etc., R. Co., 20 Mo. App. 632; Wait *v.* Albany, etc., R. Co., 5 Lans. (N. Y.) 475; Sutton *v.* Chicago, etc., R. Co., 14 S. D. 111, 84 N. W. 396.

Where the agent gives a shipping receipt, providing for the carriage of goods to the end of the company's line, a verbal agreement by him that the goods shall be sent further is not binding upon his principal. Riley *v.* New York, etc., R. Co., 34 Hun (N. Y.) 97.

An agent employed for the sole purpose of soliciting passengers has no power to bind the company by contract to receive freight from another road and transport it to the depot of, and ship it on, the road for which he is agent. Taylor *v.* Chicago, etc., R. Co., 74 Ill. 86.

85. White *v.* Missouri Pac. R. Co., 19 Mo. App. 400; Gulf, etc., R. Co. *v.* Cole, 8 Tex. Civ. App. 635, 28 S. W. 391; Bigelow *v.* Chicago, etc., R. Co., 104 Wis. 109, 80 N. W. 95.

formed an association for the transportation of goods, the agent of one has apparent authority to contract for the shipment of goods over the connecting lines.[86]

d. As to Rates and Rebates. An agent having authority to contract for shipment has also apparent authority to contract as to the rates of charge[87] and as to rebates to be allowed the shipper, if a contract for rebates would be valid.[88]

e. As to Time of Delivery. An agent having authority to contract for the shipment of goods has apparent authority to stipulate for delivery of such goods at a specified place within a specified time.[89]

H. Custody and Control of Goods in Transit — 1. Title to Goods; Special Ownership of Carrier — a. In General. The doctrine that delivery of goods by the seller thereof to a carrier for transportation to the buyer is *prima facie* a transfer of title, so that the goods in the carrier's hands are presumed to belong to the consignee, belongs to the law of sales, and, so far as it is to be applied between the consignor and the consignee, and the parties claiming under them respectively need not be discussed here,[90] but that doctrine is nevertheless of significance to the carrier in so far as it may determine his duties to the respective parties and his right to the possession of the goods. The effect of a transfer of the bill of lading as passing title and affecting the rights and duties of the carrier has already been considered.[91] Where there is no bill of lading it is presumed that the title vests in the consignee absolutely on delivery of the goods to the carrier, subject only to the carrier's lien for freight, and the consignor's right of stoppage *in transitu*.[92] Therefore, in the absence of notice to the carrier of the existence of a different relation, he must treat the consignee as the owner of the goods, with authority to control them in transit.[93] But if

Where a connecting line has received the goods under a bill of lading given by the agent of the company receiving them, providing for shipment over the connecting line, the bill of lading will be presumed to have been issued with authority. Chicago, etc., R. Co. *v.* Gustin, 35 Nebr. 86, 52 N. W. 844.

86. Southern Pac. Co. *v.* Duncan, 16 Ky. L. Rep. 119; Barrett *v.* Indianapolis, etc., R. Co., 9 Mo. App. 226; Irwin *v.* New York Cent., etc., R. Co., 59 N. Y. 653.

87. Southern Express Co. *v.* Boullemet, 100 Ala. 275, 13 So. 941.

88. Erie, etc., Despatch *v.* Cecil, 112 Ill. 180; Toledo, etc., R. Co. *v.* Elliott, 76 Ill. 67; Marsh *v.* Chicago, etc., R. Co., 79 Iowa 332, 44 N. W. 562.

89. Stoner *v.* Chicago, etc., R. Co., 109 Iowa 551, 80 N. W. 569; Rudell *v.* Ogdensburg Transit Co., 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415; Gann *v.* Chicago Great Western R. Co., 72 Mo. App. 34; Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

90. See, generally, Sales.

91. See *supra*, II, G, 2, c, (v).

92. *Arkansas.*— Memphis, etc., R. Co. *v.* Freed, 38 Ark. 614.

Louisiana.— Sonia Cotton Oil Co. *v.* Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

Michigan.— Hoffman *v.* Lake Shore, etc., R. Co., 125 Mich. 201, 84 N. W. 55.

Minnesota.— Benjamin *v.* Levy, 39 Minn. 11, 38 N. W. 702; McCauley *v.* Davidson, 13 Minn. 162.

Pennsylvania.—Lewis Werner Saw Mill Co. *v.* Ferree, 20 Pa. St. 405, 50 Atl. 924.

Consignee may maintain replevin against a warehouseman for the goods, though he is not the general owner. Butler *v.* Smith, 35 Miss. 457.

Service of garnishment process on the carrier in a proceeding against the consignee while the goods are in transit is good as against a subsequent garnishment after the goods have reached their destination and while they are being held for delivery. Schindler *v.* Smith, 18 La. Ann. 476.

Where consignee acquires title while goods are in transit by paying a draft accompanying the bill of lading, his ownership attaches at once, subject only to the consignor's right of stoppage *in transitu*, which is merely an equitable lien. Dows *v.* Cobb, 12 Barb. (N. Y.) 310.

There may be an assignment of goods in transit which will pass legal title without indorsement of the bill of lading. De Wolf *v.* Harris, 4 Pet. (U. S.) 147, 7 L. ed. 811.

93. Tebbs *v.* Cleveland, etc., R. Co., 20 Ind. App. 192, 50 N. E. 486.

The presumption that title has passed to consignee by delivery to the carrier with direction to transport to the consignee, either without a bill of lading or under a bill of lading providing for delivery of the goods to the consignee, is such that the carrier has no right afterward to treat the consignor as the owner of the goods, and change their destination at the consignor's direction (Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158; Bailey *v.* Hudson River R. Co., 49 N. Y.

the shipper has taken the bill of lading to himself or order he will be presumed to have retained the title,[94] and if the shipper has still the right to dispose of and control the goods, notwithstanding their delivery to the carrier for the consignee, any subsequent arrangement with the carrier will be valid.[95] The presumption of the passing of title to the consignee on delivery to the carrier will protect the carrier in delivering the goods to the consignee at the end of the transportation.[96] But if he is notified by the consignor before delivery to the consignee not to make such delivery then his duty in the premises depends upon the actual facts as to whether the relations between the consignor and consignee were such that delivery to the carrier would constitute as between them a transfer of title.[97] If the consignor ships goods to a factor, or other agent, in pursuance of a previous agreement to do so, but the factor or agent has made no advances on the strength of the delivery of the goods to the carrier for him, then his right to the goods has not yet attached, and the consignor may change their direction or remand the order for delivery.[98] But if the right of the consignee to the goods has become complete on their delivery to the carrier, the consignor cannot by notice or direction to the carrier prevent such delivery.[99] The carrier derives from the shipper no higher right with reference to possession of the goods than that which the shipper has, and in case of wrongful delivery by the carrier without authority the real owner may assert his rights as against the carrier.[1]

b. Carrier Cannot Question Consignor's Title. A carrier, like any other bailee,

70; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290), or issue a new or substituted bill of lading (see *supra*, II, G, 2, c, (IV)).

As to duty of carrier to deliver to consignee named in bill of lading see *infra*, II, L, 4, a.

94. Missouri Pac. R. Co. *v.* Lau, 57 Nebr. 559, 78 N. W. 291.

95. Dickson *v.* Chaffe, 34 La. Ann. 1133; Tootle *v.* Rusk, 5 Ohio Dec. (Reprint) 107, 2 Am. L. Rec. 553.

96. See *infra*, II, L, 4, a.

97. The carrier must therefore respect the directions of the consignor made before delivery to the consignee not to make such delivery, or to return the goods to the consignor, or to deliver them to another person, if the consignor is still the real owner of the goods. Sutherland *v.* Peoria Second Nat. Bank, 78 Ky. 250; Hartwell *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 778.

If carrier undertakes to use all available means to stop goods before their delivery to the consignee he will be liable for failure to do so only in case of negligence. Ryer *v.* Pennsylvania R. Co., 25 Misc. (N. Y.) 289, 54 N. Y. Suppl. 583.

If consignor directs carrier not to deliver to the consignee the carrier should make inquiry as to the consignee's title before disregarding the consignor's direction by delivering to the consignee. Wilson *v.* Churchman, 4 La. Ann. 452.

Failure of the consignor to furnish the carrier any evidence that he has the right as against the consignee, after giving notice not to deliver, would justify the carrier in delivering to the consignee, but in the absence of unreasonable refusal to do so, the carrier is bound by the notice. Allen *v.* Maine Cent. R. Co., 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310.

98. Strahorn *v.* Union Stock Yard, etc., Co., 43 Ill. 424, 92 Am. Dec. 142; Lewis *v.* Galena, etc., R. Co., 40 Ill. 281; Chaffe *v.* Mississippi, etc., R. Co., 59 Miss. 182; Pool *v.* Columbia, etc., R. Co., 23 S. C. 286. But if under a contract between the consignor and consignee the consignee's right to the goods has vested on delivery to the carrier, even though this right be less than that of ownership, the consignee may recover against the carrier for refusal to deliver the goods, notwithstanding a counter-demand by the consignor. Lester *v.* Delaware, etc., R. Co., 73 Hun (N. Y.) 398, 26 N. Y. Suppl. 206, 55 N. Y. St. 923.

99. Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. St. 264.

Thus if a purchasing agent who has bought goods for his principal delivers them to a carrier, consigned to the principal, the carrier has no right to recognize any further orders of such agent, changing the destination of the goods. Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326.

As to insolvency of vendee, who is also consignee, giving the consignor, who is the vendor of the goods, the right to stop them in transit by giving notice to the carrier before delivery to consignee see *infra*, II, H, 2.

1. Bassett *v.* Spofford, 45 N. Y. 387, 6 Am. Rep. 101; Blossom *v.* Champion, 37 Barb. (N. Y.) 554; Jacoby *v.* Laussatt, 6 Serg. & R. (Pa.) 300. But if the owner has delivered the goods to the carrier, who has rendered himself liable to third persons by giving a negotiable bill of lading, he cannot afterward reclaim possession. Western Transp. Co. *v.* Marshall, 4 Abb. Dec. (N. Y.) 575, 4 Transcr. App. (N. Y.) 366, 6 Abb. Pr. N. S. (N. Y.) 280.

Where vendor of goods violates his con-

must respect the apparent ownership of the shipper from whom he receives possession, and cannot question the shipper's right to the goods, in case the transaction is not such as to import a transfer of title to the consignee, although as matter of fact the shipper is not the real owner.[2]

e. Rights of Carrier as Special Owner. A carrier, like any other bailee, has by reason of his rightful possession a special ownership of or title to the property as against third persons which will sustain an action for damage to the property, or to recover possession thereof if wrongfully taken from him.[3] The rule that the carrier may sue in his own name as representative of the owner for a trespass on or injury to the property carried is applicable in courts of admiralty as well as at common law.[4] The right of the carrier to possession does not, however, give him authority to dispose of the goods as against the rightful owner, nor to pledge them,[5] except as under emergency he may have implied authority as representative of the owner to sell.[6]

2. Stoppage in Transitu — a. Notice to Carrier. The right of the vendor of goods sold on credit, and which have been delivered to the carrier for the vendee, in case the vendee becomes insolvent before the carrier has delivered the goods to him, to prevent such delivery by notice to the carrier and retake possession, pertains to the law of sales, and as affecting the vendor and the vendee need not be considered here.[7] It is only the duty of the carrier which arises from the giving of such notice to comply with the same which is to be considered. Such notice need not be in any specific form. It is enough if the carrier or his agent is advised of the wish of the vendor that his goods be not delivered to the vendee on account of his insolvency.[8] The notice, however, must be reasonable, and

tract with the vendee, or rescinds the sale before delivering the goods to the carrier, and consigns them to another, the vendee has no remedy against the carrier. Lester *v.* McDowell, 18 Pa. St. 91.

As to delivery to true owner see *infra*, II, L, 4, d.

2. Denver, etc., R. Co. *v.* Frame, 6 Colo. 382; Great Western R. Co. *v.* McComas, 33 Ill. 185; Illinois Cent. R. Co. *v.* Schwartz, 11 Ill. App. 482. See also *infra*, II, L, 4, d; and, generally, Bailments, 5 Cyc. 157.

3. Deford *v.* Seinour, 1 Ind. 532; State *v.* Intoxicating Liquors, 83 Me. 158, 21 Atl. 840; Chicago, etc., R. Co. *v.* Kansas City Suburban Belt R. Co., 78 Mo. App. 245; Merrick *v.* Brainard, 38 Barb. (N. Y.) 574.

Effect of payment for lost goods.— Where the carrier pays to the person entitled to the property transported the value of such property, under the assumption that it has been lost, he becomes vested with a right to the property itself. Ingerstown Bank *v.* Adams Express Co., 45 Pa. St. 419, 84 Am. Dec. 499.

Where carrier has been wrongfully deprived of possession.— As against the owner of the goods the carrier who has been wrongfully deprived of his possession can recover damages only for his special interest, but as against a third person having no right to the goods whatever he may recover the full value of the goods. White *v.* Webb, 15 Conn. 302; Ingersoll *v.* Van Bokkelin, 7 Cow. (N. Y.) 670; Lyle *v.* Barker, 5 Binn. (Pa.) 457. As between the owner of the goods and a third person who has wrongfully obtained possession of them from the carrier, the owner is entitled to possession. The carrier's right to possession constitutes no bar as against the owner unless set up by the carrier himself. Ames *v.* Palmer, 42 Me. 197, 66 Am. Dec. 271.

Effect of delivery to warehouseman.— As the carrier may, when the goods have reached their destination, deliver them to a warehouseman to hold, provided the person entitled to receive the goods is not found, the carrier by such act loses his right of possession and cannot afterward bring action against the warehouseman to recover them back. Hamilton *v.* Nickerson, 11 Allen (Mass.) 308.

4. The Beaconsfield, 158 U. S. 303, 15 S. Ct. 860, 39 L. ed. 993; Adams Express Co. *v.* Vermilye, 21 Wall. (U. S.) 138, 22 L. ed. 609; The Torgorm, 48 Fed. 584; Hovey *v.* The Sarah E. Brown, 12 Fed. Cas. No. 6,744, 39 Hunt. Mer. Mag. 329.

5. Crumbacker *v.* Tucker, 9 Ark. 365; Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249; Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

6. See *infra*, II, Q.

7. See, generally, Sales.

Assignment for benefit of creditors as affecting the right of stoppage *in transitu* see Assignments For Benefit of Creditors, 4 Cyc. 215, note 37; 217, note 44.

8. Jones *v.* Earl, 37 Cal. 630, 99 Am. Dec. 338.

Direct proof of the insolvency of the vendee should not be required in order to support the right of the vendor to resume possession of the goods as against a purchaser of doubtful solvency. Bloomingdale *v.* Memphis, etc., R. Co., 6 Lea (Tenn.) 616.

It is said not to be necessary to give any

such as to enable the carrier to advise his agent in charge of the goods, or who is to deliver them to the vendee, that such delivery shall not be made.[9] After the receipt of notice the carrier acts at his peril in delivering the goods, either to the consignor or consignee, and may by suitable action bring the goods into court and require the claimants to determine the right of possession.[10] If the carrier allows the consignee by direct or indirect means to get possession of the goods after the consignor has exercised the right of stoppage *in transitu*, liability to the consignor will result.[11]

b. Termination of the Right. The rule that the right of stoppage *in transitu* must be exercised before the carrier has delivered the goods to the consignee does not give rise to difficulty so far as the carrier is concerned, but it is also well settled that a sale of the goods by the consignee, by means of transfer of the bill of lading to a *bona fide* purchaser for value, while the goods are in transit, will terminate the right of stoppage *in transitu*,[12] and this may cause difficulty with the carrier who has no notice of such transfer. If he refuses, though under the seller's order, to deliver to such third person, he may be liable for subsequent loss by reason of a falling market.[13]

c. Effect on Carrier's Lien. The lien of the carrier for charges on the goods is prior to the vendor's right to repossession under stoppage *in transitu*, and the carrier may retain his possession until such charges are paid.[14] But the carrier, as against the right of the consignor to retake possession in the event of stoppage *in transitu*, cannot enforce the payment of charges for other shipments.[15]

I. Duty as to Transportation — 1. In General. The fact that the carrier has the custody and control of the goods charges him with a duty as to various matters incidental to the transportation, or assumed by express contract.[16] Aside from the liability of the carrier for injury to or loss of the goods, which has

reason to the carrier for the direction that the goods be not delivered. Allen *v.* Maine Cent. R. Co., 79 Me. 327, 9 Atl. 895, 1 Am. St. Rep. 310.

9. Willock *v.* Missouri Pac. R. Co., 79 Mo. App. 76, holding that where the carrier required the shipper to give an indemnifying bond, and undertook to send over his own telegraph line the notice to his agent in charge of the goods not to deliver them, and negligently delayed doing so, and the goods were delivered before the notice reached the agent in charge of them, the carrier could not set up as a defense that the goods were beyond his line at the time, or that he was ignorant as to who was in charge of the goods.

10. Howe *v.* Cincinnati, etc., R. Co., 18 Ohio Cir. Ct. 333.

If there is question as to the authority of the person who gives the notice to represent the consignor in stopping the goods, the carrier should before delivery to the consignee give reasonable time to prove the authority, and also to give indemnity to the carrier. Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580.

11. Rosenthal *v.* Weir, 54 N. Y. App. Div. 275, 66 N. Y. Suppl. 841; Poole *v.* Houston, etc., R. Co., 58 Tex. 134. If the carrier allows one who is not the vendor or consignor, but only acts as the representative of the consignor for the purpose of making shipment, to stop and retake possession of the goods, he must answer to the consignee who was entitled to them. Memphis, etc., R. Co. *v.* Freed, 38 Ark. 614.

The effect of the notice is to put an end to the contract of carriage and give rise to the relation of bailor and bailee. Union Pac. R. Co. *v.* Moyer, 40 Kan. 184, 19 Pac. 639, 10 Am. St. Rep. 183; Rosenthal *v.* Weir, 170 N. Y. 148, 63 N. E. 65; Pontifex *v.* Midland R. Co., L. R. 3 Q. B. D. 23, 47 L. J. Q. B. 28, 37 L. T. Rep. N. S. 403, 26 Wkly. Rep. 209.

12. Newhall *v.* Central Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713; Wheeling, etc., R. Co. *v.* Koontz, 15 Ohio Cir. Ct. 288; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

13. Schmidt *v.* The Steam-Ship Pennsylvania, 4 Fed. 548.

14. Pennsylvania Steel Co. *v.* Georgia R., etc., Co., 94 Ga. 636, 21 S. E. 577; Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84; Hause *v.* Judson, 4 Dana (Ky.) 7, 29 Am. Dec. 377; Potts *v.* New York, etc., R. Co., 131 Mass. 455, 41 Am. Rep. 247.

Seller may exercise his right of stoppage by replevying the goods, and need not pay the carrier's charges before the writ is issued, though they must be paid before the goods are taken from the carrier's possession. Hays *v.* Mouille, 14 Pa. St. 48.

15. Farrell *v.* Richmond, etc., R. Co., 102 N. C. 390, 9 S. E. 302, 11 Am. St. Rep. 760, 3 L. R. A. 647; Pennsylvania R. Co. *v.* American Oil Works, 126 Pa. St. 485, 17 Atl. 671, 12 Am. St. Rep. 885.

16. See *supra*, II, G, 3; II, H, 1.

For instance, he may be bound to pay customs charges where the goods are to be trans-

already been discussed,[17] he is bound to use reasonable care to preserve the goods from damage, and that duty rests upon him, and not upon the shipper.[18] In general the carrier is entitled to choose the route for transportation, unless it is fixed by the contract.[19] But if the route selected is impracticable, or its selection subjects the goods to loss which could reasonably have been avoided by the choice of a better one, the carrier will be liable for resulting damage.[20]

2. Care of Live Stock — a. In General. The carrier is bound to take reasonable care of live stock delivered for transportation, taking into account the characteristics of the animals,[21] and will be liable for damage or loss resulting from failure to do so.[22] Care is required in other respects also, as in preventing the escape of the animals which are unloaded for some reason incident to the transportation.[23] In case of transportation by rail the trains must be so managed as not to injure the animals by unnecessary concussion.[24] And it is negligence on the part of the carrier to place a stock-car in which straw bedding is used near

ported from one country into another. Mitchelson *v.* Minneapolis, etc., R. Co., 67 Minn. 406, 69 N. W. 1106.

17. See *supra*, II, D, 1.

18. Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

Extent of care required.—Although the injury or loss resulted from a cause for which the carrier is not liable at common law, or as to which he has exempted himself from liability by special contract, nevertheless, if he fails to use reasonable care and diligence in avoiding loss or injury from such cause he will be responsible for the consequences. See *supra*, II, D, 2, e; II, E, 2, b.

19. Southern Pac. Co. *v.* Booth, (Tex. Civ. App. 1897) 39 S. W. 585; Wells, etc., Express *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; Mallet *v.* Great Eastern R. Co., [1899] 1 Q. B. 309, 68 L. J. Q. B. 256, 80 L. T. Rep. N. S. 53, 47 Wkly. Rep. 334.

As to the effect of stipulations in the contract as to the route see *supra*, II, G, 3, f; *infra*, II, M, 3, c.

20. Houston, etc., R. Co. *v.* Houx, 15 Tex. Civ. App. 502, 40 S. W. 327. And see, as to deviation, *supra*, II, D, 2, e, (II).

Improper address.— Negligence of shipper in improperly designating the destination of the goods will relieve the carrier from liability for loss resulting from such improper address. Finn *v.* Western R. Corp., 102 Mass. 283. But if the address is such as to indicate to the carrier, in the exercise of reasonable care, the destination of the goods, he will be liable as for negligence in failing to transport to such destination. Blakeslee Mfg. Co. *v.* Hilton, 5 Pa. Super. Ct. 184, 18 Pa. Co. Ct. 553. If by reason of the mistake of the shipper in addressing the goods they have been carried to the wrong destination, and the carrier afterward undertakes to forward them without additional charge to the proper destination, he is, in carrying out such undertaking, merely a gratuitous bailee. Treleven *v.* Northern Pac. R. Co., 89 Wis. 598, 62 N. W. 536. Further as to mistake in address see *supra*, II, D, 2, c, (IV); *infra*, II, I, 3, e, 1.

21. **Damage due to the nature of the animals,** such as sickness, not occasioned by the carrier's negligence, will not be chargeable to the carrier. Schoenfeld *v.* Louisville, etc., R. Co., 49 La. Ann. 907, 21 So. 592.

Nor will the carrier be liable for loss of weight incident to transportation by rail. Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

Such injuries as these, occasioned by the nature of the animals, are not within the scope of the carrier's common-law liability. See *supra*, II, D, 2, d, (II).

22. *Alabama.*— Southern Express Co. *v.* Ashford, 126 Ala. 591, 28 So. 732.

Illinois.— Chicago, etc., R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095; Toledo, etc., R. Co. *v.* Hamilton, 76 Ill. 393; U. S. Express Co. *v.* Burke, 94 Ill. App. 29.

Iowa.— Kinnick *v.* Chicago, etc., R. Co., 69 Iowa 665, 29 N. W. 772.

Nebraska.— Chicago, etc., R. Co. *v.* Williams, 61 Nebr. 608, 85 N. W. 832.

United States.— Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17.

See 9 Cent. Dig. tit. "Carriers," § 823.

For instance, if hogs are in danger of injury from overheating, which can be avoided by throwing water over them, and this is practicable in the prosecution of the carrier's business, he must take such precaution. Toledo, etc., R. Co. *v.* Thompson, 71 Ill. 434; Illinois Cent. R. Co. *v.* Adams, 42 Ill. 474, 92 Am. Dec. 85.

Cows with calf and mares with foal.— Although the animals are peculiarly susceptible to injury, as cows with calf, or mares with foal, the carrier will be liable for injury due to his negligence, even though he was not specially notified of the condition of the animals. McCune *v.* Burlington, etc., R. Co., 52 Iowa 600, 3 N. W. 615; Gulf, etc., R. Co. *v.* Staton, (Tex. Civ. App. 1899) 49 S. W. 277; Estill *v.* New York, etc., R. Co., 41 Fed. 849.

23. Pitre *v.* Offutt, 21 La. Ann. 679, 99 Am. Dec. 749.

In case the animals are thus unloaded, reasonable care must also be used in giving them shelter, so far as practicable, from inclement weather. Feinberg *v.* Delaware, etc., R. Co., 52 N. J. L. 451, 20 Atl. 33.

24. Illinois Cent. R. Co. *v.* Kerl, 77 Miss. 736, 27 So. 993.

to the engine, so as to expose the animals to danger of loss by reason of fire being communicated by sparks to the straw.[25]

b. Feeding and Watering — (i) *In General.* The general duty of caring for live stock in course of transportation involves the duty to feed and water the animals, so far as is reasonably necessary for keeping them in good condition.[26] The mere fact that the owner of the stock, or his agent, by arrangement with the carrier, accompanies the animals on the same train does not relieve the carrier from the duty to feed and water and otherwise care for them.[27] But if the shipper specially agrees, as a part of the contract of transportation, that he or his agents will care for the animals and attend to feeding and watering them, the carrier is thereby relieved from liability so far as opportunity of caring for, feeding, and watering the animals is afforded him.[28] And if damage results from the failure of the shipper under such circumstances to have the animals cared for he cannot hold the carrier responsible.[29] Nevertheless, if the carrier is aware that no one is accompanying the animals to care for them, his duty to give them proper attention is the same as though no contract for care by the shipper had been made.[30] If, however, the failure of the shipper or agent to accompany the animals and care for them is not known to the carrier, of course he is not bound to furnish the care which the shipper has agreed to furnish.[31] And in general the negligence of the shipper in not giving the animals the care which he has under the contract agreed to give will relieve the carrier from liability from resulting loss or injury.[32]

25. McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 10 Am. St. Rep. 721; Powell *v.* Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564.

26. Toledo, etc., R. Co. *v.* Hamilton, 76 Ill. 393; Missouri, etc., R. Co. *v.* Leibold, (Tex. Civ. App. 1900) 55 S. W. 368.

Pigeons.— But in the absence of agreement, it was held that an express company transporting live pigeons was not required to feed and water the birds. American Merchants' Union Express Co. *v.* Phillips, 29 Mich. 515.

Under statute imposing a penalty for failure to properly care for stock in shipment the carrier has the right to act on the presumption that the stock is in proper condition when tendered, and is not required to water or feed oftener than would be done by an ordinarily prudent man in the care of his own stock. Texas, etc., R. Co. *v.* Stribling, (Tex. Civ. App. 1896) 34 S. W. 1002.

Place of feeding and watering.—Where the contract for shipment of live stock is silent as to the places where the animals are to be fed and watered, an oral agreement between an agent and the shipper that they shall be fed and watered at a certain place, and which is in accordance with the usage of the carrier, is binding upon him. Lowenstein *v.* Wabash R. Co., 63 Mo. App. 68.

27. Atchison, etc., R. Co. *v.* Ditmars, 3 Kan. App. 459, 43 Pac. 833; McAlister *v.* Chicago, etc., R. Co., 74 Mo. 351; Duvenick *v.* Missouri Pac. R. Co., 57 Mo. App. 550; Feinberg *v.* Delaware, etc., R. Co., 52 N. J. L. 451, 20 Atl. 33; Harris *v.* Northern Indiana R. Co., 20 N. Y. 232.

28. Georgia Cent. R. Co. *v.* Rogers, 111 Ga. 865, 36 S. E. 946; Boaz *v.* Central R. Co., 87 Ga. 463, 13 S. E. 711; Hengstler *v.* Flint, etc., R. Co., 125 Mich. 530, 84 N. W. 1067; Schureman *v.* Chicago, etc., R. Co., 88 Mo. App. 183. But it is not true, as seems to have been held in Illinois Cent. R. Co. *v.* Morrison, 19 Ill. 136, that under such contract there is not a complete delivery of the animals to the carrier so as to charge him with liability as a common carrier.

Where the shipment is made in contemplation of such a contract it will be binding, although not formally entered into until the transportation has been commenced. Cleveland, etc., R. Co. *v.* Patterson, 69 Ill. App. 438.

29. Georgia R., etc., Co. *v.* Reid, 91 Ga. 377, 17 S. E. 934; Terre Haute, etc., R. Co. *v.* Sherwood, 132 Ind. 129, 31 N. E. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339; Faust *v.* Chicago, etc., R. Co., 104 Iowa 241, 73 N. W. 623, 65 Am. St. Rep. 454.

30. Louisville, etc., R. Co. *v.* Spalding, 8 Ky. L. Rep. 355; Chicago, etc., R. Co. *v.* Williams, 61 Nebr. 608, 85 N. W. 832.

Proof of a habit of the carrier to carry for a shipper under such stipulation without his compliance therewith will not show a waiver of the stipulation. Chicago, etc., R. Co. *v.* Van Dresar, 22 Wis. 511.

31. Louisville, etc., R. Co. *v.* Martin, 8 Ky. L. Rep. 432.

32. Union Pac. R. Co. *v.* Langan, 52 Nebr. 105, 71 N. W. 979; Ft. Worth, etc., R. Co. *v.* Daggett, 87 Tex. 322, 28 S. W. 525; Missouri, etc., R. Co. *v.* Belcher, (Tex. Civ. App. 1897) 41 S. W. 706.

If the animals are not suffering from want of water at a particular stopping place, the shipper will not be negligent in waiting to water them at the next stopping place, in the absence of knowledge that water at the next place is not available. Toledo, etc., R. Co. *v.* Thompson, 71 Ill. 434. And he can, under such circumstances, hold the carrier liable

But even where it is the duty of the shipper to give care and furnish food and water, the carrier will be liable for not affording him or his agent reasonable facilities and opportunity for doing so.[33] At the request of the shipper it is the duty of the carrier to set the car containing the animals out at an intermediate stopping place, if essential to avoid injury from continuance of the transportation.[34]

(II) *Statutory Provisions.* By federal statute[35] a railroad company engaged in transporting cattle, sheep, swine, or other animals from one state to another is prohibited from confining the same in its cars for a longer period of time than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from doing so by accidental causes. And although a penalty is imposed for a violation of this regulation, nevertheless a failure to comply therewith is negligence *per se*, rendering the railroad company liable to the shipper for resulting injuries to the animals.[36] By the terms of this statute the duty to feed and water is not imposed on the railroad company, where it has been assumed by a shipper

for failure to furnish him reasonable opportunity to water where, before reaching the next stopping place, there is unusual delay by reason of the carrier's negligence. St. Louis, etc., R. Co. *v.* Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008.

33. *Georgia.*— Comer *v.* Stewart, 97 Ga. 403, 24 S. E. 845; Nashville, etc., R. Co. *v.* Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453; Bryant *v.* Southwestern R. Co., 68 Ga. 805.

Illinois.— Wabash, etc., R. Co. *v.* Pratt, 15 Ill. App. 177.

Michigan.—Smith *v.* Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651, 43 Am. St. Rep. 440.

Missouri.— Lowenstein *v.* Wabash R. Co., 63 Mo. App. 68; Duvenick *v.* Missouri Pac. R. Co., 57 Mo. App. 550.

South Carolina.— Comer *v.* Columbia, etc., R. Co., 52 S. C. 36, 29 S. E. 637.

Texas.— Ft. Worth, etc., R. Co. *v.* Daggett, 87 Tex. 322, 28 S. W. 525; Gulf, etc., R. Co. *v.* Gann, 8 Tex. Civ. App. 620, 28 S. W. 349.

Wisconsin.— Burns *v.* Chicago, etc., R. Co., 104 Wis. 646, 80 N. W. 927.

See 9 Cent. Dig. tit. "Carriers," § 928.

It may even be necessary for the carrier to stop the train for that purpose, if reasonable opportunity for feeding and watering is not otherwise afforded. Gulf, etc., R. Co. *v.* Gann, 8 Tex. Civ. App. 620, 28 S. W. 349.

If unloading is necessary it is the duty of the carrier to place the cars where the stock can be unloaded by the persons in charge. Burns *v.* Chicago, etc., R. Co., 104 Wis. 646, 80 N. W. 927.

The burden is upon the shipper to show that proper facilities were not furnished. Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192.

34. Coupland *v.* Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

But of course the carrier is not bound to have facilities for unloading immediately at an intermediate stopping place, and the shipper cannot complain that delay in completing the transportation is occasioned by the setting out of the car containing the animals. Regan *v.* Adams Express Co., 49 La. Ann. 1579, 22 So. 835; Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 204, 10 Am. Rep. 355.

If by the carrier's own negligent act he is unable to place the cars for necessary unloading in transit he will be liable for consequent damages. Bills *v.* New York Cent. R. Co., 84 N. Y. 5.

Where a railroad company furnishes a shipper an entire car without any agreement for any lay-out along the route, the shipper, although he has agreed to care for the animals, is not entitled to have the car stopped, save by abandoning the contract and arranging for the use of the car for a longer time. Illinois Cent. R. Co. *v.* Peterson, 68 Miss. 454, 10 So. 43, 14 L. R. A. 550.

The shipper who unloads animals from cars in transit and takes them out of the possession of the carrier for the purpose of feeding does not thereby subject them to seizure by his creditors as against a transferee of the bill of lading. Lewis *v.* Springville Banking Co., 166 Ill. 311, 46 N. E. 743.

35. U. S. Rev. Stat. (1878), §§ 4386–4389.

36. *Georgia.*— Nashville, etc., R. Co. *v.* Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453.

Nebraska.— Hale *v.* Missouri Pac. R. Co., 36 Nebr. 266, 54 N. W. 517.

Texas.— Ft. Worth, etc., R. Co. *v.* Daggett, 87 Tex. 322, 28 S. W. 525; Texas, etc., R. Co. *v.* Birchfield, 19 Tex. Civ. App. 228, 46 S. W. 900.

Virginia.— Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

Wisconsin.— Burns *v.* Chicago, etc., R. Co., 104 Wis. 646, 80 N. W. 927.

See 9 Cent. Dig. tit. "Carriers," § 927.

This statute applies to shipments of horses and mules. Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

A receiver of a railroad, appointed by a federal court, is not liable for the penalty imposed by these statutory provisions. U. S. *v.* Harris, 85 Fed. 533, 57 U. S. App. 259, 29 C. C. A. 327.

The excuse of storm or other accidental cause does not cover accident to a railroad

under a special contract.[37] There are in various states statutes of similar import relating to transportation of animals between points in the same state.[38]

c. Furnishing Suitable Cars and Appliances — (i) *In General.* A railroad company undertaking to transport live stock is bound to provide suitable cars of sufficient strength,[39] and is liable for injuries resulting from failure to do so.[40] But if suitable cars are furnished and due care is exercised, the carrier is not liable for injuries resulting by reason of the viciousness and unruly disposition of the animals or any inherent vice.[41] A railroad company is also bound, in undertaking the transportation of live stock, to furnish suitable pens, and will be liable for injury resulting from the defective condition of such appliances.[42]

train through negligence. Newport News, etc., Co. *v.* U. S., 61 Fed. 488, 22 U. S. App. 145, 9 C. C. A. 579.

A railroad company operating a line which forms only part of a continuous transportation from one state to another is not liable under this statute for violation of the provisions by connecting lines, but in estimating the period of confinement the time during which the animals have been confined prior to their delivery to the carrier in question must be included in determining its duty. U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480.

In enforcing the penal provisions of the statute the penalty cannot be imposed for breach of the statute as to each separate animal, but the offense consists in the confinement of the entire number of animals included in one shipment. U. S. *v.* Boston, etc., R. Co., 15 Fed. 209.

The provisions of this statute do not excuse a carrier for keeping the animals confined for the length of time specified without feed or water, if it would otherwise be negligent to do so. Missouri Pac. R. Co. *v.* Ivy, 79 Tex. 444, 15 S. W. 692.

Transportation wholly within state.— The statute does not apply to transportation of animals from a point within the state to another point in the same state. U. S. *v.* East Tennessee, etc., R. Co., 13 Fed. 642.

37. Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 913.

38. Hendrick *v.* Boston, etc., R. Co., 170 Mass. 44, 48 N. E. 835; Comer *v.* Columbia, etc., R. Co., 52 S. C. 36, 29 S. E. 637; Gulf, etc., R. Co. *v.* Gray, 87 Tex. 312, 28 S. W. 280; International, etc., R. Co. *v.* McRae, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 913. Under such a statute the carrier is bound to unload for feeding, even against the shipper's protest. Nashville, etc., R. Co. *v.* Parker, 123 Ala. 683, 27 So. 323. Failure of the shipper to accompany the animals as provided in a special contract will not relieve the carrier from the duty to feed and water as required by the statute. Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80.

39. A car is not sufficient for the transportation of live stock which is liable to be broken by the ordinary acts of such animals, and the shipper may recover for injuries resulting from the use of an insufficient car under such circumstances. Betts *v.* Chicago, etc., R. Co., 92 Iowa 343, 60 N. W. 623, 54 Am. St. Rep. 558, 26 L. R. A. 248.

40. St. Louis, etc., R. Co. *v.* Dorman, 72 Ill. 504; Peters *v.* New Orleans, etc., R. Co., 16 La. Ann. 222, 79 Am. Dec. 578; Great Western R. Co. *v.* Hawkins, 18 Mich. 427; International, etc., R. Co. *v.* Pool, (Tex. Civ. App. 1900) 59 S. W. 911; Missouri Pac. R. Co. *v.* Nicholson, 2 Tex. App. Civ. Cas. § 168.

But the shipper cannot require more than that the cars be suitable, safe, and sufficient, and it is error to require that the company furnish the safest and best approved appliances. Illinois Cent. R. Co. *v.* Haynes, 63 Miss. 485.

Where by reason of a defective car it is necessary to transfer animals to another car, and the owner is, by reason thereof, unable to furnish suitable bedding, the carrier will be liable for resulting damages. McDaniel *v.* Chicago, etc., R. Co., 24 Iowa 412.

The fact that the company uses a car of a special kind, furnished by an independent corporation, will not relieve it from liability if the car is defective. Louisville, etc., R. Co. *v.* Dies, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. Rep. 871.

Where the statute requires railroads to furnish suitable cars, under a penalty, the penalty will not be imposed for failing to furnish cars of a particular kind, inasmuch as only suitable cars are required. Austin, etc., R. Co. *v.* Slator, 7 Tex. Civ. App. 344, 26 S. W. 233.

A shipper who at his own expense and voluntarily introduces appliances on the car cannot recover against the carrier, in the absence of an explicit contract for such expense, as the carrier is in the first instance the judge of the sufficiency of its cars. Sloan *v.* St. Louis, etc., R. Co., 58 Mo. 220.

41. Smith *v.* New Haven, etc., R. Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166; Selby *v.* Wilmington, etc., R. Co., 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17.

42. Cooke *v.* Kansas City, etc., R. Co., 57 Mo. App. 471; Mason *v.* Missouri Pac. R. Co., 25 Mo. App. 473; Gulf, etc., R. Co. *v.* Porter, (Tex. Civ. App. 1901) 61 S. W. 343; Galveston, etc., R. Co. *v.* Jackson, (Tex. Civ. App. 1896) 37 S. W. 255.

The company will be liable for loss by shrinkage resulting from failure to provide sufficient stock-pens for loading the animals within a reasonable time after they are received for shipment. Missouri, etc., R. Co. *v.* Woods, (Tex. Civ. App. 1895) 31 S. W. 237.

(II) *Shipper Assuming Risk as to Cars and Appliances.* The mere presence of the shipper will not lessen the carrier's responsibility as to the safety of the cars, pens, and other appliances, where the shipper has no control over the matter,[43] and the mere knowledge on his part that the cars are not provided with such appliances as are required by common law or by statute will not relieve the carrier from liability.[44] A general stipulation that the shipper has examined the car in which the stock is shipped, and accepts it as suitable and sufficient, will not estop him from recovering for injuries due to a defective car, inasmuch as the carrier cannot limit his common-law liability so as to exempt himself from the consequences of his own negligence.[45] But if the shipper, with notice of defects in the car or appliances, consents to the transportation without objection, he cannot afterward complain of their insufficiency.[46] He should notify the carrier of the apparent defects.[47] The shipper having selected such cars and appliances as he requires, the carrier is not responsible for injury resulting from such selection.[48] Moreover, if the shipper by himself or his own agents exercises control in loading and securing the cars for the safe transportation of the animals, he cannot hold the carrier liable for negligence with respect thereto.[49]

d. Loading and Unloading. Not only as to the apparatus used,[50] but also as to the acts of his servants is the carrier primarily liable with reference to the loading and unloading of stock.[51] It may, however, be provided in the contract that the shipper shall be responsible for loading and unloading, and such a stipulation will relieve the carrier from liability in that respect.[52] Where the stock as loaded by the shipper is accepted by the carrier, the latter assumes all the liabilities of a common carrier, in the absence of any misrepresentation or deceit on the part of the shipper as to the loading.[53]

If the animals are unloaded en route, and escape from the pen in which they are placed, and are damaged while at large, the carrier is liable as insurer for such damage. Texas, etc., R. Co. *v.* Turner, (Tex. Civ. App. 1896) 37 S. W. 643.

43. Peters *v.* New Orleans, etc., R. Co., 16 La. Ann. 222, 79 Am. Dec. 578.

44. Union Pac. R. Co. *v.* Rainey, 19 Colo. 225, 34 Pac. 986; Paddock *v.* Missouri Pac. R. Co., 60 Mo. App. 328; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

45. Louisville, etc., R. Co. *v.* Dies, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. Rep. 871; Galveston, etc., R. Co. *v.* Silegman, (Tex. Civ. App. 1893) 23 S. W. 298.

46. Great Western R. Co. *v.* Hawkins, 18 Mich. 427.

47. St. Louis, etc., R. Co. *v.* Law, 68 Ark. 218, 57 S. W. 258; Ft. Worth, etc., R. Co. *v.* Word, (Tex. Civ. App. 1895) 32 S. W. 14; Chicago, etc., R. Co. *v.* Van Dresar, 22 Wis. 511; Betts *v.* Farmers' L. & T. Co., 21 Wis. 80, 91 Am. Dec. 460.

48. Illinois Cent. R. Co. *v.* Hall, 58 Ill. 409; Harris *v.* Northern Indiana R. Co., 20 N. Y. 232.

49. Hutchinson *v.* Chicago, etc., R. Co., 37 Minn. 524, 35 N. W. 433; Lee *v.* Raleigh, etc., R. Co., 72 N. C. 236.

50. East Tennessee, etc., R. Co. *v.* Herrman, 92 Ga. 384, 17 S. E. 344; Louisville, etc., R. Co. *v.* Owen, 12 Ky. L. Rep. 716.

51. Ritz *v.* Pennsylvania R. Co., 3 Phila. (Pa.) 82, 15 Leg. Int. (Pa.) 75.

52. East Tennessee, etc., R. Co. *v.* Johnston, 75 Ala. 596, 51 Am. Rep. 489; Fordyce *v.* McFlynn, 56 Ark. 424, 19 S. W. 961; Bowie *v.* Baltimore, etc., R. Co., 1 MacArthur (D. C.) 94; Newby *v.* Chicago, etc., R. Co., 19 Mo. App. 391; Missouri, etc., R. Co. *v.* Chittim, (Tex. Civ. App. 1900) 60 S. W. 284.

A stipulation as to loading and unloading does not apply to unloading that may be necessary by reason of accident before the transportation is completed (Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 204, 10 Am. Rep. 355), nor to unloading and loading for purpose of feeding and watering over which the carrier assumes control (Missouri Pac. R. Co. *v.* Kingsbury, (Tex. Civ. App. 1894) 25 S. W. 322).

The shipper will be precluded from recovering damages for injuries to the animals in unloading only where he has been guilty of contributory negligence with reference thereto. Chesapeake, etc., R. Co. *v.* American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; Burns *v.* Chicago, etc., R. Co., 104 Wis. 646, 80 N. W. 927.

If the agents of the carrier assist in loading, and the cars are overloaded so as to constitute a violation of statutory provisions on the subject, the company will not be relieved from liability under the statute by reason of a clause in the contract that the loading is to be done by the shipper at his own risk. Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80.

53. Kinnick *v.* Chicago, etc., R. Co., 69 Iowa 665, 29 N. W. 772; Doan *v.* St. Louis, etc., R. Co., 38 Mo. App. 408.

If the owner of the stock voluntarily uses defective apparatus in unloading the carrier will not be responsible for resulting injury.

3. Liability For Delay — a. Diligence Required. The carrier's common-law liability as an insurer for loss or injury to the goods does not cover damages, not involving direct loss of or injury to the goods themselves, occasioned by delay in transportation.[54] As to the diligence and care required in completing the express or implied contract for transportation, the rule is that the carrier is bound to use reasonable diligence and care, and that only negligence will render him liable, unless a stipulated time is fixed in the contract.[55] If, however, damage results from failure, without good excuse, to deliver the goods at their destination within a reasonable time, the carrier is liable for such damage.[56]

Candee *v.* New York, etc., R. Co., (Conn. 1901) 49 Atl. 17.

54. See *supra*, II, D, 1.

55. *Georgia.*— Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

Mississippi.— Frank *v.* Memphis, etc., R. Co., 52 Miss. 570.

North Carolina.— Boner *v.* Merchant's Steamboat Co., 46 N. C. 211.

Tennessee.— Nashville, etc., R. Co. *v.* Jackson, 6 Heisk. (Tenn.) 271.

Texas.—International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622.

Virginia.— Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

England.—Taylor *v.* Great Northern R. Co., L. R. 1 C. P. 385, 1 H. & R. 471, 12 Jur. N. S. 372, 35 L. J. C. P. 210, 14 L. T. Rep. N. S. 363, 14 Wkly. Rep. 639.

See 9 Cent. Dig. tit. "Carriers," § 396.

Mere delay in delivery will not render the carrier liable for conversion. Scovill *v.* Griffith, 12 N. Y. 509; Briggs *v.* New York Cent. R. Co., 28 Barb. (N. Y.) 515. And see *infra*, II, I, 3, h, (I).

56. *Arkansas.*— St. Louis, etc., R. Co. *v.* Mudford, 44 Ark. 439.

Georgia.— Smith *v.* Cleveland, etc., R. Co., 92 Ga. 539, 18 S. E. 977; Lowe *v.* East Tennessee, etc., R. Co., 90 Ga. 85, 15 S. E. 692; Rome R. Co. *v.* Sullivan, 32 Ga. 400.

Illinois.— Michigan Southern, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278.

Kentucky.— Felton *v.* McCreary-McClellan Live Stock Co., 22 Ky. L. Rep. 1058, 59 S. W. 744.

Missouri.— Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527; Glasscock *v.* Chicago, etc., R. Co., 86 Mo. App. 114.

New Hampshire.— Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267; Favor *v.* Philbrick, 5 N. H. 358.

New York.— Ward *v.* New York Cent. R. Co., 47 N. Y. 29, 7 Am. Rep. 405; Coffin *v.* New York Cent. R. Co., 64 Barb. (N. Y.) 379.

North Carolina.— Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347.

South Carolina.—Nettles *v.* South Carolina R. Co., 7 Rich. (S. C.) 190, 62 Am. Dec. 409.

Texas.— Gerhard *v.* Neese, 36 Tex. 635; Gulf, etc., R. Co. *v.* Porter, (Tex. Civ. App. 1901) 61 S. W. 343; Wells, etc., Express *v.* Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824.

United States.— Ormsby *v.* Union Pac. R. Co., 4 McCrary (U. S.) 48, 4 Fed. 706.

See 9 Cent. Dig. tit. "Carriers," § 396.

If there is no negligence in transportation, a reasonable time after the arrival of the goods should be allowed for delivery. Sherman *v.* Hudson River R. Co., 64 N. Y. 254.

If by the contract the carrier has the option of two vessels on which the goods may be transported, and in the exercise of ordinary care he sends the goods by the second, he will not be liable for damage resulting from a fall in the market price of the goods because of their not having arrived on the first of the two vessels. Fowler *v.* Liverpool, etc., Steam Co., 87 N. Y. 190.

Owners of vessels are liable for loss on a shipment from improper delay in not sailing at the appointed time. Hart *v.* Ship Jane Ross. 5 La. Ann. 264.

Where a carrier undertakes to return goods not accepted by the consignee he will be liable for damages by reason of unnecessary delay in returning the goods. Green *v.* Pacific Express Co., 37 Mo. App. 537.

Under express contract not specifying time of delivery.— This rule is applicable as well where goods are shipped under an express contract which does not specify a fixed time for delivery, as where there is no express contract whatever, and the carrier's liability is determined by the rules of the common law. A contract of carriage without specified time for performance implies performance within a reasonable time. Central R. Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Denman *v.* Chicago, etc., R. Co., 52 Nebr. 140, 71 N. W. 967; Gulf, etc., R. Co. *v.* Baugh, (Tex. Civ. App. 1897) 42 S. W. 245.

Under express contract specifying time of delivery.— If, however, there is an express contract for delivery by a fixed time the carrier's liability for delay will be determined by the contract itself, and not by the reasonableness of the time within which delivery is made. Cantwell *v.* Pacific Express Co., 58 Ark. 487, 25 S. W. 503; Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198; International, etc., R. Co. *v.* Ritchie, (Tex. Civ. App. 1894) 26 S. W. 840.

A mere expression of opinion by a railroad station agent as to the time required for transportation will not constitute a contract to deliver within that time. Jones *v.* New York, etc., R. Co., 29 Barb. (N. Y.) 633.

Where carrier stipulated for twelve hours, in addition to the schedule time, for transportation of cattle to market, held that the carrier was not thereby relieved from liability for loss resulting from delay caused by its

b. What Is Reasonable Time. The question as to what is reasonable time for delivery, being one of fact for the jury,[57] no definite rules can be stated as to what will and what will not constitute unreasonable delay, as this must depend on the circumstances of each case.[58]

c. What Constitutes Negligence. The overloading of the engine or its defective condition may render a railroad company liable for negligence in resulting delay.[59] But a carrier whose duty it is to transship goods is not bound to avail himself of the very first opportunity for doing so.[60] Negligence in ascertaining the location of the place to which the goods are to be transported may render the carrier liable for delay.[61] In general the selection of a route, where more than one route is available to the carrier, will not render him liable if reasonable care is exercised in this respect. And especially is this true where by reason of some obstruction in the usual route, not due to the carrier's negligence, it becomes necessary to exercise judgment as to forwarding by another route.[62]

d. Delay as Proximate Cause. If the negligent delay occasions the ultimate injury which results from the goods not reaching their destination in time, the

negligence, even though such delay did not exceed the twelve-hour limitation. Leonard *v.* Chicago, etc., R. Co., 54 Mo. App. 293, 57 Mo. App. 366.

The same excuses which may be shown for delay in the absence of specific contract as to time will not be available where there is a breach of a special contract. See *infra*, II, I, 3, e, (I).

57. Columbus, etc., R. Co. *v.* Flournoy, 75 Ga. 745; Louisville, etc., R. Co. *v.* Barbour, 9 Ky. L. Rep. 934; Schwab *v.* Union Line, 13 Mo. App. 159.

58. Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965; Glenn *v.* Charlotte, etc., R. Co., 63 N. C. 510.

Illustrations of unreasonable delay.—Where the ordinary time for transportation of freight between two points was about three days, a delay of thirty days was found to be unreasonable. Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128. And under the circumstances a delay of twelve to fifteen days was found unreasonable in Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83; Michigan Southern, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278; Jennings *v.* Grand Trunk R. Co., 52 Hun (N. Y.) 227, 5 N. Y. Suppl. 140, 23 N. Y. St. 15. A delay of twenty-four hours at one railroad station was held to be unnecessary, and therefore negligent in the absence of any excuse. Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. 706. By statute in Georgia five days is fixed as the limit of reasonable time for transportation after the receipt of the goods. McGowan *v.* Wilmington, etc., R. Co., 95 N. C. 417. Where the contract is to ship on a certain day, or by a certain train, failure to comply with such agreement will render the carrier liable for damages. Illinois Cent. R. Co. *v.* Waters, 41 Ill. 73; Illinois Cent. R. Co. *v.* Simmons, 49 Ill. App. 443. But in the absence of contract the carrier is not bound to ship stock by the first train leaving after the delivery of the stock for transportation. Pennsylvania Co. *v.* Clark, (Ind. App. 1891) 28 N. E. 208. One day's delay, where no indication of a necessity for promptness in delivery is given by the shipper, will not render the carrier liable in damages. Water Valley Bank *v.* Southern Express Co., 71 Miss. 741, 16 So. 300. Where the transportation was to be effected over a logging road which the railroad company was not operating continuously, held that a transportation in the usual course was all that was required. Burns *v.* Chicago, etc., R. Co., 104 Wis. 646, 80 N. W. 927.

59. Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198.

But a carrier is not bound to furnish a special engine for a train which would otherwise be overloaded by the taking of the goods offered. Michigan Southern, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466.

60. Frank *v.* Memphis, etc., R. Co., 52 Miss. 570.

61. Harrell *v.* Owens, 18 N. C. 273.

If a carrier loads on the same car goods for different destinations, and carelessly takes to a more remote point goods which should have been delivered at a nearer point, it will be liable for the delay caused thereby. Waite *v.* New York Cent., etc., R. Co., 110 N. Y. 635, 17 N. E. 730, 17 N. Y. St. 162; Sherman *v.* Hudson River R. Co., 64 N. Y. 254.

If some inquiry and exercise of judgment are required to ascertain whether goods are to be transported on a particular train or to a particular destination delay resulting from the making of proper inquiry and exercise of proper discretion will not be negligent. Louisville, etc., R. Co. *v.* Brinley, 17 Ky. L. Rep. 9, 29 S. W. 305; Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390; Alabama, etc., R. Co. *v.* Hayne, 76 Miss. 538, 24 So. 907.

62. Chicago, etc., R. Co. *v.* Thrapp, 5 Ill. App. 502; Guinn *v.* Wabash, etc., R. Co., 20 Mo. App. 453; Silver *v.* Hale, 2 Mo. App. 557; Empire Transp. Co. *v.* Wallace, 68 Pa. St. 302, 8 Am. Rep. 178; St. Louis, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1895) 29 S. W. 695; International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680; Missouri, etc., R. Co. *v.* Olive, (Tex. Civ. App. 1893) 23 S. W. 526. And see *infra*, II, M, 3, c.

carrier is liable, although the loss does not directly result while the goods are in his possession.[63] And even if concurrent negligence of another carrier,[64] or the inherent propensity of animals being transported, contributes to the loss, the carrier will be liable for the delay,[65] and excuses which would have been good for a delay, had there been no negligence on the part of the carrier, will not be available where the injury results from negligence.[66] But if the subsequent loss of the goods is due to an independent cause, the carrier will not be liable, although he has been guilty of a negligent delay in transportation.[67] If the carrier is not notified of special damage which will result from delay he will not be liable for consequences thereof which he could not reasonably have anticipated.[68] Even if there has been delay, if it appears that the damages complained of would have been suffered had there been no delay, there is no liability on the part of the carrier.[69] Where there has been delay, even though excusable, the carrier must take reasonable precautions to avoid injury resulting therefrom.[70] The carrier should notify the consignee of the delay if thereby resulting injury might be avoided.[71]

e. Excuses For Delay; Waiver — (i) *Acts of Shipper.* If the delay is due to the act or fault of the shipper the carrier cannot be held accountable for resulting injury.[72] If the title to the goods and right to control of them has passed to the consignee by delivery to the carrier, then the subsequent directions of the shipper will not excuse the carrier for detaining the goods.[73]

(ii) *Advising Shipper as to Probable Delay.* A carrier is bound to know, when he accepts property for shipment, that he has or can obtain facilities for its transportation within a reasonable time,[74] and as to any cause of delay which he might anticipate he should then advise the shipper, and if he does not do so the delay will not be excused.[75]

63. Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252; The Caledonia, 50 Fed. 567.

64. Conger *v.* Hudson River R. Co., 6 Duer (N. Y.) 375.

65. Galveston, etc., Co. *v.* Herring, (Tex. Civ. App. 1896) 36 S. W. 129.

66. Plotz *v.* Miller, 21 Ky. L. Rep. 257, 51 S. W. 176; Boyle *v.* McLaughlin, 4 Harr. & J. (Md.) 291; Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80.

Loss of the railroad company's depot by fire was held not to be a sufficient excuse for delay, where it appeared that subsequent shipments over the same road reached their destination before the shipment in question. Michigan Cent. R. Co. *v.* Curtis, 80 Ill. 324.

If by reason of delay in transportation perishable goods are subjected to loss by freezing, or the like, the carrier must answer as for negligence. Wood *v.* Chicago, etc., R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861; Hewett *v.* Chicago, etc., R. Co., 63 Iowa 611, 19 N. W. 790; Tierney *v.* New York Cent., etc., R. Co., 76 N. Y. 305; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696.

67. Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106. And see also *supra*, II, D, 2, e.

68. U. S. Express Co. *v.* Root, 47 Mich. 231, 10 N. W. 351; Belcher *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1898) 47 S. W. 384, 1020; Atchison, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1894) 28 S. W. 98.

69. Hamilton *v.* McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Missouri Pac. R. Co. *v.* Paine, 1 Tex. Civ. App. 621, 21 S. W. 78.

70. Illinois Cent. R. Co. *v.* Waters, 41 Ill. 73; Kinnick *v.* Chicago, etc., R. Co., 69 Iowa 665, 29 N. W. 772; Lewis *v.* The Ship Success, 18 La. Ann. 1; American Express Co. *v.* Smith, 33 Ohio St. 511, 31 Am. Rep. 561.

71. Norris *v.* Savannah, etc., R. Co., 23 Fla. 182, 1 So. 475, 11 Am. St. Rep. 355; Southern Pac. Co. *v.* Booth, (Tex. Civ. App. 1897) 39 S. W. 585.

72. Illinois Cent. R. Co. *v.* Miller, 32 Ill. App. 259; Stoner *v.* Chicago, etc., R. Co., 109 Iowa 551, 80 N. W. 569.

Neglect of the consignee to unload perishable fruit as soon as practicable will not excuse the carrier for decay caused by delay, if if appears that the loss had already occurred before arrival at destination. St. Clair *v.* Chicago, etc., R. Co., 80 Iowa 304, 45 N. W. 570.

Mistake in marking the destination of the goods may excuse the carrier for delay in delivery. McGowan *v.* Wilmington, etc., R. Co., 95 N. C. 417; Missouri Pac. R. Co. *v.* Weisman, 2 Tex. Civ. App. 86, 21 S. W. 426. Further as to mistake of shipper in addressing the goods see *supra*, II, D, 2, c, (iv); II, I, 1.

73. Ober *v.* Indianapolis, etc., R. Co., 13 Mo. App. 81; Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158.

74. Thomas *v.* Wabash, etc., R. Co., 63 Fed. 200.

75. Cincinnati, etc., R. Co. *v.* Webb, 20 Ky. L. Rep. 330, 46 S. W. 11; Place *v.* Union Express Co., 2 Hilt. (N. Y.) 19; Ayres *v.*

(III) *Climatic Conditions.* Floods, snow-storms, and the like may furnish an excuse even for the loss of or damage to the goods,[76] and of course they will furnish a sufficient excuse for delay.[77]

(IV) *In Case of Special Contract.* Where the carrier specifically agrees to deliver by a fixed time he is bound to answer in damages for failure to do so, without regard to the cause of the delay.[78]

(V) *Legal Obstacles; Military Control.* Delay due to the requirements of the law will be excused.[79] Where garnishment of the carrier is not valid as to goods after they have been accepted for immediate transportation,[80] such garnishment will be no excuse for delay in completing the transportation.[81] If a railroad is under military control the company will not be liable for delay due to such interference.[82] But if the probability of delay on such account was known to the company at the time the goods were received for transportation it cannot rely upon such defense.[83] It should in such case abdicate its functions as common carrier and refuse to receive goods for transportation.[84]

(VI) *Press of Business, or Lack of Facilities.* If the carrier treats all alike and furnishes transportation as far as his facilities will permit him, as has heretofore been explained, he may refuse to receive goods which he cannot transport, without rendering himself liable in damages for such refusal.[85] Having received goods for transportation the same excuse is not open to him, and he may be held to answer for damages due to delay, although occasioned by an unusual press of business,[86] or the lack of proper facilities.[87] So the proposition is stated; but it is evident that unusual press of business which could not reasonably have

Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226; McLaren *v.* Detroit, etc., R. Co., 23 Wis. 138; Bussey *v.* Memphis, etc., R. Co., 4 McCrary (U. S.) 405, 13 Fed. 330; Helliwell *v.* Grand Trunk R. Co., 10 Biss. (U. S.) 170, 7 Fed. 68.

But carrier is not bound to advise the shipper of a possible cause of delay which in reasonable anticipation will not interfere with the carrier's business. Palmer *v.* Atchison, etc., R. Co., 101 Cal. 187, 35 Pac. 630.

76. See *supra*, II, D, 2, a.

77. Norris *v.* Savannah, etc., R. Co., 23 Fla. 182, 1 So. 475, 11 Am. St. Rep. 355; Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527; International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680; San Antonio, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1894) 27 S. W. 676; International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622.

But it is the duty of a railroad company to make reasonable provision for operating its trains in all kinds of weather such as is to be expected in the particular latitude of its business. Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198; Missouri, etc., R. Co. *v.* Truskett, 2 Indian Terr. 633, 53 S. W. 444 [*affirmed* in 104 Fed. 728, 44 C. C. A. 179].

78. The general rule of the law of contracts that the person undertaking to perform must do so at his peril, is applicable, and unavoidable accident, unexpected rush of business, or the like, will not furnish an excuse. Reed *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 176; Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267; Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Southern R. Co. *v.* Deakins, 107 Tenn. 522, 64 S. W. 477; East Tennessee, etc., R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 272. And see *supra*, II, I, 3, a.

But carrier may be excused from literal performance when unforeseen circumstances such as the law recognizes as sufficient occasion slight delays. Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527.

79. Hynds *v.* Wynn, 71 Iowa 593, 33 N. W. 73; Alabama, etc., R. Co. *v.* Hayne, 76 Miss. 538, 24 So. 907; Galveston, etc., R. Co. *v.* Warnken, 12 Tex. Civ. App. 645, 35 S. W. 72; Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398.

80. See *infra*, II, K, 4.

81. Baldwin *v.* Great Northern R. Co., 81 Minn. 247, 83 N. W. 986, 83 Am. St. Rep. 370, 51 L. R. A. 640.

82. Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487.

83. Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128; Bacon *v.* Cobb, 45 Ill. 47; Illinois Cent. R. Co. *v.* Schwartz, 13 Ill. App. 490.

Of course, if the operation of the road is not interfered with by the military authorities, the fact that they have assumed control of it will not excuse the carrier for delay. Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83.

84. Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527.

85. See *supra*, II, B.

86. Faulkner *v.* South. Pac. R. Co., 51 Mo. 311; Gulf, etc., R. Co. *v.* McAulay, (Tex. Civ. App. 1894) 26 S. W. 475; International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691.

87. Tucker *v.* Pacific R. Co., 50 Mo. 385; Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347.

Unusually busy season.— It is not true,

been anticipated at the time the goods were received may, like any other cause not due to the carrier's fault, sometimes furnish an excuse; for the mere receipt of goods for transportation does not impose upon the carrier the same absolute liability which results from an express contract to transport by a fixed time; and the rule, supported by the weight of authority, is that if in consequence of an unusual press of business, and not on account of any inadequacy in equipment, an unanticipated delay occurs, the carrier will be excused.[88] But in general freight received is to be forwarded without discrimination, and a delay of one shipment on account of other shipments subsequently received is not excusable;[89] and the carrier can excuse himself for delay on account of unusual press of business only by showing that he has made the best practicable use of his means of transportation.[90]

(VII) *STRIKES AND MOBS.* The carrier is liable for the negligent or wrongful acts of his servants during the course of their employment, and therefore if his employees go on a strike, abandoning the performance of their duties, and causing delay in the transportation of goods in their charge or control, the carrier is liable, the delay being due to the employees' wrongful acts.[91] And after the employees have quit the carrier's employment it is his duty to promptly supply their places, if practicable.[92] But if, after leaving the carrier's employment, the employees, by violence, cause delay in the transportation so as to prevent the carrier from proceeding with his business, the delay thereby occasioned will be excusable.[93] If by mob violence the carrier is prevented from performing his

however, as a general proposition, that insufficiency of the equipment of the carrier to accommodate freight offered during a season of the year when business is likely to be unusually heavy will render him liable for delay due to that cause. Thayer *v.* Burchard, 99 Mass. 508.

88. *Illinois.*— Cobb *v.* Illinois Cent. R. Co., 88 Ill. 394.

Kentucky.— Newport News, etc., R. Co. *v.* Reed, 10 Ky. L. Rep. 1020.

Massachusetts.— See Thayer *v.* Burchard, 99 Mass. 508.

New York.— Bouker *v.* Long Island R. Co., 89 Hun (N. Y.) 202, 35 N. Y. Suppl. 23, 69 N. Y. St. 225; Wibert *v.* New York, etc., R. Co., 19 Barb. (N. Y.) 36.

Tennessee.— East Tennessee, etc., R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 272.

Texas.—International, etc., R. Co. *v.* Lewis, (Tex. Civ. App. 1893) 23 S. W. 323.

Wisconsin.— Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

United States.— Helliwell *v.* Grand Trunk R. Co., 10 Biss. (U. S.) 170, 7 Fed. 68.

See 9 Cent. Dig. tit. "Carriers," § 418.

Thus, the carrier may give preference to relief goods sent to sufferers from some public calamity, and be excused for consequent detention of goods which would otherwise have been sooner forwarded in the ordinary course of business. Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

The carrier may also give precedence to perishable freight as against that which will not suffer special injury on account of reasonable delay. Marshall *v.* New York Cent. R. Co., 45 Barb. (N. Y.) 502; Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446. Even as to perishable freight the exercise of care and diligence is all that is required, and the carrier is not absolutely and unconditionally bound to send it forward on the day of its receipt. Dixon *v.* Chicago, etc., R. Co., 64 Iowa 531, 21 N. W. 17, 52 Am. Rep. 460. But the carrier should refuse to receive perishable property for which he cannot furnish immediate transportation. Tierney *v.* New York Cent., etc., R. Co., 76 N. Y. 305.

89. Keeney *v.* Grand Trunk R. Co., 59 Barb. (N. Y.) 104.

It seems, however, that the rule requiring the carrier to haul freight of the same kind in the order of its tender for shipment applies only to the station at which the freight is offered. Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315.

90. Newport News, etc., R. Co. *v.* Reed, 10 Ky. L. Rep. 1020; International, etc., R. Co. *v.* Lewis, (Tex. Civ. App. 1893) 23 S. W. 323; Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. 706.

Accumulation of cars and freight at place of delivery will not excuse the carrier for delay in delivering, if in the exercise of reasonable diligence the obstruction could have been removed. Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83.

91. Blackstock *v.* New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372. And to same effect see Central, etc., R. Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Sherman *v.* Pennsylvania R. Co., 21 Fed. Cas. No. 12,769, 8 Wkly. Notes Cas. (Pa.) 269.

92. Pittsburgh, etc., R. Co. *v.* Hazen, 84 Ill. 36, 25 Am. Rep. 422.

93. Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629; Louisville, etc., R. Co. *v.* Bell, 13 Ky. L. Rep. 393; Geismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E.

obligation to transport goods in his charge or control he will be excused for resulting delay.[94]

(VIII) *WAIVER OF DELAY.* While mere acceptance of the goods from the carrier on their arrival will not constitute a waiver of claim for damages due to delay,[95] the shipper may by express contract waive the carrier's liability for loss resulting from delay or detention.[96] But such contract will not be valid as against delay due to the carrier's own negligence.[97]

f. Liability of Consignee or Owner For Delay in Accepting; Demurrage. The rules of maritime law on this subject[98] are not applicable in case of transportation by railroad, for the reason that railroad companies have warehouses in which the goods may be stored until ready for immediate transportation, or unloaded at the end of the transportation, and it is the duty of the company to thus keep the goods as warehouseman, for which services a reasonable charge may be made.[99] Hence, in the absence of any express contract, there is in general no right on the part of a railroad company to charge demurrage.[1] But railroad companies may by stipulation in the contract of shipment provide for the payment of charges in the nature of demurrage, and such stipulation will be binding on the consignor.[2] If there is such provision in the contract of shipment, the consignee who accepts the goods is also bound thereby.[3] A general regulation of the railroad company providing for charges on account of delay in unloading may be binding on the

828, 55 Am. Rep. 837; International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Southern Pac. R. Co. *v.* Stell, (Tex. App. 1890) 15 S. W. 122; Southern Pac. R. Co. *v.* Johnson, (Tex. App. 1890) 15 S. W. 121; Missouri Pac. R. Co. *v.* Levi, (Tex. App. 1889) 14 S. W. 1062.

Strikers cease to be in the service of a railroad company or in any sense its employees or agents for whose conduct it is responsible when they take part in a strike against it. Geismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

94. Indianapolis, etc., R. Co. *v.* Juntgen, 10 Ill. App. 295; Lake Shore, etc., R. Co. *v.* Bennett, 89 Ind. 457; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 18 Am. St. Rep. 45, 8 L. R. A. 323.

Loss or damage by mob violence is not within the exception of acts of public enemies. See II, D, 2, b, (II).

95. Georgia R. Co. *v.* Cole, 68 Ga. 623; Lowe *v.* Moss, 12 Ill. 477.

Demand of the goods, while it will waive action for non-delivery, will not waive claim for damages by reason of delay. Nudd *v.* Wells, 11 Wis. 407.

96. Johnson *v.* Lightsey, 34 Ala. 169, 73 Am. Dec. 450; Hartness *v.* Great Western R. Co., 2 Mich. N. P. 80; Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419.

97. Hamilton *v.* Wabash R. Co., 80 Mo. App. 597; Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, 40 N. Y. St. 318; Branch *v.* Wilmington, etc., R. Co., 88 N. C. 573; Missouri Pac. R. Co. *v.* Cornwall, 70 Tex. 611, 8 S. W. 312; Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 574.

98. It is customary to provide in maritime bills of lading for compensation to the carrier for delay occasioned by the owner of the goods in the lading of the vessel or in its unloading at destination. Abbott Shipp. *303. See also, generally, SHIPPING.

99. Illinois Cent. R. Co. *v.* Alexander, 20 Ill. 23. And see *infra*, II, J, 3, d, (I).

1. Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588; Grand Rapids, etc., R. Co. *v.* Diether, 10 Ind. App. 206, 37 N. E. 39, 1069; Burlington, etc., R. Co. *v.* Chicago Lumber Co., 15 Nebr. 390, 19 N. W. 451.

2. McGee *v.* Chicago, etc., R. Co., 71 Mo. App. 310; Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 45 N. Y. St. 768, 30 Am. St. Rep. 630; Swan *v.* Louisville, etc., R. Co., 106 Tenn. 229, 61 S. W. 57; Hunt *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. 523.

3. *Alabama.*— Gulf City Constr. Co. *v.* Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579.

Maryland.— Jones *v.* Freeman, 29 Md. 273.

New York.—Dart *v.* Ensign, 2 Lans. (N. Y.) 383.

Texas.— Galveston, etc., R. Co. *v.* Hunt, (Tex. Civ. App. 1895) 32 S. W. 549.

Wyoming.— Kansas Pac. R. Co. *v.* McCann, 2 Wyo. 3.

See 9 Cent. Dig. tit. "Carriers," § 427 *et seq.*

If the consignee causes detention of the cars on which the goods are shipped to him, and from which it is his duty to unload them, he is liable for the delay. Huntley *v.* Dows, 55 Barb. (N. Y.) 310.

Liability for demurrage in a charter-party may be preserved by reference under a bill of lading. Wegener *v.* Smith, 15 C. B. 285, 80 E. C. L. 285.

One railroad detaining the cars of another road may be liable to the latter for their use during such detention. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 17 Ky. L. Rep. 726, 32 S. W. 595, 56 Am. St. Rep. 326, 36 L. R. A. 850.

shipper,[4] but will not be binding on the consignee, unless he has knowledge thereof.[5] A railroad company has no lien on the goods for charges on account of delay in unloading, unless reserved by stipulation in the bill of lading.[6]

g. Actions Against Carrier For Delay; Pleading and Evidence — (i) *In General.* The general subject of pleading and practice in actions against carriers will be hereafter discussed[7] and the distinction between an action for breach of contract and an action for tort will be pointed out. It is sufficient here to say that the action for damages resulting from a delay for which the carrier is liable may be founded on contract, even though the contract of shipment does not specify any time within which the transportation is to be completed, for a contract to transport will be deemed to imply transportation within a reasonable time.[8] But the action may be in form for tort, even though the shipment is under a contract, express or implied, the allegation being that the defendant undertook to transport the goods within a reasonable time, and through negligence, carelessness, or fault on defendant's part failed to do so.[9] As to any excuses

4. Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A. 323; Baltimore, etc., R. Co. *v.* Fisher, 5 Ohio S. & C. Pl. Dec. 659, 3 Ohio N. P. 122; Norfolk, etc., R. Co. *v.* Adams, 90 Va. 393, 18 S. E. 673, 44 Am. St. Rep. 916, 22 L. R. A. 530.

5. Cleveland, etc., R. Co. *v.* Lamm, 73 Ill. App. 592; Baltimore, etc., R. Co. *v.* Fisher, 5 Ohio S. & C. Pl. Dec. 659, 3 Ohio N. P. 122; Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

A charge of one dollar per day for the detention of cars over forty-eight hours, not including Sundays and holidays, held not unreasonable. Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A. 323; Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 17 Ky. L. Rep. 762, 32 S. W. 595, 56 Am. St. Rep. 326, 36 L. R. A. 850.

6. Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588; Cleveland, etc., R. Co. *v.* Lamm, 73 Ill. App. 592; Cleveland, etc., R. Co. *v.* Holden, 73 Ill. App. 582; Crommelin *v.* New York, etc., R. Co., 1 Abb. Dec. (N. Y.) 472, 4 Keyes (N. Y.) 90; East Tennessee, etc., R. Co. *v.* Hunt, 15 Lea (Tenn.) 261.

By stipulation in the bill of lading the carrier may be entitled to payment of demurrage before delivery of the goods. Swan *v.* Louisville, etc., R. Co., 106 Tenn. 229, 61 S. W. 57.

7. See *infra*, II, R.

8. Denman *v.* Chicago, etc., R. Co., 52 Nebr. 140, 71 N. W. 967.

Unreasonable delay in transporting freight is an actionable breach of the carrier's contract. Berje *v.* Texas, etc., R. Co., 37 La. Ann. 468.

Form of declaration or petition.— The following substantial averments were held to show that the action was one founded on breach of contract: Plaintiff alleges that on —— he made a contract in writing with defendant, wherein defendant agreed to transport one hundred cattle for plaintiff from South Omaha to Chicago; that defendant received the cattle on that date for transportation; that the usual, ordinary, and reasonable time required for such transportation was from twenty-four to thirty-six hours; that defendant, in violation of its contract "unreasonably and negligently delayed the transportation of said cattle . . . and did not deliver said cattle at Chicago until ——, and more than forty-eight hours after the time when said cattle should have been delivered at Chicago in the usual and customary course of transportation," followed by allegations of special damage. Denman *v.* Chicago, etc., R. Co., 52 Nebr. 140, 141, 71 N. W. 967. In St. Louis, etc., R. Co. *v.* Mudford, 44 Ark. 439, a complaint in substantially the following form was treated as alleging breach of contract: The plaintiff alleges that heretofore, on ——, said defendant was a common carrier for hire from —— to ——, and on said day received from plaintiff at —— [certain described goods] for transportation to ——. Said goods were of the value of —— dollars, and were so to be by defendant, as a carrier for a reward there agreed upon and paid to defendant by plaintiff, carried and delivered to —— within a reasonable time. Plaintiff alleges that —— is a reasonable time in which said goods should have been transported from —— to —— aforesaid, yet the defendant so negligently misbehaved in regard to the same in its calling as carrier for hire that it failed and neglected to deliver the said goods at —— until ——, to the plaintiff's damage in the sum of one thousand dollars, wherefore plaintiff prays judgment, etc.

9. Raphael *v.* Pickford, 2 Dowl. N. S. 916, 7 Jur. 815, 12 L. J. C. P. 176, 5 M. & G. 551, 6 Scott N. R. 478, 44 E. C. L. 292.

Form.— The averments of a declaration at common law in such case might be substantially as follows: That on —— the defendant was a common carrier of goods for hire from London to Birmingham, and that plaintiff caused to be delivered to defendant, and defendant accepted and received of and from plaintiff, certain goods [specifying them] of the plaintiff to be transported from London to Birmingham within a reasonable time; that a reasonable time for the defendant's carrying and conveying and delivering the said goods was ——. That defendant did not

which it may be anticipated defendant will interpose for the delay, it is not necessary for the plaintiff to negative them in his complaint.[10] But if the plaintiff declares upon breach of contract by which he has himself assumed the risk of damage resulting from delay, the burden of alleging and proving that the delay was occasioned by defendant's negligence is on the plaintiff.[11] On the other hand, if the carrier has unconditionally agreed to transport within a given time he cannot excuse non-performance by alleging and proving an excuse which would otherwise be sufficient.[12] In general the carrier has the burden of proof to show that the delay arose from some other cause than his own neglect.[13]

(II) *Conditions Precedent.* The prepayment of freight is not essential to an action, unless required by the carrier.[14]

(III) *Questions For Jury.* The question as to what is a reasonable time for the transportation, and as to the reasonableness and sufficiency of the excuse which the carrier makes for delay, is for the jury.[15]

h. Measure of Damages For Delay — (I) *Not the Value of the Goods.* Delay in delivery of the goods, even though it is such as to render the carrier liable, does not constitute conversion, and the person entitled to the goods cannot on that account refuse to receive them and sue for the full value.[16]

(II) *Value of Use; Profits.* Where the proximate result of the delay is the loss of the use of the goods, as, for instance, where the goods consist of machinery, the measure of damage is the value of the use during the time of detention. That is, in general, the rental value.[17] Profits which are reasonably certain,

carry and deliver said goods within a reasonable time, but so negligently and improperly behaved and conducted himself that by and through the negligence, carelessness, and default of the defendant in the premises the said goods were not transported to Birmingham for delivery to plaintiff until ——, with allegations as to damages. Raphael *v.* Pickford, 2 Dowl. N. S. 916, 7 Jur. 815, 12 L. J. C. P. 176, 5 M. & G. 551, 6 Scott N. R. 478, 44 E. C. L. 292.

An action on the case in tort may be brought against a carrier by a party who makes a special contract with him for his breach of the contract, unless there be in the contract some undertaking by the carrier which it would not be his duty to perform under the common law. Spence *v.* Norfolk, etc., R. Co., 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578. See also, generally, Case, Action on.

10. Denman *v.* Chicago, etc., R. Co., 52 Nebr. 140, 71 N. W. 967.

11. Sherwood *v.* New York, etc., R. Co., 86 Hun (N. Y.) 556, 33 N. Y. Suppl. 771, 67 N. Y. St. 517.

12. Gann *v.* Chicago Great Western R. Co., 72 Mo. App. 34.

13. *Illinois.*— Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

Indiana.— Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198.

Iowa.— St. Clair *v.* Chicago, etc., R. Co., 80 Iowa 304, 45 N. W. 570.

Kentucky.— Louisville, etc., R. Co. *v.* Bell, 13 Ky. L. Rep. 393.

New York.— Harris *v.* Northern Indiana R. Co., 20 N. Y. 232; Place *v.* Union Express Co., 2 Hilt. (N. Y.) 19.

Texas.— Wells, etc., Express *v.* Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824.

Vermont.— Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398.

United States.— The Alice, 12 Fed. 496.

See 9 Cent. Dig. tit. "Carriers," § 439.

14. Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574. See also, generally, Actions, I, N [1 Cyc. 692].

15. Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390; Livingston *v.* New York Cent., etc., R. Co., 76 N. Y. 631; Acheson *v.* New York Cent., etc., R. Co., 61 N. Y. 652; Ruppel *v.* Allegheny Valley R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. Rep. 666; Wells, etc., Express *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

16. *Arkansas.*— St. Louis, etc., R. Co. *v.* Mudford, 44 Ark. 439.

Illinois.— Louisville, etc., R. Co. *v.* Heilprin, 95 Ill. App. 402.

New York.— Scovill *v.* Griffith, 12 N. Y. 509; Briggs *v.* New York Cent., etc., R. Co., 28 Barb. (N. Y.) 515.

South Carolina.— Nettles *v.* South Carolina R. Co., 7 Rich. (S. C.) 190, 62 Am. Dec. 409.

Texas.— Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

See 9 Cent. Dig. tit. "Carriers," § 456.

In case of damage to a part of the goods only by delay there can be recovery only for such partial damage. St. Louis, etc., R. Co. *v.* Cates, 15 Tex. Civ. App. 135, 38 S. W. 648.

A stipulation for a sum per day as damages for delay does not apply to injury to the goods due to delay. Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Place *v.* Union Express Co., 2 Hilt. (N. Y.) 19.

17. Priestly *v.* Northern Indiana, etc., R. Co., 26 Ill. 205, 79 Am. Dec. 369; Texas, etc., R. Co. *v.* Hassell, 23 Tex. Civ. App. 681, 58

and within the contemplation of the parties, may be recovered,[18] but in general speculative or uncertain profits are not allowed.[19] And advantages which might have been derived by the use of the goods which are wholly contingent cannot be recovered.[20]

(III) *Notice of Special Circumstances.* The carrier will not be liable for profits lost by reason of failure to perform a special contract, or on account of other special circumstances not apparent from the transaction itself, unless he has notice of the facts which caused the loss.[21] And this notice should be given when the goods are delivered for transportation.[22] Subsequent notice, however, of the effect of further delay after the goods should have been delivered may render the carrier liable for damages accruing after that time by reason of his negligence in not tracing and finding the goods.[23]

(IV) *Depreciation in Value* — (A) *Generally.* In general depreciation in value due to delay may be recovered, that is, the person entitled to recover on account of delay may have the difference between the market value at the time and place where the goods should have been delivered, and their market value at the time and place of actual delivery, if there has been a depreciation.[24] If the

S. W. 54; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

Where there was delay in transportation of horses sent to Alaska, to be delivered not later than a day named, held that the loss of what might have been earned by the use of the horses could be recovered. Port Blakely Mill Co. *v.* Sharkey, 102 Fed. 259, 42 C. C. A. 329.

18. Gulf, etc., R. Co. *v.* Compton, (Tex. Civ. App. 1896) 38 S. W. 220; Pacific Express Co. *v.* Darnell, (Tex. 1887) 6 S. W. 765.

19. East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809; Waite *v.* Gilbert, 10 Cush. (Mass.) 177; Bowden *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1894) 25 S. W. 987.

Injury to plaintiff's business by reason of non-delivery of goods cannot be considered. Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

20. Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382.

21. *Arkansas.*— St. Louis, etc., R. Co. *v.* Mudford, 48 Ark. 502, 3 S. W. 814.

Georgia.— Columbus, etc., R. Co. *v.* Flournoy, 75 Ga. 745.

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 64 Ill. 128; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83; Priestly *v.* Northern Indiana, etc., R. Co., 26 Ill. 205, 79 Am. Dec. 369; Wabash, etc., R. Co. *v.* Lynch, 12 Ill. App. 365.

Massachusetts.— Swift River Co. *v.* Fitchburg R. Co., 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

Missouri.— Rogan *v.* Wabash R. Co., 51 Mo. App. 665.

New Hampshire.— Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

New York.— Brauer *v.* Oceanic Steam Nav. Co., 66 N. Y. App. Div. 605, 73 N. Y. Suppl. 291.

Tennessee.— Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729.

Texas.— Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 35 S. W. 6; Gulf, etc., R. Co. *v.* Loonie, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; Pacific Express Co. *v.* Darnell, 62 Tex. 639; St. Louis, etc., R. Co. *v.* Cates, 15 Tex. Civ. App. 135, 38 S. W. 648; Wells *v.* Battle, 5 Tex. Civ. App. 532, 24 S. W. 353; Gulf, etc., R. Co. *v.* Cole, (Tex. App. 1890) 16 S. W. 176.

United States.— Central Trust Co. *v.* Savannah, etc., R. Co., 69 Fed. 683.

See 9 Cent. Dig. tit. "Carriers," §§ 452, 453.

If the carrier has notice of a special contract, and agrees to deliver the goods on an agreed day, the measure of damages is the difference between the contract price on that day and the price actually realized. Medbury *v.* New York, etc., R. Co., 26 Barb. (N. Y.) 564.

22. Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 35 S. W. 6; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320; Bradley *v.* Chicago, etc., R. Co., 94 Wis. 44, 68 N. W. 410.

23. Rogan *v.* Wabash R. Co., 51 Mo. App. 665; Wells *v.* Battle, 5 Tex. Civ. App. 532, 24 S. W. 353.

24. *Arkansas.*— Murrell *v.* Pacific Express Co., 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17; St. Louis, etc., R. Co. *v.* Mudford, 48 Ark. 502, 3 S. W. 814; St. Louis, etc., R. Co. *v.* Phelps, 46 Ark. 485.

Georgia.—Atlanta, etc., R. Co. *v.* Texas Grate Co., 81 Ga. 602, 9 S. E. 600.

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; Louisville, etc., R. Co. *v.* Heilprin, 95 Ill. App. 402.

Kansas.— Missouri Pac. R. Co. *v.* McGrath, 3 Kan. App. 220, 44 Pac. 39.

Kentucky.— Newport News, etc., R. Co. *v.* Reed, 10 Ky. L. Rep. 1020; Albrecht *v.* Louisville, etc., R. Co., 10 Ky. L. Rep. 449.

Louisiana.— Lowery *v.* Young, 1 La. 232.

Maine.— Weston *v.* Grand Trunk R. Co., 54 Me. 376, 92 Am. Dec. 552.

Massachusetts.— Scott *v.* Boston, etc., Steamship Co., 106 Mass. 468; Cutting *v.*

delivery is at a different destination than that contracted for of course depreciation of value on that account is also to be taken into account.[25]

(B) *Loss of Market.* The application of the rule announced in the preceding paragraph is coupled with some difficulty. It seems to be based on the assumption that the goods are shipped with the intention that they are to be sold on their arrival. And where that is the intention, and such intention is known to the carrier, or may be reasonably inferred by him from the nature of the transaction, then of course it is perfectly reasonable; and in pursuance of the same principle it has been held that if the goods are evidently intended for sale on a particular market day, or during a particular market season, then the loss of the market is a damage for which the carrier should respond.[26]

Grand Trunk R. Co., 13 Allen (Mass.) 381; Ingledew *v.* Northern R. Co., 7 Gray (Mass.) 86.

Michigan.— Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

Mississippi.— New Orleans, etc., R. Co. *v.* Tyson, 46 Miss. 729.

Missouri.— D. Klass Commission Co. *v.* Wabash R. Co., 80 Mo. App. 164; Rankin *v.* Pacific R. Co., 55 Mo. 167.

New York.— Sherman *v.* Hudson River R. Co., 64 N. Y. 254; Holden *v.* New York Cent. R. Co., 54 N. Y. 662; Ward *v.* New York Cent. R. Co., 47 N. Y. 29, 7 Am. Rep. 405; Livingston *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 562.

North Carolina.— Van Lindley *v.* Richmond, etc., R. Co., 88 N. C. 547.

Ohio.— Devereux *v.* Buckley, 34 Ohio St. 16, 32 Am. Rep. 342.

Texas.— Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Texas Pac. R. Co. *v.* Nicholson, 61 Tex. 491; Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 49 S. W. 526; Southern Pac. Co. *v.* Booth, (Tex. Civ. App. 1897) 39 S. W. 585; Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 22 S. W. 761.

Vermont.— Newell *v.* Smith, 49 Vt. 255; Laurent *v.* Vaughn, 30 Vt. 90.

Wisconsin.— Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

United States.— Petersen *v.* Case, 21 Fed. 885; The Golden Rule, 9 Fed. 334; Page *v.* Munro, Holmes (U. S.) 232, 18 Fed. Cas. No. 10,665; Milne *v.* Douglass, 5 McCrary (U. S.) 368, 17 Fed. 482; Bussey *v.* Memphis, etc., R. Co., 4 McCrary (U. S.) 405, 13 Fed. 330.

England.— O'Hanlan *v.* Great Western R. Co., 6 B. & S. 484, 11 Jur. N. S. 797, 34 L. J. Q. B. 154, 12 L. T. Rep. N. S. 490, 13 Wkly. Rep. 741, 118 E. C. L. 484.

Canada.—Monteith *v.* Merchants' Despatch, etc., Co., 1 Ont. 47 [*affirmed* in 9 Ont. App. 282].

See 9 Cent. Dig. tit. "Carriers," § 451.

25. Missouri, etc., R. Co. *v.* Quinn, (Tex. Civ. App. 1895) 29 S. W. 404; The Alice, 12 Fed. 496.

If by reason of delay there is no longer a market value for the goods at the destination, then evidence as to what might have been obtained for the goods by reshipment without unreasonable delay to a point where they might have been sold may be considered. Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148.

Difference in value at place of destination may be considered, although the defendant was to deliver to a connecting carrier. Missouri, etc., R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179.

In case of transportation by connecting carriers, each liable only with reference to his own line, one of them will be liable only for depreciation during delay due to his own negligence. St. Louis, etc., R. Co. *v.* Cohen, (Tex. Civ. App. 1900) 55 S. W. 1123.

In case of a contract for through shipment over connecting lines, the place of destination is the end of the transportation. Ruppel *v.* Allegheny Valley R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. Rep. 666.

In determining the market price at destination, evidence as to market price at other points influencing that at the point of destination may be received. Hudson *v.* Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550.

Inflation brought about by temporary scarcity will not be considered as the real market price. Louis *v.* Steamboat Buckeye, 1 Handy (Ohio) 150, 12 Ohio Dec. (Reprint) 74.

Value at point to which goods were to be reshipped cannot be considered. Louis *v.* Steamboat Buckeye, 1 Handy (Ohio) 150, 12 Ohio Dec. (Reprint) 74.

Where it is stipulated that any recovery is to be based on value at place of shipment, damages for delay and consequent deterioration are to be measured by difference of value due to that cause, not exceeding value at place of shipment. Southern Pac. R. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17.

26. *Illinois.*— Toledo, etc., R. Co. *v.* Lockhart, 71 Ill. 627.

New York.— Baumann *v.* New York, etc., R. Co., 35 Misc. (N. Y.) 223, 71 N. Y. Suppl. 632.

Texas.— Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834.

Vermont.— King *v.* Woodbridge, 34 Vt. 565.

United States.— Rowe *v.* The City of Dublin, 1 Ben. (U. S.) 46, 20 Fed. Cas. No. 12,094.

See 9 Cent. Dig. tit. "Carriers," § 451.

But where the goods are not shipped for immediate sale on arrival, depreciation of the

(v) *Incidental Expenses and Damages.* Necessary expenses incurred by the owner of the goods on account of negligent delay of the carrier in delivering them at their destination may be recovered, such as expense in searching for the property, or carrying insurance on it, or keeping it after arrival.[27] But no recovery can be had for time lost in making inquiry for the goods when they might have been expected to arrive, nor for loss of time while awaiting arrival.[28] Nor can expense be included which might have been avoided by the exercise of reasonable care.[29] In some Texas cases recovery has been allowed for distress of mind caused to the consignee by delay in the transportation of a corpse.[30]

(vi) *Freight; Interest.* Unpaid freight is to be deducted from the amount of damage, as the owner receives the advantage of the transportation.[31] Legal interest on the value of the goods has usually been considered a proper element of damage, to be computed from the time when the goods should have arrived.[32]

market value during the delay may be of no importance whatever to the owner, and it might be entirely unreasonable to adopt that as the measure of damage, although of course any real depreciation in value due to the delay would always be recoverable. In an English case it has been held that when goods are to be conveyed by railway for the purpose of sale the rule already announced may be reasonable, but that no such presumption can be entertained in case of a contract of carriage for a long distance by sea, because goods thus shipped are frequently sold before arrival, or with the intention of holding them for a proper market after arrival, and therefore that the depreciation in market value during the transportation is a purely speculative measure of damage. The Parana, 1 P. D. 452, 2 P. D. 118 [*citing* Ward *v.* New York Cent. R. Co., 47 N. Y. 29, 7 Am. Rep. 405; Collard *v.* South Eastern R. Co., 7 H. & N. 79, 7 Jur. N. S. 950, 30 L. J. Exch. 393, 4 L. T. Rep. N. S. 410, 9 Wkly. Rep. 697].

27. *Georgia.*— Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

Illinois.— Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148; Sangamon, etc., R. Co. *v.* Henry, 14 Ill. 156.

Kentucky.— Louisville, etc., R. Co. *v.* Robinson, 18 Ky. L. Rep. 275, 36 S. W. 6.

Massachusetts.— Swift River Co. *v.* Fitchburg R. Co., 169 Mass. 326, 47 N. E. 1015, 16 Am. St. Rep. 288.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; Davis *v.* Cincinnati, etc., R. Co., 1 Disn. (Ohio) 23, 12 Ohio Dec. (Reprint) 463.

Vermont.— Beckwith *v.* Frisbie, 32 Vt. 559.

United States.— The J. C. Stevenson, 17 Fed. 540.

See 9 Cent. Dig. tit. "Carriers," § 451.

Expenses incurred in doctoring animals which have been made sick by the delay may be allowed. Chicago, etc., R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095.

Physical injury, such as shrinkage in weight due to the delay, may be recovered for. Richmond, etc., R. Co. *v.* Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69; Louisville, etc., R. Co. *v.* Robinson, 18 Ky. L. Rep. 275, 36 S. W. 6; Sturgeon *v.* St. Louis, etc., R. Co., 65 Mo. 569; Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Douglass *v.* Hannibal, etc., R. Co., 53 Mo. App. 473.

28. Thompson *v.* Alabama Midland R. Co., 122 Ala. 378, 24 So. 931; St. Louis, etc., R. Co. *v.* Mudford, 48 Ark. 502, 3 S. W. 814; Denver, etc., R. Co. *v.* De Witt, 1 Colo. App. 419, 29 Pac. 524; Ingledew *v.* Northern R. Co., 7 Gray (Mass.) 86.

Nor for interest paid on a debt which the consignee expected to discharge by delivery of the goods. Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209.

29. De Leon *v.* McKernan, 25 Misc. (N. Y.) 182, 54 N. Y. Suppl. 167; Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 50 S. W. 559.

30. **Delay in transportation of corpse.**— Hale *v.* Bonner, 82 Tex. 33, 17 S. W. 605, 27 Am. St. Rep. 850, 14 L. R. A. 336; Wells, etc., Express *v.* Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824.

But mental anguish which could not have been anticipated as a result of the delay is not to be considered. Nichols *v.* Eddy, (Tex. Civ. App. 1893) 24 S. W. 316.

Mental anguish experienced by reason of delay in transporting a museum for a certain exhibition was disallowed. Yoakum *v.* Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411.

Where medicine was shipped to a relative of a sick person, it was held that there could be no recovery by the sick person for pain and suffering due to the delay in forwarding the medicine (Pacific Express Co. *v.* Redman, (Tex. Civ. App. 1901) 60 S. W. 677); nor by the consignee for sympathetic mental suffering on account of the pain suffered by the sick person (Pacific Express Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830).

31. St. Louis, etc., R. Co. *v.* Phelps, 46 Ark. 485; East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809; Van Lindley *v.* Richmond, etc., R. Co., 88 N. C. 547.

32. *Louisiana.*— Murrell *v.* Dixey, 14 La. Ann. 298.

Mississippi.— Illinois Cent. R. Co. *v.* Haynes, 64 Miss. 604, 1 So. 765.

J. Carrier's Custody of Goods Before and After Transportation — 1. Custody of Goods Awaiting Transportation. Where the goods are delivered to the carrier for immediate transportation, and nothing remains to be done by the shipper, the liability of the carrier as carrier attaches at once.[33] And even while detained in the carrier's warehouse in the usual course of business, or for the carrier's convenience, the liability of the carrier is not that of warehouseman, but that of carrier proper.[34] But if the goods are detained by the carrier before commencement of actual transportation, at the request of the consignor, and for his accommodation, or in order that something further may be done to prepare the goods for transportation, the carrier's liability during such detention is that of warehouseman only.[35]

2. Custody For Delivery to Connecting Carrier. Where a carrier receives goods for transportation to a destination beyond his own line, and involving a delivery to a connecting carrier, he does not become warehouseman of the goods while holding them at the end of his own line before delivery to the connecting carrier, but his liability remains that of carrier so long as the custody continues.[36]

Missouri.— Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268; Smith *v.* Whitman, 13 Mo. 352.

Texas.— Gulf, etc., R. Co. *v.* Lee, (Tex. Civ. App. 1901) 65 S. W. 54; International, etc., R. Co. *v.* Lewis, (Tex. Civ. App. 1893) 23 S. W. 323; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209.

Vermont.— Newell *v.* Smith, 49 Vt. 255.

United States.— Missouri, etc., R. Co. *v.* Truskett, 104 Fed. 728, 44 C. C. A. 179.

See 9 Cent. Dig. tit. "Carriers," § 454.

Punitive damages.— In one case interest on the amount of damage to the goods while in the hands of the carrier was allowed as punitive damages for gross negligence. Wolfe *v.* Lacy, 30 Tex. 349.

33. See *supra*, II, F, 1.

34. *New Hampshire.*— Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

New York.— London, etc., F. Ins. Co. *v.* Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 63 N. Y. St. 73, 43 Am. St. Rep. 752.

Ohio.— Pittsburgh, etc., R. Co. *v.* Barrett, 36 Ohio St. 448.

Pennsylvania.— Clarke *v.* Needles, 25 Pa. St. 338.

Texas.— Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

Virginia.— Southern Express Co. *v.* McVeigh, 20 Gratt. (Va.) 264.

Wisconsin.— White *v.* Goodrich Transp. Co., 46 Wis. 493, 1 N. W. 75.

See 9 Cent. Dig. tit. "Carriers," § 617.

The test is whether the carrier has accepted the goods only for the purpose of transportation, without further direction. Wade *v.* Wheeler, 3 Lans. (N. Y.) 201.

The fact that consignee consents that the goods may be held for a time in the carrier's freight house, because the carrier has no cars ready for carrying out the transportation, will not reduce the carrier's liability to that of warehouseman. Gregory *v.* Wabash R. Co., 46 Mo. App. 574.

35. *Illinois.*— St. Louis, etc., R. Co. *v.* Montgomery, 39 Ill. 335.

Kansas.— Missouri Pac. R. Co. *v.* Riggs, (Kan. App. 1900) 62 Pac. 712.

Massachusetts.— Watts *v.* Boston, etc., R. Corp., 106 Mass. 466; Barron *v.* Eldredge, 100 Mass. 455, 1 Am. Rep. 126; Judson *v.* Western R. Corp., 4 Allen (Mass.) 520, 81 Am. Dec. 718.

Michigan.— Michigan Southern, etc., R. Co. *v.* Shurtz, 7 Mich. 515.

New Hampshire.— Moses *v.* Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222.

New York.— O'Neill *v.* New York Cent., etc., R. Co., 60 N. Y. 138; Rogers *v.* Wheeler, 52 N. Y. 262; Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75.

North Carolina.— Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 16 S. E. 323.

Wisconsin.— Schmidt *v.* Chicago, etc., R. Co., 90 Wis. 504, 63 N. W. 1057.

United States.— Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Atlanta Nat. Bank *v.* Southern R. Co., 106 Fed. 623.

See 9 Cent. Dig. tit. "Carriers," § 617.

36. *Michigan.*— Condon *v.* Marquette, etc., R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; Moore *v.* Michigan Cent. R. Co., 3 Mich. 23.

Minnesota.— Kirk *v.* Chicago, etc., R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. Rep. 397; Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376, 18 Am. Rep. 340; Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130.

New York.— McDonald *v.* Western R. Corp., 34 N. Y. 497; Ladue *v.* Griffith, 25 N. Y. 364, 82 Am. Dec. 360; Dunson *v.* New York Cent. R. Co., 3 Lans. (N. Y.) 265; Coyle *v.* Western R. Corp., 47 Barb. (N. Y.) 152.

Wisconsin.— Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465; Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

United States.— Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Texas, etc., R. Co. *v.* Clayton, 84 Fed. 305, 51 U. S. App. 676, 28 C. C. A. 142.

See 9 Cent. Dig. tit. "Carriers," § 751.

It is immaterial that while the goods are being held for delivery to the connecting carrier they have been stored in a warehouse.[37] But if the connecting carrier refuses to receive them the duty of the first carrier having been fully discharged, he may then place them in a warehouse, and his liability as carrier ceases.[38] So if, by the shipper's orders, the goods are stopped *in transitu*, and they are held for the shipper, the carrier while so holding is liable as warehouseman only.[39]

3. Custody Awaiting Delivery to Consignee — a. Carrier Liable Until Transportation Completed. It is only on the completion of the entire duty of the carrier with reference to the transportation of the goods that any question as to the reduction of the carrier's liability to that of warehouseman can arise. So long as anything remains to be done by the carrier as carrier, before the goods are ready for acceptance by the consignee, the carrier's liability as such continues.[40]

b. Express Companies. Where by contract or custom — as is usually the case with express companies — the duty of the carrier is to make personal delivery to the consignee, he remains liable as carrier until reasonable effort to deliver has proven ineffectual. Then, if by reason of inability to find the consignee, or the consignee's refusal to receive the goods, delivery is not completed, the carrier is liable only for safe-keeping as bailee for hire.[41]

c. General Ships. In case of carriage by water, otherwise than by steamboats having a regular schedule time for arriving and departing, and which come under the same classification as railroads, the rule seems to be uniformly recognized that the liability of the carrier as such continues until the consignee has been notified that the goods are ready for delivery, and he has had a reasonable opportunity to receive them.[42] Notice may, however, be excused by stipulation in the bill of

Liability of carrier is reduced to that of warehouseman only when the contract of carriage has been completed. Wheeler *v.* Oceanic Steam Nav. Co., 52 Hun (N. Y.) 75, 5 N. Y. Suppl. 101, 22 N. Y. St. 590 [*reversed* in 125 N. Y. 155, 26 N. E. 248, 34 N. Y. St. 866, 21 Am. St. Rep. 729]. See also *infra*, II, M, 3, b.

37. Illinois Cent. R. Co. *v.* Mitchell, 68 Ill. 471, 18 Am. Rep. 564.

38. Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394.

39. MacVeagh *v.* Atchison, etc., R. Co., 3 N. M. 205, 5 Pac. 457.

If the goods are to be delivered to a transfer company acting as the agent of the consignee, then, while the goods are being held to be called for by the transfer company, the liability of the carrier is that of warehouseman only. Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88.

40. Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760; Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398; Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes (N. Y.) 64.

What constitutes a termination of transportation.— But it is not a simple matter to state an exact rule with reference to what constitutes a termination of transportation. Much depends on the nature of the particular kind of carriage and the usage in connection therewith as to who is charged with the duty of unloading. As to express companies, the general custom is to make personal delivery; as to general ships, the goods may be delivered to the consignee on board, he being charged with the responsibility of removing them, or upon a wharf or pier from which he is to take them; in case of transportation by railroad or steamboat the general custom is to unload into a warehouse or freight house, from which the consignee takes the goods, although railroad companies by contract or usage often place cars loaded with goods for one consignee upon a side-track at a suitable place for unloading, from which, by contract or usage, it is the duty of the consignee to remove the goods. These different methods of delivery require separate discussion. The duty of the carrier to the consignee as to time and place of final delivery will be discussed under a subsequent heading. See *infra*, II, J, 3, b, c, d; II, J, 4; II, L, 3.

41. American Express Co. *v.* Baldwin, 26 Ill. 504, 79 Am. Dec. 389; Adams Express Co. *v.* Darnell, 31 Ind. 20, 99 Am. Dec. 582; American Express Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691; Byrne *v.* Fargo, 36 Misc. (N. Y.) 543, 73 N. Y. Suppl. 943; Witbeck *v.* Holland, 38 How. Pr. (N. Y.) 273.

42. *Connecticut.*—Graves *v.* Hartford, etc., Steamboat Co., 38 Conn. 143, 9 Am. Rep. 369.

Illinois.— Union Steamboat Co. *v.* Knapp, 73 Ill. 506; Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

Louisiana.— Kennedy *v.* Roman, 19 La. Ann. 519; Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453.

New York.— McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Price *v.* Powell, 3 N. Y. 322; Rowland *v.* Miln, 2 Hilt. (N. Y.) 150; Barclay *v.* Clyde, 2 E. D. Smith (N. Y.) 95.

Wisconsin.— Parker *v.* Milwaukee, etc., R. Co., 30 Wis. 689.

lading.[43] After the expiration of reasonable time after notice, the carrier is liable only as warehouseman, no matter what may be the excuse of the consignee for not receiving the goods.[44] But if the goods are not called for the carrier must safely store them.[45]

d. Railroads and Steamboats — (1) *General Rule; Reasonable Time.* Notwithstanding the distinction between the usual methods of delivery in case of general ships on the one hand, and railroad and steamboat lines having fixed schedules of time for arriving and departing on the other, which will hereafter be adverted to, the general rule of liability announced in the preceding paragraph has been very frequently applied to carriage by rail or steamboat, that is, that the carrier remains liable until the goods have reached their destination, and the consignee has had reasonable opportunity[46] (involving notice of arrival, where such notice is essential to charge him with the duty of taking the goods), to receive the goods from the carrier, and that, after the expiration of such reasonable time,[47] the liability of the carrier, if the goods remain in his possession, is

United States.— The Nail City, 22 Fed. 537; The Mary Washington, 1 Abb. (U. S.) 1, Chase (U. S.) 125, 12 Fed. Cas. No. 9,229, 5 Am. L. Rep. 692; The St. Laurent, 7 Ben. (U. S.) 7, 21 Fed. Cas. No. 12,231; Germania Ins. Co. *v.* La Crosse, etc., Packet Co., 3 Biss. (U. S.) 501, 21 Fed. Cas. No. 5,361; The Santee, 7 Blatchf. (U. S.) 186, 21 Fed. Cas. No. 12,330; Vose *v.* Allen, 28 Fed. Cas. No. 17,005, 2 Am. L. Reg. 563, 30 Hunt. Mer. Mag. 331, 12 N. Y. Leg. Obs. 100.

See 9 Cent. Dig. tit. "Carriers," § 318.

Reasonable time is such as gives the consignee time enough, under all proper and ordinary circumstances, and by proceeding in the ordinary mode of those engaged in the same business, to provide for the care and removal of the goods. McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657. As to what is reasonable notice see Crawford *v.* Clark, 15 Ill. 561; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474.

Mere knowledge on the part of the consignee that the ship has arrived, or is unloading, will not render notice of the time when he is to call for his goods unnecessary. Robinson *v.* Chittenden, 7 Hun (N. Y.) 133; Unnevehr *v.* The Steamship Hindoo, 1 Fed. 627; The Middlesex, Brunn. Col. Cas. (U. S.) 695, 17 Fed. Cas. No. 9,533, 21 Law Rep. 14.

The fact that the master does not, through his own fault, know the names of the consignees of the goods will not be an excuse for not giving notice. The Peytona, 2 Curt. (U. S.) 21, 19 Fed. Cas. No. 11,058.

Placing goods in a warehouse without proper notice to the consignee does not terminate the carrier's liability. Bell *v.* St. Louis, etc., R. Co., 6 Mo. App. 363; Snow *v.* The Inca, 22 Fed. Cas. No. 13,145*a*; Burgthal *v.* The George Skolfield, 4 Fed. Cas. No. 2,155. But where the owner of the vessel agrees, as a part of the consideration for the price paid, to allow storage in the vessel during a period following the termination of the transportation, his liability is that of warehouseman only. The Richard Winslow, 67 Fed. 259.

43. Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618; Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903.

44. Goodwin *v.* Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457; Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402; De Grau *v.* Wilson, 17 Fed. 698 [*affirmed* in 22 Fed. 560]; Liverpool, etc., Steam Co. *v.* Snitter, 17 Fed. 695; Salmon Falls Mfg. Co. *v.* The Tangier, 3 Ware (U. S.) 110, 21 Fed. Cas. No. 12,267.

45. Crawford *v.* Clark, 15 Ill. 561; Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578, 7 Am. Rep. 390.

46. The fact that the goods arrived on time and when the consignee had reason to expect them may be considered in determining what is a reasonable time for their removal. Jeffersonville R. Co. *v.* Cleveland, 2 Bush (Ky.) 468.

The question of reasonable opportunity is not to be determined by any peculiar circumstances in the situation of the owner or consignee rendering it necessary, for his own convenience, that he have a longer time than required under ordinary circumstances for the removal of the goods. Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773.

If the consignee uses due diligence, the carrier remains liable as carrier until the goods are removed. Hedges *v.* Hudson River R. Co., 6 Rob. (N. Y.) 119.

If access to the goods is rendered impracticable by the act of the carrier, and the consignee is thereby delayed in getting the goods, the carrier remains liable. Goodwin *v.* Baltimore, etc., R. Co., 58 Barb. (N. Y.) 195.

If the consignee is misled by the statements of the carrier that the goods have not arrived, and does not get the goods as he might have done but for such statement, the liability of the carrier is not reduced to that of warehouseman. Jeffersonville R. Co. *v.* Cotton, 29 Ind. 498, 95 Am. Dec. 656; East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 699, 20 S. W. 312, 30 Am. St. Rep. 609, 17 L. R. A. 691; Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781; Meyer *v.* Chicago, etc., R. Co., 24 Wis. 566, 1 Am. Rep. 207.

47. What will constitute a reasonable time cannot of course be stated as a general propo-

that of warehouseman only.[48] The carrier is liable only as warehouseman after the consignee has refused to receive the goods,[49] or while the goods are held by the carrier at the request and for the convenience of the consignee.[50]

(II) *Storing; Placing on Side-Track.* Railroads usually have freight houses in which the goods are placed on reaching their destination, and in the absence of some contract or usage by which the consignee is bound to unload from the cars, their liability as carrier is not reduced to that of warehouseman until the goods are placed in the freight house, ready to be taken by the consignee.[51] And

sition, but must depend upon the circumstances of each case. Anniston, etc., R. Co. *v.* Ledbetter, 92 Ala. 326, 9 So. 73; Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471; Briant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47; Adams Express Co. *v.* Tingle, 7 Ky. L. Rep. 441; Tarbell *v.* Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. 721, 17 N. Y. St. 153, 6 Am. St. Rep. 350; Northrop *v.* Syracuse, etc., R. Co., 3 Abb. Dec. (N. Y.) 386, 2 Transcr. App. (N. Y.) 183, 5 Abb. Pr. N. S. (N. Y.) 183; Laporte *v.* Wells, etc., Express, 23 N. Y. App. Div. 267, 48 N. Y. Suppl. 292; Solomon *v.* Philadelphia, etc., Express Steamboat Co., 2 Daly (N. Y.) 104; King *v.* New Brunswick, etc., Steamboat Co., 36 Misc. (N. Y.) 555, 73 N. Y. Suppl. 999; Brand *v.* New Jersey Steamboat Co., 10 Misc. (N. Y.) 128, 30 N. Y. Suppl. 903, 62 N. Y. St. 470; Parker *v.* Milwaukee, etc., R. Co., 30 Wis. 689.

Where the facts are not in dispute the question of whether the time in a particular case was reasonable is one of law for the court. Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471; Hedges *v.* Hudson River R. Co., 49 N. Y. 223; Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

48. *Alabama.*— Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471; Kennedy *v.* Mobile, etc., R. Co., 74 Ala. 430.

California.— Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268.

Georgia.— Almand *v.* Georgia R., etc., Co., 95 Ga. 775, 22 S. E. 674; Rome R. Co. *v.* Sullivan, 14 Ga. 277.

Illinois.— Merchants' Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284; Illinois Cent. R. Co. *v.* Alexander, 20 Ill. 23; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286.

Iowa.— Mohr *v.* Chicago, etc., R. Co., 40 Iowa 579.

Kansas.— Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333.

Kentucky.— Jeffersonville R. Co. *v.* Cleveland, 2 Bush (Ky.) 468; Louisville, etc., R. Co. *v.* Jones, 10 Ky. L. Rep. 494; Briant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47; Adams Express Co. *v.* Tingle, 7 Ky. L. Rep. 441.

Louisiana.— Segura *v.* Reed, 3 La. Ann. 695.

Massachusetts.— Rice *v.* Hart, 118 Mass. 201, 19 Am. Rep. 433; Stowe *v.* New York, etc., R. Co., 113 Mass. 521.

Minnesota.— Kirk *v.* Chicago, etc., R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. Rep. 397; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133.

Missouri.— Bell *v.* St. Louis, etc., R. Co., 6 Mo. App. 363.

New Hampshire.— Welch *v.* Concord R. Co., 68 N. H. 206, 44 Atl. 304.

New Jersey.— Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

New York.— Draper *v.* Delaware, etc., Canal Co., 118 N. Y. 118, 23 N. E. 131, 27 N. Y. St. 931; Gleadell *v.* Thomson, 56 N. Y. 194; Pelton *v.* Rensselaer, etc., R. Co., 54 N. Y. 214, 13 Am. Rep. 568; J. Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121, 52 N. Y. 657; Weed *v.* Barney, 45 N. Y. 344, 6 Am. Rep. 96; Grieve *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 518, 49 N. Y. Suppl. 949.

Ohio.— Roberts *v.* Union Line Express Co., 2 Ohio Dec. (Reprint) 577, 4 West. L. Month. 99; Hirsch *v.* Steamboat Quaker City, 2 Disn. (Ohio) 144.

Pennsylvania.— McCarty *v.* New York, etc., R. Co., 30 Pa. St. 247.

Tennessee.— Butler *v.* East Tennessee, etc., R. Co., 8 Lea (Tenn.) 32.

Vermont.— Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 349.

West Virginia.— Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

Wisconsin.— Parker *v.* Milwaukee, etc., R. Co., 30 Wis. 689.

See 9 Cent. Dig. tit. "Carriers," § 316 *et seq.*

If the carrier undertake to deliver to his own agent instead of to the owner, his liability as warehouseman attaches after the arrival of the goods at their destination. Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209.

49. Shoninger *v.* Day, 53 Mo. App. 147; O'Neal *v.* Day, 53 Mo. App. 139; Hathorn *v.* Ely, 28 N. Y. 78; Kremer *v.* Southern Express Co., 6 Coldw. (Tenn.) 356.

50. *Alabama.*— Southern Express Co. *v.* Holland, 109 Ala. 362, 19 So. 66.

Dakota.— Mulligan *v.* Northern Pac. R. Co., 4 Dak. 315, 29 N. W. 659.

Kentucky.— Harris *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 392.

New York.— Fenner *v.* Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; King *v.* New Brunswick, etc., Steamboat Co., 36 Misc. (N. Y.) 555, 73 N. Y. Suppl. 999.

North Carolina.— Chalk *v.* Charlotte, etc., R. Co., 85 N. C. 423.

Pennsylvania.— National Line Steamship Co. *v.* Smart, 107 Pa. St. 492.

51. *Alabama.*— Mobile, etc., R. Co. *v.* Prewitt, 46 Ala. 63, 7 Am. Rep. 586.

Illinois.— Vallette *v.* Bennett, 69 Ill. 632; Chicago, etc., R. Co. *v.* Sawyer, 69 Ill. 285,

in general on failure or refusal of the consignee to take the goods, the duty of the carrier as warehouseman involves the storage of the goods.[52] If by custom or contract the duty of the carrier is performed when it places the car containing the goods on a side-track ready for unloading by the consignee, then from that time the liability of the carrier as carrier ceases.[53]

(III) *NECESSITY OF NOTICE*—(A) *In General.* The rule above stated[54] has not been uniformly recognized as applicable to railroads and steamboats, but in many jurisdictions a different rule, which may be designated as the Massachusetts rule, has been adopted, based on the assumption that by reason of the existence of fixed schedules for the arrival of trains or boats, from which the consignee may know when to expect his goods, it is his duty to be on hand to receive them,[55] and that rule is that when the goods have reached their destination and are ready for delivery to the consignee, the carrier's duty as carrier terminates, and that of warehouseman begins without regard to notice to the consignee or a reasonable time for the removal of the goods.[56] This rule is convenient by reason of its

18 Am. Rep. 613; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286.

New Jersey.— Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

Pennsylvania.— Pennsylvania, etc., Canal, etc., Co. *v.* Waltman, 1 Walk. (Pa.) 139.

South Carolina.— Wardlaw *v.* South Carolina R. Co., 11 Rich. (S. C.) 337.

See 9 Cent. Dig. tit. "Carriers," § 609½; and *infra*, II, J, 4.

In case of extraordinary interruption of communication, necessitating a considerable delay before the goods reach their destination, the carrier may store them and give notice to the consignee, and thereafter he is liable only as warehouseman. Conkey *v.* Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630.

52. Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; Bickford *v.* Metropolitan Steamship Co., 109 Mass. 151; Frank *v.* Grand Tower, etc., R. Co., 57 Mo. App. 181; McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Northrop *v.* Syracuse, etc., R. Co., 3 Abb. Dec. (N. Y.) 386, 2 Transcr. App. (N. Y.) 183, 5 Abb. Pr. N. S. (N. Y.) 425; Clendaniel *v.* Tuckerman, 17 Barb. (N. Y.) 184.

53. Chicago, etc., R. Co. *v.* Kendall, 72 Ill. App. 105; Pindell *v.* St. Louis, etc., R. Co., 41 Mo. App. 84; Missouri Pac. R. Co. *v.* Haynes, 72 Tex. 175, 10 S. W. 398. Although the duty of the carrier under the circumstances may be only to place the car on a side-track ready for unloading by the consignee, nevertheless its liability as carrier does not terminate until the car is placed in a safe and convenient location for unloading. Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. Rep. 258.

If the carrier has no freight house at the place of destination, but is in the habit of transacting its business there on the cars themselves, the fact that the goods have not been removed from the car does not prevent the liability of the carrier being reduced to that of warehouseman. MacVeagh *v.* Atchison, etc., R. Co., 3 N. M. 205, 5 Pac. 457.

Reasonable time.— But even where the car is placed on a side-track, the same rule as to reasonable time applies as when the goods are placed in a warehouse. Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899; Pindell *v.* St. Louis, etc., R. Co., 34 Mo. App. 675.

54. See *supra*, II, J, 3, d, (I).

55. *Massachusetts.*— Norway Plains Co. *v.* Boston, etc., R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423.

Minnesota.— Derosia *v.* Winona, etc., R. Co., 18 Minn. 133.

New Mexico.— MacVeagh *v.* Atchison, etc., R. Co., 3 N. M. 205, 5 Pac. 457.

North Carolina.— Hilliard *v.* Wilmington, etc., R. Co., 51 N. C. 343.

South Carolina.— Spears *v.* Spartanburg, etc., R. Co., 11 S. C. 158.

West Virginia.— Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

United States.— Binford *v.* The Virginia, 3 Fed. Cas. No. 1,412, 3 Quart. L. J. 153.

See 9 Cent. Dig. tit. "Carriers," § 316.

It is as much a part of the contract that the owner or consignee should be ready at the place of destination to receive the goods when they arrive, or within a reasonable time thereafter, as that the carrier should transport and deliver them. Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209.

56. *Alabama.*— South, etc., Alabama R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749.

Georgia.— Georgia, etc., R. Co. *v.* Pound, 111 Ga. 6, 36 S. E. 312; Southwestern R. Co. *v.* Felder, 46 Ga. 433.

Illinois.— Rothschild *v.* Michigan Cent. R. Co., 69 Ill. 164; The Anchor Line *v.* Knowles, 66 Ill. 150; Illinois Cent. R. Co. *v.* Friend, 64 Ill. 303; Merchants' Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Chicago, etc., R. Co. *v.* Scott, 42 Ill. 132; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; Richards *v.* Michigan Southern, etc., R. Co., 20 Ill. 404; Davis *v.* Michigan Southern, etc., R. Co., 20 Ill. 412; Chicago, etc., R. Co. *v.* Kendall, 72 Ill. App. 105.

Indiana.— Cincinnati, etc., R. Co. *v.* McCool, 26 Ind. 140; Bansemer *v.* Toledo, etc.,

definiteness, and in that it obviates the constant difficulty of determining the sufficiency of notice and reasonableness of time. But notwithstanding this consideration, the weight of authority is with what may be called the New York rule, by which the carrier remains liable after the goods have reached their destination, and notwithstanding their being placed in a freight house or other suitable place for being received by the consignee, until the consignee has had reasonable opportunity to take them away.[57] In not all the jurisdictions which follow the New York rule as to the carrier being liable for a reasonable time after the goods reach their destination is it required that the carrier give notice. Some courts hold that the consignee is bound to take notice of the usual time for the arrival of the goods, and that he has only a reasonable time thereafter in which to remove them, without regard to notice given by the carrier.[58] But in most of the jurisdictions in which it has been held that the carrier continues responsible as carrier for a reasonable time, it is required that the carrier give such notice as is practicable to the consignee of the arrival, and that the question of reasonable time is to be determined with reference to the giving of such notice.[59] The liability of the carrier as such continues under this doctrine until,

R. Co., 25 Ind. 434, 87 Am. Dec. 367; New Albany, etc., R. Co. *v.* Campbell, 12 Ind. 55.

Iowa.— State *v.* Creeden, 78 Iowa 556, 43 N. W. 673, 7 L. R. A. 295; Mohr *v.* Chicago, etc., R. Co., 40 Iowa 579; Francis *v.* Dubuque, etc., R. Co., 25 Iowa 60, 95 Am. Dec. 769.

Kentucky.— Jeffersonville R. Co. *v.* Cleveland, 2 Bush (Ky.) 468.

Massachusetts.— Rice *v.* Hart, 118 Mass. 201, 19 Am. Rep. 433; Hall *v.* Boston, etc., R. Corp., 14 Allen (Mass.) 439, 92 Am. Dec. 783; Norway Plains Co. *v.* Boston, etc., R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423; Thomas *v.* Boston, etc., R. Corp., 10 Metc. (Mass.) 472, 43 Am. Dec. 444.

Michigan.—Michigan Cent. R. Co. *v.* Lantz, 32 Mich. 502; Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243.

Missouri.— Gashweiler *v.* Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558; Hull *v.* Missouri Pac. R. Co., 60 Mo. App. 593; Buddy *v.* Wabash, etc., R. Co., 20 Mo. App. 206; Bergner *v.* Chicago, etc., R. Co., 13 Mo. App. 499; Eaton *v.* St. Louis, etc., R. Co., 12 Mo. App. 386.

New Jersey.— Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

North Carolina.— Neal *v.* Wilmington, etc., R. Co., 53 N. C. 482.

See 9 Cent. Dig. tit. "Carriers," § 316.

Reason for rule.— It is urged in support of this rule that by reason of the nature of the railroad company's means of transportation it cannot make personal delivery, as can those who transport by vehicles traversing the common highways, and it is not practicable in the ordinary course of business to give notice to the consignee, as is done in the case of general ships. But the controlling distinction probably is to be found in the fact that it is customary for railroad companies to deliver goods at the destination into a freight house, and there is no good reason for applying the severe common-law rules of liability after the risks incident to transportation have been terminated by storage in such freight house. Norway Plains Co. *v.* Boston, etc., R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423.

The reasons for the opposite rule are stated in Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333; McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Moses *v.* Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

57. *Kansas.*— Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899; Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333.

Kentucky.—Louisville, etc., R. Co. *v.* Jones, 10 Ky. L. Rep. 494; Adams Express Co. *v.* Tingle, 7 Ky. L. Rep. 441.

Louisiana.— Sleade *v.* Payne, 14 La. Ann. 453.

Michigan.— Buckley *v.* Great Western R. Co., 18 Mich. 121.

New Hampshire.— Moses *v.* Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

New York.— Faulkner *v.* Hart, 82 N. Y. 413, 37 Am. Rep. 574; Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454.

Vermont.— Winslow *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365.

Wisconsin.— Backhaus *v.* Chicago, etc., R. Co., 92 Wis. 393, 66 N. W. 400.

See 9 Cent. Dig. tit. "Carriers," § 316.

58. *Minnesota.*— Derosia *v.* Winona, etc., R. Co., 18 Minn. 133.

New Jersey.— Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

North Carolina.— Hilliard *v.* Wilmington, etc., R. Co., 51 N. C. 343.

Vermont.— Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 349.

West Virginia.— Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

See 9 Cent. Dig. tit. "Carriers," § 316.

59. *Arkansas.*— Missouri Pac. R. Co. *v.* Nevill, 60 Ark. 375, 30 S. W. 425, 46 Am. St. Rep. 208, 28 L. R. A. 80.

Colorado.— Denver, etc., R. Co. *v.* De Witt, 1 Colo. App. 419, 29 Pac. 524.

after notice, the consignee has had a reasonable time to remove the goods.[60] What constitutes a reasonable time will depend to some extent on the circumstances of the case,[61] but will not depend upon the peculiar circumstances in the situation of the owner or consignee as affecting his own necessity or convenience.[62] Where notice is required, newspaper publication is not sufficient.[63] If the consignee is unknown, the carrier must use reasonable and diligent effort to find and notify him.[64]

(B) *Under Provisions of Contract or Statute.* The duty of the carrier as to giving notice may be controlled by contract between the shipper and the carrier.[65] In some states there are statutes requiring the carrier to give notice to the consignee, but such a statute does not necessarily determine the time when the carrier's liability as carrier ceases and his liability as warehouseman begins. Where the rule is that the carrier's strict liability terminates with the arrival of the goods at their destination, it seems that statutory requirement as to notice does not alone extend the term of strict liability.[66] But in some states the statutory provision is such as to continue the carrier's strict liability until a reasonable time after the giving of notice.[67]

e. Effect of Custom or Usage. The duty to give notice, and the liability of the carrier as such until reasonable time after notice is given may arise from usage of such nature that the carrier is presumed to have assented thereto.[68] On

Louisiana.— Sleade *v.* Payne, 14 La. Ann. 453.

Michigan.— Michigan Cent. R. Co. *v.* Ward, 2 Mich. 538.

New Hampshire.— Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 59 Am. Dec. 364.

New York.— Sprague *v.* New York Cent. R. Co., 52 N. Y. 637; Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402; Fenner *v.* Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Gibson *v.* Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297.

Ohio.— Lake Erie, etc., R. Co. *v.* Hatch, 52 Ohio St. 408, 39 N. E. 1042.

Pennsylvania.—Union Express Co. *v.* Ohleman, 92 Pa. St. 323.

Tennessee.— Dean *v.* Vaccaro, 2 Head (Tenn.) 488, 75 Am. Dec. 744.

Wisconsin.—Hermann *v.* Goodrich, 21 Wis. 536, 94 Am. Dec. 562.

United States.— Howe *v.* Lexington, 12 Fed. Cas. No. 6,767*a*, 2 N. Y. Leg. Obs. 4.

See 9 Cent. Dig. tit. "Carriers," § 316.

60. Alabama Midland R. Co. *v.* Darby, 119 Ala. 531, 24 So. 713; Chicago, etc., R. Co. *v.* Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Maignan *v.* New Orleans, etc., R. Co., 24 La. Ann. 333; Price *v.* Powell, 3 N. Y. 322.

61. *Iowa.*— Angle *v.* Mississippi, etc., R. Co., 9 Iowa 487.

Minnesota.— Pinney *v.* First Div. St. Paul, etc., R. Co., 19 Minn. 251; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133.

Missouri.— Herf, etc., Chemical Co. *v.* Lackawana Line, 70 Mo. App. 274.

New York.— Scheu *v.* Benedict, 116 N. Y. 510, 22 N. E. 1073, 27 N. Y. St. 526, 15 Am. St. Rep. 426; Wynantskill Knitting Co. *v.* Murray, 90 Hun (N. Y.) 554, 36 N. Y. Suppl. 26, 71 N. Y. St. 33; Dunham *v.* Boston, etc., R. Co., 46 Hun (N. Y.) 245.

Wisconsin.—Lemke *v.* Chicago, etc., R. Co., 39 Wis. 449; Parker *v.* Milwaukee, etc., R. Co., 30 Wis. 689.

See 9 Cent. Dig. tit. "Carriers," § 316.

62. Moses *v.* Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381; Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773.

63. Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474; Caruana *v.* British, etc., Royal Mail Steam-Packet Co., 6 Ben. (U. S.) 517, 5 Fed. Cas. No. 2,484; Snow *v.* The Inca, 22 Fed. Cas. No. 13,145*a*.

64. Sherman *v.* Hudson River R. Co., 64 N. Y. 254; Butler *v.* East Tennessee, etc., R. Co., 8 Lea (Tenn.) 32. If the consignee is unknown to the carrier, it is the duty of the consignee to give such information before the arrival of the goods as will enable the carrier to give him the requisite notice. Pelton *v.* Rensselaer, etc., R. Co., 54 N. Y. 214, 13 Am. Rep. 568.

65. Collins *v.* Alabama Great Southern R. Co., 104 Ala. 390, 16 So. 140; Tanner *v.* Oil Creek R. Co., 53 Pa. St. 411.

66. Collins *v.* Alabama Great Southern R. Co., 104 Ala. 390, 16 So. 140; Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471; Butler *v.* East Tennessee, etc., R. Co., 8 Lea (Tenn.) 32.

67. Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Hirshfield *v.* Central Pac. R. Co., 56 Cal. 484; Missouri Pac. R. Co. *v.* Haynes, 72 Tex. 175, 10 S. W. 398.

Statutory provisions as to liability of railroads for damages to property by fire from their negligence do not generally affect the liability of the railroad as carrier. Welch *v.* Concord R. Co., 68 N. H. 206, 44 Atl. 304; Walker *v.* Eikleberry, 7 Okla. 599, 54 Pac. 553.

68. Georgia, etc., R. Co. *v.* Pound, 111 Ga. 6, 36 S. E. 312; Herf, etc., Chemical Co. *v.* Lackawana Line, 70 Mo. App. 274.

the other hand, the duration of the carrier's liability as carrier after the goods have reached their destination may be restricted by usage[69] or a course of dealing between the parties.[70] It is said that notice to the consignee of the arrival of the goods may be dispensed with by usage of the port.[71] But when usage or custom is relied on it must be such as that the consignor or consignee should be presumed to have had knowledge thereof.[72] Usage may control as to whether delivery is properly made on holidays.[73] A usage as to posting the arrival of goods on a bulletin board as a substitute for any other form of notice may be binding.[74]

4. Liability as Custodian or Warehouseman[75]— a. Gratuitous Bailee; Slight Care. The goods may no doubt be so left in the hands of the carrier after reaching their destination and the consignee or owner has had opportunity to take them, as that the further duty of the carrier with reference thereto is only that of an accommodation or gratuitous bailee or custodian, with no right on the part of the carrier to collect charges for keeping, and no duty to exercise more than slight care, and in such case the carrier will be liable, it is said, only for gross negligence.[76]

b. Bailee For Hire; Ordinary Care. The presumption, however, is that even after the strict responsibility of carrier ceases, he continues to be a warehouseman of the goods until taken by the consignee or owner, and for compensation, either included in the original charge for carriage, or collectable as an additional charge against the consignee or owner.[77] Therefore the carrier as warehouseman is bound to use ordinary care in the keeping of the goods, and will be liable for negligence causing injury thereto.[78] It would be impracticable to differentiate

69. Turner *v.* Huff, 46 Ark. 222, 55 Am. Rep. 580; Sullivan *v.* Thompson, 99 Mass. 259.

70. Baltimore, etc., R. Co. *v.* Green, 25 Md. 72; J. Russell Mfg. Co. *v.* New Haven Steamboat Co., 52 N. Y. 657.

71. Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474; Gibson *v.* Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; Farmers', etc., Bank *v.* Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491.

Contra.— Dean *v.* Vaccaro, 2 Head (Tenn.) 488, 75 Am. Dec. 744.

72. The Mary Washington, 1 Abb. (U. S.) 1, Chase (U. S.) 125, 16 Fed. Cas. No. 9,229, 5 Am. L. Reg. 693; Howe *v.* Lexington, 12 Fed. Cas. No. 6,767*a*, 2 N. Y. Leg. Obs. 4.

73. Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Richardson *v.* Goddard, 23 How. (U. S.) 28, 16 L. ed. 412.

74. Briant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47; Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903.

75. See, generally, Bailments, 5 Cyc. 157; Warehousemen.

76. *Michigan.*— Michigan Southern, etc., R. Co. *v.* Shurtz, 7 Mich. 515.

Missouri.— Hapgood Plow Co. *v.* Wabash R. Co., 61 Mo. App. 372.

New Hampshire.— Brown *v.* Grand Trunk R. Co., 54 N. H. 535; Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 59 Am. Dec. 364.

North Carolina.— Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 16 S. E. 323; McCombs *v.* North Carolina R. Co., 67 N. C. 193.

Texas.— Texas Cent. R. Co. *v.* Flanary, (Tex. Civ. App. 1899) 50 S. W. 726.

Wisconsin.— Dimmick *v.* Milwaukee, etc., R. Co., 18 Wis. 471.

See 9 Cent. Dig. tit. "Carriers," § 621; and, generally, Bailments, 5 Cyc. 157.

77. Brown *v.* Grand Trunk R. Co., 54 N. H. 535; Hardman *v.* Montana Union R. Co., 83 Fed. 588, 48 U. S. App. 570, 27 C. C. A. 407, 39 L. R. A. 300.

78. *Delaware.*— McHenry *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 448.

Illinois.— Chicago, etc., R. Co. *v.* Scott, 42 Ill. 132; American Express Co. *v.* Baldwin, 26 Ill. 504, 79 Am. Dec. 389.

Indiana.— Merchants' Despatch, etc., Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954; Cincinnati, etc., R. Co. *v.* McCool, 26 Ind. 140.

Iowa.— Leland *v.* Chicago, etc., R. Co., (Iowa 1885) 23 N. W. 390.

Kentucky.— Adams Express Co. *v.* Tingle, 10 Ky. L. Rep. 358.

Maryland.— Merchants', etc., Transp. Co. *v.* Story, 50 Md. 4, 33 Am. Rep. 293; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Massachusetts.— Lane *v.* Boston, etc., R. Co., 112 Mass. 455.

Missouri.— E. O. Stanard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704.

New York.— Grieve *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 518, 49 N. Y. Suppl. 949.

Wisconsin.— Kronshage *v.* Chicago, etc., R. Co., 40 Wis. 587; Pike *v.* Chicago, etc., R. Co., 40 Wis. 583; Whitney *v.* Chicago, etc.,

the various cases as to what acts or omissions on the part of the carrier or his servant or agent will constitute negligence in the preservation or care of the goods in his hands as warehouseman, for this must as a rule depend upon the circumstances of each case.[79]

R. Co., 27 Wis. 327; Dimmick *v.* Milwaukee, etc., R. Co., 18 Wis. 471.

United States.— Liverpool, etc., Steam Co. *v.* Saitta, 22 Fed. 560; White *v.* Colorado Cent. R. Co., 5 Dill. (U. S.) 428, 3 McCrary (U. S.) 559, 29 Fed. Cas. No. 17,543, 17 Am. L. Reg. N. S. 783; The Bobolink, 6 Sawy. (U. S.) 146, 3 Fed. Cas. No. 1,588.

Canada.— Milloy *v.* Grand Trunk R. Co., 21 Ont. App. 404.

See 9 Cent. Dig. tit. "Carriers," § 625; and, generally, BAILMENTS, 5 Cyc. 157.

79. *Georgia.*— Brunswick Grocery Co. *v.* Brunswick, etc., R. Co., 106 Ga. 270, 32 S. E. 92, 71 Am. St. Rep. 249.

Kentucky.— Lewis *v.* Louisville, etc., R. Co., 13 Ky. L. Rep. 144.

Maine.— Knowles *v.* Atlantic, etc., R. Co., 38 Me. 55, 61 Am. Dec. 234.

Maryland.— Merchants', etc., Transp. Co. *v.* Story, 50 Md. 4, 33 Am. Rep. 293.

Massachusetts.— Barron *v.* Eldredge, 100 Mass. 455, 1 Am. Rep. 126.

Michigan.— Burroughs *v.* Grand Trunk R. Co., 67 Mich. 351, 34 N. W. 875.

New York.— Grossman *v.* Fargo, 6 Hun (N. Y.) 310; Byrne *v.* Fargo, 36 Misc. (N. Y.) 543, 73 N. Y. Suppl. 943; Aaronson *v.* Pennsylvania R. Co., 23 Misc. (N. Y.) 666, 52 N. Y. Suppl. 95.

North Carolina.— Young *v.* Wilmington, etc., R. Co., 116 N. C. 932, 21 S. E. 177; Neal *v.* Wilmington, etc., R. Co., 53 N. C. 482.

Pennsylvania.— Allam *v.* Pennsylvania R. Co., 183 Pa. St. 174, 38 Atl. 709, 39 L. R. A. 535.

Texas.— Ft. Worth Transfer Co. *v.* Isaacs, (Tex. Civ. App. 1897) 40 S. W. 39.

Vermont.— Davis *v.* Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

Wisconsin.— Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

United States.— The City of Lincoln, 25 Fed. 835.

See 9 Cent. Dig. tit. "Carriers," § 625.

Care required of express companies to constitute ordinary care is greater than that required of ordinary railroad carriers on account of the greater value of the goods usually sent by express, and acts or omissions which might not be negligent in the latter case may be negligent in the former.

Illinois.— American Express Co. *v.* Baldwin, 26 Ill. 504, 79 Am. Dec. 389.

Indiana.— Adams Express Co. *v.* Darnell, 31 Ind. 20, 99 Am. Dec. 582; American Express Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691.

Massachusetts.—Conway Bank *v.* American Express Co., 8 Allen (Mass.) 512.

Minnesota.— Geo. C. Bagley Elevator Co. *v.* American Express Co., 63 Minn. 142, 65 N. W. 264.

New York.— Laporte *v.* Wells, etc., Express, 23 N. Y. App. Div. 267, 48 N. Y. Suppl. 292.

Pennsylvania.— Howard Express Co. *v.* Wile, 64 Pa. St. 201.

See 9 Cent. Dig. tit. "Carriers," § 628.

Duty to keep watchman.— Ordinarily it is not the duty of a carrier to keep a watchman about the premises at night. Louisville, etc., R. Co. *v.* Gidley, 119 Ala. 523, 24 So. 753; Merchants' Dispatch Transp. Co. *v.* Hoskins, 14 Ky. L. Rep. 927; Lewis *v.* Louisville, etc., R. Co., 13 Ky. L. Rep. 144; Kronshage *v.* Chicago, etc., R. Co., 40 Wis. 587; Pike *v.* Chicago, etc., R. Co., 40 Wis. 583.

Negligence in not making prompt delivery. — If the consignee is prevented from getting the goods by reason of negligence of the carrier's servant in assuring him that the goods have not arrived, the carrier will be liable for the destruction of the goods, although not due to any negligence in their keeping. Union Pac. R. Co. *v.* Moyer, 40 Kan. 184, 19 Pac. 639, 10 Am. St. Rep. 183; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133; East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 708, 20 S. W. 314, 17 L. R. A. 691; East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 699, 20 S. W. 312, 30 Am. St. Rep. 902, 17 L. R. A. 691; Deming *v.* Merchants' Cotton Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518. But the carrier may excuse non-delivery by showing that the loss was not due to his fault. Hornthal *v.* Roanoke, etc., Steamboat Co., 107 N. C. 76, 11 S. E. 1049.

Storing with the goods explosive or inflammable material, thus increasing the risk to them, will render carrier liable for their destruction through that cause. Nichols *v.* Smith, 115 Mass. 332; Hardman *v.* Montana Union R. Co., 83 Fed. 88, 48 U. S. App. 570, 27 C. C. A. 407, 39 L. R. A. 300; Farmers' L. & T. Co. *v.* Oregon R., etc., Co., 73 Fed. 1003; White *v.* Colorado Cent. R. Co., 5 Dill. (U. S.) 428, 3 McCrary (U. S.) 559, 29 Fed. Cas. No. 17,543, 17 Am. L. Reg. N. S. 783.

Usage of the carrier in the conduct of his own business as to how much care is generally taken of similar goods is immaterial. Merchants', etc., Transp. Co. *v.* Story, 50 Md. 4, 33 Am. Rep. 293; Lane *v.* Boston, etc., R. Co., 112 Mass. 455; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133. But evidence of the sufficiency of the freight house for the business usually done at the place of destination is admissible. Stowe *v.* New York, etc., R. Co., 113 Mass. 521. And evidence is competent for the purpose of showing that defendant exercised the same degree of care that was usually exercised in the vicinity with reference to the same kind of property by other carriers. Cass *v.* Boston, etc., R. Co., 14 Allen (Mass.) 448.

5. ACTIONS AGAINST CARRIER AS WAREHOUSEMAN.[80] The storage of the goods does not create a new contract, and the action against the carrier for negligence in keeping the goods at their destination may be based on the contract of shipment.[81] As the action against the carrier as warehouseman is founded on negligence, it is perhaps theoretically correct to say that the burden of proving negligence is on the plaintiff.[82] But, the custody of the goods being shown to have been in the carrier, and their loss, or the failure to produce them, being established, the burden of showing that there was no negligence is usually held to rest upon the carrier.[83]

K. Effect of Legal Process[84]—1. EXCUSE FOR NON-DELIVERY. Where the goods are taken from the possession of the carrier by valid legal process against the owner the carrier is excused from further liability, if he acts in good faith and without negligence in surrendering the goods. Such surrender on the part of the carrier does not amount to conversion.[85] But if the goods are not actually taken from the carrier, legal process will furnish no excuse for failure to transport or deliver.[86] And if the goods are not subject to seizure under the process

80. See, generally, BAILMENTS, 5 Cyc. 157; WAREHOUSEMEN.

81. Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Hoyt *v.* Nevada County Narrow Gauge R. Co., 68 Cal. 644, 10 Pac. 187; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 7 S. Ct. 1132, 30 L. ed. 1077.

82. *Alabama.*— Collins *v.* Alabama Great Southern R. Co., 104 Ala. 390, 16 So. 140.

California.— Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268.

Illinois.— Chicago, etc., R. Co. *v.* Kendall, 72 Ill. App. 105.

Missouri.— E. O. Stanard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704.

United States.— De Grau *v.* Wilson, 17 Fed. 698 [*affirmed* in 22 Fed. 560]; Strauss *v.* Wilson, 17 Fed. 701.

See 9 Cent. Dig. tit. "Carriers," § 632.

83. *California.*— Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685.

Connecticut.— Boies *v.* Hartford, etc., R. Co., 37 Conn. 272, 9 Am. Rep. 347.

Georgia.— Almand *v.* Georgia R., etc., Co., 95 Ga. 775, 22 S. E. 674.

Iowa.— Leland *v.* Chicago, etc., R. Co., (Iowa 1885) 23 N. W. 390.

Massachusetts.— Cass *v.* Boston, etc., R. Co., 14 Allen (Mass.) 448; Lamb *v.* Western R. Corp., 7 Allen (Mass.) 98.

New York.— J. Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121; Aaronson *v.* Pennsylvania R. Co., 23 Misc. (N. Y.) 666, 52 N. Y. Suppl. 95.

South Carolina.— Wardlaw *v.* South Carolina R. Co., 11 Rich. (S. C.) 337.

See 9 Cent. Dig. tit. "Carriers," § 632.

The question of negligence is generally for the jury, but where there is no dispute as to the facts, the question of whether the goods have been properly cared for may become one of law. Laporte *v.* Wells, etc., Express, 23 N. Y. App. Div. 267, 48 N. Y. Suppl. 292.

84. See, generally, ATTACHMENT, 4 Cyc. 368; EXECUTIONS.

85. *Indiana.*— Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727; Indiana, etc., R. Co. *v.* Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. Rep. 264.

Massachusetts.— French *v.* Star Union Transp. Co., 134 Mass. 288.

Michigan.— Pingree *v.* Detroit, etc., R. Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479.

New Hampshire.— Hett *v.* Boston, etc., R. Co., 69 N. H. 139, 44 Atl. 910; Johnson *v.* Grand Trunk R. Co., 44 N. H. 626.

New Mexico.— MacVeagh *v.* Atchison, etc., R. Co., 3 N. M. 205, 5 Pac. 457.

New York.—Bliven *v.* Hudson River R. Co., 36 N. Y. 403, 2 Transcr. App. (N. Y.) 179; Livingston *v.* Miller, 48 Hun (N. Y.) 232, 16 N. Y. St. 71.

Oregon.— Jewett *v.* Olsen, 18 Oreg. 419, 23 Pac. 262, 17 Am. St. Rep. 745.

United States.— Stiles *v.* Davis, 1 Black (U. S.) 101, 17 L. ed. 33; Lemont *v.* New York, etc., R. Co., 28 Fed. 920.

See 9 Cent. Dig. tit. "Carriers," § 365.

Seizure under police regulations.—The state being the owner of game unlawfully killed, the carrier is accountable only to the state therefor, and is not bound to give notice to the consignor of seizure. Thomas *v.* Northern Pac. Express Co., 73 Minn. 185, 75 N. W. 1120. But if the pretended seizure under the game laws is illegal, the carrier will be liable to the consignor. Bennett *v.* American Express Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 13 L. R. A. 33; Merriman *v.* Great Northern Express Co., 63 Minn. 543, 65 N. W. 1080. Where liquors in the custody of the carrier were seized and destroyed in conformity with a state statute, and the carrier gave notice to the owner, it was held that he was relieved from all liability. Wells *v.* Maine Steamship Co., 4 Cliff. (U. S.) 228, 29 Fed. Cas. No. 17,401.

86. Western, etc., R. Co. *v.* Ohio Valley Banking, etc., Co., 107 Ga. 512, 33 S. E. 821; Faust *v.* South Carolina R. Co., 8 S. C. 118; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57; The Mary Ann Guest, Olcott (U. S.) 498, 16 Fed. Cas. No. 9,197.

Demand by the mortgagee is not such legal

in response to which the carrier surrenders them, the carrier is liable for failure to deliver.[87]

2. Duty to Notify Owner. Where the carrier surrenders the goods under legal process he should, to relieve himself from liability, at once notify the owner of the fact.[88]

3. Rights of Officer Levying on Goods. The officer under legal process can only take the goods from the carrier by paying the carrier's charges, and upon doing so he is subrogated to the carrier's lien.[89]

4. Garnishment of Carrier.[90] A garnishment of the carrier at the suit of a creditor of the owner of the goods is not effectual while the goods are in transit.[91] But while holding the goods at the end of the transportation for delivery to the consignee the carrier may be garnished therefor.[92]

L. Final Delivery[93] **— 1. What Sufficient — a. In General.** Where the transportation is by water, much depends upon the usage and custom of the trade as to what is a sufficient delivery to terminate the carrier's responsibility for the care of the goods.[94] The general rule seems to be that the carrier's liability terminates when the goods are unloaded and placed on the wharf,[95] with notice to the consignee, and after a reasonable time for their removal.[96] The same rules apply

process as will render the carrier liable for conversion on refusal to deliver the goods in pursuance of such demand. Kohn *v.* Richmond, etc., R. Co., 37 S. C. 1, 16 S. E. 376, 34 Am. St. Rep. 726, 24 L. R. A. 100.

87. Simpson *v.* Dufour, 126 Ind. 322, 26 N. E. 69, 22 Am. St. Rep. 590; Kiff *v.* Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429; Edwards *v.* White Line Transit Co., 104 Mass. 159, 6 Am. Rep. 213; Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301; McAlister *v.* Chicago, etc., R. Co., 74 Mo. 351; Nickey *v.* St. Louis, etc., R. Co., 35 Mo. App. 79.

88. Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727; MacVeagh *v.* Atchison, etc., R. Co., 3 N. M. 205, 5 Pac. 457; Spiegel *v.* Pacific Mail Steamship Co., 26 Misc. (N. Y.) 414, 56 N. Y. Suppl. 171; The M. M. Chase, 37 Fed. 708.

Failing to give such notice the carrier becomes liable as in any other case of delivery to another person than the one entitled to the goods, and assumes the burden of showing that the process was valid, unless he can show that the owner had actual knowledge from other sources in due time to assert his rights to the goods. Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57.

It is not the duty of the carrier to defend against a seizure for the protection of, nor to give notice to, the consignor where the process is valid against the consignee and the goods are seized at the point of destination. Frank *v.* Central R. Co., 9 Pa. Super. Ct. 129.

Notice to owner's husband.— Where the goods were delivered to the carrier by the husband of the owner, held that notice to such husband was sufficient. Furman *v.* Chicago, etc., R. Co., 57 Iowa 42, 10 N. W. 272, 81 Iowa 540, 46 N. W. 1049.

Where neither consignor nor consignee makes any response to the notice the carrier may presume that they have abandoned the property as subject to seizure under the process. Savannah, etc., R. Co. *v.* Wilcox, 48 Ga. 432.

89. Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121; Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

90. See, generally, Garnishment.

91. The carrier is under no obligation to suspend his duty of transportation in response to notice of such proceeding. Illinois Cent. R. Co. *v.* Cobb, 48 Ill. 402; Montrose Pickle Co. *v.* Dodson, etc., Mfg. Co., 76 Iowa 172, 40 N. W. 705, 14 Am. St. Rep. 213, 2 L. R. A. 417; Stevenot *v.* Eastern R. Co., 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600; Bates *v.* Chicago, etc., R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369.

92. Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609; Landa *v.* Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459.

Carrier's knowledge of ownership.—The carrier is not liable to garnishment, unless he has knowledge that the goods belong to the debtor in the garnishment proceeding. Walker *v.* Detroit, etc., R. Co., 49 Mich. 446, 13 N. W. 812.

If the garnishment is in a proceeding against the shipper, the carrier is not chargeable for subsequent delivery to the consignee, as he has a right to presume, in the absence of knowledge to the contrary, that they belong to the consignee, and not to the shipper. Bingham *v.* Lamping, 26 Pa. St. 340, 67 Am. Dec. 418.

93. Questions analogous to those involved in this paragraph have already been discussed in considering when the carrier's liability as carrier terminates, and his liability as warehouseman begins. See *supra*, II, J.

94. See *infra*, II, L, 1, f.

95. Delivery on the wharf alone is sufficient, it seems, only where it is by direction of the consignee (Howland *v.* The Henry Hood, 12 Fed. Cas. No. 6,795), or by some well-defined and notorious custom (Snow *v.* The Inca, 22 Fed. Cas. No. 13,145*a*).

96. Turner *v.* Huff, 46 Ark. 222, 55 Am. Rep. 580; Goodwin *v.* Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457; The Santee, 2 Ben. (U. S.) 519, 21 Fed. Cas. No. 12,328;

to transportation by rail, where it is the duty of consignee, by usage or custom to take away the goods from the station platform, as for instance where the goods have been pointed out to him and he has taken charge of them,[97] or where by arrangement the goods are placed on a side-track and the consignee has notice and reasonable opportunity to take them away.[98] In other words, there must be actual or constructive delivery to the consignee, involving actual acceptance by the consignee or reasonable opportunity to accept.[99] If something remains to be done to complete delivery and acceptance, the carrier is still liable at least as warehouseman.[1] Thus, until the goods are so separated that the consignee can accept them, the carrier's liability continues.[2] The agent of the carrier may, however, by arrangement also be made the agent of the consignee or owner, so that delivery to such agent will relieve the carrier from further responsibility, as where it is directed that the goods be delivered to the carrier's agent to be held for the consignee.[3]

b. Duty as to Unloading. In general the expense of unloading the goods

Kennedy *v.* Dodge, 1 Ben. (U. S.) 311, 14 Fed. Cas. No. 7,701; Leaning *v.* Standish, 15 Fed. Cas. No. 8,161; The Santee, 7 Blatchf. (U. S.) 186, 12 Fed. Cas. No. 12,330; The Middlesex, Brunn. Col. Cas. (U. S.) 605, 17 Fed. Cas. No. 9,533; Salmon Falls Mfg. Co. *v.* The Tangier, 1 Cliff. (U. S.) 396, 21 Fed. Cas. No. 12,266; The Grafton, Olcott (U. S.) 43, 10 Fed. Cas. No. 5,656; Salmon Falls Mfg. Co. *v.* The Tangier, 3 Ware (U. S.) 110, 21 Fed. Cas. No. 12,267; Illsworth *v.* The Wild Hunter, 2 Woods (U. S.) 315, 8 Fed. Cas. No. 4,411; The Tybee, 1 Woods (U. S.) 358, 24 Fed. Cas. No. 14,304; Warner *v.* The Illinois, 29 Fed. Cas. No. 17,184*a*, 18 Reporter 11.

If consignee is bound to accept in bulk on the wharf he has no right to insist on separation into different parts and delivery of portions of the goods at different places. The Richmond, 1 Biss. (U. S.) 49, 20 Fed. Cas. No. 11,796.

If consignee has made a reasonable effort to get the goods, and has been prevented from doing so by the delay of the carrier in setting them apart, the consignee has a reasonable time after he has the first opportunity to get the goods in which to take them away. Segura *v.* Reed, 3 La. Ann. 695. And see *supra*, II, J, 3, d, (III).

97. South, etc., Alabama R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749; Culbreth *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 392; New Albany, etc., R. Co. *v.* Campbell, 12 Ind. 55; Young *v.* Smith, 3 Dana (Ky.) 91, 28 Am. Dec. 57.

In case of live stock, the owner who is charged with the care of the stock, or the consignee who is bound to know when the stock will arrive, must look for the animals at once. Chicago, etc., R. Co. *v.* Pratt, 13 Ill. App. 477; Steiger *v.* Erie R. Co., 5 Hun (N. Y.) 345.

98. Hill *v.* St. Louis, etc., R. Co., 67 Ark. 402, 55 S. W. 216; Anchor Mill Co. *v.* Burlington, etc., R. Co., 102 Iowa 262, 71 N. W. 255; Whitney Mfg. Co. *v.* Richmond, etc., R. Co., 38 S. C. 365, 17 S. E. 147, 37 Am. St. Rep. 767.

Delivery of baggage to passenger carrier.— Where an expressman is intrusted with baggage to deliver at a passenger station his liability ceases when he puts the baggage in the usual place from which the passenger carrier is in the habit of checking the baggage. Anniston Transfer Co. *v.* Gurley, 107 Ala. 600, 18 So. 209, 34 L. R. A. 137; Manheim *v.* Carr, 62 Me. 473; Henshaw *v.* Rowland, 54 N. Y. 242; Sunderland *v.* Westcott, 2 Sweeny (N. Y.) 260, 40 How. Pr. (N. Y.) 468.

99. *Alabama.*— Melbourne *v.* Louisville, etc., R. Co., 88 Ala. 443, 6 So. 762.

New York.— Salinger *v.* Simmons, 8 Abb. Pr. N. S. (N. Y.) 409.

Pennsylvania.— Eagle *v.* White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

South Carolina.— Galloway *v.* Hughes, 1 Bailey (S. C.) 553.

Wisconsin.— Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465.

See 9 Cent. Dig. tit. "Carriers," § 280.

1. Sleade *v.* Payne, 14 La. Ann. 453; Bartlett *v.* Steamboat Philadelphia, 32 Mo. 256; Smith *v.* Nashua, etc., R., 27 N. H. 86, 59 Am. Dec. 364; Collins *v.* Burns, 63 N. Y. 1.

2. *New York.*— Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578, 7 Am. Rep. 390.

Pennsylvania.— Warner *v.* The Steamship Illinois, 17 Phila. (Pa.) 549, 41 Leg. Int. (Pa.) 216.

South Carolina.— Hipp *v.* Southern R. Co., 50 S. C. 129, 27 S. E. 623.

Texas.— Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264.

Wisconsin.— Hungerford *v.* Winnebago Tug Boat, etc., Co., 33 Wis. 303.

United States.— Dibble *v.* Morgan, 1 Woods (U. S.) 406, 7 Fed. Cas. No. 3,881.

See 9 Cent. Dig. tit. "Carriers," § 280.

3. *Maine.*— Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

New York.— Labar *v.* Taber, 35 Barb. (N. Y.) 305.

Ohio.— Roberts *v.* Union Line Express Co., 2 Ohio Dec. (Reprint) 577, 4 West. L. Month. 99.

Oregon.— Bennett *v.* Northern Pac. Express Co., 12 Oreg. 49, 6 Pac. 160.

South Carolina.— Carroll *v.* Southern Express Co., 37 S. C. 452, 16 S. E. 128; Edwards *v.* Cheraw, etc., R. Co., 32 S. C. 117, 10 S. E. 822.

from the cars or boat in which such goods have been transported is to be borne by the carrier.[4]

c. Opportunity to Inspect and Remove. The consignee has the right to examine the goods before accepting delivery,[5] and if unloading is essential for that purpose the duty rests on the carrier to make it.[6]

d. Storage. While it may be the duty of the consignee to be present to receive the goods when ready for delivery,[7] yet the carrier cannot abandon the goods for failure of the consignee to appear and claim them, although his liability as carrier may be terminated,[8] but he must store or warehouse them and hold them for the consignee.[9]

e. Part Delivery. There may be delivery and acceptance as to a part of the goods, leaving the carrier liable as to the balance.[10] But unless there is something to indicate a contrary agreement, the contract of carriage will be deemed indivisible, and the consignee will not be bound to accept part performance.[11]

f. Usage or Custom as Affecting Delivery. The duty of the carrier as to making delivery may be determined by established custom or well-known usage which will be binding on the shipper and the consignee.[12] Thus, the place of

Texas.— Houston, etc., R. Co. *v.* Hogg, 2 Tex. Unrep. Cas. 544.

See 9 Cent. Dig. tit. "Carriers," § 285.

Carrier's agent may, in behalf of the carrier, consent to the goods being held, awaiting the convenience of the consignee, and in such event the liability of the carrier as warehouseman will continue. Oderkirk *v.* Fargo, 58 Hun (N. Y.) 347, 11 N. Y. Suppl. 871, 34 N. Y. St. 166; Ostrander *v.* Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211.

Delivery to consignee's agent.— So there may be a complete delivery to another person authorized to represent the consignee. Southern Express Co. *v.* Everett, 37 Ga. 688.

4. Little Rock, etc., R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363; Benson *v.* Gray, 154 Mass. 391, 28 N. E. 275, 13 L. R. A. 262; New York, etc., R. Co. *v.* Standard Oil Co., 87 N. Y. 486; Benbow *v.* North Carolina R. Co., 61 N. C. 421, 98 Am. Dec. 76.

But the consignee, by directing the unloading at a different place than that required by contract or usage, may relieve the carrier from liability as to unloading. Lewis *v.* Western R. Corp., 11 Metc. (Mass.) 509.

5. Clark *v.* Masters, 1 Bosw. (N. Y.) 177; Brand *v.* Weir, 27 Misc. (N. Y.) 212, 57 N. Y. Suppl. 731; The Mary Washington, 1 Abb. (U. S.) 1, Chase (U. S.) 125, 16 Fed. Cas. No. 9,229, 5 Am. L. Reg. 692; Bradstreet *v.* Heran, Abb. Adm. (U. S.) 209, 3 Fed. Cas. No. 1,792; Dibble *v.* Morgan, 1 Woods (U. S.) 406, 7 Fed. Cas. No. 3,881.

6. But it is only the unloading necessary to place the goods in the possession of the consignee which is required of the carrier. Hudson River Lighterage Co. *v.* Wheeler Condenser, etc., Co., 93 Fed. 374.

7. Gulf City Constr. Co. *v.* Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579; Pickering *v.* Weld, 159 Mass. 522, 34 N. E. 1081; The Mill Boy, 4 McCrary (U. S.) 383, 13 Fed. 181. See also *supra*, II, J, 3, d.

8. See *supra*, II, J, 3.

9. McHenry *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 448; Chicago, etc., R. Co. *v.* Bensley, 69 Ill. 630; Merchants' Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284; Green, etc., Nav. Co. *v.* Marshall, 48 Ind. 596.

Further as to storage see *supra*, II, J, 3, d.

If the place of storage is known to be unsafe, the carrier will be liable for loss. Adams Express Co. *v.* Cressap, 6 Bush (Ky.) 572.

10. Maignan *v.* New Orleans, etc., R. Co., 24 La. Ann. 333; Wynantskill Knitting Co. *v.* Murray, 90 Hun (N. Y.) 554, 36 N. Y. Suppl. 26, 71 N. Y. St. 33; Lee *v.* Marsh, 43 Barb. (N. Y.) 102, 28 How. Pr. (N. Y.) 275; Gulf, etc., R. Co. *v.* Booton, (Tex. App. 1890) 15 S. W. 502.

11. He may refuse a portion of the consignment if the balance has been lost. Sayward *v.* Stevens, 3 Gray (Mass.) 97. Where a portion of the goods has been lost, and the balance is undistinguishable as belonging to the consignment, held that the consignee was not bound to receive the portion tendered. Chicago, etc., R. Co. *v.* Warren, 16 Ill. 502, 63 Am. Dec. 317.

Where the shipment consisted of several boxes of assorted merchandise, held that damage to some of the boxes did not entitle the consignee to reject the entire lot and recover as for total loss. Silverman *v.* St. Louis, etc., R. Co., 51 La. Ann. 1785, 26 So. 447.

Where there has been a partial delivery, and subsequently the remainder of the goods are lost, it is for the jury to determine whether partial acceptance by the consignee was intended and understood as delivery of the whole, or only of the part taken. Sessions *v.* Western R. Corp., 16 Gray (Mass.) 132.

Where the consignee refuses to receive any part of the shipment or to coöperate in making an examination of the goods to ascertain the damage, and claims for total loss, the carrier will not be guilty of conversion in calling disinterested and competent persons who break open the packages in order to ascertain the character and condition of the contents. Silverman *v.* St. Louis, etc., R. Co., 51 La. Ann. 1785, 26 So. 447.

12. *Alabama.*— Stone *v.* Rice, 58 Ala. 95; Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221.

delivery may be determined by usage.[13] But a custom or usage relied on must not be unreasonable or contrary to public policy,[14] nor must it be contrary to the terms of the contract,[15] and it must be of such character that the consignee is chargeable with notice thereof.[16]

2. PERSONAL DELIVERY — a. Express Companies. In case of land carriage it seems to have been thought by earlier judges that personal delivery was implied in the contract, in the absence of stipulation or usage authorizing some other delivery.[17] And this is still the presumption as to expressmen, express companies, and other carriers holding themselves out as having facilities for making personal delivery.[18] Until reasonable effort to deliver in person has been made the express company remains liable as carrier.[19] If, however, by custom or reason-

Colorado.— Denver, etc., R. Co. *v.* De Witt, 1 Colo. App. 419, 29 Pac. 524.

Illinois.— Indianapolis, etc., R. Co. *v.* Murray, 72 Ill. 128; Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96.

Indiana.— Pittsburgh, etc., R. Co. *v.* Nash, 43 Ind. 423.

Iowa.— Angle *v.* Mississippi, etc., R. Co., 9 Iowa 487.

Massachusetts.— Forbes *v.* Boston, etc., R. Co., 133 Mass. 154.

New Hampshire.— Stimson *v.* Jackson, 58 N. H. 138.

New York.—Blossom *v.* Champion, 37 Barb. (N. Y.) 554; Hempstead *v.* New York Cent. R. Co., 28 Barb. (N. Y.) 485; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474.

Pennsylvania.— McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264.

South Carolina.— Galloway *v.* Hughes, 1 Bailey (S. C.) 553.

Utah.— Sharp *v.* Clark, 13 Utah 510, 45 Pac. 566.

United States.— Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 510; The Mill Boy, 4 McCrary (U. S.) 383, 13 Fed. 181; Field *v.* The Lovett Peacock, Fed. Cas. No. 4,768.

See 9 Cent. Dig. tit. "Carriers," § 276.

Local usage must be affirmatively established. Rowland *v.* Miln, 2 Hilt. (N. Y.) 150.

Long-established, uniform, and well-known usage as to the mode of delivery is a part of the contract. The Richmond, 1 Biss. (U. S.) 49, 20 Fed. Cas. No. 11,796.

13. *Massachusetts.*— Packard *v.* Earle, 113 Mass. 280.

New Hampshire.— Stimson *v.* Jackson, 58 N. H. 138.

New York.— Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474.

North Carolina.— Homesly *v.* Elias, 66 N. C. 330.

United States.— Bradstreet *v.* Heran, Abb. Adm. (U. S.) 209, 3 Fed. Cas. No. 1,792; The Boston, 1 Lowell (U. S.) 464, 3 Fed. Cas. No. 1,671.

See 9 Cent. Dig. tit. "Carriers," § 277.

If the bill of lading is silent as to the place and mode of delivery, such delivery must be according to the usages and regulations of the port or special arrangements of the consignee. Irzo *v.* Perkins, 10 Fed. 779.

14. Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155; Liverpool, etc., Steam Co. *v.* Suitter, 17 Fed. 695.

15. Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Pennsylvania R. Co. *v.* Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. Rep. 626; Myrick *v.* Michigan Cent. R. Co., 9 Biss. (U. S.) 44, 17 Fed. Cas. No. 10,001, 11 Chic. Leg. N. 151, 7 Reporter 229.

16. Central R., etc., Co. *v.* Anderson, 58 Ga. 393; Steamboat Albatross *v.* Wayne, 16 Ohio 513.

17. Schroeder *v.* Hudson River R. Co., 5 Duer (N. Y.) 55; Hyde *v.* Trent, etc., Nav. Co., 5 T. R. 389, 1 Esp. 36, 2 Rev. Rep. 620.

Presumption where contract provides for cartage fees.— The contract to make personal delivery may be implied even as to carriers whose business does not generally involve personal delivery from a provision in the contract for the payment of cartage as a part of the charge of transportation. Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96; Baltimore, etc., R. Co. *v.* Green, 25 Md. 72; Hyde *v.* Trent, etc., Nav. Co., 5 T. R. 389, 1 Esp. 36, 2 Rev. Rep. 620.

18. American Merchants' Union Express Co. *v.* Wolf, 79 Ill. 430; Sullivan *v.* Thompson, 99 Mass. 259; American Union Express Co. *v.* Robinson, 72 Pa. St. 274. And see *supra*, II, J, 3, b.

Reciprocal duty.— The duty of the carrier to deliver and the consignee to receive in such cases are reciprocal, however; and if the carrier is unable, by reason of the fault of the consignee, to make personal delivery, his liability as carrier terminates and his further responsibility is that of warehouseman only. Adams Express Co. *v.* Darnell, 31 Ind. 20, 99 Am. Dec. 582.

Waiver of personal delivery.— The duty to make personal delivery may be waived by custom so that it is the duty of the consignee to call for the goods within a reasonable time. Southern Express Co. *v.* Holland, 109 Ala. 362, 19 So. 66.

19. American Express Co. *v.* Haggard, 37 Ill. 465, 87 Am. Dec. 257; Baldwin *v.* American Express Co., 23 Ill. 197, 74 Am. Dec. 190; Witbeck *v.* Holland, 45 N. Y. 13, 6 Am. Rep. 23; Haslam *v.* Adams Express Co., 6 Bosw. (N. Y.) 235.

Deposit upon station platform.— It is not sufficient for the express company to deposit the goods on the station platform of the railroad company, although it has no local agent at that place. Southern Express Co. *v.* Armstead, 50 Ala. 350.

During business hours.— It is the duty of

able regulation of the express company limits are fixed beyond which it does not make personal delivery, one who is charged with knowledge of such custom or regulation must govern himself accordingly.[20]

b. Carriers by Rail. The rule requiring personal delivery does not apply to railroad companies, as they have no facilities for taking the goods to the residence or place of business of the consignee, and the general usage of their business does not require them to do so,[21] and the same principle is applicable to special transportation companies.[22]

c. Carriers by Water. A carrier by water is not bound to deliver to the consignee in person, or at the consignee's warehouse. He may land the goods at a wharf at the port of designation.[23]

3. Place of Final Delivery — a. In General. The goods are to be delivered at the usual place for making such delivery,[24] unless a place of destination is specially named in the bill of lading.[25] In the absence of special contract, express or implied, a carrier by water is not obliged to deliver freight at the nearest pier to the address of the consignee.[26] Delivery on a side-track will not be sufficient to terminate the carrier's liability, unless such delivery is agreed

the express company to deliver goods as soon as practicable after arrival at the place of the consignment, within the usual hours of transacting general business in such place. Hill *v.* Humphreys, 5 Watts & S. (Pa.) 123, 39 Am. Dec. 117; Marshall *v.* American Express Co., 7 Wis. 1, 73 Am. Dec. 381. But where the consignee is a bank, business hours are not necessarily confined to banking hours, unless so determined by special engagement or established usage. Young *v.* Smith, 3 Dana (Ky.) 91, 28 Am. Dec. 57; Marshall *v.* American Express Co., 7 Wis. 1, 73 Am. Dec. 381.

20. Bullard *v.* American Express Co., 107 Mich. 695, 65 N. W. 551, 61 Am. St. Rep. 358, 33 L. R. A. 66.

Delivery at its office to the authorized agent of the consignee is a sufficient delivery by an express company. Sweet *v.* Barney, 23 N. Y. 335.

21. South, etc., Alabama R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749; Illinois Cent. R. Co. *v.* Friend, 64 Ill. 303; Michigan Cent. R. Co. *v.* Ward, 2 Mich. 538; Buddy *v.* Wabash, etc., R. Co., 20 Mo. App. 206.

Even where a portion of the goods is destroyed, and it is the duty of the railroad carrier, in order to avoid liability for the entire shipment, to tender delivery of the balance, it is not necessary that such tender be a personal delivery. Michigan Southern, etc., R. Co. *v.* Bivens, 13 Ind. 263.

22. Merchants' Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284.

A stipulation that goods be forwarded to "Louisville depot only" was held sufficient to relieve the transportation company from making personal delivery at residence or place of business. Merchants' Despatch, etc., Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

23. *Louisiana.*— Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453.

Massachusetts.— Chickering *v.* Fowler, 4 Pick. (Mass.) 371.

New York.— McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657.

Pennsylvania.— Cope *v.* Cordova, 1 Rawle (Pa.) 203.

United States.—The Grafton, Olcott (U. S.) 43, 10 Fed. Cas. No. 5,656.

See 9 Cent. Dig. tit. "Carriers," § 293.

In an early case it was said that the responsibility of the carrier upon the Ohio river extended to actual delivery to the consignee. Hemphill *v.* Chenie, 6 Watts & S. (Pa.) 62.

Deposit on bank of river.—The carrier does not, however, discharge himself from liability by simply placing the goods on the bank of a river, in the absence of the consignee, and not in the care of the agent. Stone *v.* Rice, 58 Ala. 95; Dresbach *v.* California Pac. R. Co., 57 Cal. 462.

24. Crawford *v.* Clark, 15 Ill. 561; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474.

25. St. Louis, etc., R. Co. *v.* Rose, 20 Ill. App. 670; Loomis *v.* Wabash, etc., R. Co., 17 Mo. App. 340; Graff *v.* Bloomer, 9 Pa. St. 114. See also *infra*, II, L, 3, b.

Aside from special requirement or contract on the part of the consignor, delivery is to be made at the usual place. Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96; Thomson *v.* Liverpool, etc., Steam Co., 44 N. Y. Super. Ct. 407; Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Gronstadt *v.* Witthoff, 15 Fed. 265. And if the goods are not called for they are to be placed in a warehouse, which may be a general public warehouse, if no place of safe-keeping is controlled by the carrier for his own use. Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120; Arthur *v.* St. Paul, etc., R. Co., 38 Minn. 95, 35 N. W. 718; Collins *v.* Burns, 36 N. Y. Super. Ct. 518.

26. Western Transp. Co. *v.* Hawley, 1 Daly (N. Y.) 327. See also *infra*, II, L, 3, b.

If the usual place of unloading is temporarily inaccessible it is not a deviation to discharge the consignment, even without notice to the consignee, at a neighboring wharf which is a fit and proper place therefor. Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903.

upon between the parties.[27] If the carrier's line does not reach the destination named, his duty is to take the goods as near to the place of destination as practicable, in accordance with his general custom and usage, and notify the consignee at the place of destination.[28] Neither party can require of the other that goods shipped under one bill of lading be delivered in parcels or at different places.[29]

b. Specified Place. If goods are accepted for delivery at a specified warehouse, or other particular place, the carrier is bound to deliver at such place, although it is not the ordinary place for delivery at that destination.[30] By special agreement a carrier by water may be bound to deliver at a special wharf.[31] Without previous contract the shipper is not entitled to have the goods delivered at a different warehouse from that at which the goods are usually delivered and to which the carrier has access.[32]

c. Acceptance at Intermediate Point. The person to whom the carrier has the right to deliver the goods may accept them at an intermediate point, and thereupon the carrier's liability terminates.[33]

4. To Whom Delivery Made — a. Consignee. Where the carrier receives the

27. Louisville, etc., R. Co. *v.* Gilmer, 89 Ala. 534, 7 So. 654; South, etc., Alabama R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749; Pittsburgh, etc., R. Co. *v.* Nash, 43 Ind. 423; D. Klass Commission Co. *v.* Wabash R. Co., 80 Mo. App. 164.

As to delivery on side-track to terminate carrier's liability as such see *supra*, II, J, 3, d, (II).

28. Louisville, etc., R. Co. *v.* Bernheim, 113 Ala. 489, 21 So. 405; Denver, etc., R. Co. *v.* De Witt, 1 Colo. App. 419, 29 Pac. 524; Wheeler *v.* St. Louis, etc., R. Co., 3 Mo. App. 358.

29. The Richmond, 1 Biss. (U. S.) 49, 20 Fed. Cas. No. 11,796; One Thousand Two Hundred and Sixty-Five Vitrified Pipes, 14 Blatchf. (U. S.) 274, 18 Fed. Cas. No. 10,536, 5 N. Y. Wkly. Dig. 194.

30. Chicago, etc., R. Co. *v.* National Elevator, etc., Co., 153 Ill. 70, 38 N. E. 915; Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33; The Steamship Sultana *v.* Chapman, 5 Wis. 454.

Bill of lading controls as against marks.— A provision in the bill of lading as to destination will control even as against marks on the goods. Moore *v.* Henry, 18 Mo. App. 35. But where the bill of lading was for transportation to "East St. Louis station," held that such specification would not overcome the implied agreement arising from the marks on the goods to carry to St. Louis as the ultimate destination, which was beyond the carrier's line. Wabash, etc., R. Co. *v.* Jaggerman, 115 Ill. 407, 4 N. E. 641.

If the place is specified in the bill of lading, evidence of a custom to unload elsewhere is not admissible. Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145. But by custom the place of unloading within the limits of the general place of destination may be determined. Reiss *v.* Texas, etc., R. Co., 98 Fed. 533, 39 C. C. A. 149; Walker *v.* Keenan, 73 Fed. 755, 34 U. S. App. 691, 19 C. C. A. 668.

31. Shaw *v.* Gardner, 12 Gray (Mass.) 488. But it has been held that a contract to deliver to consignee or his assigns was not an undertaking to deliver at the consignee's wharf. Smith *v.* Lee, 66 Fed. 344, 21 U. S. App. 650, 13 C. C. A. 506.

By custom it may be the right of the consignee to designate the particular wharf for the discharge of the consignment. The Boston, 1 Lowell (U. S.) 464, 3 Fed. Cas. No. 1,671; Higgins *v.* U. S. Mail Steamship Co., 3 Blatchf. (U. S.) 282, 12 Fed. Cas. No. 6,469.

If consignee fails to provide a convenient place for unloading in accordance with the specifications of the contract, the carrier may treat the contract as broken and land the cargo at the usual place. Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255.

Unreasonable designation.— But the consignee has no right to designate as place of discharge within the port a wharf which is unreasonably inconvenient. O'Rourke *v.* Two Hundred and Twenty-One Tons of Coal, 1 Fed. 619.

32. **He cannot require that the carrier provide facilities** for delivery at a different warehouse. People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631.

But carrier cannot discriminate between warehouses and refuse to deliver to one to which there is reasonable access, on account of any contract with the owner of another warehouse by which delivery of goods received at that destination are to be made to such warehouse. This is regulated in Illinois by constitutional and statutory provisions. Hoyt *v.* Chicago, etc., R. Co., 93 Ill. 601; Chicago, etc., R. Co. *v.* Stanbro, 87 Ill. 195; Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33.

33. *Maine.*— Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

Mississippi.— Bennett *v.* Byram, 38 Miss. 17, 75 Am. Dec. 90.

New Hampshire.— Jewell *v.* Grand Trunk R. Co., 55 N. H. 84.

New York.— Parsons *v.* Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521.

Ohio.— Cleveland, etc., R. Co. *v.* Sargent, 19 Ohio St. 438.

Pennsylvania.— Reed *v.* Dick, 8 Watts (Pa.) 479.

goods under a contract, either express, or implied from the marks on the goods, to deliver them to a person named, without any reservation of power of disposal by the consignor, then the delivery to such person completes the contract and relieves the carrier from further liability.[34] This rests on the assumption which the carrier is authorized to entertain that the title to the goods passes to the consignee on delivery to the carrier.[35] But if the carrier has notice that the consignee is not the owner, nor entitled to receive the goods, delivery to him will constitute conversion.[36] Where there is nothing in the bill of lading indicating a reservation of title or power of disposal to the consignor, it is unnecessary that the consignee produce the bill of lading in order to be entitled to receive the goods;[37] nor will reservation of power of disposal to the consignor in the bill of lading render delivery to the consignee unlawful if the carrier has no notice of such bill of lading.[38]

See 9 Cent. Dig. tit. "Carriers," § 290.

The person entitled to the goods may demand and take possession of them at an intermediate point on payment of freight to destination. Sharp *v.* Clark, 13 Utah 510, 45 Pac. 566. But as the title is presumed to be in the consignee, the shipper has no right to require delivery at an intermediate point, even on offering to pay freight to destination. Pinnix *v.* Charlotte, etc., R. Co., 66 N. C. 34; Wells *v.* Oregon R., etc., Co., 12 Sawy. (U. S.) 519, 32 Fed. 51.

An offer to receive at an intermediate point on conditions which are refused will not terminate the carrier's liability nor his duty to deliver at the original destination. Arbuckle *v.* Thompson, 37 Pa. St. 170.

Damages already incurred.— The acceptance of goods from the carrier at an intermediate point will not free the carrier from responsibility for damages already incurred. Atkinson *v.* Steamboat Castle Garden, 28 Mo. 124.

34. Southern Express Co. *v.* Williams, 99 Ga. 482, 27 S. E. 743; Marshall *v.* New York Cent. R. Co., 45 Barb. (N. Y.) 502.

35. *California.*— Scammon *v.* Wells, 84 Cal. 311, 24 Pac. 284.

Illinois.—Schlesinger *v.* West Shore R. Co., 88 Ill. App. 273.

Indiana.— Pennsylvania Co. *v.* Holderman, 69 Ind. 18.

Kentucky.— Hartwell *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 778.

Minnesota.—Dyer *v.* Great Northern R. Co., 51 Minn. 345, 53 N. W. 714, 38 Am. St. Rep. 506.

New York.— Sweet *v.* Barney, 23 N. Y. 335.

See 9 Cent. Dig. tit. "Carriers," § 299.

Delivery on written authority from the consignee will protect the carrier, although the consignee states that he has no claim on the goods. Dobbin *v.* Michigan Cent. R. Co., 56 Mich. 522, 23 N. W. 204. See also *infra*, II, L. 4, c.

The presumption being that the consignee is the owner, the carrier has no right to change the destination of the goods at the direction of the consignor. Bailey *v.* Hudson River R. Co., 49 N. Y. 70.

36. Southern Express Co. *v.* Dickson, 94 U. S. 549, 24 L. ed. 285.

But if a connecting carrier delivers the goods at the destination in accordance with the marks, without knowledge of any different provision in the bill of lading, he will not be liable for conversion. Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.

Carrier should observe the directions of the bill of lading, which will not be controlled by the marks on the goods designating the person to whom they are sent. Rome R. Co. *v.* Sullivan, 25 Ga. 228. See also *supra*, note 30.

Issuance of two bills of lading.—If the carrier issues a bill of lading to the consignor for the delivery of the goods to such consignor, and then without authority issues another bill to the consignee, he will be liable to the consignee who has advanced money on such bill of lading for failure to deliver in accordance with such second bill. Chicago, etc., R. Co. *v.* Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43.

37. Nebraska Meal Mills *v.* St. Louis Southwestern R. Co., 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358; Bishop *v.* Empire Transp. Co., 33 N. Y. Super. Ct. 99; Weisman *v.* Philadelphia, etc., R. Co., 22 R. I. 128, 47 Atl. 318.

Indorsee of bill of lading.— Where the bill of lading is taken to the order of the consignor, an indorsee of the bill becomes in effect the consignee, and delivery to him is sufficient without production of the bill of lading. Chicago Packing, etc., Co. *v.* Savannah, etc., R. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367. See also *infra*, II, L, 4, b.

38. Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; Phœnixville Nat. Bank *v.* Philadelphia, etc., R. Co., 163 Pa. St. 467, 30 Atl. 228.

If, however, the carrier has notice, either by issuance of a bill of lading negotiable in form (Alderman *v.* Eastern R. Co., 115 Mass. 233; Wolfe *v.* Missouri Pac. R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539; Furman *v.* Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; Chester Nat. Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216), or in any other manner (Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474), that power of disposal is reserved then delivery to the consignee will not protect the

b. Holder of Bill of Lading. The indorsement of a bill of lading, which by reservation[39] therein in some manner of the right of subsequent disposition to the person in whose favor it is drawn, whether he be the owner of the goods or consignee, is made to stand as representative of the goods, transfers the right to receive the goods named therein, and a delivery to such indorsee will protect the carrier.[40] And if the bill of lading is thus made to stand for the goods the person claiming the goods should produce and surrender the bill of lading. Otherwise the carrier will make delivery to the claimant of the goods at his peril.[41] But the fact that the carrier is directed to give notice to a person named of the arrival of the goods, or to deliver in care of a person named, will not make the person so named the consignee in such sense that delivery to him will be sufficient.[42]

c. Agent. The agent of the carrier at point of destination may be designated as the consignee in such way that delivery to him will terminate the carrier's lia-

carrier from liability to one who has become holder of the bill in good faith and for value before such delivery. See also *infra*, II, L, 4, b.

39. The reservation of the power to transfer the goods by a transfer of the bill of lading is sufficiently indicated by a provision in the bill that the goods shall be delivered to the person named on production of the bill of lading. Jeffersonville, etc., R. Co. *v.* Irvin, 46 Ind. 180; McEwen *v.* Jeffersonville, etc., R. Co., 33 Ind. 368, 5 Am. Rep. 216.

40. Commercial Bank *v.* Chicago, etc., R. Co., 160 Ill. 401, 43 N. E. 756; Chester Nat. Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

Condition not complied with.— Where the bill of lading indicates a reservation by the consignor of the power of disposal, the mere presentation by another holding such bill of lading, even though it appears that he is the person who is to receive the goods on payment of a draft attached to the bill of lading, or in like manner, will not justify the carrier in making delivery of the goods to him, the condition on which such person is to be entitled to the goods not appearing to have been complied with. Louisville, etc., R. Co. *v.* Barkhouse, 100 Ala. 543, 13 So. 534; Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; Weyand *v.* Atchison, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650.

41. *Georgia.*— Boatmen's Sav. Bank *v.* Western, etc., R. Co., 81 Ga. 221, 7 S. E. 125; Bass *v.* Glover, 63 Ga. 745.

Indiana.— Merchants' Despatch, etc., Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

Nebraska.— Union Pac. R. Co. *v.* Johnson, 45 Nebr. 57, 63 N. W. 144, 50 Am. St. Rep. 540.

New Hampshire.— Peoria First Nat. Bank *v.* Northern R. Co., 58 N. H. 203.

New York.— Foggan *v.* Lake Shore, etc., R. Co., 16 N. Y. Suppl. 25, 40 N. Y. St. 718.

United States.— Walters *v.* Western, etc., R. Co., 63 Fed. 391; The Steamship Thames *v.* Seaman, 14 Wall. (U. S.) 98, 20 L. ed. 804.

See 9 Cent. Dig. tit. "Carriers," § 299.

By statute in New York delivery by a common carrier is forbidden except on production and cancellation of the bill of lading, unless it is stamped or indorsed on its face as non-negotiable. Colgate *v.* Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114; First Nat. Bank *v.* New York Cent., etc., R. Co., 85 Hun (N. Y.) 160, 32 N. Y. Suppl. 604, 66 N. Y. St. 112.

Delivery by the carrier to the holder of duplicate bills of lading will not relieve it from liability if the original bills have been transferred and are held by one who has advanced money thereon, there being no provision for delivery on the presentation of duplicate bills. Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

Waiver or estoppel.— The person entitled to the goods may waive his right and authorize delivery to another by acts indicating such intention on his part. Mitchell *v.* Chesapeake, etc., R. Co., 17 Ill. App. 231; Schwarzchild, etc., Co. *v.* Savannah, etc., R. Co., 76 Mo. App. 623; Alabama Nat. Bank *v.* Mobile, etc., R. Co., 42 Mo. App. 284. But where the bill of lading, which was in the hands of a bank, with draft attached, was stolen from the bank and presented without authority, held that the carrier would not be protected in making delivery, there being no duty on the part of the bank toward the carrier of so guarding possession of the bill as to protect the carrier from loss. Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867. If, however, the bank allows the person who would have been entitled to the bill on paying the draft to take the bill for the purpose of getting the goods without first paying the draft, it is estopped to deny the legality of the delivery. Douglas *v.* People's Bank, 86 Ky. 176, 10 Ky. L. Rep. 243, 5 S. W. 420, 9 Am. St. Rep. 276.

42. *Nebraska.*— Union Stock Yards Co. *v.* Westcott, 47 Nebr. 300, 66 N. W. 419.

North Carolina.— Sloan *v.* Carolina Cent. R. Co., 126 N. C. 487, 36 S. E. 21.

Pennsylvania.— Wright *v.* Northern Cent. R. Co., 8 Phila. (Pa.) 19.

South Carolina.— Chester Nat. Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

United States.— North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 8 S. Ct. 266, 31 L. ed. 287; The Thames, 7 Blatchf. (U. S.) 226, 23 Fed. Cas. No. 13,859.

bility, the agent of the carrier being thereby designated as the agent of the owner.[43] So delivery to any one who is the real agent of the person to whom delivery should be made, or who is indicated as such agent, will be sufficient.[44] But an agent engaged in the general employment of the consignee in connection with his business may not have such authority as to excuse the carrier in making delivery to him if he has not actual authority to receive the goods.[45]

d. Real Owner. The carrier is bound to respond to the demand of the real owner[46] for possession of his goods, and in doing so does not render himself liable to one who, having fraudulently or otherwise unlawfully obtained possession of them, has delivered them to the carrier for transportation.[47] And the real owner

43. Fitzsimmons *v.* Southern Express Co., 40 Ga. 330, 2 Am. Rep. 577; Bristol *v.* Rensselaer, etc., R. Co., 9 Barb. (N. Y.) 158.

But to the contrary it has been held that in such case the carrier's agent becomes simply warehouseman for the carrier, and that the latter remains liable as warehouseman in case of unauthorized delivery to a third person. Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209.

44. *Alabama.*— Louisville, etc., R. Co. *v.* Gilmer, 89 Ala. 534, 7 So. 654.

Illinois.— Illinois Cent. R. Co. *v.* Simpson, 17 Ill. App. 325.

Iowa.— Ryder *v.* Burlington, etc., R. Co., 51 Iowa 460, 1 N. W. 747.

Minnesota.— Wilcox *v.* Chicago, etc., R. Co., 24 Minn. 269.

Nebraska.— Gates *v.* Chicago, etc., R. Co., 42 Nebr. 379, 60 N. W. 583.

Texas.— St. Louis, etc., R. Co. *v.* Crawford, (Tex. Civ. App. 1896) 35 S. W. 748.

See 9 Cent. Dig. tit. "Carriers," § 305.

Acquiescence in former deliveries to one claiming to be agent may be sufficient to justify the carrier in making further deliveries to the same person. Ontario Bank *v.* New Jersey Steamboat Co., 59 N. Y. 510.

A drayman who has been in the habit of receiving goods for a consignee is not necessarily an authorized agent with reference to any particular shipment. Dean *v.* Vaccaro, 2 Head (Tenn.) 488, 75 Am. Dec. 744; Sawyer *v.* Chicago, etc., R. Co., 22 Wis. 403, 99 Am. Dec. 49.

Carrier's knowledge of agency.— If the person to whom delivery is made is really the agent of the shipper, authorized to receive the goods, the delivery will be sufficient, although the authority was not known to the carrier. Angle *v.* Mississippi, etc., R. Co., 9 Iowa 487.

Goods addressed to "Hon. J. G. Carlisle, Secretary United States Treas. Dept., Washington, D. C.," were properly delivered in the usual course of business to the treasury department. Aldrich Car-Seal Mfg. Co. *v.* American Express Co., 117 Mich. 32, 75 N. W. 94.

Husband of consignor cannot be presumed to be consignor's agent for the purpose of accepting delivery. Missouri Pac. R. Co. *v.* Weil, 8 Kan. App. 839, 57 Pac. 853.

One charged with the duty of paying customs dues on goods may not be such agent as is authorized to accept final delivery or change the destination of the goods. Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341; McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657. But the carrier may be justified in putting the goods into the custody of such person. Redmond *v.* Liverpool, etc., Steamship Co., 56 Barb. (N. Y.) 320.

Where packages are addressed to a bank, or the cashier thereof, delivery to any agent of the bank, engaged in the transaction of its general business, is sufficient. Sweet *v.* Barney, 23 N. Y. 335; Hotchkiss *v.* Artisans' Bank, 2 Abb. Dec. (N. Y.) 403, 2 Keyes (N. Y.) 564.

Wrongful delivery to third person.—Where the consignor directed the carrier to forward a portion of the consignment to places to be designated by a third party, and the carrier delivered the goods to such third party, it was held that the delivery was wrongful. Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

45. Wilson Sewing Mach. Co. *v.* Louisville, etc., R. Co., 71 Mo. 203; Nebenzahl *v.* Fargo, 15 Daly (N. Y.) 130, 3 N. Y. Suppl. 929, 22 N. Y. St. 231, 23 N. Y. St. 65; Ela *v.* American Merchants' Union Express Co., 29 Wis. 611, 9 Am. Rep. 619.

Delivery made to one who had been the consignee's agent, but whose authority had been terminated with notice to the consignor, held not sufficient. Lester *v.* Delaware, etc., R. Co., 92 Hun (N. Y.) 342, 36 N. Y. Suppl. 907, 72 N. Y. St. 334.

46. The carrier, like any other bailee, will be excused from further liability on delivery of the goods to the true owner thereof who is entitled to the present possession, regardless of whether he is consignor, consignee, or holder of bill of lading. American Express Co. *v.* Greenhalgh, 80 Ill. 68; Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978. See also, generally, BAILMENTS, 5 Cyc. 157.

47. *Indiana.*— U. S. Express Co. *v.* Hammer, 21 Ind. App. 186, 51 N. E. 953; Cleveland, etc., R. Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480.

Iowa.— Brunswick *v.* U. S. Express Co., 46 Iowa 677.

Minnesota.— National Bank of Commerce *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263.

New York.— Bliven *v.* Hudson River R. Co., 36 N. Y. 403, 2 Transcr. App. (N. Y.) 179.

may maintain an action against the carrier for refusal to deliver goods to which he is entitled.[48] But as the carrier cannot set up the right of a third person who has made no demand for the goods as an excuse for not delivering to the person entitled to the goods under a contract of shipment, so if the transportation is completed and proper delivery made in accordance with the shipment, the carrier is not liable to a third person for conversion.[49]

e. Wrong Person Through Mistake or Fraud — (i) *Liability For Mistake.* The carrier, delivering goods to a person not entitled to receive them, is liable to the person who is entitled to them for conversion,[50] and it is immaterial that the delivery was secured by the third person through mistake or fraud, even though the carrier, acting in good faith, was imposed upon by such person.[51] The ques-

Pennsylvania.— King *v.* Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420.

Tennessee.— Witt *v.* East Tennessee, etc., R. Co., 99 Tenn. 442, 41 S. W. 1064.

West Virginia.— Dresser *v.* West Virginia Transp. Co., 8 W. Va. 553.

United States.— Hentz *v.* The Steamship Idaho, 93 U. S. 575, 23 L. ed. 978; Herbst *v.* The Asiatic Prince, 97 Fed. 343; Rosenfield *v.* Express Co., 1 Woods (U. S.) 131, 20 Fed. Cas. No. 12,060.

See 9 Cent. Dig. tit. "Carriers," § 302.

48. *Georgia.*— Southern Express Co. *v.* Palmer, 48 Ga. 85.

Indiana.— Cleveland, etc., R. Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480.

Nebraska.— Shellenberg *v.* Fremont, etc., R. Co., 45 Nebr. 487, 63 N. W. 859, 50 Am. St. Rep. 561.

New York.— Lester *v.* Delaware, etc., R. Co., 92 Hun (N. Y.) 342, 36 N. Y. Suppl. 907, 72 N. Y. St. 334; Bates *v.* Stanton, 1 Duer (N. Y.) 79.

Wisconsin.— Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

See 9 Cent. Dig. tit. "Carriers," § 299.

49. Young *v.* East Alabama R. Co., 80 Ala. 100; Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; Robert C. White Live Stock Commission Co. *v.* Chicago, etc., R. Co., 87 Mo. App. 330; Norwalk Bank *v.* Adams Express Co., 4 Blatchf. (U. S.) 455, 18 Fed. Cas. No. 10,354, 19 How. Pr. (N. Y.) 462, 43 Hunt. Mer. Mag. 710, 17 Leg. Int. (Pa.) 325; Rosenfield *v.* Express Co., 1 Woods (U. S.) 131, 20 Fed. Cas. No. 12,060.

50. Illinois Cent. R. Co. *v.* Parks, 54 Ill. 294; St. Louis, etc., R. Co. *v.* Rose, 20 Ill. App. 670; Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341; Packard *v.* Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Trowell *v.* Youmans, 5 Strobh. (S. C.) 67.

51. *Alabama.*— Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209.

Arkansas.— Little Rock, etc., R. Co. *v.* Glidewell, 39 Ark. 487.

Illinois.— St. Louis, etc., R. Co. *v.* Larned, 103 Ill. 293; Chicago, etc., R. Co. *v.* Ames, 40 Ill. 249; Diamond Joe Line *v.* Carter, 76 Ill. App. 470; Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 59 Ill. App. 451.

Massachusetts.— Hall *v.* Boston, etc., R. Corp., 14 Allen (Mass.) 439, 92 Am. Dec. 783; Lichtenhein *v.* Boston, etc., R. Co., 11 Cush. (Mass.) 70.

Michigan.— Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301.

Minnesota.— Foy *v.* Chicago, etc., R. Co., 63 Minn. 255, 65 N. W. 627.

Missouri.— Wilson *v.* Wabash, etc., R. Co., 23 Mo. App. 50.

New York.— Oderkirk *v.* Fargo, 61 Hun (N. Y.) 418, 16 N. Y. Suppl. 220, 41 N. Y. St. 9; Scheu *v.* Erie R. Co., 10 Hun (N. Y.) 498; Bush *v.* Romer, 2 Thomps. & C. (N. Y.) 597; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474; Marrus *v.* New Haven Steamboat Co., 30 Misc. (N. Y.) 421, 62 N. Y. Suppl. 474.

Pennsylvania.— Shenk *v.* Philadelphia Steam Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541.

United States.— The Santee, 2 Ben. (U. S.) 519, 21 Fed. Cas. No. 12,328; The Huntress, 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914, 24 Am. Jur. 486, 4 Hunt. Mer. Mag. 83, 4 West. L. J. 38.

See 9 Cent. Dig. tit. "Carriers," §§ 339, 357.

Forged order.— If the delivery is secured by a forged order from the consignee, the carrier is nevertheless liable. American Merchants' Union Express Co. *v.* Milk, 73 Ill. 224.

Impersonation of consignee.— The carrier is liable for delivering the goods to one who impersonates the consignee. Pacific Express Co. *v.* Critzer, (Tex. Civ. App. 1897) 42 S. W. 1017; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116. Apparently *contra*, Pacific Express Co. *v.* Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795.

Lost notice presented by finder.—Where notice sent to the consignee of the arrival of the goods contained a direction that it should be returned when the goods were called for, and the truckman to whom it was given by the consignee lost it, and a third person, finding it, by presenting it to the carrier, secured the goods, held that the carrier was liable for the loss. Sinsheimer *v.* New York Cent., etc., R. Co., 21 Misc. (N. Y.) 45, 46 N. Y. Suppl. 887.

Subsequent delivery to person entitled to receive.— If the goods are, however, delivered by the person who wrongfully receives them from the carrier to the one entitled to receive them, the latter can only recover nominal damages. Rosenfield *v.* Express Co., 1 Woods (U. S.) 131, 20 Fed. Cas. No. 12,060.

tion is not one of due care, for the carrier, like any other bailee, acts at his peril in making delivery.[52] The carrier's duty to deliver to the right person is not affected by the fact that the goods are left uncalled for or are refused by the person entitled to them.[53]

(II) *Fraudulent Consignee.* Difficult cases involving the question discussed in the preceding paragraph have arisen where consignors have been induced by fraud to ship goods, supposing that they were to be delivered to a person of known responsibility, when the intent has been to secure delivery to another person. But it may be regarded as well settled by the weight of authority that if the person to whom the consignor intended to ship the goods (in the absence of any act on the part of the consignor to mislead the carrier) is not the person who secures them, the fraud is to be deemed one perpetrated on the carrier, and for the consequences of which the carrier will be liable, and it is immaterial that the person to whom the goods were actually intended to be delivered refuses to receive them.[54] On the other hand, if the consignor is induced by fraud perpetrated upon him to ship to another person than the one to whom he supposes the shipment is being made, then he must stand the loss, and the carrier will be exonerated on delivery to the one to whom the goods are actually shipped.[55]

(III) *Negligence of Shipper.* If the carrier is misled by some act of the shipper or consignee as to the person to whom delivery should be made, the carrier will be excused.[56]

52. Adams *v.* Blankenstein, 2 Cal. 413, 56 Am. Dec. 350; Cleveland, etc., R. Co. *v.* Wright, 25 Ind. App. 525, 58 N. E. 559; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154; Sonn *v.* Smith, 57 N. Y. App. Div. 372, 68 N. Y. Suppl. 217.

Erroneous view.— There are some cases in which the question is erroneously treated as though it was one involving the exercise of due care. A number of cases may be found in which language of that import is used, but where the result was correct under the facts, the carrier being held liable. As apparent examples of the application of the erroneous rule see Wilson *v.* Adams Express Co., 43 Mo. App. 659; Tarbell *v.* Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. 721, 17 N. Y. St. 153, 6 Am. St. Rep. 350; Erie Dispatch *v.* Johnson, 87 Tenn. 490, 11 S. W. 441.

53. *Alabama.*— Bullard *v.* Young, 3 Stew. (Ala.) 46.

Arkansas.— Little Rock, etc., R. Co. *v.* Glidewell, 39 Ark. 487.

Georgia.— American Sugar Refining Co. *v.* McGhee, 96 Ga. 27, 21 S. E. 383.

Illinois.— Indianapolis, etc., R. Co. *v.* Herndon, 81 Ill. 143.

Iowa.— Angle *v.* Mississippi, etc., R. Co., 18 Iowa 555.

New York.— Collins *v.* Burns, 63 N. Y. 1.

North Carolina.— Howard *v.* Old Dominion Steamship Co., 83 N. C. 158, 35 Am. Rep. 571.

United States.— The Steamship Thames *v.* Seaman, 14 Wall. (U. S.) 98, 20 L. ed. 804.

See 9 Cent. Dig. tit. "Carriers," § 299; and *infra*, II, L, 5.

54. *Florida.*— Southern Express Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107.

Georgia.— Bruhl *v.* Coleman, 113 Ga. 1102, 39 S. E. 481.

Illinois.— Pacific Express Co. *v.* Shearer, 160 Ill. 215, 43 N. E. 816, 52 Am. St. Rep. 324, 37 L. R. A. 177.

Indiana.— American Express Co. *v.* Stack, 29 Ind. 27; American Express Co. *v.* Fletcher, 25 Ind. 492.

Iowa.— Brunswick *v.* U. S. Express Co., 46 Iowa 677.

Kentucky.— Louisville, etc., R. Co. *v.* Ft. Wayne Electric Co., 21 Ky. L. Rep. 1544, 55 S. W. 918.

New York.— Guillaume *v.* General Transp. Co., 100 N. Y. 491, 3 N. E. 489; Price *v.* Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475.

North Carolina.— Howard *v.* Old Dominion Steamship Co., 83 N. C. 158, 35 Am. Rep. 571.

Ohio.— Oskamp *v.* Southern Express Co., 61 Ohio St. 341, 56 N. E. 13.

Pennsylvania.— Wernwag *v.* Philadelphia, etc., R. Co., 117 Pa. St. 46, 11 Atl. 868.

Tennessee.— Sword *v.* Young, 89 Tenn. 126, 14 S. W. 481, 604.

Vermont.— Joslyn *v.* Grand Trunk R. Co., 51 Vt. 92; Winslow *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365.

See 9 Cent. Dig. tit. "Carriers," § 306.

Contra.—See Wilson *v.* Adams Express Co., 27 Mo. App. 360, 43 Mo. App. 659; Bush *v.* St. Louis, etc., R. Co., 3 Mo. App. 62.

55. Edmunds *v.* Merchants' Despatch Transp. Co., 135 Mass. 283; Samuel *v.* Cheney, 135 Mass. 278, 46 Am. Rep. 467; Dunbar *v.* Boston, etc., R. Corp., 110 Mass. 26, 14 Am. Rep. 576; Platt *v.* Wells, 26 How. Pr. (N. Y.) 442; The Drew, 15 Fed. 826.

56. *New Hampshire.*— Stimson *v.* Jackson, 58 N. H. 138.

New York.— Viner *v.* New York, etc., Steamship Co., 50 N. Y. 23; Feldstein *v.* Old Dominion Steamship Co., 21 Misc. (N. Y.) 60, 46 N. Y. Suppl. 897.

Pennsylvania.— Lake Shore, etc., R. Co. *v.* Hodapp, 83 Pa. St. 22.

Texas.— Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853.

(IV) *Recovery by Carrier Against Person Wrongfully Receiving.* Where the carrier has through mistake or fraud been induced to deliver the goods to a wrong person, he may maintain an action against such person for damages.[57]

5. Failure or Refusal of Consignee to Accept. If the consignee fails or refuses to take or accept the goods when ready for delivery, the carrier remains liable for them as warehouseman only, but he is not under obligation to return them to the consignor.[58] The duty of the carrier is to store or keep as warehouseman,[59] and it seems that the carrier is not bound to give the consignor notice of refusal of the consignee to accept.[60]

6. Failure or Refusal of Carrier to Deliver; Conversion. The act of the carrier in failing to deliver without lawful excuse constitutes a breach of contract,[61] but it also constitutes a conversion,[62] and after the consignee has waited a

Wisconsin.— Wells *v.* American Express Co., 44 Wis. 342.

Canada.— Conley *v.* Canadian Pac. R. Co., 32 Ont. 258.

See 9 Cent. Dig. tit. "Carriers," § 299.

Bill of lading in hands of wrong person.— If by negligence of the owner of the goods one not entitled to them obtains possession of the bill of lading, showing him to be the proper person to whom delivery should be made, the carrier is not liable for delivery to such person. Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

The mere fact, however, that an erroneous address is given will not exonerate the carrier for misdelivery, if the carrier is not thereby misled into making delivery to a person who wrongfully secures the goods. McCulloch *v.* McDonald, 91 Ind. 240.

Unauthorized delivery may be ratified by the consignee who is entitled to the goods. Converse *v.* Boston, etc., R. Co., 58 N. H. 521. But the owner will not waive his rights as against the carrier by attempting to secure the value of the goods from the person to whom they have been wrongfully delivered. McSwegan *v.* Pennsylvania R. Co., 7 N. Y. App. Div. 301, 40 N. Y. Suppl. 51, 74 N. Y. St. 664; Arrington *v.* Wilmington, etc., R. Co., 51 N. C. 68, 72 Am. Dec. 559.

57. Walker *v.* Louisville, etc., R. Co., 111 Ala. 233, 20 So. 358; Cheshire R. Co. *v.* Foster, 51 N. H. 490; Hudson River R. Co. *v.* Lounsberry, 25 Barb. (N. Y.) 597; Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. St. 264.

But goods cannot be recovered from a bona fide purchaser where the delivery has been through negligence of the shipper. Norfolk Southern R. Co. *v.* Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611.

58. Louisville, etc., R. Co. *v.* Heilprin, 95 Ill. App. 402; Landsberg *v.* Dinsmore, 4 Daly (N. Y.) 490; Salinger *v.* Simmons, 2 Lans. (N. Y.) 325, 57 Barb. (N. Y.) 513; Kremer *v.* Southern Express Co., 6 Coldw. (Tenn.) 356. See also *supra*, II, J.

C. O. D. packages.— This is true even as to C. O. D. packages. Kremer *v.* Southern Express Co., 6 Coldw. (Tenn.) 356. But if the carrier accounts in no way to the consignor on demand, either for the package or its value, he will be liable. U. S. Express Co. *v.* Keefer, 59 Ind. 263; Adams Express Co. *v.* McConnell, 27 Kan. 238.

On subsequent refusal of carrier on a renewed demand by the consignee, the goods still being in the carrier's possession, the consignee may sue for conversion on refusal to deliver. Bacharach *v.* Chester Freight Line, 133 Pa. St. 414, 19 Atl. 409.

Where owner of goods consigned to himself refuses to receive them at the destination, it has been said that he thereby abandons his right and cannot afterward sue for conversion. Illinois Cent. R. Co. *v.* Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; Beedy *v.* Pacey, 22 Wash. 94, 60 Pac. 56.

59. Adams Express Co. *v.* McConnell, 27 Kan. 238; Sonia Cotton Oil Co. *v.* Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293; Chickering *v.* Fowler, 4 Pick. (Mass.) 371; Manhattan Rubber Shoe Co. *v.* Chicago, etc., R. Co., 9 N. Y. App. Div. 172, 41 N. Y. Suppl. 83, 75 N. Y. St. 544. That failure or refusal of consignee to accept will not excuse delivery by carrier to one not entitled to the goods see *supra*, II, L, 4, e, (I), (II).

60. Gregg *v.* Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238; Manhattan Rubber Shoe Co. *v.* Chicago, etc., R. Co., 9 N. Y. App. Div. 172, 41 N. Y. Suppl. 83, 75 N. Y. St. 544; Williams *v.* Holland, 22 How. Pr. (N. Y.) 137; Kremer *v.* Southern Express Co., 6 Coldw. (Tenn.) 356.

Duty to notify consignor.— It has, however, been held to the contrary as to the duty to notify the consignor. American Sugar Refining Co. *v.* McGhee, 96 Ga. 27, 21 S. E. 383; American Merchants' Union Express Co. *v.* Wolf, 79 Ill. 430.

61. Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685.

62. *Georgia.*— Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Bird *v.* Georgia R. Co., 72 Ga. 655.

Kentucky.— Jeffersonville R. Co. *v.* White, 6 Bush (Ky.) 251.

Missouri.— Loeffler *v.* Keokuk-Northern Line Packet Co., 7 Mo. App. 185.

New York.— Clement *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 601, 30 N. Y. St. 713.

reasonable time he may, on demand, maintain such action, and having brought it the carrier cannot be excused by subsequent offer to deliver.[63] But if before action is brought the goods are tendered, the consignee cannot then refuse to receive them and sue for conversion.[64] And if the goods have been lost, even through negligence, the remedy for non-delivery is not by action for conversion, but for breach of duty to transport and deliver.[65] As has already been indicated, the carrier on transporting to destination may place in a public warehouse, and such act will not constitute a conversion.[66] Where by mistake or negligence the carrier on reasonable demand by the consignee denies receipt of the goods, he is liable for conversion, although the goods may actually have been received and be held for delivery.[67] If there is doubt as to whether the person demanding the goods has a right to receive them the carrier will not be guilty of conversion on refusal to deliver, until the one making demand reasonably shows his right to receive.[68] And the carrier has a right to demand a receipt for the goods as a condition of delivery.[69] As the carrier's lien for freight entitles him to retain posses-

Ohio.— Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

United States.— The Ben Adams, 2 Ben. (U. S.) 445, 3 Fed. Cas. No. 1,289.

See 9 Cent. Dig. tit. "Carriers," § 339.

63. Hamilton *v.* Chicago, etc., R. Co., 103 Iowa 325, 72 N. W. 536; Frisby *v.* Sheridan, 3 Mart. N. S. (La.) 242; Fisk *v.* Newton, 1 Den. (N. Y.) 45, 43 Am. Dec. 649; Nudd *v.* Wells, 11 Wis. 407.

64. His remedy is for the delay.— American Express Co. *v.* Brunswick, 4 Ill. App. 606; Scovill *v.* Griffith, 12 N. Y. 509.

If goods are delivered to the right party, delay alone in making such delivery will not be ground of action for conversion. Louisville, etc., R. Co. *v.* Campbell, 7 Heisk. (Tenn.) 253.

65. Magnin *v.* Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608.

66. Rome R. Co. *v.* Sullivan, 14 Ga. 277. And see *supra*, II, L, 1, d.

If there is no suitable place for storage, the carrier transporting the goods by boat may, without liability for conversion, retain them in possession on the boat. The Hattie Palmer, 68 Fed. 380, 35 U. S. App. 369, 15 C. C. A. 479.

Goods shipped in sealed car.— It will not constitute conversion on the part of a railroad company that goods shipped in a sealed car are transferred to another car for the convenience of the carrier, if they are actually transported to their destination. Tucker *v.* Housatonic R. Co., 39 Conn. 447.

67. *Alabama.*— Louisville, etc., R. Co. *v.* McGuire, 79 Ala. 395.

Kansas.— Union Pac. R. Co. *v.* Moyer, 40 Kan. 184, 19 Pac. 639, 10 Am. St. Rep. 183.

Kentucky.— Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496, 11 Ky. L. Rep. 38, 11 S. W. 511.

Massachusetts.— Stevens *v.* Boston, etc., R. Co., 1 Gray (Mass.) 277.

Missouri.— Herf, etc., Chemical Co. *v.* Lackawana Line, 70 Mo. App. 274.

Nebraska.— Burlington, etc., R. Co. *v.* Arms, 15 Nebr. 69, 17 N. W. 351.

Tennessee.— East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 708, 20 S. W. 314, 17 L. R. A. 691; East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 699, 20 S. W. 312, 30 Am. St. Rep. 902, 17 L. R. A. 691.

Wisconsin.— Meyer *v.* Chicago, etc., R. Co., 24 Wis. 566, 1 Am. Rep. 207.

United States.— Central Trust Co. *v.* East Tennessee, etc., R. Co., 70 Fed. 764.

See 9 Cent. Dig. tit. "Carriers," § 342.

But if before action is brought the goods are tendered to the consignee he cannot treat the previous refusal to deliver as a conversion. Louisville, etc., R. Co. *v.* Lawson, 9 Ky. L. Rep. 681; Williams *v.* Delaware & H. Canal Co., 3 Silv. Supreme (N. Y.) 19, 6 N. Y. Suppl. 36, 25 N. Y. St. 518.

68. *Maryland.*— Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

Missouri.— Thomas *v.* Pacific Express Co., 30 Mo. App. 86.

New Hampshire.— Hett *v.* Boston, etc., R. Co., 69 N. H. 139, 44 Atl. 910.

New York.—McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28; Shepard *v.* Heineken, 2 Sweeny (N. Y.) 525.

Pennsylvania.—Union Express Co. *v.* Shoop, 85 Pa. St. 325.

Texas.— Gulf, etc., R. Co. *v.* Fowler, 12 Tex. Civ. App. 683, 34 S. W. 661; Gulf, etc., R. Co. *v.* Freeman, (Tex. Civ. App. 1891) 16 S. W. 109.

See 9 Cent. Dig. tit. "Carriers," § 344.

As to when carrier may deliver to true owner who is not the consignee see *supra*, II, L, 4, d.

69. Skinner *v.* Chicago, etc., R. Co., 12 Iowa 191.

Carrier is not bound to take separate receipts for different portions of the goods as taken away by the consignee, and may demand a receipt for the entire consignment which is ready for delivery. Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393, 80 Am. Dec. 215. But a regulation requiring a receipt for the entire consignment before there is an opportunity to determine whether all the goods are ready for delivery is unreasonable and void. Christian *v.* First Div. St. Paul, etc., R. Co., 20 Minn. 21.

sion until the freight is paid, he will not be guilty of conversion in making payment of freight a condition for delivery.[70] After liability of the carrier for conversion has been established, he may, with reference to third persons, treat the property as his own and himself maintain an action for conversion of such property.[71]

7. Goods Carried C. O. D.— a. Acceptance For Transportation. The peculiarity of shipment of goods C. O. D. (meaning, collect on delivery), which is usually undertaken only by express companies, is that a condition is attached that the carrier on delivery to the consignee shall collect a specified sum of money, usually the purchase-price of the goods (and other than transportation charges), and return the sum thus collected to the consignor. This additional condition of the transportation involves duties and liabilities on the part of the carrier which are not to be deemed to have been assumed by the carrier, unless specially shown to have been undertaken.[72]

b. Title to Goods in Transit. There is a square conflict in the authorities as to whether the attaching of this condition to the delivery affects the ordinary presumptions as to the title to the goods while in transit. By the decided weight of authority delivery C. O. D., like an ordinary delivery to a carrier, presumptively passes title to the consignee, the only difference being that the carrier is to retain possession of the goods as agent for the shipper until payment is made by the consignee, and on receiving money in payment is, as carrier for the consignor, to transport back such money. In other words, under this view, the title to the goods passes to the consignee on delivery to the carrier, but right to possession in the nature of a vendor's lien remains with the consignor while the goods are in the carrier's possession, and terminates only when the condition is performed and the money paid by the consignee to the carrier, whereupon the title to and possession of the money vests in the consignor.[73] There is authority,

70. Missouri Pac. R. Co. *v.* Weisman, 2 Tex. Civ. App. 86, 21 S. W. 426; Mordecai *v.* Lindsay, 5 Wall. (U. S.) 481, 18 L. ed. 486.

As to lien for freight see *infra*, II, N, 6.

But if carrier has no lien for freight he cannot refuse delivery for non-payment of his charges. Chandler *v.* Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Marsh *v.* Union Pac. R. Co., 3 McCrary (U. S.) 236, 9 Fed. 873. Thus, if the damages for which the carrier is liable by reason of injury to the goods exceed his freight charges, he cannot refuse delivery. Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123; Ewart *v.* Kerr, Rice (S. C.) 203; Dyer *v.* Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

Refusal to deliver on tender of freight will be a conversion. Judah *v.* Kemp, 2 Johns. Cas. (N. Y.) 411.

71. Hamilton *v.* Chicago, etc., R. Co., 103 Iowa 325, 72 N. W. 536; Maine Stage Co. *v.* Longley, 14 Me. 444.

72. American Merchants' Union Express Co. *v.* Wolf, 79 Ill. 430.

Issuance of a receipt indicating acceptance C. O. D. is sufficient, as the letters imply an undertaking. American Express Co. *v.* Lesem, 39 Ill. 312; U. S. Express Co. *v.* Keefer, 59 Ind. 263. But if the receipt issued by the carrier on acceptance of the goods does not contain the condition the carrier is not bound, although the instruction to the carrier was that the package was delivered with that condition. Smith *v.* Southern Express Co., 104 Ala. 387, 16 So. 62.

"Please collect," written on the bill accompanying a parcel delivered to a carrier, is a request only, and the acceptance of the parcel does not indicate an agreement to comply with the request which will be binding on the carrier. Tooker *v.* Gormer, 2 Hilt. (N. Y.) 71.

That package is marked "C. O. D." is not sufficient unless there is an undertaking by the carrier to carry on that condition, which undertaking is to be directly proven, or may be inferred from usage. Chicago, etc., R. Co. *v.* Merrill, 48 Ill. 425.

73. *Alabama.*— Pilgreen *v.* State, 71 Ala. 368.

Maine.— State *v.* Peters, 91 Me. 31, 39 Atl. 342; State *v.* Intoxicating Liquors, 73 Me. 278.

Massachusetts.— Lane *v.* Chadwick, 146 Mass. 68, 15 N. E. 121.

New York.— Higgins *v.* Murray, 73 N. Y. 252.

North Carolina.— Norfolk Southern R. Co. *v.* Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611.

Texas.— Bruce *v.* State, (Tex. Crim. 1896) 35 S. W. 383.

This doctrine has frequently been applied in cases of transportation of intoxicating liquors, and it has been held that where an order for such liquors has been accepted by the seller and the liquors delivered to the carrier for transportation C. O. D. to the buyer, the sale is made, that is the title passes, where the liquors are delivered to the carrier, and not where the carrier deliv-

however, for the view that where such condition is attached to the delivery of the goods to the carrier, the title does not pass until delivery to the buyer, the payment by him of the purchase-price being deemed a condition precedent to the passing of title.[74]

c. Duties and Liabilities of Carrier. The carrier is under no obligation, unless so directed by the consignor, to allow the consignee to examine the goods before paying the charges.[75] If the carrier delivers the goods to the consignee without receiving the amount to be collected on delivery, he renders himself liable to the consignor therefor.[76] On refusal of the consignee to accept and pay charges the carrier should notify the consignor,[77] and on failure to do so remains liable for the goods as carrier.[78] But where the carrier fully discharges his duty

ers the liquors to the buyer and accepts payment of the purchase-price.

Alabama.— Pilgreen *v.* State, 71 Ala. 368.

Arkansas.— Smith *v.* State, (Ark. 1891) 16 S. W. 2; Herron *v.* State, 51 Ark. 133, 10 S. W. 25; State *v.* Carl, 43 Ark. 353, 51 Am. Rep. 565.

Kansas.— State *v.* Cairns, (Kan. 1902) 68 Pac. 621.

Kentucky.— James *v.* Com., 102 Ky. 108, 19 Ky. L. Rep. 1045, 42 S. W. 1107.

Maine.— State *v.* Intoxicating Liquors, 73 Me. 278.

Pennsylvania.— Com. *v.* Fleming, 130 Pa. St. 138, 18 Atl. 622, 17 Am. St. Rep. 763, 5 L. R. A. 470.

Texas.— Freshman *v.* State, 37 Tex. Crim. 126, 38 S. W. 1007.

West Virginia.— State *v.* Flanagan, 38 W. Va. 53, 17 S. E. 792, 45 Am. St. Rep. 836, 22 L. R. A. 430.

74. State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557. See also following cases:

Colorado.— Thorne *v.* Schumaker Piano Co., 3 Colo. App. 183, 32 Pac. 721.

Iowa.— Latta *v.* U. S. Express Co., (Iowa 1902) 92 N. W. 68; State *v.* American Express Co., (Iowa 1902) 92 N. W. 66; State *v.* U. S. Express Co., 70 Iowa 271, 30 N. W. 568.

Missouri.— State *v.* Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406.

New York.— Baker *v.* Bourcicault, 1 Daly (N. Y.) 23.

United States.— U. S. *v.* Chevallier, 107 Fed. 434, 46 C. C. A. 402; U. S. *v.* Cline, 26 Fed. 515; U. S. *v.* Shriver, 23 Fed. 134.

It is of course true that the facts might be such as to indicate no intention to pass title until delivery to, and acceptance by, the consignee, and in such a case the sale would be consummated where the delivery is made. Weil *v.* Golden, 141 Mass. 364, 6 N. E. 229; State *v.* Wingfield, 115 Mo. 428, 23 S. W. 363, 37 Am. St. Rep. 406; U. S. *v.* Shriver, 23 Fed. 134.

Where consignor consents to retake goods, on the refusal of the consignee to receive them, the effect may be to rescind, so that afterward the consignee, although judgment is rendered against him in a suit by the consignor for the purchase-price, cannot recover from the carrier. American Express Co. *v.* Greenhalgh, 80 Ill. 68.

75. Wiltse *v.* Barnes, 46 Iowa 210.

It is said, however, that carrier may permit inspection, and that to do so will not constitute a delivery binding the carrier to return the money to the consignor (Aaron *v.* Adams Express Co., 11 Ohio Dec. (Reprint) 500, 27 Cinc. L. Bul. 183), and that the carrier may receive the money from the consignee, on condition that it shall be returned to him if the goods are not such as required in his negotiations with the consignor. And certainly if the consignor has consented to such arrangement the carrier will not be liable to the consignor for a return of the money to the consignee in pursuance of such conditional arrangement (Lyons *v.* Hill, 46 N. H. 49, 88 Am. Dec. 189; Brooks *v.* American Express Co., 14 Hun (N. Y.) 364).

If the transaction between consignor and consignee is fraudulent as to the latter, the carrier will not be liable for returning the money to the consignee when the fraud is discovered. Herrick *v.* Gallagher, 60 Barb. (N. Y.) 566.

76. Meyer *v.* Lemcke, 31 Ind. 208; Murray *v.* Warner, 55 N. H. 546, 20 Am. Rep. 227; Tooker *v.* Gormer, 2 Hilt. (N. Y.) 71; Steamboat John Owen *v.* Johnson, 2 Ohio St. 142.

If carrier accepts consignee's check, which is returned to the consignor and received by him, the carrier's liability is terminated. Rathbun *v.* Citizens' Steamboat Co., 57 How. Pr. (N. Y.) 191.

If consignee accepts a portion of the goods, and the balance, with a check for the part delivered, is returned to the consignor, he cannot recover damages against the carrier if it appears that he has suffered no loss. Feiber *v.* Manhattan Dist. Tel. Co., 15 Daly (N. Y.) 62, 3 N. Y. Suppl. 116, 4 N. Y. Suppl. 555, 20 N. Y. St. 95, 22 Abb. N. Cas. (N. Y.) 121.

Where a corpse was shipped by an undertaker in a casket C. O. D., held that the carrier was not liable to the undertaker for allowing the corpse to be taken from the casket without payment of charges, as it would be against public policy to require the return of the corpse. American Express Co. *v.* Epply, 5 Ohio Dec. (Reprint) 337, 4 Am. L. Rec. 672.

77. Kremer *v.* Southern Express Co., 6 Coldw. (Tenn.) 356.

78. American Express Co. *v.* Wettstein, 28 Ill. App. 96.

as to transporting and holding the goods for the consignee, he is liable for the goods only as warehouseman while awaiting acceptance by the consignee and payment of charges.[79]

M. Connecting Carriers — 1. Relations Between; Joint Liability. By joint arrangement between carriers operating connecting lines, a partnership relation may arise by which each is liable for breach of the duty of carrier by any one of them in the course of the transportation, and suit may be brought against any one for the loss.[80] But mere joint traffic arrangements, and an agreement for division of freight, will not in themselves constitute such a partnership.[81] The joint arrangement between the connecting lines may be such as to make each the agent for the other in undertaking the continuous transportation of goods.[82] On

79. Hasse *v.* American Express Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328; Weed *v.* Barney, 45 N. Y. 344, 6 Am. Rep. 96; Grossman *v.* Fargo, 6 Hun (N. Y.) 310.

80. *Kentucky.*— Cincinnati, etc., R. Co. *v.* Spratt, 2 Duv. (Ky.) 4.

Maryland.— Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

Massachusetts.— Block *v.* Fitchburg R. Co., 139 Mass. 308, 1 N. E. 348; Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202.

Mississippi.—Alabama, etc., R. Co. *v.* Lamkin, (Miss. 1901) 30 So. 47.

Missouri.— Robert C. White Live Stock Commission Co. *v.* Chicago, etc., R. Co., 87 Mo. App. 330; Shewalter *v.* Missouri Pac. R. Co., 84 Mo. App. 589; Wyman *v.* Chicago, etc., R. Co., 4 Mo. App. 35.

New Hampshire.— Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Nashua Lock Co. *v.* Worcester, etc., R. Co., 48 N. H. 339, 2 Am. Rep. 242.

New York.— Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583; Berg *v.* Narragansett Steamship Co., 5 Daly (N. Y.) 394; Wing *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 235.

North Carolina.— Rocky Mount Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682; Phillips *v.* North Carolina R. Co., 78 N. C. 294.

Rhode Island.— Harris *v.* Cheshire R. Co., (R. I. 1889) 16 Atl. 512.

South Carolina.— Bradford *v.* South Carolina R. Co., 7 Rich. (S. C.) 201, 62 Am. Dec. 411.

Texas.— Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; Missouri, etc., R. Co. *v.* Wells, 24 Tex. Civ. App. 304, 58 S. W. 842; Goldstein *v.* Sherman, etc., R. Co., (Tex. Civ. App. 1901) 61 S. W. 336; Galveston, etc., R. Co. *v.* Houston, (Tex. Civ. App. 1897) 40 S. W. 842; Houston, etc., R. Co. *v.* McFadden, (Tex. Civ. App. 1897) 40 S. W. 216; Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286.

United States.— Richardson *v.* The Charles P. Chouteau, 37 Fed. 532; Harp *v.* The Grand Era, 1 Woods (U. S.) 184, 11 Fed. Cas. No. 6,084.

See 9 Cent. Dig. tit. "Carriers," §§ 735, 776.

81. *Arkansas.*— St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963; Hot Springs R. Co. *v.* Trippe, 42 Ark. 465, 48 Am. Rep. 65.

Connecticut.— Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166.

Illinois.— Irvin *v.* Nashville, etc., R. Co., 92 Ill. 103, 34 Am. Rep. 116; Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217.

Massachusetts.— Aigen *v.* Boston, etc., R. Co., 132 Mass. 423; Gass *v.* New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742; Darling *v.* Boston, etc., R. Corp., 11 Allen (Mass.) 295.

Missouri.— Robert C. White Live Stock Commission Co. *v.* Chicago, etc., R. Co., 87 Mo. App. 330.

Nebraska.—Fremont, etc., R. Co. *v.* Waters, 50 Nebr. 592, 70 N. W. 225.

New York.— Hunt *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 228.

Tennessee.— Post *v.* Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

Texas.— Galveston, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1896) 37 S. W. 243.

United States.— Deming *v.* Norfolk, etc., R. Co., 21 Fed. 25; Citizens' Ins. Co. *v.* Kountz Line, 10 Fed. 768; St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. ed. 679.

See 9 Cent. Dig. tit. "Carriers," § 776.

Exclusive joint traffic arrangement.— Connecting carriers cannot make arrangements with each other which will preclude either one of them from serving the public generally with reference to transportation of goods as a common carrier.

Georgia.— Seaboard Air-Line Belt. R. Co. *v.* Western, etc., R. Co., 97 Ga. 289, 23 S. E. 848.

Kentucky.— Seasongood, etc., Co. *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270.

Minnesota.— Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372.

Missouri.— Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 5 Mo. App. 347.

Texas.— Houston, etc., R. Co. *v.* Lone Star Salt Co., 19 Tex. Civ. App. 676, 48 S. W. 619.

82. Shewalter *v.* Missouri Pac. R. Co., 84 Mo. App. 589; Norfolk, etc., R. Co. *v.* Read, 87 Va. 185, 12 S. E. 395.

the other hand, where the initial carrier undertakes the entire transportation, the connecting carriers through whose hands the goods pass in the performance of the contract are agents of the initial carrier in the performance of its contract, and a suit for breach of the contract should be brought against the carrier with whom the contract is made.[83]

2. ACCEPTANCE OF GOODS MARKED TO DESTINATION BEYOND CARRIER'S LINE — a. General Rule. There has been much discussion by the courts of the question whether, if a carrier receives goods marked to a destination beyond his usual line of transportation, so that for the final delivery of the goods at their destination transportation by a connecting carrier will be necessary, the shipper, who has actual or presumptive knowledge of the facts, is entitled to rely on the acceptance by the first carrier as constituting a contract to deliver the goods at their destination, employing the intermediate carrier as agent for that purpose, or whether, on the other hand, the contract implied is that the first carrier will transport the goods to the end of his usual line, and as agent of the shipper deliver them to an intermediate carrier, who thereupon becomes carrier of the shipper to complete the transportation. On the determination of this question will depend the solution of the further question whether the first carrier, after transporting the goods to the end of his line and delivering them to a connecting carrier, is absolved from liability, or whether his liability as carrier continues until the connecting carrier completes the transportation by delivering the goods at their destination. These questions, which seem to have assumed practical form only since the introduction of transportation by railroad, were first decided by the English courts on the theory that the shipper had a right to assume an undertaking by the carrier, in the absence of any express agreement to the contrary, to deliver the goods at their ultimate destination, and according to what is called the English rule the carrier receiving the goods becomes liable as carrier for the entire transportation.[84] A few American courts have given theoretical sanction to the English rule,[85] but

By statute in Texas such relation of common agency seems to be recognized. Ft. Worth, etc., R. Co. *v.* Williams, 77 Tex. 121, 13 S. W. 637; Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530; Texas, etc., R. Co. *v.* Randle, 18 Tex. Civ. App. 348, 44 S. W. 603; Ft. Worth, etc., R. Co. *v.* Johnson, 5 Tex. Civ. App. 24, 23 S. W. 827; Houston, etc., R. Co. *v.* Ney, (Tex. Civ. App. 1900) 58 S. W. 43.

Where each carrier acts as agent for other connecting carriers of the same line, each is responsible for the acts of its own servants. Illinois Cent. R. Co. *v.* Foulks, 92 Ill. App. 391.

83. *Georgia.*— Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Cohen *v.* Southern Express Co., 45 Ga. 148; Southern Express Co. *v.* Shea, 38 Ga. 519.

Illinois.— Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890; The Anchor Line *v.* Dater, 68 Ill. 369; St. Louis Southwestern R. Co. *v.* Elgin Condensed-Milk Co., 74 Ill. App. 619.

Kansas.— St. Louis, etc., R. Co. *v.* Piper, 13 Kan. 505.

Kentucky.— Louisville, etc., R. Co. *v.* Cooper, 21 Ky. L. Rep. 1644, 56 S. W. 144.

Missouri.— Fischer *v.* Merchants' Dispatch Transp. Co., 13 Mo. App. 133; Freeburg Coal Co. *v.* Union R., etc., Co., 10 Mo. App. 596.

Nebraska.— Union Pac. R. Co. *v.* Vincent, 58 Nebr. 171, 78 N. W. 457.

North Carolina.— Van Lindley *v.* Richmond, etc., R. Co., 88 N. C. 547.

United States.— Ogdensburg, etc., R. Co. *v.* Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827.

See 9 Cent. Dig. tit. "Carriers," § 779 *et seq.*

That one of two connecting lines owns a large amount of stock of the other does not of itself show that the latter is a servant of the former. Gulf, etc., R. Co. *v.* Lee, (Tex. Civ. App. 1901) 65 S. W. 54.

84. Muschamp *v.* Lancaster, etc., R. Co., 5 Jur. 656, 8 M. & W. 421, 2 R. & Can. Cas. 607; Watson *v.* Ambergate, etc., R. Co., 15 Jur. 450, 3 Eng. L. & Eq. 497.

85. Mobile, etc., R. Co. *v.* Copeland, 63 Ala. 219, 35 Am. Rep. 13; Adams Express Co. *v.* Wilson, 81 Ill. 339; Milwaukee, etc., R. Co. *v.* Smith, 74 Ill. 197; Chicago, etc., R. Co. *v.* Montfort, 60 Ill. 175; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Illinois Cent. R. Co. *v.* Johnson, 34 Ill. 389; Lehigh Valley Transp. Co. *v.* Pillsbury-Washburn Flour Mills Co., 92 Ill. App. 628; Ohio, etc., R. Co. *v.* Emrich, 24 Ill. App. 245; Beard *v.* St. Louis, etc., R. Co., 79 Iowa 527, 44 N. W. 803; Angle *v.* Mississippi, etc., R. Co., 9 Iowa 487; Memphis, etc., R. Co. *v.* Stockard, 11 Heisk. (Tenn.) 568; Louisville, etc., R. Co. *v.* Campbell, 7 Heisk. (Tenn.) 253; Western, etc., R. Co. *v.* McElwee, 6 Heisk. (Tenn.) 208; East Tennessee, etc., R. Co. *v.* Rogers, 6 Heisk. (Tenn.) 143, 19 Am. Rep. 589.

a contrary conclusion has been reached in this country on reasoning which seems satisfactory and more in harmony with the conditions surrounding transportation by rail.[86] Accordingly the courts of this country have, with but few exceptions, adopted the rule, which has been called the American rule, that the liability of the first carrier, in the absence of any contract to the contrary, terminates when he transports the goods to the end of his line of carriage and delivers them to a connecting carrier to be taken to their destination.[87] But whatever may be the presumption, the right of the carrier is fully recognized to limit his liability by contract, and even by usage, to his own line.[88]

86. Hood *v.* New York, etc., R. Co., 22 Conn. 1; Nutting *v.* Connecticut River R. Co., 1 Gray (Mass.) 502; Michigan Cent. R. Co. *v.* Myrick, 107 U. S. 102, 1 S. Ct. 425, 27 L. ed. 325; Michigan Cent. R. Co. *r.* Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297.

87. *Indiana.*— U. S. Express Co. *v.* Rush, 24 Ind. 403.

Kansas.— Hoffman *r.* Union Pac. R. Co., 8 Kan. App. 379, 56 Pac. 331.

Kentucky.— Seasongood, etc., Co. *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270; Louisville, etc., R. Co. *v.* Cooper, 19 Ky. L. Rep. 1152, 42 S. W. 1134; Louisville, etc., R. Co. *v.* Foster, 13 Ky. L. Rep. 637; Louisville, etc., R. Co. *v.* Cooper, 13 Ky. L. Rep. 496; Louisville, etc., R. Co. *r.* Crozier, 13 Ky. L. Rep. 175; Louisville, etc., Mail Co. *v.* Levey, 11 Ky. L. Rep. 286.

Maine.— Skinner *r.* Hall, 60 Me. 477.

Maryland.— Hoffman *r.* Cumberland Valley R. Co., 85 Md. 391, 37 Atl. 214; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Massachusetts.— Washburn, etc., Mfg. Co. *r.* Providence, etc., R. Co., 113 Mass. 490.

Minnesota.— Ortt *r.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

Mississippi.— Crawford *r.* Southern R. Assoc., 51 Miss. 222, 24 Am. Rep. 626.

Missouri.— Crouch *v.* Louisville, etc., R. Co., 42 Mo. App. 248.

Nebraska.—Fremont, etc., R. Co. *r.* Waters, 50 Nebr. 592, 70 N. W. 225.

New Hampshire.— Gray *v.* Jackson, 51 N. H. 9, 12 Am. Rep. 1.

New York.— Root *v.* Great Western R. Co., 45 N. Y. 524; Hempstead *r.* New York Cent. R. Co., 28 Barb. (N. Y.) 485; Weil *r.* Merchants' Despatch Transp. Co., 7 Daly (N. Y.) 456; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223.

North Carolina.— Knott *r.* Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321; Phillips *v.* North Carolina R. Co., 78 N. C. 294.

Pennsylvania.— Mullarkey *r.* Philadelphia, etc., R. Co., 9 Phila. (Pa.) 114, 30 Leg. Int. (Pa.) 108.

Rhode Island.— Harris *r.* Grand Trunk R. Co., 15 R. I. 371, 5 Atl. 305; Knight *v.* Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46.

South Carolina.— Van Santwood *v.* St. John, 6 Hill (S. C.) 157.

Texas.— Hunter *r.* Southern Pac. R. Co., 76 Tex. 195, 13 S. W. 190; Southern Pac. Co. *r.* Booth, (Tex. Civ. App. 1897) 39 S. W. 585; Wichita Valley R. Co. *v.* Swenson, (Tex. Civ. App. 1894) 25 S. W. 47.

Vermont.— Hadd *v.* U. S., etc., Express Co., 52 Vt. 335, 36 Am. Rep. 757.

Virginia.— McConnell *v.* Norfolk, etc., R. Co., 86 Va. 248, 9 S. E. 1006.

United States.— St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. ed. 679; Cincinnati, etc., R. Co. *r.* Fairbanks, 90 Fed. 467, 33 C. C. A. 611; Dixon *r.* Columbus, etc., R. Co., 4 Biss. (U. S.) 137, 7 Fed. Cas. No. 3,929; Stewart *v.* Terre Haute, etc., R. Co., 1 McCrary (U. S.) 312, 3 Fed. 768.

See 9 Cent. Dig. tit. "Carriers," § 780.

By statute in some states the so-called American rule has been adopted. Georgia Cent. R. Co. *r.* Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; McElveen *r.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371; Falvey *v.* Georgia R. Co., 76 Ga. 597, 2 Am. St. Rep. 58; Sutton *r.* Chicago, etc., R. Co., 14 S. D. 111, 84 N. W. 396.

Qualified countenance to English rule, to some extent at least, seems to have been given in some states. Chicago, etc., R. Co. *r.* Simon, 57 Ill. App. 502; Hance *v.* Wabash Western R. Co., 56 Mo. App. 476; Watkins *r.* St. Louis, etc., R. Co., 44 Mo. App. 245; Root *r.* Great Western R. Co., 2 Lans. (N. Y.) 199 [*reversed* in 45 N. Y. 524]; Smith *v.* New York Cent. R. Co., 43 Barb. (N. Y.) 225; Richmond, etc., R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 18 S. Ct. 33, 42 L. ed. 759.

What law governs.— In determining the effect of a contract for transportation through two or more states, it is to be construed in accordance with the law of the state where injury to or loss of the goods occurs, for the purpose of determining the liability of the carrier then in possession of the goods. Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

88. *Arkansas.*— Taylor *v.* Little Rock, etc., R. Co., 32 Ark. 393, 29 Am. Rep. 1.

Georgia.— Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

Illinois.— East St. Louis Connecting R. Co. *v.* Wabash, etc., R. Co., 123 Ill. 594, 15 N. E. 45; Merchants' Dispatch, etc., Co. *r.* Moore, 88 Ill. 136, 30 Am. Rep. 541; Field *v.* Chicago, etc., R. Co., 71 Ill. 458; Chicago, etc., R. Co. *v.* Montfort, 60 Ill. 175; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Lehigh Valley Transp. Co. *r.* Pillsbury-Washburn Flour Mills Co., 92 Ill. App. 628; Coles *v.* Louisville, etc., R. Co., 41 Ill.

b. Contract For Through Transportation — (i) *Through Bill of Receipt.* By issuing a bill of lading or shipping receipt for the transportation of the goods to their destination beyond the line of the carrier issuing such bill or receipt, the carrier binds himself as such to deliver the goods at the destination named and becomes liable for loss or delay on the line of another carrier over which a part of the transportation is performed.[89] But the mere designation of the destination

App. 607; Chicago, etc., R. Co. *v.* Church, 12 Ill. App. 17.

Iowa.— Hewett *v.* Chicago, etc., R. Co., 63 Iowa 611, 19 N. W. 790; Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514.

Kansas.— Berg *v.* Atchison, etc., R. Co., 30 Kan. 561, 2 Pac. 639; Hoffman *v.* Union Pac. R. Co., 8 Kan. App. 379, 56 Pac. 331.

Kentucky.— Richmond, etc., R. Co. *v.* Richardson, 19 Ky. L. Rep. 1495, 43 S. W. 465; Louisville, etc., R. Co. *v.* Bourne, 15 Ky. L. Rep. 445.

Michigan.— McEacheran *v.* Michigan Cent. R. Co., 101 Mich. 264, 59 N. W. 612; Smith *v.* American Express Co., 108 Mich. 572, 66 N. W. 479.

Missouri.— Nines *v.* St. Louis, etc., R. Co., 107 Mo. 475, 18 S. W. 26; Snider *v.* Adams Express Co., 63 Mo. 376; Historical Pub. Co. *v.* Adams Express Co., 44 Mo. App. 421; F. A. Drew Glass Co. *v.* Ohio, etc., R. Co., 44 Mo. App. 416.

New York.— Ricketts *v.* Baltimore, etc., R. Co., 59 N. Y. 637; Reed *v.* U. S. Express Co., 48 N. Y. 462, 8 Am. Rep. 561; Shiff *v.* New York Cent., etc., R. Co., 16 Hun (N. Y.) 278; Gibson *v.* American Merchants' Union Express Co., 1 Hun (N. Y.) 387.

North Carolina.— Weinberg *v.* Albemarle, etc., R. Co., 91 N. C. 31; Phifer *v.* Carolina Cent. R. Co., 89 N. C. 311, 45 Am. Rep. 687.

Ohio.— Cincinnati, etc., R. Co. *v.* Pontius, 19 Ohio St. 221, 2 Am. Rep. 391.

South Carolina.— Hill *v.* Georgia, etc., R. Co., 43 S. C. 461, 21 S. E. 337; Dunbar *v.* Port Royal, etc., R. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860.

Tennessee.— Texas, etc., R. Co. *v.* Rogers, (Tenn. 1887) 3 S. W. 660; East Tennessee, etc., R. Co. *v.* Brumley, 5 Lea (Tenn.) 401.

Texas.— Gulf, etc., R. Co. *v.* Crossman, 11 Tex. Civ. App. 622, 33 S. W. 290; Texas, etc., R. Co. *v.* Hawkins, (Tex. Civ. App. 1895) 30 S. W. 1113; Rogers *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1895) 28 S. W. 1024; New York, etc., Steamship Co. *v.* Wright, (Tex. Civ. App. 1894) 26 S. W. 106; Texas, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1893) 24 S. W. 565; Gulf, etc., R. Co. *v.* Clark, 5 Tex. Civ. App. 547, 24 S. W. 355; Gulf, etc., R. Co. *v.* Tennant, (Tex. Civ. App. 1893) 22 S. W. 761; International, etc., R. Co. *v.* Thornton, 3 Tex. Civ. App. 197, 22 S. W. 67.

Vermont.— Brintnall *v.* Saratoga, etc., R. Co., 32 Vt. 665.

Virginia.— Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

Wisconsin.— Tolman *v.* Abbot, 78 Wis. 192, 47 N. W. 264; Detroit, etc., R. Co. *v.* Farmers', etc., Bank, 20 Wis. 122.

United States.— Cincinnati, etc., R. Co. *v.* Fairbanks, 90 Fed. 467, 33 C. C. A. 611; Harding *v.* International Nav. Co., 12 Fed. 168.

England.— Zunz *v.* South Eastern R. Co., L. R. 4 Q. B. 539, 10 B. & S. 594, 38 L. J. Q. B. 209, 20 L. T. Rep. N. S. 873, 17 Wkly. Rep. 1096.

Canada.—Grand Trunk R. Co. *v.* McMillan, 16 Can. Supreme Ct. 543.

See 9 Cent. Dig. tit. "Carriers," §§ 752, 757.

A railroad company cannot be compelled to give a bill of lading making it responsible beyond its own line. Lotspeich *v.* Central R., etc., Co., 73 Ala. 306; Coles *v.* Central R., etc., Co., 86 Ga. 251, 12 S. E. 749.

89. *California.*— Colfax Mountain Fruit Co. *v.* Southern Pac. Co., (Cal. 1896) 46 Pac. 668.

Georgia.— Central, etc., R. Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Falvey *v.* Georgia R. Co., 76 Ga. 597, 2 Am. St. Rep. 58; Cohen *v.* Southern Express Co., 45 Ga. 148; Southern Express Co. *v.* Shea, 38 Ga. 519; Mosher *v.* Southern Express Co., 38 Ga. 37.

Illinois.— Toledo, etc., R. Co. *v.* Lockhart, 71 Ill. 627; Toledo, etc., R. Co. *v.* Merriman, 52 Ill. 123, 4 Am. Rep. 590; Wabash R. Co. *v.* Harris, 55 Ill. App. 159; Fortier *v.* Pennsylvania Co., 18 Ill. App. 260.

Kansas.— St. Louis, etc., R. Co. *v.* Piper, 13 Kan. 505.

Kentucky.— Ireland *v.* Mobile, etc., R. Co., 105 Ky. 400, 20 Ky. L. Rep. 1586, 49 S. W. 188; Bryan *v.* Memphis, etc., R. Co., 11 Bush (Ky.) 597; Louisville, etc., Mail Co. *v.* Levey, 11 Ky. L. Rep. 286.

Louisiana.— Hirsch *v.* Leathers, 23 La. Ann. 50.

Maine.— Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Mississippi.— Crawford *v.* Southern R. Assoc., 51 Miss. 222, 24 Am. Rep. 626.

Missouri.— Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965; Landes *v.* Pacific R. Co., 50 Mo. 346; Eckles *v.* Missouri Pac. R. Co., 72 Mo. App. 296.

New York.—Condict *v.* Grand Trunk R. Co., 54 N. Y. 500; Root *v.* Great Western R. Co., 45 N. Y. 524; Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269; King *v.* Macon, etc., R. Co., 62 Barb. (N. Y.) 160; Berg *v.* Narragansett Steamship Co., 5 Daly (N. Y.) 394; Mallory *v.* Burrett, 1 E. D. Smith (N. Y.) 234.

Ohio.— Fatman *v.* Cincinnati, etc., R. Co., 2 Disn. (Ohio) 248.

South Carolina.— Kyle *v.* Laurens R. Co., 10 Rich. (S. C.) 382, 70 Am. Dec. 231.

Texas.— Gulf, etc., R. Co. *v.* Insurance Co.

of the goods in the contract with the first carrier will not make it a contract for through transportation, where the other terms indicate a limitation of liability to the end of the contracting carrier's line.[90]

(II) *Implied Contract.* A contract for through transportation by the first carrier may be implied from the circumstances of the shipment,[91] the question being one of fact for the jury.[92] But an indication in the contract that there are arrangements for through transportation, such as the fixing of a through rate, or the like, will not show a through contract.[93]

of North America, (Tex. Civ. App. 1894) 28 S. W. 237.

Vermont.— Newell *v.* Smith, 49 Vt. 255; Cutts *v.* Brainerd, 42 Vt. 566, 1 Am. Rep. 353; Morse *v.* Brainard, 41 Vt. 550; Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398.

Wisconsin.— Hansen *v.* Flint, etc., R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791.

United States.— Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 19 S. Ct. 755, 43 L. ed. 1093; Ohio, etc., R. Co. *v.* McCarthy, 96 U. S. 258, 24 L. ed. 693; Evansville, etc., R. Co. *v.* Androscoggin Mills, 22 Wall. (U. S.) 594, 22 L. ed. 724; Ogdensburg, etc., R. Co. *v.* Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; St. John *v.* Southern Express Co., 1 Woods (U. S.) 612, 21 Fed. Cas. No. 12,228, 10 Am. L. Rep. N. S. 777.

See 9 Cent. Dig. tit. "Carriers," §§ 762, 771, 781.

But a proposition to take carload lots of goods from one point to another at a specified rate is not an offer to carry, but only to take the goods for carriage and deliver to a connecting carrier. Harris *v.* Grand Trunk R. Co., 15 R. I. 371, 5 Atl. 305.

Second carrier may by contract obligate himself to transport to destination on delivery to him by the first carrier, although such transportation involves the employment of a subsequent carrier. Beard *v.* St. Louis, etc., R. Co., 79 Iowa 527, 44 N. W. 803.

Suit may be brought against what carrier. — If the contract is for through transportation action for breach may be brought against the contracting carrier, although the injury or delay is on a connecting line. Missouri Pac. R. Co. *v.* Twiss, 35 Nebr. 267, 53 N. W. 76, 37 Am. St. Rep. 437; Monell *v.* Northern Cent. R. Co., 67 Barb. (N. Y.) 531.

90. *Connecticut.*— Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468; Elmore *v.* Naugatuck R. Co., 23 Conn. 457, 63 Am. Dec. 143.

Massachusetts.— Pendergast *v.* Adams Express Co., 101 Mass. 120.

Michigan.— Rickerson Roller Mill Co. *v.* Grand Rapids, etc., R. Co., 67 Mich. 110, 34 N. W. 269.

Minnesota.— Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

Mississippi.— Crawford *v.* Southern R. Assoc., 51 Miss. 222, 24 Am. Rep. 626.

New York.— Ricketts *v.* Baltimore, etc., R. Co., 59 N. Y. 637; Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491; Wright *v.* Boughton, 22 Barb. (N. Y.) 561.

North Carolina.— Phillips *v.* North Carolina R. Co., 78 N. C. 294.

Vermont.—Hadd *v.* U. S., etc., Express Co., 52 Vt. 335, 36 Am. Rep. 757.

Wisconsin.— Parmelee *v.* Western Transp. Co., 26 Wis. 439; Detroit, etc., R. Co. *v.* Farmers', etc., Bank, 20 Wis. 122.

United States.— Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 1 S. Ct. 425, 27 L. ed. 323; St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. ed. 679.

See 9 Cent. Dig. tit. "Carriers," § 781.

91. Colfax Mountain Fruit Co. *v.* Southern Pac. Co., 118 Cal. 648, 50 Pac. 775, 40 L. R. A. 78; Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394; Missouri, etc., R. Co. *v.* Wells, 24 Tex. Civ. App. 304, 58 S. W. 842.

92. Philadelphia, etc., R. Co. *v.* Ramsey, 89 Pa. St. 474; Page *v.* Chicago, etc., R. Co., 7 S. D. 297, 64 N. W. 137; Michigan Cent. R. Co. *v.* Myrick, 107 U. S. 102, 1 S. Ct. 425, 27 L. ed. 325.

93. *California.*— Colfax Mountain Fruit Co. *v.* Southern Pac. Co., (Cal. 1896) 46 Pac. 668.

Connecticut.— Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166.

Georgia.— Baugh *v.* McDaniel, 42 Ga. 641.

Illinois.— Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92.

Iowa.— Hill *v.* Burlington, etc., R. Co., 60 Iowa 196, 14 N. W. 249.

Maine.— Taylor *v.* Maine Cent. R. Co., 87 Me. 299, 32 Atl. 905.

Massachusetts.— Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202.

Michigan.— McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

Minnesota.— Wehman *v.* Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546.

Mississippi.— Illinois Cent. R. Co. *v.* Kerr, 68 Miss. 14, 8 So. 330.

Missouri.— Goldsmith *v.* Chicago, etc., R. Co., 12 Mo. App. 479.

Nebraska.—Missouri Pac. R. Co. *v.* Crowell Lumber, etc., Co., 51 Nebr. 293, 70 N. W. 964.

Pennsylvania.— Clyde *v.* Hubbard, 88 Pa. St. 358.

South Carolina.— Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353.

Texas.— Gulf, etc., R. Co. *v.* Griffith, (Tex. Civ. App. 1893) 24 S. W. 362.

United States.— St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. ed. 679; Cincinnati, etc., R. Co. *v.* Fairbanks, 90 Fed. 467, 33 C. C. A. 611; The Thomas McManus, 24 Fed. 509; Stewart *v.* Terre Haute,

3. Liability of First Carrier Under American Rule — a. Duty to Deliver to Connecting Carrier. A carrier who accepts goods for a destination beyond his line thereby binds himself to make delivery to a connecting carrier,[94] and he must notify the connecting carrier of any facts with reference to the destination of the goods, the method of transportation, etc., which are essential to enable the connecting carrier to properly receive and transport.[95]

b. Liability in Connection With Delivery. Until delivery is made to the connecting carrier the first carrier remains liable as carrier for the goods.[96] The

etc., R. Co., 1 McCrary (U. S.) 312, 3 Fed. 768.

See 9 Cent. Dig. tit. "Carriers," § 781.

A stipulation for through transportation without change of cars at a specified rate, with no restriction of liability to the first carrier's line, may be enough to show a through contract.

Georgia.— Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

Pennsylvania.— Baltimore, etc., Steamboat Co. *v.* Brown, 54 Pa. St. 77.

Texas.— International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545.

Wisconsin.— Wahl *v.* Holt, 26 Wis. 703; Peet *v.* Chicago, etc., R. Co., 19 Wis. 118.

United States.— Ogdensburg, etc., R. Co. *v.* Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 447, 30 Fed. Cas. No. 18,007, 5 Leg. Op. (Pa.) 92; Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 403, 30 Fed. Cas. No. 18,006; St. John *v.* Southern Express Co., 1 Woods (U. S.) 612, 21 Fed. Cas. No. 12,228, 10 Am. L. Reg. N. S. 777.

See 9 Cent. Dig. tit. "Carriers," § 781.

Transshipment.— A stipulation by which the shipper shall have the right to transship or reship before the goods reach their destination does not change the nature of the contract. Little *v.* Semple, 8 Mo. 99, 40 Am. Dec. 123; White *v.* Missouri Pac. R. Co., 19 Mo. App. 400; Texas-Mexican R. Co. *v.* Gallagher, (Tex. Civ. App. 1901) 64 S. W. 809.

The fact that goods are marked to a destination beyond the receiving carrier's line does not show a contract for through transportation. Rome R. Co. *v.* Sullivan, 25 Ga. 228. And see *supra*, II, M, 2, a, b, (I).

94. Fremont, etc., R. Co. *v.* Waters, 50 Nebr. 592, 70 N. W. 225; Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 39.

Initial carrier must give notice to connecting carrier of the arrival of the goods ready for transshipment. Louisville, etc., R. Co. *v.* Bourne, 16 Ky. L. Rep. 825, 29 S. W. 975.

Refusal of connecting carrier to accept.— The fact that the connecting carrier will not receive the goods because of lack of cars does not excuse the first carrier from his duty to make delivery as directed. East Tennessee, etc., R. Co. *v.* Nelson, 1 Coldw. (Tenn.) 272.

Where delivery is impracticable.— But this duty does not arise where there is no such connection between the lines as to make delivery practicable. St. Louis, etc., R. Co. *v.* Marrs, (Ark. 1897) 31 S. W. 42.

95. *Alabama.*— Alabama Great Southern R. Co. *v.* Mount Vernon Co., 84 Ala. 173, 4 So. 356; Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 694.

California.— Colfax Mountain Fruit Co. *v.* Southern Pac. Co., (Cal. 1896) 46 Pac. 668.

Connecticut.— Palmer *v.* Chicago, etc., R. Co., 56 Conn. 137, 13 Atl. 818.

Michigan.— Rickerson Roller-Mill Co. *v.* Grand Rapids, etc., R. Co., 67 Mich. 110, 34 N. W. 269.

Texas.— Booth *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1896) 37 S. W. 168.

See 9 Cent. Dig. tit. "Carriers, § 747 *et seq.*

Thus, if by delay of the first carrier to give proper shipping directions to the second there is delay in the transportation, the first carrier will be responsible therefor.

Alabama.— Melbourne *v.* Louisville, etc., R. Co., 88 Ala. 443, 6 So. 762.

Illinois.— Michigan Southern, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278.

Missouri.— Hall *v.* Wabash R. Co., 80 Mo. App. 463.

New York.— Sherman *v.* Hudson River R. Co., 64 N. Y. 254.

Tennessee.— Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729.

Time of notice.— It is not required, however, that the first carrier notify the connecting carrier in advance when the goods will arrive. Louisville, etc., R. Co. *v.* Bourne, 15 Ky. L. Rep. 445.

Outstanding bill of lading.—If by reason of failure to notify the connecting carrier that there is an outstanding bill of lading the connecting carrier delivers to one not entitled to the goods, the first carrier is responsible to the person to whom the goods should have been delivered. Chicago, etc., R. Co. *v.* Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43.

96. Reynolds *v.* Boston, etc., R. Co., 121 Mass. 291; Erie R. Co. *v.* Lockwood, 28 Ohio St. 358; Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439; Texas, etc., R. Co. *v.* Clayton, 173 U. S. 348, 19 S. Ct. 421, 43 L. ed. 725. And see *supra*, II, J, 2.

Carrier is liable for any loss of or injury to the property until delivery is completed, although it may be incident to the duty of making delivery rather than to the transportation of the property. Larimore *v.* Chicago, etc., R. Co., 65 Mo. App. 167; Missouri, etc., R. Co. *v.* Wells, 22 Tex. Civ. App. 255, 54 S. W. 939.

If there is a duty to feed and water stock at the place of transfer it is to be discharged by the first carrier, and he is responsible for loss due to failure to perform such duty.

first carrier may, by improperly dealing with the goods, render himself liable to the shipper, even though the actual loss resulting is not apparent until the goods are in the second carrier's hands.[97] Thus, if by delay in the delivery to the connecting carrier of perishable goods their loss is caused in the hands of the second carrier, the first carrier will be liable.[98] While holding the goods for delivery to the second carrier the first carrier is not a warehouseman merely, but is subject to the full liability of common carrier.[99] But as the duty of the first carrier is to deliver to the second carrier, and his liability is to terminate when such delivery is made, he terminates his common-law liability as carrier by making proper efforts to deliver to the connecting carrier, and having done so he may, on the refusal of the connecting carrier to receive the goods, then store them and become liable as warehouseman only.[1] Where goods are thus held after failure or refusal of the connecting carrier to receive them, it is the duty of the initial carrier to at once notify the shipper or consignee, as the case may be.[2]

c. First Carrier as Forwarder. One may be a mere forwarder, that is, an agent charged with the duty of procuring transportation for goods, without becom-

Texas, etc., R. Co. *v.* Stribling, (Tex. Civ. App. 1896) 34 S. W. 1002; Galveston, etc., R. Co. *v.* Ivey, (Tex. Civ. App. 1893) 23 S. W. 321. As to feeding and watering see *supra*, II, I, 2, b.

97. Popham *v.* Barnard, 77 Mo. App, 619; Hunt *v.* Nutt, (Tex. Civ. App. 1894) 27 S. W. 1031; Norfolk, etc., R. Co. *v.* Harman, 91 Va. 601, 22 S. E. 490, 50 Am. St. Rep. 855, 44 L. R. A. 289; Norfolk, etc., R. Co. *v.* Sutherland, 89 Va. 703, 17 S. E. 127.

First carrier will not be liable for conversion by second carrier, even though there has been negligence in properly advising the second carrier as to ownership of the property. Northern R. Co. *v.* Fitchburg R. Co., 6 Allen (Mass.) 254.

98. Michigan Cent. R. Co. *v.* Curtis, 80 Ill. 324; Rock Island, etc., R. Co. *v.* Potter, 36 Ill. App. 590; Fox *v.* Boston, etc., R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702.

Proximate cause — Concurrent negligence. — But to render the first carrier liable it must appear that his delay, and not that of the second carrier, was the proximate cause of the loss. Detroit, etc., R. Co. *v.* McKenzie, 43 Mich. 609, 5 N. W. 1031; Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6. If, however, there is concurring negligence of both carriers, either will be liable. Ft. Worth, etc., R. Co. *v.* Byers, (Tex. Civ. App. 1896) 35 S. W. 1082.

Shipper must take notice of delays necessarily incident to transfers from one line to another. Burns *v.* Chicago, etc., R. Co., 104 Wis. 646, 80 N. W. 927.

99. Bancroft *v.* Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482; Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130; Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; McDonald *v.* Western R. Corp., 34 N. Y. 497; Ladue *v.* Griffith, 25 N. Y. 364, 82 Am. Dec. 360; Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398; Reiss *v.* Texas, etc., R. Co., 98 Fed. 533, 39 C. C. A. 149; Peterson *v.* Case, 21 Fed. 885. And see *supra*, II, J, 2.

Carrier cannot make himself forwarder only and liable merely as bailee for a part of the transportation. Simmons *v.* Law, 4 Abb. Dec. (N. Y.) 241, 3 Keyes (N. Y.) 217.

Stipulation in contract that liability of initial carrier shall cease when the goods are ready to be delivered to the connecting line is void. Louisville, etc., R. Co. *v.* Farmers', etc., Live Stock Commission Firm, 21 Ky. L. Rep. 708, 52 S. W. 972.

1. *Louisiana.*—Dalzell *v.* Steamboat Saxon, 10 La. Ann. 280.

Maryland.—Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Minnesota.— Wehman *v.* Minneapolis, etc., R. Co., 58 Minn. 22, 59 N. W. 546.

Missouri.— Bennitt *v.* Missouri Pac. R. Co., 46 Mo. App. 656.

New York.—Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

Wisconsin.— Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465.

United States.— Deming *v.* Norfolk, etc., R. Co., 21 Fed. 25.

See 9 Cent. Dig. tit. "Carriers," §§ 612, 751.

The refusal of the connecting carrier to receive the goods will not render the retention of them by the first carrier a conversion. Little Rock, etc., R. Co. *v.* Odom, 63 Ark. 326, 38 S. W. 339. But under such circumstances, having received the goods for transportation involving their acceptance by the connecting carrier, the initial carrier is responsible as actual custodian, having by acceptance guaranteed that they will be forwarded. Southard *v.* Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442, 619.

2. *Kentucky.*— Louisville, etc., R. Co. *v.* Farmers', etc., Live Stock Commission Firm, 21 Ky. L. Rep. 708, 52 S. W. 972.

Missouri.— Lesinsky *v.* Great Western Dispatch, 10 Mo. App. 134.

New York.— Johnson *v.* New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416, 39 How. Pr. (N. Y.) 127.

Tennessee.—Louisville, etc., R. Co. *v.* Campbell, 7 Heisk. (Tenn.) 253.

United States.— Peterson *v.* Case, 21 Fed. 885.

See 9 Cent. Dig. tit. "Carriers," § 750.

ing a carrier,[3] and some courts have chosen to speak of the duty of the initial carrier to the owner with reference to sending the goods on by a connecting carrier as that of forwarder only, involving, therefore, liability for negligence rather than full carrier liability. But regardless of this distinction it is evident that with reference to securing transportation for the goods by the connecting carrier the first carrier is liable only for negligence.[4] As forwarder, so called, it is the duty of the first carrier to use reasonable care in selecting the proper connecting carrier.[5] If the shipper designates, however, the line over which the goods are to be forwarded, the first carrier will be liable for any loss or injury resulting from a failure to comply with such direction.[6] If instructions to the connecting carrier are

Failure to thus notify the owner will not, however, continue the first carrier's responsibility as common carrier, but render him liable for any loss or injury resulting from want of such notice. Cramer *v.* American Merchants' Union Express Co., 56 Mo. 524.

3. See *supra*, II, A, 7.

4. *California.*— Hooper *v.* Wells, 27 Cal. 11, 85 Am. Dec. 211.

Maine.— Plantation No. 4, R. 1, *v.* Hall, 61 Me. 517.

Massachusetts.— Lowell Wire Fence Co. *v.* Sargent, 8 Allen (Mass.) 189; Northern R. Co. *v.* Fitchburg R. Co., 6 Allen (Mass.) 254.

New Hampshire.— Merrill *v.* American Express Co., 62 N. H. 514.

New York.— Stannard *v.* Prince, 64 N. Y. 300; Hersfield *v.* Adams, 19 Barb. (N. Y.) 577; Goodrich *v.* Thompson, 4 Rob. (N. Y.) 75.

North Carolina.— Foard *v.* Atlantic, etc., R. Co., 53 N. C. 235, 78 Am. Dec. 277.

Pennsylvania.— American Express Co. *v.* Titus Second Nat. Bank, 69 Pa. St. 394, 8 Am. Rep. 268; Hemphill *v.* Chenie, 6 Watts & S. (Pa.) 62.

South Carolina.— Maybin *v.* South Carolina R. Co., 8 Rich. (S. C.) 240, 64 Am. Dec. 753.

See 9 Cent. Dig. tit. "Carriers," § 804 *et seq.*

An agreement in bill of lading "to forward" does not show that the carrier receiving the goods takes them otherwise than as carrier with reference to his duty to deliver to a connecting carrier. Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122; Fischer *v.* Merchants' Dispatch Transp. Co., 13 Mo. App. 133; Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Krender *v.* Woolcott, 1 Hilt. (N. Y.) 223.

Contract between forwarder and connecting carrier.— The owner of the goods is bound by any contract between the forwarder and the connecting carrier. Stoddard *v.* Long Island R. Co., 5 Sandf. (N. Y.) 180.

5. *Indiana.*— Snow *v.* Indiana, etc., R. Co., 109 Ind. 422, 9 N. E. 702.

Louisiana.— Devillers *v.* Schooner John Bell, 6 La. Ann. 544.

Massachusetts.— Simkins *v.* Norwich, etc., Steamboat Co., 11 Cush. (Mass.) 102.

New York.— Ingalls *v.* Brooks, 1 Edm. Sel. Cas. (N. Y.) 104.

Tennessee.— Post *v.* Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 5 L. R. A. 481.

See 9 Cent. Dig. tit. "Carriers," § 804 *et seq.*

If delay is occasioned by the failure to select the connecting carrier who will transport the goods to their destination within a reasonable time, the first carrier is liable. McKay *v.* New York Cent., etc., R. Co., 50 Hun (N. Y.) 563, 3 N. Y. Suppl. 708, 20 N. Y. St. 816. And see *supra*, II, I, 3, c.

6. *Georgia.*— Georgia R. Co. *v.* Cole, 68 Ga. 623.

Minnesota.— Brown, etc., Co. *v.* Pennsylvania Co., 63 Minn. 546, 65 N. W. 961.

New York.— Hinckley *v.* New York Cent., etc., R. Co., 56 N. Y. 429; Goodrich *v.* Thompson, 4 Rob. (N. Y.) 75; Uptegrove *v.* Central R. Co., 16 Misc. (N. Y.) 14, 37 N. Y. Suppl. 659, 73 N. Y. St. 278; Johnson *v.* New York Cent. R. Co., 39 How. Pr. (N. Y.) 127; Ingalls *v.* Brooks, 1 Edm. Sel. Cas. (N. Y.) 104.

Wisconsin.— Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

United States.— Strong *v.* Certain Quantity of Wheat, 23 Fed. Cas. No. 13,541, 2 Am. L. Rep. N. S. 287, 4 West. L. Month. 82.

See 9 Cent. Dig. tit. "Carriers," § 787.

Delivery to carrier other than one designated will be a deviation rendering the first carrier liable for subsequent loss, regardless of whether the deviation from the contract is or is not the proximate cause of the loss of the goods. Goodrich *v.* Thompson, 44 N. Y. 324; Johnson *v.* New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Philadelphia, etc., R. Co. *v.* Beck, 125 Pa. St. 620, 17 Atl. 505, 11 Am. St. Rep. 924. Further as to deviation see *supra*, II, D, 2, e, (II).

Connecting carrier designated cannot sue first carrier for failure to comply with such direction. St. Louis, etc., Packet Co. *v.* Missouri Pac. R. Co., 35 Mo. App. 272.

Designation causing delay.— If the shipper has made a choice as to a connecting line which will probably cause delay, the carrier should notify the shipper of the fact and allow him opportunity to change the route. Inman *v.* St. Louis Southwestern R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37.

Where it is impracticable to forward the goods by the stipulated route the carrier may, in the exercise of proper care, send them by another route and will not be liable for subsequent loss, even though he does not notify

necessary to enable him to carry out the transportation in accordance with the contract with the first carrier, it is the duty of the first carrier to give such instructions, and he will be liable for loss resulting from failure to do so.[7] If there is unnecessary delay in making delivery to the second carrier the first carrier will be liable therefor.[8]

d. What Constitutes Sufficient Delivery to Connecting Carrier. To relieve the first carrier from further liability and charge the second carrier, it is necessary that the goods be completely delivered by the first carrier and accepted by the second.[9] But usage or contract as between the two carriers may control as to when the goods are to be deemed to have been thus completely delivered and accepted.[10]

e. Delay. If the first carrier has undertaken to carry the goods to their destination over connecting lines, he will be liable for delay on such connecting lines to the same extent as on his own line.[11] But if by law or contract his liability is limited to his own line, he will not be responsible for delays on a connecting line.[12]

the shipper of the change. Regan *v.* Grand Trunk R. Co., 61 N. H. 579.

7. *Michigan.*—Hutchings *v.* Ladd, 16 Mich. 493.

New York.— Dana *v.* New York Cent., etc., R. Co., 50 How. Pr. (N. Y.) 428.

North Carolina.— Foard *v.* Atlantic, etc., R. Co., 53 N. C. 235, 78 Am. Dec. 277.

Ohio.— Little Miami R. Co. *v.* Washburn, 22 Ohio St. 324.

Pennsylvania.— Forsythe *v.* Walker, 9 Pa. St. 148.

Texas.— Booth *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1896) 37 S. W. 168.

See 9 Cent. Dig. tit. "Carriers," § 786.

8. Rome R. Co. *v.* Sullivan, 25 Ga. 228.

9. *Connecticut.*— Palmer *v.* Chicago, etc., R. Co., 56 Conn. 137, 13 Atl. 818.

Georgia.— Wallace *v.* Rosenthal, 40 Ga. 419; Union Dray Line Co. *v.* Hurt, 30 Ga. 798.

Illinois.— Illinois Cent. R. Co. *v.* Mitchell, 68 Ill. 471, 18 Am. Rep. 564.

Michigan.— Moore *v.* Michigan Cent. R. Co., 3 Mich. 23.

New York.— Dunson *v.* New York Cent. R. Co., 3 Lans. (N. Y.) 265.

Tennessee.— Kentucky M. & F. Ins. Co. *v.* Western, etc., R. Co., 8 Baxt. (Tenn.) 268.

Texas.— Gulf, etc., R. Co. *v.* Insurance Co. of North America, (Tex. Civ. App. 1894) 28 S. W. 237.

West Virginia.— Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816.

Wisconsin.— Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

See 9 Cent. Dig. tit. "Carriers," § 752.

If anything remains to be done by the first carrier, such as the giving of notice or shipping directions, the first carrier remains liable. Mt. Vernon Co. *v.* Alabama Great Southern R. Co., 92 Ala. 296, 8 So. 687; Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Miller *v.* South Carolina R. Co., 33 S. C. 359, 11 S. E. 1093, 9 L. R. A. 833; Bosworth *v.* Chicago, etc., R. Co., 87 Fed. 72, 30 C. C. A. 541.

10. If there is a common place of transfer at which the first carrier deposits the goods, ready to be taken by the second carrier, such deposit may constitute the necessary delivery and acceptance, although the agents of the connecting carrier have not exercised manual control over the goods. Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166; Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Root *v.* Great Western R. Co., 55 N. Y. 636; Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. ed. 336.

Placing in common depot.— It seems that where the goods are delivered by the first carrier to a common depot, the liability of the second carrier does not attach until the lapse of a reasonable time for taking the goods away. Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465.

11. *California.*— Pereira *v.* Central Pac. R. Co., 66 Cal. 92, 4 Pac. 988.

Georgia.— Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92; Rome R. Co. *v.* Sullivan, 25 Ga. 228.

Illinois.— Toledo, etc., R. Co. *v.* Lockhart, 71 Ill. 627.

Minnesota.— Baldwin *v.* Great Northern R. Co., 81 Minn. 247, 83 N. W. 986, 83 Am. St. Rep. 370, 1 L. R. A. 640.

Texas.— International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691.

United States.— St. Louis, etc., R. Co. *v.* Edwards, 78 Fed. 745, 49 U. S. App. 52, 24 C. C. A. 300; Bussey *v.* Memphis, etc., R. Co., 4 McCrary (U. S.) 405, 13 Fed. 330.

See 9 Cent. Dig. tit. "Carriers," § 767.

12. *California.*— Palmer *v.* Atchison, etc., R. Co., 101 Cal. 187, 35 Pac. 630.

Georgia.— Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

Michigan.— Hope *v.* Delaware, etc., Canal Co., 111 Mich. 209, 69 N. W. 487; Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

Minnesota.— Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

New York.— Sherman *v.* Hudson River R. Co., 64 N. Y. 254.

4. Duties and Liabilities of Second Carrier — a. To Owner of Goods. Until the goods are accepted by the second carrier he does not become liable to the owner,[13] but if the goods are tendered in such manner that the second carrier is under obligation to receive them, he will be liable as any other carrier for refusing to do so.[14] After the goods are received by the second carrier, his liability is that of common carrier of goods.[15] The second carrier is not chargeable, however, with damaged condition of the goods not apparent when they are accepted by him.[16] The liability of the second carrier is not under the contract made with the first carrier, but upon the contract, express or implied, under which the second carrier has accepted the goods for transportation.[17] Each carrier, under the American rule, is liable to the owner of the goods for injury thereto in course of transportation over his line,[18] and each is liable for delay on his own line.[19]

See 9 Cent. Dig. tit. "Carriers," § 817.

13. Mt. Vernon Co. *v.* Alabama Great Southern R. Co., 92 Ala. 296, 8 So. 687; Gass *v.* New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742.

If second carrier has taken custody of the goods, but something remains to be done before they can be forwarded, he is liable only as warehouseman. Judson *v.* Western R. Corp., 4 Allen (Mass.) 520, 81 Am. Dec. 718.

Injury by fault of preceding carrier.— The second carrier is not liable for injury to the goods due to the fault of the preceding carrier. Trumbull *v.* Coulson, 12 Colo. App. 102, 54 Pac. 915.

14. Central R. Co. *v.* Logan, 77 Ga. 804, 2 S. E. 465; Dunham *v.* Boston, etc., R. Co., 70 Me. 164, 35 Am. Rep. 314; Gulf, etc., R. Co. *v.* Texas, etc., R. Co., 93 Tex. 482, 56 S. W. 328; Gulf, etc., R. Co. *v.* Godair, 3 Tex. Civ. App. 514, 22 S. W. 777.

Reasonable regulations and conditions may be imposed with reference to the acceptance of goods from another carrier. Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 13 S. E. 137; Gulf, etc., R. Co. *v.* A. B. Frank Co., (Tex. Civ. App. 1898) 48 S. W. 210.

15. *Georgia.*— Southern Express Co. *v.* Urquhart, 52 Ga. 142.

Illinois.— Gulliver *v.* Adams Express Co., 38 Ill. 503.

Maryland.— Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415.

Mississippi.— Southern Express Co. *v.* Thornton, 41 Miss. 216.

New York.—Livingston *v.* New York Cent., etc., R. Co., 76 N. Y. 631; Cartwright *v.* Rome, etc., R. Co., 85 Hun (N. Y.) 517, 33 N. Y. Suppl. 147, 66 N. Y. St. 772; Witbeck *v.* Holland, 55 Barb. (N. Y.) 443, 38 How. Pr. (N. Y.) 273.

Texas.— Missouri, etc., R. Co. *v.* Dilworth, (Tex. Civ. App. 1901) 65 S. W. 502.

Wisconsin.— Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465.

See 9 Cent. Dig. tit. "Carriers," § 795.

The owner may change the destination of the goods by arrangement with the second carrier. Sutherland *v.* Peoria Second Nat. Bank, 78 Ky. 250.

Under the federal statute, prohibiting a carrier of stock from confining the same for more than twenty-eight hours without food and water, the connecting carrier must take notice of the length of time the animals have been confined by the previous carrier. Comer *v.* Columbia, etc., R. Co., 52 S. C. 36, 29 S. E. 637; U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480. And see *supra*, II, I, 2, b, (II).

If goods are accepted in cars delivered by the first carrier, which cars are used in continuing the transportation, the carrier in charge of the goods is responsible for their sufficiency. Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 18 Am. St. Rep. 381, 7 L. R. A. 280; Corso *v.* New Orleans, etc., R. Co., 48 La. Ann. 1286, 20 So. 752; Shea *v.* Chicago, etc., R. Co., 66 Minn. 102, 68 N. W. 608.

16. Carrier's liability is only with reference to condition of goods as he receives them.

Alabama.— McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29.

Iowa.— Carson *v.* Harris, 4 Greene (Iowa) 516.

Oregon.— Goodman *v.* Oregon R., etc., Co., 22 Oreg. 14, 28 Pac. 894.

Rhode Island.— Knight *v.* Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46.

Texas.— Gulf, etc., R. Co. *v.* Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; Gulf, etc., R. Co. *v.* Malone, (Tex. Civ. App. 1894) 25 S. W. 1077.

See 9 Cent. Dig. tit. "Carriers," § 795.

17. Parker *v.* Macy, Wright (Ohio) 674; St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. ed. 679.

18. *Alabama.*— Alabama Great Southern R. Co. *v.* Mt. Vernon Co., 84 Ala. 173, 4 So. 356; Montgomery, etc., R. Co. *v.* Moore, 51 Ala. 394.

Georgia.— Baugh *v.* McDaniel, 42 Ga. 641.

New Hampshire.— Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

New York.— Lamb *v.* Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454; Hunt *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 228; Jacobs *v.* Hooker, 1 Edm. Sel. Cas. (N. Y.) 472.

Wisconsin.— Conkey *v.* Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630.

United States.— Harding *v.* International Nav. Co., 12 Fed. 168; Knowles *v.* Pittsburgh, etc., R. Co., 4 Biss. (U. S.) 466, 14 Fed. Cas. No. 7,899.

See 9 Cent. Dig. tit. "Carriers," § 792.

19. Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

b. To Carrier From Whom Goods Are Received. If through any fault on the part of the second carrier liability for loss of or injury to the goods is thrown upon the first carrier, the second carrier is responsible to the first, who has been compelled to answer for the injury.[20] Where cars of one carrier are received by another, containing goods for transportation, the second carrier is a common carrier of the cars as well as the goods, and for the cars is responsible to the first carrier.[21]

5. Liability of Last Carrier. The liability of the last successive carrier as to making delivery is not, in general, different from that of a carrier who completes the transportation on his own line.[22] If he delivers to the wrong person,[23] even by reason of negligent direction of a preceding carrier for whose acts the shipper is not responsible,[24] he must answer to the shipper for the loss of the goods.[25]

6. Limitations of Liability. The conflict in the authorities as to what are the relations between the shipper and the successive carriers makes it difficult to lay down general propositions as to whether succeeding carriers are entitled to the lawful exemptions from liability contracted for by the first carrier. If the first carrier is the agent of the shipper for the purpose of procuring transportation over connecting lines, then a contract for limitation of liability made between the first and second carriers on delivery of the goods to the latter will be binding on the shipper.[26] By express stipulation in the contract with the first carrier the

As to responsibility of first carrier for delay see *supra*, II, M, 3, e.

20. Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217; Powhatan Steamboat Co. *v.* Appomatox R. Co., 24 How. (U. S.) 247, 16 L. ed. 682.

If goods are lost while waiting at the end of the first carrier's line for acceptance by the second carrier, the first carrier, after responding in damages to the owner, may have a remedy against the second carrier for his neglect in failing to remove the goods within due time. Conkey *v.* Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630.

The judgment against the first carrier is not admissible in an action over against the second carrier for negligence, as the measure of damage is the value of the goods, and not the liability of the first carrier to the shipper. Pennsylvania Co. *v.* Chicago, etc., R. Co., 44 Ill. App. 132.

21. Peoria, etc., R. Co. *v.* U. S. Rolling-Stock Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; East St. Louis Connecting R. Co. *v.* Wabash, etc., R. Co., 123 Ill. 594, 15 N. E. 45; Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605; Vermont, etc., R. Co. *v.* Fitchburg R. Co., 14 Allen (Mass.) 462, 92 Am. Dec. 785; New Jersey R., etc., Co. *v.* Pennsylvania R. Co., 27 N. J. L. 100; Rau *v.* Bosworth, 179 U. S. 443, 21 S. Ct. 183, 45 L. ed. 268; Missouri Pac. R. Co. *v.* Chicago, etc., R. Co., 25 Fed. 317.

Duty to accept cars.— One railroad company must receive and transport the cars of another company, if not defective or unreasonably hazardous. Chicago, etc., R. Co. *v.* Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. Rep. 456.

22. See *supra*, II, L.

23. Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; Southern Express Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237.

24. Ratzer *v.* Burlington, etc., R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530; Foy *v.* Chicago, etc., R. Co., 63 Minn. 255, 65 N. W. 627.

25. The last carrier with reference to transportation by connecting carriers is the one who last transports the goods in pursuance of the original delivery for shipment. If the consignee has designated a carrier to receive the goods for him, delivery to such carrier terminates the original transportation. Illinois Cent. R. Co. *v.* Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; Western, etc., R. Co. *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Fenner *v.* Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709.

The presumption with reference to whether the last carrier is liable for loss of or injury to the goods, where it does not appear on what portion of the transportation by connecting lines the loss or injury occurred, will be discussed hereafter. See *infra*, II, M, 7.

26. Levy *v.* Southern Express Co., 4 S. C. 234.

But a mere undertaking on part of first carrier to transport to end of his route and deliver to a connecting carrier does not in itself constitute the first carrier an agent of the shipper in such sense as to authorize him to make such a contract. Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491.

Ratification of contract.— Even if there is no authority to contract with the succeeding carrier, the shipper, by suing the last carrier under such contract, may ratify it and thereby become bound to its terms. Sanderson *v.* Lamberton, 6 Binn. (Pa.) 129.

benefit of limitations contained in that contract may inure to subsequent carriers.[27] The weight of authority seems to support the proposition that unless the contract for transportation by the first carrier is limited by its terms to that carrier, it is to be deemed a contract regulating the entire transportation, and connecting carriers are entitled to the benefit of limitations contained therein.[28] Especially is this true where the bill of lading provides for an entire compensation for the through transportation.[29] But if the contract with the first carrier apparently relates to his liability only,[30] as, for instance, where it is stipulated that his liability shall not extend beyond his own line,[31] the connecting carrier is not entitled to the benefit thereof. Especially is this true where there is no provision in the contract for a through rate.[32] It has indeed been held with much reason that unless the contract expressly refers to succeeding carriers it is not available to them as a defense, inasmuch as the succeeding carrier is not a party to such contract.[33] As, according to the American rule, the first carrier is *prima facie* liable only with reference to the transportation over his own line, a contract for through transportation by which the liability of the first carrier is limited to his own line is valid, even in states where limitation of liability is prohibited by statute;[34] and liability

27. Kansas City, etc., R. Co. *v.* Sharp, 64 Ark. 115, 40 S. W. 781; Whitworth *v.* Erie R. Co., 87 N. Y. 413; Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415.

28. *Arkansas.*— St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104.

Kansas.— Kiff *v.* Atchison, etc., R. Co., 32 Kan. 263, 4 Pac. 401.

Missouri.— Halliday *v.* St. Louis, etc., R. Co., 74 Mo. 159, 41 Am. Rep. 309.

New York.— Manhattan Oil Co. *v.* Camden, etc., R., etc., Co., 54 N. Y. 197; Lamb *v.* Camden, etc., R., etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; Hinkley *v.* New York Cent., etc., R. Co., 3 Thomps. & C. 281.

Tennessee.— Bird *v.* Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. Rep. 856.

United States.— St. Louis Ins. Co. *v.* St. Louis, etc., R. Co., 104 U. S. 146, 26 L. ed. 679; Evansville, etc., R. Co. *v.* Androscoggin Mills, 22 Wall. (U. S.) 594, 22 L. ed. 724.

See 9 Cent. Dig. tit. "Carriers," § 825.

On the same theory it is said that as the first carrier, by accepting the goods for through transportation without prepayment of charges, impliedly agrees that no demand for charges shall be made until the point of destination is reached, this agreement is binding on succeeding carriers, and they are likewise bound to see that no damage results to the shipper from demand for prepayment of charges by succeeding carriers. Bird *v.* Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. Rep. 856.

Stipulation that the first carrier shall not be liable beyond end of his route is said to be one inuring to the benefit of succeeding carriers. Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; St. Louis, etc., R. Co. *v.* Cohen, (Tex. Civ. App. 1900) 55 S. W. 1123; International, etc., R. Co. *v.* Mahula, 1 Tex. Civ. App. 182, 20 S. W. 1002.

Succeeding carrier claiming the benefit of an exemption made by the first carrier on receipt of the goods in another state has the burden of proving that the exemption is valid under the laws of the state where made. International, etc., R. Co. *v.* Moody, 71 Tex. 614, 9 S. W. 465.

29. Maghee *v.* Camden, etc., R. Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124; White *v.* Weir, 33 N. Y. App. Div. 145, 53 N. Y. Suppl. 465.

30. Bancroft *v.* Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482.

If contract is made in reference to connecting lines limitations therein inure to the benefit of a succeeding carrier. Adams Express Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214. And see Merchants' Despatch Transp. Co. *v.* Bolles, 80 Ill. 473.

31. Edsall *v.* Camden, etc., R., etc., Co., 50 N. Y. 661; Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491. And this is so even though the contract fixes a through rate. Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616.

Thus a stipulation that a written notice of claim for damages must be given within a specified time after delivery of the goods is not applicable to succeeding carriers. Jennings *v.* Grand Trunk R. Co., 52 Hun (N. Y.) 227, 5 N. Y. Suppl. 140, 23 N. Y. St. 15; Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286.

32. Taylor *v.* Little Rock, etc., R. Co., 39 Ark. 148; Central R., etc., Co. *v.* Bridger, 94 Ga. 471, 20 S. E. 349; Camden, etc., R. Co. *v.* Forsyth, 61 Pa. St. 81.

33. Burroughs *v.* Grand Trunk R. Co., 67 Mich. 351, 34 N. W. 875; McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Robinson *v.* New York, etc., Steamship Co., 63 N. Y. App. Div. 211, 71 N. Y. Suppl. 424; Martin *v.* American Express Co., 19 Wis. 336.

34. Wabash R. Co. *v.* Harris, 55 Ill. App. 159; Chicago, etc., R. Co. *v.* Church, 12 Ill. App. 17; Miller Grain, etc., Co. *v.* Union Pac. R. Co., 138 Mo. 658, 40 S. W. 894; Dimmitt *v.* Kansas City, etc., R. Co., 103 Mo. 433, 15 S. W. 761; Hill *v.* Missouri Pac. R. Co., 46 Mo. App. 517; Bird *v.* Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. Rep.

beyond the receiving carrier's line being the result of contract, the carrier may impose on the assumption of such contract relation any limitation which he sees fit.[35]

7. Action Against Connecting Carriers; Presumptions; Burden of Proof. Under the American rule that, in the absence of partnership relations or contract for through transportation, each of the carriers is alone liable for loss or damage occurring during his part of the transportation, the action may be brought directly against the carrier on whose line the loss or injury occurred.[36] To render the first carrier liable it must appear that he failed to deliver the goods to the connecting carrier, or delivered them in damaged condition.[37] The second or subsequent carrier is not to be held liable in an action against him until it appears that he received the goods in sound condition and that loss or injury happened to them while in his possession.[38] But on proof of delivery to the first carrier in good condition and receipt by the second carrier without objection, it will be presumed, in an action against the second carrier, that the goods were still in the condition in which they were received by the first carrier.[39]

856; McCarn *v.* International, etc., R. Co., 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39; Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; Galveston, etc., R. Co. *v.* Short, (Tex. Civ. App. 1894) 25 S. W. 142; Gulf, etc., R. Co. *v.* Thompson, (Tex. Civ. App. 1893) 21 S. W. 186.

But it is otherwise if the connecting carriers assume liability as partners. Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486, 26 S. W. 131; Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302.

35. Hartley *v.* St. Louis, etc., R. Co., (Iowa 1902) 89 N. W. 88; McCarn *v.* International, etc., R. Co., 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39. But see Ireland *v.* Mobile, etc., R. Co., 20 Ky. L. Rep. 1586, 49 S. W. 188, 453; Miller Grain, etc., Co. *v.* Union Pac. R. Co., 138 Mo. 658, 40 S. W. 894; McCann *v.* Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110; Popham *v.* Barnard, 77 Mo. App. 619; Marshall *v.* Kansas City, etc., R. Co., 74 Mo. App. 81; Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, 40 N. Y. St. 318; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847.

36. *Alabama.*— Montgomery, etc., R. Co. *v.* Moore, 51 Ala. 394.

Arkansas.— Packard *v.* Taylor, 35 Ark. 402, 37 Am. Rep. 37.

Georgia.— Southwestern R. Co. *v.* Thornton, 71 Ga. 61.

Illinois.— Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116; Bissel *v.* Price, 16 Ill. 408; Chesapeake, etc., R. Co. *v.* Radbourne, 52 Ill. App. 203.

Kentucky.— U. S. Mail Line Co. *v.* Carrollton Furniture Mfg. Co., 101 Ky. 658, 19 Ky. L. Rep. 833, 42 S. W. 342.

North Carolina.—Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

Pennsylvania.— Wilson *v.* Harry, 32 Pa. St 270.

United States.— Sumner *v.* Walker, 30 Fed. 261.

See 9 Cent. Dig. tit. "Carriers," § 775 *et seq.*

37. *Alabama.*— Louisville, etc., R. Co. *v.* Jones, 100 Ala. 263, 14 So. 114.

Massachusetts.— Farmington Mercantile Co. *v.* Chicago, etc., R. Co., 166 Mass. 154, 44 N. E. 131.

Missouri.— Snider *v.* Adams Express Co., 63 Mo. 376; Orr *v.* Chicago, etc., R. Co., 21 Mo. App. 333.

Pennsylvania.—American Express Co. *v.* Titusville Second Nat. Bank, 69 Pa. St. 394, 8 Am. Rep. 268.

Texas.— St. Louis, etc., R. Co. *v.* Cohen, (Tex. Civ. App. 1900) 55 S. W. 1123.

United States.— Dixon *v.* Columbus, etc., R. Co., 4 Biss. (U. S.) 137, 7 Fed. Cas. No. 3,929.

See 9 Cent. Dig. tit. "Carriers," § 835.

There is some authority, however, for saying that the burden of proof is on the first carrier in a suit against him to show that he delivered the goods in sound condition to the connecting line. Georgia Pac. R. Co. *v.* Hughart, 90 Ala. 36, 8 So. 62; Ohio, etc., R. Co. *v.* Emrich, 24 Ill. App. 245; Holden *v.* New York Cent. R. Co., 54 N. Y. 662; Brintnall *v.* Saratoga, etc., R. Co., 22 Vt. 665.

38. Southern Express Co. *v.* Hess, 53 Ala. 19; Chicago, etc., R. Co. *v.* Goldman, 46 Ill. App. 625; Lake Erie, etc., R. Co. *v.* Oakes, 11 Ill. App. 489; San Antonio, etc., R. Co. *v.* Moore, (Tex. Civ. App. 1897) 39 S. W. 960.

39. *Georgia.*— Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498.

Illinois.— Great Western R. Co. *v.* McDonald, 18 Ill. 172.

Indian Territory.— Gulf, etc., R. Co. *v.* Jones, 1 Indian Terr. 354, 37 S. W. 208.

New York.— Hunt *v.* Michigan Southern, etc., R. Co., 37 N. Y. 162, 4 Transcr. App. (N. Y.) 103, 35 How. Pr. (N. Y.) 287.

North Carolina.— Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675; Morganton Mfg. Co. *v.* Ohio, etc., R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679; Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

Indeed, the weight of authority[40] seems to be in support of the general proposition that if the goods are delivered by the last carrier in damaged condition the presumption arises without further evidence that the damage occurred while in the possession of the last carrier, and that the burden is upon him to prove that they were in the damaged condition when received by him, the double presumption being entertained that they were accepted in good condition by the first carrier, and that such good condition continued until their receipt by the last carrier, notwithstanding transportation over intermediate lines.

N. Charges and Liens — 1. Charges For Transportation — a. In Advance. That the carrier may be chargeable as common carrier the service must be for compensation,[41] and this compensation may be required in advance, and if not so paid the carrier may refuse to receive the goods.[42] But it is not necessary that charges be tendered in advance unless demanded.[43]

b. In Absence of Contract; Reasonable Compensation. Where there is no contract as to the compensation to be paid the law implies a reasonable compensa-

Texas.— Houston, etc., R. Co. *v.* Ney, (Tex. Civ. App. 1900) 58 S. W. 43.

See 9 Cent. Dig. tit. "Carriers," § 841.

40. *Alabama.*— Southern Express Co. *v.* Hess, 53 Ala. 19.

Florida.— Savannah, etc., R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544, 23 Am. St. Rep. 551.

Georgia.— Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Central R., etc., Co. *v.* Bayer, 91 Ga. 115, 16 S. E. 953; Paramore *v.* Western R. Co., 53 Ga. 383.

Indian Territory.— Gulf, etc., R. Co. *v.* Jones, 1 Indian Terr. 354, 37 S. W. 208.

Iowa.— Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 18 Am. St. Rep. 381, 7 L. R. A. 280.

Minnesota.— Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353.

Missouri.— Flynn *v.* St. Louis, etc., R. Co., 43 Mo. App. 424.

North Carolina.— Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675; Dixon *v.* Richmond, etc., R. Co., 74 N. C. 538.

Tennessee.— Louisville, etc., R. Co. *v.* Tennessee Brewing Co., 96 Tenn. 677, 36 S. W. 392; Memphis, etc., R. Co. *v.* Holloway, 9 Baxt. (Tenn.) 188.

Texas.— Texas, etc., R. Co. *v.* Barnhart, 5 Tex. Civ. App. 601, 23 S. W. 801, 24 S. W. 331; Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56.

Wisconsin.— Laughlin *v.* Chicago, etc., R. Co., 28 Wis. 204, 9 Am. Rep. 493.

See 9 Cent. Dig. tit. "Carriers," § 841.

By statute in Georgia this is the rule. Savannah, etc., R. Co. *v.* Hardin, 110 Ga. 433, 35 S. E. 681; Kerr *v.* Georgia R. Co., 105 Ga. 371, 31 S. E. 114; Georgia R., etc., Co. *v.* Forrester, 96 Ga. 428, 23 S. E. 416; Joseph *v.* Georgia R., etc., Co., 88 Ga. 426, 14 S. E. 591; Georgia R. Co. *v.* Gann, 68 Ga. 350; Central R. Co. *v.* Rogers, 66 Ga. 251. But even under the statute it is held necessary to show the receipt of the goods by the last carrier, and some facts on which the presumption that the goods were in good condition when so received may be based. Western, etc., R. Co. *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Central R., etc., Co. *v.* Rogers, 57 Ga. 336; Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498.

Goods in sealed car.—And this presumption is entertained, even though the goods were received by the last carrier in a sealed car without opportunity for examination. Leo *v.* St. Paul, etc., R. Co., 30 Minn. 438, 15 N. W. 872; Faison *v.* Alabama, etc., R. Co., 69 Miss. 569, 13 So. 37, 30 Am. St. Rep. 577.

Rule criticized.— It is doubtful, however, whether this doctrine can be supported in reason, there being no logical ground for saying that the last carrier rather than any other carrier is to be charged with a loss not shown to have occurred during the transportation on his line. Marquette, etc., R. Co. *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453. Certainly to hold the last carrier liable there must be evidence of the receipt of the goods by him (Church *v.* Atchison, etc., R. Co., 1 Okla. 44, 29 Pac. 530), and while it may be presumed that the goods were received in good condition if they were accepted without objection (Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116; Newport News, etc., R. Co. *v.* Mendell, 17 Ky. L. Rep. 1400, 34 S. W. 1081; The T. A. Goddard, 12 Fed. 174), yet, if it appears that presumably injury resulted before the goods reached the last carrier, it will not be liable in the absence of direct evidence (Swetland *v.* Boston, etc., R. Co., 102 Mass. 276; Louisville, etc., R. Co. *v.* Tennessee Brewing Co., 96 Tenn. 677, 36 S. W. 392).

Indorsement on a bill of lading as to condition of goods made by an agent will not be binding, unless the agent had authority to investigate and determine the condition of the goods. Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498.

With regard to delay certainly there is no presumption that it happened on the line of the last carrier. Almand *v.* Georgia R., etc., Co., 95 Ga. 775, 22 S. E. 674.

41. See *supra*, II, C.

42. Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Fitch *v.* Newbery, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33. And see *supra*, II, B, 4.

43. Cleveland, etc., R. Co. *v.* Perishow, 61 Ill. App. 179; Wilson *v.* Grand Trunk R. Co., 56 Me. 60, 96 Am. Dec. 435.

tion, to be determined in an action in which the question as to amount of compensation arises and to be measured by what is ordinarily charged for like services under like conditions.[44]

c. Legislative Control. That it is within the power of a state legislature with reference to commerce within a state, and of congress with reference to interstate commerce, to prescribe the rates to be charged by public carriers for their services, so long as the charges fixed do not require that the services rendered shall be without reasonable compensation, is well settled.[45]

d. By Contract. The rate of charge is usually specified in the bill of lading or other shipping contract. If the amount fixed is by reference to a schedule of rates, and by mutual mistake a different rate is inserted in the contract, the rate intended will control.[46] There may be, by general announcement of schedule rates accepted by the shipper, by the act of shipment, a resulting contract as to the rate to be charged.[47] But where the announced schedule is subject to change on notice, a notice of the change of the schedule rate will be binding as to subsequent shipments.[48] An agent having authority to contract for shipment of goods may bind the carrier as to the rate of shipment.[49]

e. Divisibility of Contract; Full or Partial Performance — (I) *When Right to Freight Attaches.* In ordinary cases of land carriage there is no difficulty in saying that the right to the freight provided for by the contract attaches when the goods are delivered into the possession of the carrier for transportation, but there are some peculiarities as to carriage by sea. It is said that in such cases the performance of the contract is not to be deemed as commenced so that the right to freight has attached until the vessel has "broken ground," that is, started on its journey,[50] and accordingly that after delivery of the goods to the vessel, but

44. Louisville, etc., R. Co. *v.* Wilson, 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244; Newstadt *v.* Adams, 5 Duer (N. Y.) 43; Harvey *v.* Grand Trunk R. Co., 2 Hask. (U. S.) 124, 11 Fed. Cas. No. 6,180; Camblos *v.* Philadelphia, etc., R. Co., 4 Fed. Cas. No. 2,331, 4 Brewst. (Pa.) 563, 9 Phila. (Pa.) 411, 30 Leg. Int. (Pa.) 149; Simmes *v.* Marine Ins. Co., 2 Cranch C. C. (U. S.) 618, 22 Fed. Cas. No. 12,862.

45. Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. ed. 377; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77. But this question is discussed elsewhere. See, generally, COMMERCE; CONSTITUTIONAL LAW.

46. Savannah, etc., R. Co. *v.* Bundick, 94 Ga. 775, 21 S. E. 995.

But if the shipper has no knowledge as to the basis on which the charge is fixed he may insist on the contract rate. Wood *v.* Steamboat Fleetwood, 27 Mo. 159.

If duplicate bills of lading are issued and there is a variance as to the rate to be charged, the bill given to the shipper, or the bill first executed and under which the transportation was undertaken, will be binding. Ontario Bank *v.* Hanlon, 23 Hun (N. Y.) 283; Costello *v.* Seven Hundred and Thirty-Four Thousand Seven Hundred Laths, 44 Fed. 105.

47. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Fitchburg R. Co. *v.* Gage, 12 Gray (Mass.) 393; Kellerman *v.* Kansas City, etc., R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Chicago, etc., R. Co. *v.* Gustin, 35 Nebr. 86, 52 N. W. 844.

If an offered rate is not accepted during the time of the offer, the shipper cannot complain that a higher rate is charged. Dillingham *v.* Labott, (Tex. Civ. App. 1895) 30 S. W. 370.

Posted rates will not control as against the terms of the contract, where actual knowledge of such rates is not brought home to the shipper in some way. Coupland *v.* Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534.

Where there is a contract to maintain a specified rate for the benefit of a manufacturing plant, the owner may recover damages to the value of the plant resulting from refusal of the carrier to maintain the rate. Newport News, etc., Co. *v.* McDonald Brick Co., 22 Ky. L. Rep. 934, 59 S. W. 332.

48. Thayer *v.* Burchard, 99 Mass. 508.

49. Atchison, etc., R. Co. *v.* Goetz, etc., Mfg. Co., 51 Ill. App. 151; Borden *v.* Richmond, etc., R. Co., 113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 632; Inkfield *v.* Packington, 2 C. & P. 599. See also, generally, PRINCIPAL AND AGENT.

But if the agent of a connecting line in giving rates fixes a rate which is not authorized by the classification determined by statute the carrier will not be bound. St. Louis, etc., R. Co. *v.* Ostrander, 66 Ark. 567, 52 S. W. 435. And see St. Louis, etc., R. Co. *v.* Gibson, 68 Ark. 34, 56 S. W. 268.

50. Curling *v.* Long, 1 B. & P. 634, 4 Rev. Rep. 747.

before sailing, the shipper may demand them back, with liability only for damages, and not for freight.[51]

(II) *Contract Not Divisible.* In general the contract of transportation is not divisible, and after the carrier has entered upon performance he is entitled to the full freight agreed upon, although full performance of the contract is prevented by the act of the owner, as, for instance, in taking possession of the goods before they reach their destination.[52] But if the agreement is for an amount to be determined by the quantity or weight of the goods, the amount of charge will be determined by the quantity received and delivered, and the recitals in the bill of lading as to quantity will not be binding in determining that question.[53] It is sometimes specified that damage by reason of shortage or injury to the goods as delivered shall be deducted from the carrier's freight charges.[54]

(III) *Full Performance; Pro-Rating.* As a general principle freight is not due until delivery of the goods, unless such delivery is prevented by fraud of the shipper or his agents, and although delivery becomes impossible by reason of some cause for which the carrier is not responsible, even though it be act of God or the public enemy, he is not entitled to freight, no matter how great a part of the transportation has been performed.[55] If the goods are in part lost or destroyed, or suffer damage, for which the carrier is responsible, the consignee is not bound to accept part performance, and there is in general no liability for freight charges.[56] In case of damage to the goods for which the carrier is not

51. Bailey *v.* Damon, 3 Gray (Mass.) 92, *Contra*, Tindal *v.* Taylor, 3 C. L. R. 199, 4 E. & B. 219, 1 Jur. N. S. 112, 24 L. J. Q. B. 12, 82 E. C. L. 219.

52. Ellis *v.* Willard, 9 N. Y. 529; Whitney *v.* Rogers, 2 Disn. (Ohio) 421; Warehouse, etc., Supply Co. *v.* Galvin, 96 Wis. 523, 71 N. W. 804, 65 Am. St. Rep. 57; Violett *v.* Stettinius, 5 Cranch C. C. (U. S.) 559, 28 Fed. Cas. No. 16,953; The Nathaniel Hooper, 3 Sumn. (U. S.) 542, 17 Fed. Cas. No. 10,032, 1 Hunt. Mer. Mag. 334, 2 Law Rep. 133, 165.

53. Cushing *v.* Jacobs, 24 La. Ann. 463; Byrne *v.* Weeks, 4 Abb. Dec. (N. Y.) 657; Allen *v.* Bates, 1 Hilt (N. Y.) 221; Baird *v.* St. Louis, etc., R. Co., 41 Fed. 592; Henderson *v.* Three Hundred Tons of Iron Ore, 38 Fed. 36; The Andover, 3 Blatchf. (U. S.) 303, 1 Fed. Cas. No. 366; Maloney *v.* Butterly, 16 Fed. Cas. No. 8,997.

Weight unknown.— If the contract is, however, for certain specified boxes or packages "weight unknown," the carrier will be entitled to full freight as estimated on the weight given, although he is not liable for shortage in the weight of the goods as received and delivered. Shepherd *v.* Naylor, 5 Gray (Mass.) 591.

54. Naugatuck R. Co. *v.* Beardsley Scythe Co., 33 Conn. 218; Ford *v.* Head, 34 Hun (N. Y.) 146; The Barcore, [1896] P. 294, 8 Aspin 189, 65 L. J. Adm. 97, 75 L. T. Rep. N. S. 168.

But a custom or usage to that effect will not be sustained, as the carrier is not bound by the quantity or weight stated in the bill of lading. Strong *v.* Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184; Law *v.* Botsford, 26 Fed. 651.

55. *Delaware.*—Thibault *v.* Russell, 5 Harr. (Del.) 293.

Georgia.— Breed *v.* Mitchell, 48 Ga. 533.

Indiana.— Holliday *v.* Coe, 3 Ind. 26.

Louisiana.— Northern *v.* Williams, 6 La. Ann. 578.

Maryland.— Ferguson *v.* Cappeau, 6 Harr. & J. (Md.) 394.

Massachusetts.— Tirrell *v.* Gage, 4 Allen (Mass.) 245.

New York.— New York Cent., etc., R. Co. *v.* Standard Oil Co., 87 N. Y. 486; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474; McKee *v.* Hecksher, 10 Daly (N. Y.) 393; Bates *v.* White, 13 N. Y. St. 602; Hinsdell *v.* Weed, 5 Den. (N. Y.) 172.

Virginia.— Brown *v.* Ralston, 4 Rand. (Va.) 504.

United States.— The Ann D. Richardson, Abb. Adm. (U. S.) 499, 1 Fed. Cas. No. 410; Arthur *v.* The Cassius, 2 Story (U. S.) 81, 1 Fed. Cas. No. 564.

See 9 Cent. Dig. tit. "Carriers," § 856.

For instance, if the goods are delivered at a wharf, but not being called for by the consignee are lost by reason of failure of the carrier to store them, he is not entitled to freight. Rowland *v.* Miln, 2 Hilt. (N. Y.) 150. But if, after reaching the destination, the goods are, at the request of the consignee, held by the carrier for the consignee's convenience, the carrier being liable only as warehouseman will be entitled to recover the stipulated freight, although the goods are lost, if without his fault. Clendaniel *v.* Tuckerman, 17 Barb. (N. Y.) 184.

56. Stevens *v.* Sayward, 3 Gray (Mass.) 108; Western Transp. Co. *v.* Hoyt, 69 N. Y. 230, 25 Am. Rep. 175.

But if part performance is accepted, or if the contract is by its terms or by implication divisible, the carrier is entitled to freight on the portion delivered, but not on that which

responsible, the consignee is bound to accept, and the carrier is entitled to full freight.[57] If the goods are voluntarily accepted by the owner, with the consent of the carrier, before the completion of the transportation, the carrier is entitled to *pro rata* freight for the portion of the contract performed, the voluntary delivery and acceptance constituting a new implied contract by way of substitute for the original contract.[58] The carrier is not entitled, however, to additional charges for additional services rendered without the owner's consent by reason of sending the goods to their destination by a roundabout way,[59] nor on account of the value of the goods being greater than that named in the bill of lading, even though the usual freight rate is measured to some extent by the value of the goods, as the liability of the carrier is limited to the value specified in the bill of lading.[60] The rule that the carrier is entitled to freight only on full performance of the contract precludes his recovery of charges where there is a misdelivery, even though the owner gets possession of the goods from the person to whom they have been wrongfully delivered.[61] As freight is not earned where the contract of transportation is not performed by the carrier, the consignor who has paid freight in advance may recover back what he has paid, on the failure of the

has been lost. Boston, etc., R. Co. *v.* Brown, 15 Gray (Mass.) 223; Harris *v.* Rand, 4 N. H. 259, 555, 17 Am. Dec. 421; New York Cent., etc., R. Co. *v.* Standard Oil Co., 87 N. Y. 486; J. Russell Mfg. Co. *v.* New Haven Steamboat Co., 52 N. Y. 657; Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645; Dean *v.* Furness, 9 Quebec Q. B. 81.

57. Nelson *v.* Stephenson, 5 Duer (N. Y.) 538; Seaman *v.* Adler, 37 Fed. 268; The Cuba, 3 Ware (U. S.) 260, 6 Fed. Cas. No. 3,458; Steelman *v.* Taylor, 3 Ware (U. S.) 52, 22 Fed. Cas. No. 13,349, 19 Law Rep. 36.

But if a part of a cargo has perished by reason of inherent defect and without the fault of the carrier, and is abandoned at an intermediate port, freight is only recoverable on the portion delivered. Lawrence *v.* Denbreens, 1 Black (U. S.) 170, 17 L. ed. 89.

58. *Connecticut.*— Escopiniche *v.* Stewart, 2 Conn. 262, 391.

Maine.— Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387.

Massachusetts.— Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151.

New York.— Kinsman *v.* New York Mut. Ins. Co., 5 Bosw. (N. Y.) 460; Atlantic Mut. Ins. Co. *v.* Bird, 2 Bosw. (N. Y.) 195; Parsons *v.* Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; New York Mar. Ins. Co. *v.* United Ins. Co., 9 Johns. (N. Y.) 186; Williams *v.* Smith, 2 Cai. (N. Y.) 1, 2 Am. Dec. 209.

Ohio.— Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month. 75.

South Carolina.— Lorent *v.* Kentring, 1 Nott & M. (S. C.) 132.

United States.— Scow No. 190 and Four Hundred and Fifty Bales Cotton, 88 Fed. 320.

See 9 Cent. Dig. tit. "Carriers," § 856.

If the contract of shipment contemplates the possibility of the goods being taken at an intermediate point, and the owner does thus take them, he is liable for the tariff schedule rate to that point, although more than a *pro rata* charge as computed on the charge for the entire transportation. Sherman, etc., R. Co. *v.* Beebe, 15 Tex. Civ. App. 685, 39 S. W. 1102; Southern Pac. R. Co. *v.* Haas, (Tex. Civ. App. 1892) 21 S. W. 1021.

Involuntary acceptance.— But if the acceptance at an intermediate point is involuntary and on account of the inability of the carrier to complete his contract, no freight can be recovered. Bork *v.* Norton, 2 McLean (U. S.) 422, 3 Fed. Cas. No. 1,659; The Nathaniel Hooper, 3 Sumn. (U. S.) 542, 17 Fed. Cas. No. 10,032, 1 Hunt. Mer. Mag. 334, 2 Law Rep. 133, 165; Hurtin *v.* Union Ins. Co., 1 Wash. (U. S.) 530, 12 Fed. Cas. No. 6,942.

So, on the other hand, if the owner of the goods takes possession of them at an intermediate point at his own election, the carrier being able and willing to complete the contract, the owner must pay full freight to the carrier. Braithwait *v.* Power, 1 N. D. 455.

59. Jones *v.* Boston, etc., R. Co., 63 Me. 188; Burlington, etc., R. Co. *v.* Chicago Lumber Co., 15 Nebr. 390, 19 N. W. 451.

60. U. S. Express Co. *v.* Koerner, 65 Minn. 540, 68 N. W. 181, 33 L. R. A. 600; Baldwin *v.* Liverpool, etc., Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277; Holford *v.* Adams, 2 Duer (N. Y.) 471.

61. Ferguson *v.* Cappeau, 6 Harr. & J. (Md.) 394; Western Transp. Co. *v.* Hoyt, 69 N. Y. 230, 25 Am. Rep. 175.

But if carrier regains possession of goods and tenders them to owner he may collect his charges. Barnett *v.* Central Line of Boats, 51 Ga. 439.

Paying damages tantamount to delivery.— It is said that if the carrier pays damages for the loss of the goods by negligence this is tantamount to safe delivery, and he is entitled to full freight. Hammond *v.* McClures, 1 Bay (S. C.) 101. The fact, however, that the owner gets compensation for damage by means of insurance on the goods does not entitle the carrier to freight. McKibbin *v.* Peck, 39 N. Y. 262, 6 Transcr. App. (N. Y.) 69.

carrier to complete the transportation, in the absence of any agreement to the contrary between the parties.[62]

f. Connecting Carriers; Advancement of Charges — (I) *Charges of Each Carrier For His Own Line.* Where connecting carriers act under joint arrangement as to rates, each is entitled to proportionate compensation out of the charge for the entire transportation.[63] But in an ordinary case of receipt by one carrier for transportation to a destination beyond his own line the succeeding carrier to whom the goods are offered is in the same situation as an independent carrier, and may demand prepayment if he so elects,[64] and is entitled to freight as an independent carrier, regardless of any contract of the initial carrier of which he has no knowledge.[65] If the first carrier has contracted for the rate for the entire transportation, and the charges exacted by connecting carriers are such as to render the entire charge greater than that contracted for, the remedy of the consignor or owner is against the carrier with whom the contract was made.[66]

(II) *Charges Advanced to Preceding Carrier.* A connecting carrier may advance the charges of the preceding carrier, including charges which the preceding carrier may have already advanced in the same way, and demand the full amount of his own charges and the advancements at the end of the transportation.[67] However, a connecting carrier is under no obligation to make such

62. Hagedorn *v.* St. Louis Perpetual Ins. Co., 2 La. Ann. 1005; Lee *v.* Barreda, 16 Md. 190; Atwell *v.* Miller, 11 Md. 348, 69 Am. Dec. 206; Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311; Griggs *v.* Austin, 3 Pick. (Mass.) 20, 15 Am. Dec. 175; Phelps *v.* Williamson, 5 Sandf. (N. Y.) 578; Emery *v.* Dunbar, 1 Daly (N. Y.) 408.

63. Ackley *v.* Chicago, etc., R. Co., 36 Wis. 252.

64. Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 13 S. E. 137.

But if prepayment is not required when the goods are received his charges cannot be demanded until delivery to the connecting carrier. Grand Rapids, etc., R. Co. *v.* Diether, 10 Ind. App. 206, 37 N. E. 39, 1069.

65. *Arkansas.*— Loewenberg *v.* Arkansas, etc., R. Co., 56 Ark. 439, 19 S. W. 1051.

Colorado.— Price *v.* Denver, etc., R. Co., 12 Colo. 402, 21 Pac. 188.

Tennessee.— Sumner *v.* Southern Railroad Assoc., 7 Baxt. (Tenn.) 345, 32 Am. Rep. 565.

Texas.— San Antonio, etc., R. Co. *v.* Clements, 20 Tex. Civ. App. 398, 49 S. W. 913.

Wisconsin.— Schneider *v.* Evans, 25 Wis. 241, 3 Am. Rep. 56.

United States.— Patten *v.* Union Pac. R. Co., 29 Fed. 590.

See 9 Cent. Dig. tit. "Carriers," § 868.

But if connecting carrier has notice of a contract of the shipper that the goods shall be carried over another line he cannot recover his charges, as the goods were received without authority. Withers *v.* Macon, etc., R. Co., 35 Ga. 273; Liefert *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. 899. So if the way-bill delivered to the connecting carrier shows the contract under which the first carrier undertook to transport the goods, the connecting carrier will be bound thereby. Converse Bridge Co. *v.* Collins, 119 Ala. 534, 24 So. 561.

Defense against preceding carrier when immaterial.— The connecting carrier not being responsible for any fault of the preceding carrier may recover his own charges, although the owner would have had a defense as against the preceding carrier had the contract been for the entire transportation. Vaughan *v.* Providence, etc., R. Co., 13 R. I. 578; Sumner *v.* Walker, 30 Fed. 261.

66. *Arkansas.*— Little Rock, etc., R. Co. *v.* Daniels, 49 Ark. 352, 5 S. W. 584.

Louisiana.— Tardos *v.* Chicago, etc., R. Co., 35 La. Ann. 15; Hatchett *v.* Steamer Compromise, 12 La. Ann. 783, 68 Am. Dec. 782.

Missouri.— Wells *v.* Thomas, 27 Mo. 17, 72 Am. Dec. 228.

New York.—Tugman *v.* National Steamship Co., 76 N. Y. 207.

North Carolina.— Mt. Pleasant Mfg. Co. *v.* Cape Fear, etc., R. Co., 106 N. C. 207, 10 S. E. 1046.

Virginia.—Virginia Coal, etc., Co. *v.* Louisville, etc., R. Co., 98 Va. 776, 37 S. E. 310.

See 9 Cent. Dig. tit. "Carriers," § 868½.

If there is a contract for a through rate which is binding on the last carrier the consignee is entitled to the goods on tendering the agreed rate. Evansville, etc., R. Co. *v.* Marsh, 57 Ind. 505.

67. Bissel *v.* Price, 16 Ill. 408; Armstrong *v.* Chicago, etc., R. Co., 62 Mo. App. 639; White *v.* Vann, 6 Humphr. (Tenn.) 70, 44 Am. Dec. 294.

Services not part of transportation.— But the connecting carrier is not entitled to insist on payment of charges advanced for services not constituting a part of the transportation of the particular consignment. Robinson *v.* Dover, etc., R. Co., 99 Ga. 480, 27 S. E. 713; Steamboat Virginia *v.* Kraft, 25 Mo. 76. So where the goods have reached the destination contemplated in the original contract of shipment, and another carrier, a volunteer, undertakes to transport them from the depot of the last carrier to the place of business of the consignee, he has no right to pay the charges and collect them from such consignee. Kan-

advances or to give credit therefor to the preceding carrier, even though it is customary to do so.[68] The last carrier advances charges to the preceding carrier at his own risk, and if they have in fact been paid he cannot recover them, at least where he is chargeable with notice of the fact of such prepayment.[69] The right of the consignee or owner to offset damages against freight[70] cannot be asserted against the last carrier with reference to damages on the line of the preceding carrier, either as to the last carrier's charges or the charges which he has advanced to the preceding carrier, the remedy being against the carrier in whose hands the damage occurred.[71]

2. Charges For Other Services. In addition to the charges by express or implied contract for transportation, the carrier is entitled to charge for other services incident to the transportation, such as storage, if the consignee is not ready to receive the goods on arrival at destination.[72]

3. Payment of Charges at End of Transportation; Tender; Offsetting Damages; Recovery of Excessive Payments — a. Delivery and Payment Concurrent;

sas City Transfer Co. *v.* Neiswanger, 18 Mo. App. 103.

The right of action for the charges advanced in such case is in the carrier who has advanced them. Chicago, etc., R. Co. *v.* Hall, 69 Ill. App. 497.

68. Southern Indiana Express Co. *v.* U. S. Express Co., 88 Fed. 659 [*affirmed* in 92 Fed. 1022, 35 C. C. A. 172]; Oregon Short Line, etc., R. Co. *v.* Northern Pac. R. Co., 51 Fed. 465; Baltimore, etc., R. Co. *v.* Adams Express Co., 22 Fed. 32.

Second carrier regarded as first carrier's agent.— Without paying the preceding carrier's charges the connecting carrier may be regarded as the agent of his predecessor to collect such charges. Travis *v.* Thompson, 37 Barb. (N. Y.) 236. But in such case the charges of the preceding carrier are due to such carrier, and not to the connecting carrier. Gould *v.* Newburyport R. Co., 14 Gray (Mass.) 472.

Subrogation.— As to the preceding charges advanced, the last carrier is subrogated to the rights of the preceding carrier and may recover therefor, although he himself has not completed his contract. Western Transp. Co. *v.* Hoyt, 69 N. Y. 230, 25 Am. Rep. 175.

Failure to collect entire charges at end of transportation.— The last carrier may become liable to the preceding carrier in accordance with custom for failing to collect the entire charges at the end of the transportation. Lee *v.* Salter, Lalor (N. Y.) 163. But the last carrier does not become liable to the preceding carrier until the goods are actually received by him. New York, etc., R. Co. *v.* National Steamship Co., 137 N. Y. 23, 32 N. E. 993, 49 N. Y. St. 901.

69. Converse Bridge Co. *v.* Collins, 119 Ala. 534, 24 So. 561; American Nat. Bank *v.* Georgia R. Co., 96 Ga. 665, 23 S. E. 898, 51 Am. St. Rep. 155; Moses *v.* Port Townsend Southern R. Co., 5 Wash. 595, 32 Pac. 488.

70. See *infra*, II, N, 3, b.

71. *Arkansas.*— St. Louis, etc., R. Co. *v.* Lear, 54 Ark. 399, 15 S. W. 1030.

Illinois.— Bissel *v.* Price, 16 Ill. 408.

Mississippi.— Lowenburg *v.* Jones, 56 Miss. 688, 31 Am. Rep. 379.

New York.— Merrick *v.* Gordon, 20 N. Y. 93. Apparently *contra*, see Mallory *v.* Burrett, 1 E. D. Smith (N. Y.) 234.

United States.— Monteith *v.* Kirkpatrick, 3 Blatchf. (U. S.) 279, 17 Fed. Cas. No. 9,721. See 9 Cent. Dig. tit. "Carriers," § 881.

72. Hurd *v.* Hartford, etc., Steamboat Co., 40 Conn. 48; Illinois Cent. R. Co. *v.* Alexander, 20 Ill. 23.

Demurrage.— Charges for car services in the nature of demurrage are also permissible. Gulf City Constr. Co. *v.* Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579. And as to demurrage see *supra*, II, I, 3, f.

If consignee refuses to receive the goods the carrier may recover from the consignor charges for returning them, not exceeding the value. Steamboat Keystone *v.* Moies, 28 Mo. 243, 75 Am. Dec. 123.

The entire compensation for transportation and storage may be included in a general charge, or the two services may be charged separately. Hurd *v.* Hartford, etc., Steamboat Co., 40 Conn. 48. But there cannot be a terminal charge in addition to the regular charge for transportation where no additional service is rendered. Union Trust Co. *v.* Atchison, etc., R. Co., 64 Fed. 992; Camblos *v.* Philadelphia, etc., R. Co., 4 Fed. Cas. No. 2,331, 4 Brewst. (Pa.) 563, 9 Phila. (Pa.) 411, 30 Leg. Int. (Pa.) 149; Pegler *v.* Monmouthshire R., etc., Co., 6 H. & N. 644, 30 L. J. Exch. 249, 4 L. T. Rep. N. S. 331, 9 Wkly. Rep. 597; Cox *v.* Great Eastern R. Co., L. R. 4 C. P. 181, 38 L. J. C. P. 151. It seems that a rate additional to that authorized by the charter of a railroad company may be made for necessary services, such as switching, side-tracking, and the like. National Tube-Works Co. *v.* Baltimore, etc., R. Co., (Pa. 1887) 8 Atl. 6. And see Pryce *v.* Monmouthshire Canal Co., 4 App. Cas. 197, 49 L. J. Exch. 130, 40 L. T. Rep. N. S. 630, 27 Wkly. Rep. 666; Hall *v.* London, etc., R. Co., 15 Q. B. D. 505, 5 R. & Can. T. Cas. 28, 53 L. T. Rep. N. S. 345.

Where carrier unlawfully detains the goods there can be no valid claim for storage. Southern Pac. Co. *v.* Redding, 17 Tex. Civ. App. 440, 43 S. W. 1061.

Tender. As the carrier has a lien for his charges,[73] his duty to deliver the possession of the goods at the end of the transportation, and the consignee's duty to pay, are concurrent.[74] And until the carrier is ready to make complete and final delivery of possession to the consignee he is not entitled to his freight.[75] The consignee has a right to examine the goods as to quantity, quality, and condition before accepting delivery and becoming liable for freight.[76] On the other hand, the consignee must tender the freight before being entitled to possession of the goods, and even though excessive freight is demanded, the amount due should be tendered.[77] But if the carrier denies possession of the goods, tender of freight is waived.[78]

b. Offsetting Damages. As against the carrier's claim for freight the consignee may offset damages for which the carrier is liable,[79] and he may thus offset damages by reason of the failure of the carrier to deliver the entire amount of goods received.[80] But the recitals of the bill of lading as to the quantity of goods received are not conclusive, the bill of lading being in that respect a receipt only.[81]

73. See *infra*, II, N, 6.

74. Clark *v.* Masters, 1 Bosw. (N. Y.) 177.

75. *Connecticut.*— Jones *v.* Hoyt, 25 Conn. 374.

District of Columbia.— Barker *v.* Schooner E. M. Wright, 1 Mackey (D. C.) 24, 47 Am. Rep. 234.

New York.— Clark *v.* Masters, 1 Bosw. (N. Y.) 177.

Tennessee.— East Tennessee, etc., R. Co. *v.* Hunt, 15 Lea (Tenn.) 261.

United States.— Brittan *v.* Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177; British, etc., Mar. Ins. Co. *v.* Southern Pac. Co., 72 Fed. 285, 38 U. S. App. 243, 18 C. C. A. 561; One Hundred and Seventy-Five Tons of Coal, 9 Ben. (U. S.) 400, 18 Fed. Cas. No. 10,522; One Thousand Two Hundred and Sixty-Five Vitrified Pipes, 14 Blatchf. (U. S.) 274, 18 Fed. Cas. No. 10,536, 5 N. Y. Wkly. Dig. 194.

See 9 Cent. Dig. tit. "Carriers," § 875.

Interruption of delivery by some cause not the fault of the consignee will not excuse the complete delivery required as a condition to the right to freight. Rowland *v.* Miln, 2 Hilt. (N. Y.) 150.

The consignee cannot require delivery at an impossible place not in accordance with the contract. O'Rourke *v.* Two Hundred and Twenty-One Tons of Coal, 1 Fed. 619.

When the consignee is notified of the arrival of the goods and the carrier's readiness to deliver, freight is due, although it may be necessary in making actual delivery to switch the car containing the goods to a particular track. Columbus Southern R. Co. *v.* Woolfolk, 94 Ga. 507, 20 S. E. 119.

76. Clark *v.* Masters, 1 Bosw. (N. Y.) 177; Isham *v.* Greenham, 1 Handy (Ohio) 357, 12 Ohio Dec. (Reprint) 182; Brittan *v.* Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177; One Thousand Two Hundred and Sixty-Five Vitrified Pipes, 14 Blatchf. (U. S.) 274, 18 Fed. Cas. No. 10,536, 5 N. Y. Wkly. Dig. 194; Certain Logs of Mahogany, 2 Sumn. (U. S.) 589, 5 Fed. Cas. No. 2,559.

77. Loewenberg *v.* Arkansas, etc., R. Co., 56 Ark. 439, 19 S. W. 1051.

Sufficiency of tender.— If the consignee offers to pay the amount of freight named in the contract, and the carrier refuses it, claiming a larger sum, the consignee need not make a further tender. Isham *v.* Greenham, 1 Handy (Ohio) 357, 12 Ohio Dec. (Reprint) 182. But the person to whom the freight is payable should be present, ready to receive payment. Thomas *v.* Snyder, 39 Pa. St. 317.

Tender unnecessary.— If the damages which the consignee is entitled to offset against freight exceed the amount of the freight, no tender is necessary. Moran Bros. Co. *v.* Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 49, 1101. As to offsetting damages see *infra*, II, N, 3, b.

Where bill of lading recites prepayment of freight such recital cannot be contradicted as against the consignee who has purchased or made advances on the faith of the bill of lading. Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151.

78. Adams Express Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214.

Tender of freight may also be waived by the previous acceptance of a guaranty as security therefor, but such waiver cannot be shown by parol evidence in conflict with the terms of the bill of lading requiring payment of freight as a condition precedent to delivery. Jones *v.* Hoyt, 25 Conn. 374.

79. *Illinois.*— Edwards *v.* Todd, 2 Ill. 462.

Kentucky.— Boggs *v.* Martin, 13 B. Mon. (Ky.) 239.

Michigan.— Bancroft *v.* Peters, 4 Mich. 619.

New York.— Gleadell *v.* Thomson, 56 N. Y. 194.

Pennsylvania.— Leech *v.* Baldwin, 5 Watts (Pa.) 446.

United States.— Page *v.* Munro, Holmes (U. S.) 232, 18 Fed. Cas. No. 10,665; Snow *v.* Carruth, 1 Sprague (U. S.) 324, 22 Fed. Cas. No. 13,144, 19 Law Rep. 198.

See 9 Cent. Dig. tit. "Carriers," § 881.

80. Rhodes *v.* Newhall, 126 N. Y. 574, 27 N. E. 947, 38 N. Y. St. 431, 22 Am. St. Rep. 859.

81. Great Western R. Co. *v.* McDonald, 18 Ill. 172; Bissel *v.* Price, 16 Ill. 408; Abbe *v.* Eaton, 51 N. Y. 410; Meyer *v.* Peck, 28 N. Y. 590; Sutton *v.* Kettell, 1 Sprague (U. S.) 309, 23 Fed. Cas. No. 13,647, 18 Law Rep. 550; Cafiero *v.* Welsh, 4 Fed. Cas. No. 2,286, 8

c. Recovery of Excessive Payments. If freight in excess of the amount contracted for, or a reasonable rate, in the absence of contract, is demanded, either as condition precedent to accepting the goods for transportation or to their delivery at the end of the transportation, the consignor or the consignee, as the case may be, may pay under protest and bring action to recover back the excess.[82] But charges once voluntarily paid, without any fraud or deception having been practised, cannot be recovered.[83] If payment has been made, no demand for the return of the excessive freight is necessary before bringing action.[84] The common-law right of action to recover excessive charges is not suspended by a statute allowing the recovery of a penalty for exacting an excessive rate.[85]

4. Discrimination in Charges; Rebates — a. Whether Discrimination Lawful. The general doctrine that the common carrier must serve the public without discrimination[86] has been applied in many courts so as to prohibit discrimination in rates as between different shippers, and entitle one who has been injured by such discrimination to recover damages against the carrier.[87] There may, however, be

Phila. (Pa.) 130, 28 Leg. Int. (Pa.) 20, 1 Leg. Gaz. (Pa.) 121, 3 Leg. Gaz. (Pa.) 21.

Conclusiveness of bill of lading.— That the bill of lading is not conclusive as to the quantity of goods received see *supra*, II, G, 2, b, (VI). The recital of the bill of lading as to the condition of the goods when received by the carrier is not conclusive. Nelson *v.* Stephenson, 5 Duer (N. Y.) 538.

82. *Indiana.*— Lafayette, etc., R. Co. *v.* Pattison, 41 Ind. 312.

Kentucky.— Memphis, etc., Packet Co. *v.* Abell, 17 Ky. L. Rep. 191, 30 S. W. 658.

New Jersey.— McGregor *v.* Erie R. Co., 35 N. J. L. 89.

New York.—Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

Ohio.—Peters *v.* Scioto, etc., R. Co., 42 Ohio St. 275, 51 Am. Rep. 814.

England.— Baxendale *v.* London, etc., R. Co., L. R. 1 Exch. 137, 12 Jur. N. S. 274, 35 L. J. Exch. 108, 14 L. T. Rep. N. S. 26, 14 Wkly. Rep. 458; Lancashire, etc., R. *v.* Gidlow, L. R. 7 H. L. 517, 45 L. J. Exch. 625, 32 L. T. Rep. N. S. 573, 24 Wkly. Rep. 144; Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. 177, 18 Wkly. Rep. 92; London, etc., R. Co. *v.* Evershed, 3 App. Cas. 1029, 48 L. J. Q. B. 22, 39 L. T. Rep. N. S. 306, 26 Wkly. Rep. 863; Garton *v.* Bristol, etc., R. Co., 1 B. & S. 112, 7 Jur. N. S. 1234, 30 L. J. Q. B. 273, 9 Wkly. Rep. 734, 101 E. C. L. 112; Baxendale *v.* Eastern Counties R. Co., 4 C. B. N. S. 63, 27 L. J. C. P. 137, 93 E. C. L. 63.

See 9 Cent. Dig. tit. "Carriers," § 905.

Necessity of payment under protest.— Indeed, it has been said that excessive charges may be recovered though payment was not made under protest. Heiserman *v.* Burlington, etc., R. Co., 63 Iowa 732, 18 N. W. 903.

83. Arnold *v.* Georgia R., etc., Co., 50 Ga. 304; Killmer *v.* New York Cent., etc., R. Co., 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194; Kenneth *v.* South Carolina R. Co., 15 Rich. (S. C.) 284, 98 Am. Dec. 382.

What is not voluntary payment.— If the shipper has no other means of securing transportation save over the line of one carrier, excessive charges paid to such carrier will not be deemed to have been voluntarily paid. Chicago, etc., R. Co. *v.* Chicago, etc., Coal Co., 79 Ill. 121; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434.

84. Colburn *v.* Phillips, 13 Gray (Mass.) 64; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434; Ashmole *v.* Wainwright, 2 Q. B. 837, 2 G. & D. 217, 6 Jur. 729, 11 L. J. Q. B. 79, 42 E. C. L. 938.

85. Smith *v.* Chicago, etc., R. Co., 49 Wis. 443, 5 N. W. 240; Graham *v.* Chicago, etc., R. Co., 49 Wis. 532, 5 N. W. 944. But it has been held to be otherwise under the Kansas statute. Beadle *v.* Kansas City, etc., R. Co., 51 Kan. 248, 32 Pac. 910; Winsor Coal Co. *v.* Chicago, etc., R. Co., 52 Fed. 716.

Where by statute recovery of excessive charges is by way of damages as for tort, the last connecting carrier is liable for the entire damage, although the freight charged was for transportation over different lines. Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49. And the action for tort may be maintained under a statute existing at the time the illegal charge was exacted, although such statute has been repealed before the action is brought. Graham *v.* Chicago, etc., R. Co., 53 Wis. 473, 10 N. W. 609.

Where rates are fixed by a public commission, which rates are to be posted, it must be averred in an action to recover excessive rates that the rates fixed were duly posted, as required. Sorrell *v.* Central R. Co., 75 Ga. 509; Swift *v.* Philadelphia, etc., R. Co., 64 Fed. 59.

86. See *supra*, II, B.

87. *Illinois.*— Chicago, etc., R. Co. *v.* People, 67 Ill. 11, 16 Am. Rep. 599; Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; National Elevator, etc., Co. *v.* Chicago, etc., R. Co., 50 Ill. App. 339.

Missouri.— Sloan *v.* Pacific R. Co., 61 Mo. 24, 21 Am. Rep. 397.

New Jersey.— Messenger *v.* Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457.

Ohio.— Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

Pennsylvania.— Twells *v.* Pennsylvania R. Co., 2 Walk. (Pa.) 450.

United States.— Goodridge *v.* Union Pac. R. Co., 35 Fed. 35; Hays *v.* Pennsylvania Co., 12 Fed. 309.

See 9 Cent. Dig. tit. "Carriers," § 901.

Monopoly.—Such discriminations have been

a discrimination in rates when founded on a reasonable difference in the conditions attending the different shipments. Thus, a lower rate may be granted at competing points than at points where there is no such competition.[88] And it is said that a greater general benefit to the carrier from one kind of business than from another may justify a discrimination.[89] But a greater aggregate charge for a short than for a long haul is in general prohibited by statute.[90] Discriminations on the basis of a larger amount of freight shipped by a favored shipper as compared with another shipper seem to be disfavored, evidently on the ground that they tend to create a monopoly.[91] It is apparent from the cases cited that no very definite rule on the subject of discriminations has been established, and the whole matter is now so largely regulated by statute that a discussion of the question on common-law principles would not be of much service. There are cases in which it has been held that so long as a reasonable rate is given to any shipper applying for transportation for his goods, discrimination in favor of particular shippers is not unlawful.[92] And it is not unlawful to charge less than the sched-

held particularly reprehensible where they tended to create a monopoly in favor of one shipper to the exclusion of others. Louisville, etc., R. Co. *v.* Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; State *v.* Cincinnati, etc., R. Co., 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319. It has also been held that a railroad company cannot give the exclusive privilege to one express company of carrying express matter over its line, excluding other express companies from doing business over its line on the same terms. McDuffee *v.* Portland, etc., R. Co., 52 N. H. 430, 13 Am. Rep. 72; Sandford *v.* Catawissa, etc., R. Co., 24 Pa. St. 378, 64 Am. Dec. 667. But on this subject see a full discussion *supra*, II, B, 5.

So a railroad company may be enjoined from binding itself to deliver to a particular stock-yard all live stock coming over its line to that destination and refusing to grant the same privilege to other stock-yards similarly situated. McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. 3.

Where two rival lines of steamboats made connection with the same railroad, it was held that the railroad company could not charge higher rates for goods to be forwarded over one line than for goods to be forwarded over the other. Samuels *v.* Louisville, etc., R. Co., 31 Fed. 57.

88. Lough *v.* Outerbridge, 66 Hun (N. Y.) 103, 20 N. Y. Suppl. 758, 49 N. Y. St. 504; Interstate Commerce Commission *v.* Western, etc., R. Co., 93 Fed. 83, 35 C. C. A. 217.

Short and long hauls.— So, in the absence of statutory provision, a higher proportionate rate may be charged for a short than for a long haul. St. Louis, etc., R. Co. *v.* Hill, 14 Ill. App. 579. Under the English act regulating rates see Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. 177, 18 Wkly. Rep. 92; Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 11 App. Cas. 97, 50 J. P. 340, 55 L. J. Q. B. 181, 6 R. & Can. T. Cas. 133, 54 L. T. Rep. N. S. 1.

Where the rate charged is not unreasonable, the fact that the lower rate is granted to another shipper in order to get business which would otherwise go by a different route will justify a discrimination. Ragan *v.* Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684.

89. Louisville, etc., R. Co. *v.* Com., 22 Ky. L. Rep. 328, 57 S. W. 508.

90. Hutcherson *v.* Louisville, etc., R. Co., 22 Ky. L. Rep. 361, 57 S. W. 251.

Further as to long and short haul see COMMERCE.

91. Louisville, etc., R. Co. *v.* Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; Brundred *v.* Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; Kinsley *v.* Buffalo, etc., R. Co., 37 Fed. 181; Burlington, etc., R. Co. *v.* Northwestern Fuel Co., 31 Fed. 652; Hays *v.* Pennsylvania Co., 12 Fed. 309.

Extent and limits of rule.— It is said, however, that there may be a discrimination in rates based upon the quantities of goods sent by different shippers, although not as between a shipper who gives his entire business to the carrier in question as against one who refuses to do so. Menacho *v.* Ward, 23 Blatchf. (U. S.) 502, 27 Fed. 529. Even this basis of discrimination is, however, sustained, provided the carrier is prepared to transport goods for a reasonable sum for any shipper who does not agree to such condition. Lough *v.* Outerbridge, 143 N. Y. 271, 38 N. E. 292, 62 N. Y. St. 324, 42 Am. St. Rep. 712, 25 L. R. A. 674.

92. Cowden *v.* Pacific Coast Steamship Co., 94 Cal. 470, 29 Pac. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221; Johnson *v.* Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731; Illinois, etc., Co. *v.* Beaird, 24 Ill. App. 322; Fitchburg R. Co. *v.* Gage, 12 Gray (Mass.) 393.

A shipper cannot recover back freight paid in excess of rates paid by others, where the payment has been voluntary. Potomac Coal Co. *v.* Cumberland, etc., R. Co., 38 Md. 226.

Complaint against a railroad company for unjust discrimination against plaintiff must aver actual injury sustained by reason of such discrimination. Allen *v.* Cape Fear, etc., R. Co., 100 N. C. 397, 6 S. E. 105.

Injunction will not be granted against extortionate charges without an allegation that

ule rate in a particular case where the purpose is not to discriminate between shippers.[93] Usually the question of whether there is an unjust discrimination is a question of fact for the jury.[94] In jurisdictions where a discrimination between rates to different shippers is deemed unlawful, the complaining shipper may recover the difference between the rate which he was required to pay, and that charged a favored shipper for similar services.[95] But loss of profits by reason of discrimination cannot be recovered.[96] Interest on the recovery is in the discretion of the jury.[97]

b. Rebates. In general a contract to repay a portion of the freight charged by way of rebate is not unlawful and may be enforced.[98] But a rebate contracted for with the view of making an unlawful discrimination cannot be recovered.[99]

5. Who Liable For Freight Charges. In general the consignor with whom the contract of shipment is made is liable under the contract for the charges provided for therein. And this liability exists regardless of whether the consignor is the owner, and irrespective of the failure of the carrier to collect freight from the consignee.[1] In general also the owner of the goods for whose benefit

complainant has no other means of carrying on his business than those controlled by the carrier complained against. De Bary Baya Merchants' Line *v.* Jacksonville, etc., R. Co., 40 Fed. 392.

93. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480; Kelly *v.* Chicago, etc., R. Co., 93 Iowa 436, 61 N. W. 957.

94. *Illinois.*— Savitz *v.* Ohio, etc., R. Co., 150 Ill. 208, 37 N. E. 235.

Indiana.— Louisville, etc., R. Co. *v.* Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105.

Iowa.— Hopper *v.* Chicago, etc., R. Co., 91 Iowa 639, 60 N. W. 487; Paxon *v.* Illinois Cent. R. Co., 56 Iowa 427, 9 N. W. 334.

New York.— Root *v.* Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 23 N. Y. St. 226, 11 Am. St. Rep. 643, 4 L. R. A. 331.

Texas.— Houston, etc., R. Co. *v.* Rust, 58 Tex. 98.

See 9 Cent. Dig. tit. "Carriers," § 914.

95. Murphy *v.* Creighton, 45 Iowa 179; Seawell *v.* Kansas City, etc., R. Co., 119 Mo. 222, 24 S. W. 1002.

Under the interstate commerce law, prohibiting a greater charge for a short than a long haul, the complaining shipper may recover the excess of the charge for a short haul over a charge for a long haul. Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49; Junod *v.* Chicago, etc., R. Co., 47 Fed. 290.

96. Kankakee Coal Co. *v.* Illinois Cent. R. Co., 17 Ill. App. 614; Union Pac. R. Co. *v.* Taggart, 149 U. S. 698, 13 S. Ct. 977, 37 L. ed. 905; Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 13 S. Ct. 970, 37 L. ed. 896; Florida Cent., etc., R. Co. *v* Bucki, 68 Fed. 864, 30 U. S. App. 454, 16 C. C. A. 42.

97. Osborne *v.* Chicago, etc., R. Co., 48 Fed. 49.

Interest may be allowed, even though the action is in form in tort. Graham *v.* Chicago, etc., R. Co., 53 Wis. 473, 10 N. W. 609.

Statutory provisions as to discriminations are more fully considered in another connection. See, generally, Commerce.

98. *Illinois.*— Erie, etc., Despatch *v.* Cecil, 112 Ill. 180.

Indiana.— Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754.

Missouri.—Christie *v.* Missouri Pac. R. Co., 94 Mo. 453, 7 S. W. 567.

New York.— Root *v.* Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 23 N. Y. St. 226, 11 Am. St. Rep. 643, 4 L. R. A. 331.

South Carolina.—*Ex p.* Benson, 18 S. C. 38, 44 Am. Rep. 564.

See 9 Cent. Dig. tit. "Carriers," § 888.

A rebate to shipper of cattle, by way of allowance for services rendered in taking care of them, is not necessarily illegal. Rothschild *v.* Wabash R. Co., 15 Mo. App. 242.

A verbal agreement for a rebate cannot be shown where the terms of the shipment are stated in the bill of lading. Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 8 So. 803.

99. Indianapolis, etc., R. Co. *v.* Davis, 32 Ill. App. 67; Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754; Cook *v.* Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764; Baltimore, etc., R. Co. *v.* Diamond Coal Co., 61 Ohio St. 242, 55 N. E. 616.

1. Wooster *v.* Tarr, 8 Allen (Mass.) 270, 85 Am. Dec. 707; Blanchard *v.* Page, 8 Gray (Mass.) 281; Gilson *v.* Madden, 1 Lans. (N. Y.) 172; Hayward *v.* Middleton, 3 McCord (S. C.) 121, 15 Am. Dec. 615, 1 Mill (S. C.) 186.

Even though the bill of lading provides for delivery of the goods to the consignee on his paying freight, the consignor remains liable on the contract.

Maine.— Holt *v.* Westcott, 43 Me. 445, 69 Am. Dec. 74.

New Jersey.— Grant *v.* Wood, 21 N. J. L. 292, 47 Am. Dec. 162.

North Carolina.— Spencer *v.* White, 23 N. C. 236.

Pennsylvania.— Collins *v.* Union Transp. Co., 10 Watts (Pa.) 384; Layng *v.* Stewart, 1 Watts & S. (Pa.) 222.

and under whose direction they are shipped is liable for the freight.[2] As the carrier is in general entitled to freight from the consignee as a condition of delivering the goods, the consignee who actually receives the goods is liable for freight, although it may not have been exacted before delivery.[3] In general also the assignee of a bill of lading who receives the goods thereby becomes bound to pay charges of transportation.[4]

6. Liens — a. Right to Lien — (1) *For Freight.* A common carrier has a lien on the goods transported for the charges of transportation.[5] This lien, however, is a specific, and not a general, lien; that is, it attaches to the goods involved in one transaction, or constituting a part of one consignment, for charges relating to that transaction, or connected with that consignment and does not

England.— Great Western R. Co. *v.* Bagge, 15 Q. B. D. 625, 54 L. J. Q. B. 599, 53 L. T. Rep. N. S 225, 34 Wkly. Rep. 45.

See 9 Cent. Dig. tit. "Carriers," § 870.

But it may be shown by parol that it was understood between the parties that the freight should be paid by the consignee or another. Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335; Union Freight R. Co. *v.* Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398.

If by reason of fault of carrier the consignee is not required to pay the freight on delivery, as indicated in the bill of lading, the consignor will be released. Lee *v.* Salter, Lalor (N. Y.) 163; Thomas *v.* Snyder, 39 Pa. St. 317.

2. Barnard *v.* Wheeler, 24 Me. 412; Grant *v.* Wood, 21 N. J. L. 292, 47 Am. Dec. 162; Ogden *v.* Coddington, 2 E. D. Smith (N. Y.) 317.

3. *Maine.*— Hill *v.* Leadbetter, 42 Me. 572, 66 Am. Dec. 305.

Massachusetts.— Union Freight R. Co. *v.* Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398; Old Colony R. Co. *v.* Wilder, 137 Mass. 536.

New York.—Dart *v.* Ensign, 2 Lans. (N. Y.) 383; Byrne *v.* Weeks, 7 Bosw. (N. Y.) 372 [*affirmed* in 4 Abb. Dec. (N. Y.) 657].

Rhode Island.— Hatch *v.* Tucker, 12 R. I. 501, 34 Am. Rep. 707.

United States.— Sumner *v.* Walker, 30 Fed. 261; Philadelphia, etc., R. Co. *v.* Barnard, 3 Ben. (U. S.) 39, 19 Fed. Cas. No. 11,086.

See 9 Cent. Dig. tit. "Carriers," § 871.

But if nominal consignee is known to be acting merely as agent for the owner for the purpose of transmitting the goods to him, liability for freight does not arise from the mere fact of receipt. Dart *v.* Ensign, 47 N. Y. 619; Ackerman *v.* Redfield, 9 Hun (N. Y.) 378. And see Elwell *v.* Skiddy, 77 N. Y. 282.

If, however, the consignee has by receiving the goods deprived the carrier of his lien he cannot set up that he had no real interest in the transaction. Sheets *v.* Wilgus, 56 Barb. (N. Y.) 662.

Presumption of payment.— When the property has been delivered to the consignee, a presumption arises that the freight has been paid. Shea *v.* Minneapolis, etc., R. Co., 63 Minn. 228, 65 N. W. 458.

Demurrage.—A consignee is not liable for demurrage unless so stipulated in the bill of lading. Scaife *v.* Tobin, 3 B. & Ad. 523, 1 L. J. K. B. 183, 23 E. C. L. 233.

4. New York, etc., R. Co. *v.* Sanders, 134 Mass. 53; New York, etc., Steam Nav. Co. *v.* Young, 3 E. D. Smith (N. Y.) 187; Merian *v.* Funck, 4 Den. (N. Y.) 110.

But an assignee of the bill of lading for security only is not liable for freight beyond the value of the goods. Swett *v.* Black, 2 Sprague (U. S.) 49, 23 Fed. Cas. No. 13,691.

Demurrage.—An assignee of the bill of lading, receiving the goods thereunder, is liable for demurrage stipulated for in the contract. Wegener *v.* Smith, 15 C. B. 285, 80 E. C. L. 285.

5. *Illinois.*— Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

Maine.— Wilson *v.* Grand Trunk R. Co., 56 Me. 60, 96 Am. Dec. 435.

New Mexico.— Santa Fé Pac. R. Co. *v.* Bossut, (N. M. 1900) 62 Pac. 977.

New York.— Langworthy *v.* New York, etc., R. Co., 2 E. D. Smith (N. Y.) 195.

Ohio.— Goodman *v.* Stewart, Wright (Ohio) 216.

South Carolina.—Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123; Hayward *v.* Middleton, 1 Mill (S. C.) 186.

England.— Skinner *v.* Upshaw, 2 Ld. Raym. 752.

See 9 Cent. Dig. tit. "Carriers," § 891.

Property belonging to the government is not exempt from the carrier's lien for freight. Union Pac. R. Co. *v.* U. S., 2 Wyo. 170.

Relation of debtor and creditor.— To support a lien for freight the relation of debtor and creditor must exist between the owner of the goods and the carrier so that action at law might be maintained for payment of the debt. Fitch *v.* Newberry, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33.

There is no lien for an unliquidated amount due the carrier by way of damages for not fully lading the vessel (called "dead freight"). Phillips *v.* Rodie, 15 East 547, 13 Rev. Rep. 528.

Whether a contract for services is one of affreightment or of hiring by the job is a question for the jury in an action to replevin the goods claimed to be held under a carrier's lien. Fuller *v.* Bradley, 25 Pa. St. 120.

extend to charges for other shipments under a separate contract.[6] If, however, one consignment covers several lots or parcels of goods there is a lien on each lot or parcel for the charges for the whole consignment.[7] If by reason of damage to the goods to an amount exceeding the freight the carrier is not entitled to collect any charges he of course has no lien,[8] nor has the carrier any lien where he is in default for having failed to complete his contract.[9]

(II) *For Other Charges.* The carrier's lien covers, however, not only charges for transportation, but any other lawful charges which the carrier may be entitled to collect, such as for storage, and the like.[10]

(III) *For Charges Advanced.* The lien covers charges which a connecting carrier has advanced to a preceding carrier, as he is authorized to do,[11] and his right to a lien for his own charges and those advanced will not be affected by the fact that they exceed the charge for the entire transportation as contracted for by the first carrier,[12] unless he has notice of the first carrier's contract.[13] Nor will the lien be affected by the fact that the previous carrier has been in default by

6. *Illinois.*— Hale *v.* Barrett, 26 Ill. 195, 79 Am. Dec. 367.

Kentucky.— Eastern Kentucky R. Co. *v.* Holbrook, 4 Ky. L. Rep. 730.

Louisiana.— Pharr *v.* Collins, 35 La. Ann. 939, 48 Am. Rep. 251.

Massachusetts.—Adams *v.* Clark, 9 Cush. (Mass.) 215, 57 Am. Dec. 41.

New Jersey.— Hartshorne *v.* Johnson, 7 N. J. L. 108.

North Carolina.—Farrell *v.* Richmond, etc., R. Co., 102 N. C. 390, 9 S. E. 302, 11 Am. St. Rep. 760, 3 L. R. A. 647.

Pennsylvania.— Leonard *v.* Winslow, 2 Grant (Pa.) 139.

United States.— Atlas Steam Ship Co. *v.* Colombian Land Co., 102 Fed. 358, 42 C. C. A. 398.

England.— Butler *v.* Woolcott, 2 B. & P. N. R. 64.

See 9 Cent. Dig. tit. "Carriers," § 891.

By contract the lien on one consignment may be extended to cover other freight charges, but such an arrangement with the consignee is not valid as against the consignor's right of stoppage *in transitu*. Bacharach *v.* Chester Freight Line, 133 Pa. St. 414, 19 Atl. 409; Pennsylvania R. Co. *v.* American Oil Works, 126 Pa. St. 485, 17 Atl. 671, 12 Am. St. Rep. 885.

7. Dixon *v.* Georgia Cent. R. Co., 110 Ga. 173, 35 S. E. 369; Pennsylvania Steel Co. *v.* Georgia R., etc., Co., 94 Ga. 636, 21 S. E. 577. See *infra*, II, N, 6, b.

8. Bancroft *v.* Peters, 4 Mich. 619; Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123; Ewart *v.* Kerr, Rice (S. C.) 203; Dyer *v.* Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

As to offsetting damages against freight see *supra*, II, N, 3, b.

9. Breed *v.* Mitchell, 48 Ga. 533. And see *supra*, II, N, 1, e.

10. Dixon *v.* Georgia Cent. R. Co., 110 Ga. 173, 35 S. E. 369; Illinois Cent. R. Co. *v.* Alexander, 20 Ill. 23; Miller *v.* Mansfield, 112 Mass. 260; Western Transp. Co. *v.* Barber, 56 N. Y. 544. And see *supra*, II, N, 2.

But there is no lien for demurrage unless it is expressly so stipulated in the contract. Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588.

Where carrier has paid custom duties on the goods his lien covers such charges advanced. Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453.

11. *Alabama.*—Long *v.* Mobile, etc., R. Co., 51 Ala. 512.

Georgia.— Georgia R., etc., Co. *v.* Murrah, 85 Ga. 343, 11 S. E. 779.

Kentucky.— Cayo *v.* Pool, 21 Ky. L. Rep. 1600, 55 S. W. 887, 49 L. R. A. 251.

Missouri.— Shewalter *v.* Missouri Pac. R. Co., 84 Mo. App. 589; Evans *v.* Chicago, etc., R. Co., 76 Mo. App. 472; Moore *v.* Henry, 18 Mo. App. 35.

New York.— Travis *v.* Thompson, 37 Barb. (N. Y.) 236.

See 9 Cent. Dig. tit. "Carriers," § 893.

As to advancement of charges by connecting carrier see *supra*, II, N, 1, f, (II).

12. *Arkansas.*— Loewenberg *v.* Arkansas, etc., R. Co., 56 Ark. 439, 19 S. W. 1051.

Georgia.— Georgia R., etc., Co. *v.* Murrah, 85 Ga. 343, 11 S. E. 779.

Louisiana.— Walker *v.* Cassaway, 4 La. Ann. 19, 50 Am. Dec. 551.

Massachusetts.— Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626.

Missouri.— Wells *v.* Thomas, 27 Mo. 17, 72 Am. Dec. 228.

South Carolina.— Lewis *v.* Richmond, etc., R. Co., 25 S. C. 249.

Washington. —Moses *v.* Port Townsend Southern R. Co., 5 Wash. 595, 32 Pac. 488.

Wisconsin.— Schneider *v.* Evans, 25 Wis. 241, 3 Am. Rep. 56.

See 9 Cent. Dig. tit. "Carriers," § 897.

13. *Connecticut.*— Rowland *v.* New York, etc., R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175.

Kansas.— Wolf *v.* Hough, 22 Kan. 659.

Massachusetts.— Crossan *v.* New York, etc., R. Co., 149 Mass. 196, 21 N. E. 367, 14 Am. St. Rep. 408, 3 L. R. A. 766.

Mississippi.— Illinois Cent. R. Co. *v.* Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252.

United States.— Marsh *v.* Union Pac. R. Co., 3 McCrary (U. S.) 236, 9 Fed. 873.

See 9 Cent. Dig. tit. "Carriers," § 891.

reason of damage to the goods.[14] If, however, the first carrier delivered the goods to the connecting carrier without authority to do so, as where the direction of the owner as to the connecting line to which the goods should be delivered has been violated, the connecting carrier has no lien, either for his own charges or those advanced.[15]

b. Waiver; Delivery of Possession. The carrier's lien is dependent upon possession, and is lost by delivering the goods to the consignee or owner.[16] The carrier, however, may deliver a portion of the consignment and retain a lien for his entire charges on the balance.[17] The right to a lien may be waived by giving credit.[18] If the carrier asserts a right to retain possession of the goods on another ground than that of a lien for charges he cannot afterward assert a right of possession under a claim for such lien.[19] So, if he claims a lien for a debt other than transportation charges on the goods, for which he is not entitled to a lien, the consignee may replevin the goods without tendering the amount of transporta-

14. Bowman *v.* Hilton, 11 Ohio 303. And see *supra*, II, N, 1, f.

If carrier orders return of goods not received by the consignee or not delivered by reason of misdirection, the carrier who returns the goods may recover not only the charges therefor, but the charges on the first transportation. U. S. Express Co. *v.* Haines, 37 Ill. 137; Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Vaughan *v.* Providence, etc., R. Co., 13 R. I. 578.

15. Denver, etc., R. Co. *v.* Hill, 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376; Bird *v.* Georgia R. Co., 72 Ga. 655; Bass *v.* Upton, 1 Minn. 408; Marsh *v.* Union Pac. R. Co., 3 McCrary (U. S.) 236, 9 Fed. 873.

16. Reineman *v.* Covington, etc., R. Co., 51 Iowa 338, 1 N. W. 619; Bieglow *v.* Heaton, 4 Den. (N. Y.) 496; Lake Shore, etc., R. Co. *v.* Ellsey, 85 Pa. St. 283.

Delivery to assignee for benefit of consignee's creditors does not prevent the carrier as a creditor of the consignee for the freight from having his lien recognized in the assignment proceeding. Cayo *v.* Pool, 21 Ky. L. Rep. 1600, 55 S. W. 887, 49 L. R. A. 251.

Fraud.— If possession of the goods is obtained by the consignee by fraud the carrier may recover possession by replevin and thus perpetuate his lien. Bigelow *v.* Heaton, 6 Hill (N. Y.) 43.

Legal process.— The carrier's lien is not divested by the consignor's obtaining possession of the goods by legal process. Newhall *v.* Vargas, 15 Me. 314, 33 Am. Dec. 617.

Mere manual delivery to consignee, without intent to part with possession, will not forfeit the carrier's lien. One Hundred and Fifty-One Tons of Coal, 4 Blatchf. (U. S.) 368, 18 Fed. Cas. No. 10,520, 6 Am. L. Rev. 759, 15 Int. Rev. Rec. 34.

The fact that carrier becomes an agent of consignee to hold the goods is not inconsistent with his right to enforce his lien. Hall *v.* Dimond, 63 N. H. 565, 3 Atl. 423.

Under the Louisiana civil code the carrier may enforce his lien within fifteen days after having delivered the goods to the consignee, if they have not in the meantime passed into third hands. Granger *v.* Campbell, 7 La. Ann. 611.

Where car containing goods was placed on a spur track for the purpose of unloading by the consignee, but the goods had not yet been taken from the car, held that there was not such delivery as to terminate the lien. New York Cent., etc., R. Co. *v.* Davis, 86 Hun (N. Y.) 86, 34 N. Y. Suppl. 206, 68 N. Y. St. 54.

17. *Iowa.*— Chicago, etc., R. Co. *v.* Northwestern Union Packet Co., 38 Iowa 377.

Kentucky.— Boggs *v.* Martin, 13 B. Mon. (Ky.) 239.

Massachusetts.—Potts *v.* New York, etc., R. Co., 131 Mass. 455, 41 Am. Rep. 247; New Haven, etc., Co. *v.* Campbell, 128 Mass. 104, 35 Am. Rep. 360; Lane *v.* Old Colony, etc., R. Co., 14 Gray (Mass.) 143.

New York.— New York Cent., etc., R. Co. *v.* Davis, 158 N. Y. 674, 52 N. E. 1125.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Dows, 15 Phila. (Pa.) 101, 39 Leg. Int. (Pa.) 264.

Wisconsin.— Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, 33 L. R. A. 351.

United States.— Sears *v.* Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, 1 Cliff. (U. S.) 68, 12 Fed. Cas. No. 12,589.

See 9 Cent. Dig. tit. "Carriers," § 898 *et seq.*

18. Pinney *v.* Wells, 10 Conn. 104; Chandler *v.* Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Sicard *v.* Buffalo, etc., R. Co., 15 Blatchf. (U. S.) 525, 22 Fed. Cas. No. 12,831, 8 Reporter 550.

Mere fact that credit is extended in belief that consignee is solvent cannot be revoked and the lien asserted on account of the insolvency of the consignee. Sears *v.* Wills, 4 Allen (Mass.) 212.

Suing for freight charges and attaching other goods for the debt will not waive the lien possessed by the carrier. Barnard *v.* Wheeler, 24 Me. 412.

19. Louisville, etc., R. Co. *v.* McGuire, 79 Ala. 395; Wingard *v.* Banning, 39 Cal. 543; Fernandez *v.* Silva, 1 La. 269; Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117.

tion charges.[20] So, if a lien is claimed for an excessive amount the consignee may recover possession of the goods or sue for conversion without a formal tender of the amount to which the carrier is entitled, provided it appears that he was ready and willing to pay the just charges.[21]

c. Priority of Lien Over Other Claims. The carrier has no lien as against the true owner of the goods who has never expressly or by implication authorized their delivery to the carrier.[22] The carrier's lien is also inferior to the right of a mortgagee of the property under a mortgage of which the carrier has actual or constructive knowledge.[23] It is also inferior to the lien of a warehouseman for storage, the goods having been delivered by the carrier to the warehouseman without requiring advancement of freight charges.[24] But the carrier's lien is superior to that of a vendor under his right of stoppage *in transitu*;[25] and to the claims of attaching creditors of the consignor;[26] and to any claims of a pledgee of the goods whose rights accrue while they are in the carrier's possession.[27]

d. Enforcement. The carrier's lien, like other bailees' liens, gives a right of possession but not a right to sell.[28] The statutes in some states have authorized sale by the carrier to enforce his lien,[29] especially in case of perishable goods.[30] It seems that such sale is to be of the contents of the packages, and not of the packages unopened.[31]

20. Adams *v.* Clark, 9 Cush. (Mass.) 215, 57 Am. Dec. 41; Blair *v.* Jeffries, Dudley (S. C.) 59; Sicard *v.* Buffalo, etc., R. Co. 15 Blatchf. (U. S.) 525, 22 Fed. Cas. No. 12,831, 8 Reporter 550.

21. *Alabama.*— Long *v.* Mobile, etc., R. Co., 51 Ala. 512.

Illinois.— Northern Transp. Co. *v.* Sellick, 52 Ill. 249.

Michigan.— Johnston *v.* Davis, 60 Mich. 56, 26 N. W. 830.

Missouri.— Loomis *v.* Wabash, etc., R. Co., 17 Mo. App. 340.

Ohio.—Isham *v.* Greenham, 1 Handy (Ohio) 357, 12 Ohio Dec. (Reprint) 182.

South Carolina.— Blair *v.* Jeffries, Dudley (S. C.) 59.

Tennessee.— East Tennessee, etc., R. Co. *v.* Hunt, 15 Lea (Tenn.) 261.

See 9 Cent. Dig. tit. "Carriers," § 368.

Formal tender is not necessary where the carrier wrongfully refuses to deliver the goods. Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

22. Stevens *v.* Boston, etc., R. Corp., 8 Gray (Mass.) 262; Robinson *v.* Baker, 5 Cush. (Mass.) 137, 51 Am. Dec. 54; Bassett *v.* Spofford, 45 N. Y. 387, 6 Am. Rep. 101. Thus the carrier receiving the goods for transportation from a bailee, without authority to forward them, has no lien against the owner. Gilson *v.* Gwinn, 107 Mass. 126, 9 Am. Rep. 13; Clark *v.* Lowell, etc., R. Co., 9 Gray (Mass.) 231.

But if through fraud the owner has been induced to give authority to another to deal with the goods as his own the carrier, without knowledge of the fraud, will be protected in dealing with the one having apparent authority. Hoffman *v.* Lake Shore, etc., R. Co., 125 Mich. 201, 84 N. W. 55.

Where shipper accepted a bill of lading and transferred it to another as security for money advanced, held that the carrier was entitled to a lien as provided for in the bill. Bishop *v.* Empire Transp. Co., 48 How. Pr. (N. Y.) 119.

23. Owen *v.* Burlington, etc., R. Co., 11 S. D. 153, 76 N. W. 302, 74 Am. St. Rep. 786.

24. Powers *v.* Sixty Tons of Marble, 21 La. Ann. 402.

25. *Georgia.*— Pennsylvania Steel Co. *v.* Georgia R., etc., Co., 94 Ga. 636, 21 S. E. 577.

Kansas.— Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

Kentucky.— Hause *v.* Judson, 4 Dana (Ky.) 7, 29 Am. Dec. 377.

Massachusetts.— Potts *v.* New York, etc., R. Co., 131 Mass. 455, 41 Am. Rep. 247.

Pennsylvania.— Hays *v.* Mouille, 14 Pa. St. 48.

26. Wolfe *v.* Crawford, 54 Miss. 514; Campbell *v.* Conner, 70 N. Y. 424.

27. Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609.

28. Indianapolis, etc., R. Co. *v.* Herndon, 81 Ill. 143; Briggs *v.* Boston, etc., R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626. See also, generally, BAILMENTS, 5 Cyc. 157.

29. Central R., etc., Co. *v.* Sawyer, 78 Ga. 784, 3 S. E. 629; Hodges *v.* Peacock, 2 Tex. App. Civ. Cas. § 824.

As to a similar statute in England see North *v.* London, etc., R. Co., 14 C. B. N. S. 132, 9 Jur. N. S. 896, 32 L. J. C. P. 156, 8 L. T. Rep. N. S. 246, 11 Wkly. Rep. 624, 108 E. C. L. 132; Field *v.* Newport, etc., R. Co., 3 H. & N. 409, 27 L. J. Exch. 396.

Equitable remedies.— Such statutes do not, in the absence of express provision, take away previous equitable remedies. Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

30. Western R. Co. *v.* Rembert, 50 Ala. 25; Martin *v.* McLaughlin, (Colo. 1885) 6 Pac. 137; Rankin *v.* Memphis, etc., Packet Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339.

31. Nathan *v.* Shivers, 71 Ala. 117, 46 Am. Rep. 303; Adams Express Co. *v.* Schlessinger, 75 Pa. St. 246.

O. Claims For Damages; Notice of Loss; Limitation of Time For Bringing Action — 1. CLAIMS FOR DAMAGES; WAIVER. Acceptance of the goods by the consignee without objection and with knowledge of their defective condition precludes recovery for damages thereto.[32] But the consignee is entitled to a reasonable opportunity of examination, and acceptance for that purpose will not be a waiver.[33] Nor will acceptance waive objection for damage not apparent.[34] Indeed, the receipt of the goods alone, with no stipulation that they are accepted in full performance of the contract, does not, it seems, constitute a waiver of claim for damages for which the carrier may be liable.[35] A receipt acknowledging a delivery of the goods in good condition is only *prima facie* evidence of the fact.[36] Acceptance of a part of the goods will not waive objection on account of the damaged condition of the balance.[37] Payment of the freight is no waiver of the right to recover damages, as the consignee may maintain action therefor without interposing it by way of offset or counter-claim as against the freight.[38]

2. NOTICE OF CLAIM FOR LOSS — a. Validity of Special Limitations. It is usual to insert in bills of lading, or other contracts for shipment, a stipulation that written notice of a claim for loss of or damage to the goods shall be given to the agents of the carrier within some specified time, such as thirty or ninety days, and that unless such notice is given there will be no liability on the part of the carrier, and such stipulations are generally upheld so far as they are found to be reasonable.[39] Cases holding such stipulations to be invalid are usually based on

32. Marcy *v.* Warner, 17 La. Ann. 34; Monro *v.* Ship Baltic, 1 Mart. O. S. (La.) 194.

33. Bradstreet *v.* Heran, 2 Blatchf. (U. S.) 116, 3 Fed. Cas. No. 1,792*a*.

34. Oakey *v.* Russell, 6 Mart. N. S. (La.) 58.

If consignee is induced to accept with assurance that any damage discovered will be afterward settled, acceptance does not waive the claim. Bernadon *v.* Nolte, 7 Mart. (La.) 278.

35. Alden *v.* Pearson, 3 Gray (Mass.) 342; Lesinsky *v.* Great Western Dispatch, 10 Mo. App. 134; Howe *v.* Oswego, etc., R. Co., 56 Barb. (N. Y.) 121; Withers *v.* New Jersey Steamboat Co., 48 Barb. (N. Y.) 455; Bowman *v.* Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562.

If injury is discovered after acceptance the consignee may recover therefor, although he has sold the goods without giving the carrier an opportunity to inspect. The Elmira Shepherd, 8 Blatchf. (U. S.) 341, 8 Fed. Cas. No. 4,418.

Notice of injury to animal.— It is not essential to recovery for injury to an animal transported that the plaintiff show notice to the carrier of the injury. Evans *v.* Dunbar, 117 Mass. 546.

As to notice required by terms of contract see *infra*, II, O, 2.

36. Porter *v.* Chicago, etc., R. Co., 20 Iowa 73; Monell *v.* Northern Cent. R. Co., 16 Hun (N. Y.) 585.

Release executed without authority.—A release of damages by the consignor is not binding on the consignee if executed without his authority. Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 23 N. W. 425, 53 Am. Dec. 267.

37. Brown, etc., Co. *v.* Pennsylvania Co., 63 Minn. 546, 65 N. W. 961; Scheu *v.* Benedict, 116 N. Y. 510, 22 N. E. 1073, 27 N. Y. St. 526, 15 Am. St. Rep. 426.

If consignee desires to recover damages for breach of entire contract in excess of the value of the goods not delivered, he should tender the return of the portion accepted after discovering the inability of the carrier to deliver the balance. Conner *v.* The Sarah Sands, 6 Fed. Cas. No. 3,115, 30 Hunt. Mer. Mag. 714.

The right to recover damages is not waived by making effort to save a portion of the goods from the wreck of the vessel containing the consignment. Lengsfield *v.* Jones, 11 La. Ann. 624.

38. Brown, etc., Co. *v.* Pennsylvania Co., 63 Minn. 546, 65 N. W. 961; Schwinger *v.* Raymond, 83 N. Y. 192, 38 Am. Rep. 415.

39. *Illinois.*— Chicago, etc., R. Co. *v.* Bozarth, 91 Ill. App. 68.

Indiana.— U. S. Express Co. *v.* Harris, 51 Ind. 127.

Mississippi.—Southern Express Co. *v.* Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385.

Missouri.— Brown *v.* Wabash, etc., R. Co., 18 Mo. App. 568.

New York.—American Grocery Co. *v.* Staten Island Rapid Transit R. Co., 23 Misc. (N. Y.) 356, 51 N. Y. Suppl. 307.

Tennessee.—Southern Express Co. *v.* Glenn, 16 Lea (Tenn.) 472, 1 S. W. 102.

United States.— Southern Express Co. *v.* Caldwell, 21 Wall. (U. S.) 264, 22 L. ed. 556.

Canada.— Northern Pac. Express Co. *v.* Martin, 26 Can. Supreme Ct. 135.

See 9 Cent. Dig. tit. "Carriers," § 670.

Such a stipulation is applicable to the carrier's conduct as warehouseman, as well as with reference to the transportation of the goods. Armstrong *v.* Chicago, etc., R. Co., 53 Minn. 183, 54 N. W. 1059. But *contra*, see Smith *v.* Dinsmore, 9 Daly (N. Y.) 188.

the ground that the terms thereof are unreasonable, rather than on the general invalidity of such conditions. But they are regarded as limitations of the carrier's liability, and therefore as ineffectual against a claim for loss or injury due to the carrier's negligence,[40] and also as invalid where limitation of common-law liability is prohibited by statute.[41] Such stipulations have been held not applicable to depreciation in the property due to delay in transportation,[42] nor to a case where the consignee refuses to receive the property on the ground that it is not tendered in proper condition,[43] nor to a case where the goods are never delivered,[44] and it is also said that the time during which the carrier is engaged in tracing the goods in order to find where they are and make delivery is not to be included in the computation.[45] Such stipulation in the bill of lading is of course not applicable where the shipment is made under parol contract, and not under the bill of lading.[46] If the stipulation is valid, then the giving of notice in accordance with its requirements is a condition precedent to recovery by the owner, and compliance, or excuse for non-compliance, should be alleged.[47]

b. Reasonableness. In general an unreasonable provision as to the giving of notice will not be binding;[48] for instance, if there is indefiniteness and uncer-

On the other hand it is not applicable where the claim is for conversion. Chicago, etc., R. Co. *v.* Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43. And such a stipulation has been held to be applicable to shipment to a destination beyond defendant's line. Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, 40 N. Y. St. 318.

A mere posted regulation as to the time for presenting claims will not be enforced as a part of the contract. Browning *v.* Long Island R. Co., 2 Daly (N. Y.) 117.

The mere statement that claims must be presented within thirty days in order to receive attention is not sufficiently definite to be enforced as a contract stipulation. Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268.

40. *Alabama.*— Southern Express Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140.

Kentucky.— Illinois Cent. R. Co. *v.* Brown, 21 Ky. L. Rep. 1089, 54 S. W. 169.

Massachusetts.— Sanford *v.* Housatonic R. Co., 11 Cush. (Mass.) 155.

Mississippi.— Baltimore, etc., R. Co. *v.* Cooper, 66 Miss. 558, 6 So. 327, 14 Am. St. Rep. 586.

New York.— Guillaume *v.* Hamburgh, etc., Packet Co., 42 N. Y. 212, 1 Am. Rep. 512; Vroman *v.* American Merchants' Union Express Co., 2 Hun (N. Y.) 512, 5 Thomps. & C. (N. Y.) 22; Westcott *v.* Fargo, 6 Lans. (N. Y.) 319, 63 Barb. (N. Y.) 349.

Texas.— Gulf, etc., R. Co. *v.* York, 2 Tex. App. Civ. Cas. § 813.

See *supra*, II, E, 2, b; and 9 Cent. Dig. tit. "Carriers," § 670 *et seq.*

41. Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; Brown *v.* Illinois Cent. R. Co., 100 Ky. 525, 38 S. W. 862; Ohio, etc., R. Co. *v.* Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

The statute in Texas authorizing such stipulation when reasonable is by its terms not applicable to interstate shipments. Galveston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1894) 25 S. W. 311.

42. Kramer *v.* Chicago, etc., R. Co., 101 Iowa 178, 70 N. W. 119; D. Klass Commission Co. *v.* Wabash R. Co., 80 Mo. App. 164.

43. Gulf, etc., R. Co. *v.* Golding, 3 Tex. App. Civ. Cas. § 33.

44. Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441.

45. Ghormley *v.* Dinsmore, 51 N. Y. Super. Ct. 196.

46. Green *v.* Pacific Express Co., 37 Mo. App. 537; McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Missouri, etc., R. Co. *v.* Graves, (Tex. App. 1890) 16 S. W. 102; North West Transp. Co. *v.* McKenzie, 25 Can. Supreme Ct. 38.

47. Anderson *v.* Lake Shore, etc., R. Co., 26 Ind. App. 196, 59 N. E. 396; Parrill *v.* Cleveland, etc., R. Co., 23 Ind. App. 638, 55 N. E. 1026; Atchison, etc., R. Co. *v.* Crittenden, 4 Kan. App. 512, 44 Pac. 1000; Osterhoudt *v.* Southern Pac. Co., 47 N. Y. App. Div. 146, 62 N. Y. Suppl. 134; Metropolitan Trust Co. *v.* Toledo, etc., R. Co., 107 Fed. 628.

But other courts have looked upon the stipulation as a limitation, non-compliance with which should be pleaded by the carrier. Wichita, etc., R. Co. *v.* Koch, 8 Kan. App. 642, 56 Pac. 538; McNichol *v.* Pacific Express Co., 12 Mo. App. 401; Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300; St. Louis Southwestern R. Co. *v.* Hays, 13 Tex. Civ. App. 577, 35 S. W. 476.

48. Thus, if the stipulation is so broad as to cover any loss or damage whatever it is invalid. Porter *v.* Southern Express Co., 4 S. C. 135, 16 Am. Rep. 762. Or if it is uncertain as to the time from which the specified limitation is to run. Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675. Or if the nature of the injury makes it impracticable to give notice within the specified time. Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311, 50 S. W. 782; Glenn *v.* Southern Express Co., 86 Tenn. 594, 8 S. W. 152.

While the stipulation may be disregarded where it is unreasonable under the facts of a particular case, yet, on the other hand, in

tainty as to the agent to whom notice is to be given, or an agent is named to whom it would be impracticable to give notice, or if there is no agent reasonably accessible.[49] There is some diversity in the conclusions of the courts as to what is a reasonable time within which notice may be required to be given. If the time specified is to date from the delivery of the goods to the carrier or the date of the contract of shipment, it is usually held unreasonable, at least where the time allowed might be largely consumed in the performance of the contract before it could be determined whether or not there was any breach.[50] But where the time likely to be required for the transportation was only one day, a limitation of ninety days after delivery of the goods to the company was held valid.[51] A thirty-day limitation dating from the loss or delivery has been upheld.[52] So a ten-day limitation,[53] and a five-day limitation [54] have been sustained. But the carrier cannot avail himself of the limitation where it was not practicable for the owner to discover the loss within the time.[55] It is for the carrier relying upon the stipulation as a defense to show that it is reasonable,[56] and it is said that the question of reasonableness is for the jury.[57]

determining the general validity of such a stipulation the question is not what might have been done in a particular case, but what might ordinarily be expected, in the exercise of reasonable diligence. Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97.

Reasonable time.— It is said that even though the time stipulated is unreasonably short, the owner is bound to present his claim within a reasonable time. Osterhoudt *v.* Southern Pac. Co., 47 N. Y. App. Div. 146, 62 N. Y. Suppl. 134; The St. Hubert, 102 Fed. 362.

49. *Illinois.*— Baxter *v.* Louisville, etc., R. Co., 165 Ill. 78, 45 N. E. 1003.

Kentucky.— Adams Express Co. *v.* Spalding, 10 Ky. L. Rep. 540.

Minnesota.— Carpenter *v.* Eastern R. Co., 67 Minn. 188, 69 N. W. 720; Engesether *v.* Great Northern R. Co., 65 Minn. 168, 68 N. W. 4.

North Carolina.— Capehart *v.* Seaboard, etc., R. Co., 81 N. C. 326, 31 Am. Rep. 505.

Texas.— Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75; Missouri Pac. R. Co. *v.* Cornwall, 70 Tex. 611, 8 S. W. 312; Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 574; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Galveston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1894) 25 S. W. 1019; Galveston, etc., R. Co. *v.* Short, (Tex. Civ. App. 1894) 25 S. W. 142; Missouri Pac. R. Co. *v.* Paine, 1 Tex. Civ. App. 621, 21 S. W. 78; St. Louis, etc., R. Co. *v.* Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008; Good *v.* Galveston, etc., R. Co., (Tex. 1889) 11 S. W. 854, 4 L. R. A. 801.

Virginia.— Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

See 9 Cent. Dig. tit. "Carriers," § 668 *et seq.*

50. *Alabama.*— Southern Express Co. *v.* Tupelo Bank, 108 Ala. 517, 18 So. 664, 54 Am. St. Rep. 191; Southern Express Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140.

Indiana.— Adams Express Co. *v.* Reagan, 29 Ind. 21, 92 Am. Dec. 332.

Massachusetts.— Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97.

North Carolina.—Dixie Cigar Co. *v.* Southern Express Co., 120 N. C. 348, 27 S. E. 73, 58 Am. St. Rep. 795.

Texas.— Pacific Express Co. *v.* Darnell, (Tex. 1887) 6 S. W. 765.

51. Southern Express Co. *v.* Caldwell, 21 Wall. (U. S.) 264, 22 L. ed. 556.

So a thirty-day limitation from date of bill of lading was held reasonable. U. S. Express Co. *v.* Harris, 51 Ind. 127.

52. Armstrong *v.* Chicago, etc., R. Co., 53 Minn. 183, 54 N. W. 1059; Hirschberg *v.* Dinsmore, 12 Daly (N. Y.) 429, 67 How. Pr. (N. Y.) 103; Kaiser *v.* Hoey, 1 N. Y. Suppl. 429; Central Vermont R. Co. *v.* Soper, 59 Fed. 879, 21 U. S. App. 24, 8 C. C. A. 341.

53. Baltimore, etc., R. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. 1106.

54. Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628; Chicago, etc., R. Co. *v.* Simms, 18 Ill. App. 68.

A thirty-hour limitation was sustained where it appeared that the time allowed was reasonable under the circumstances. St. Louis, etc., R. Co. *v.* Hurst, 67 Ark. 407, 55 S. W. 215. But a thirty-six-hour limitation was held void, it appearing that the time allowed under the circumstances was unreasonably short. Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, 40 N. Y. St. 318.

55. Popham *v.* Barnard, 77 Mo. App. 619.

56. Kansas, etc., R. Co. *v.* Ayers, 63 Ark. 331, 38 S. W. 515; Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97; Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Galveston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1894) 25 S. W. 311; Galveston, etc., R. Co. *v.* Boothe, 3 Tex. App. Civ. Cas. § 364.

57. Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; Missouri, etc., R. Co. *v.* Liebold, (Tex. Civ. App. 1900) 55 S. W. 368; Gulf, etc., R. Co. *v.* Clarke, 5 Tex. Civ. App. 547, 24 S. W. 355; International, etc., R. Co. *v.* Garrett, 5 Tex. Civ. App. 540, 24 S. W. 354.

By statute, in Texas it is provided that a period of less than ninety days is unreasonable. St. Louis Southwestern R. Co. *v.* Hays, 13 Tex. Civ. App. 577, 35 S. W. 476.

c. **Rule in Live-Stock Cases.** The controlling considerations bearing upon the reasonableness of a stipulation as to the time within which notice of a claim for damages shall be given in case of shipments of live stock are somewhat different from those applicable in ordinary cases, and stipulations have been sustained which would perhaps in other cases not be regarded as valid. Thus it is held that a stipulation that a claim for damages shall be made before the animals are removed from the place of delivery and mingled with other animals is valid.[58] Other stipulations for a short time of giving notice of damage in case of live stock have been sustained.[59]

3. **Time For Bringing Suit.** It is undoubtedly competent for the parties to a contract of shipment to agree on a limitation of time within which action for breach of the contract shall be brought shorter than the statutory limitation, and such a limitation will be enforced if reasonable.[60] It has accordingly been held that a limitation to three months is valid.[61]

58. Wichita, etc., R. Co. *v.* Koch, 47 Kan. 753, 28 Pac. 1013; Sprague *v.* Missouri Pac. R. Co., 34 Kan. 347, 8 Pac. 465; Goggin *v.* Kansas Pac. R. Co., 12 Kan. 416; Rice *v.* Kansas Pac. R. Co., 63 Mo. 314; Wood *v.* Southern R. Co., 118 N. C. 1056, 24 S. E. 704; Selby *v.* Wilmington, etc., R. Co., 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; Capehart *v.* Seaboard, etc., R. Co., 77 N. C. 355.

Contra.— Coles *v.* Louisville, etc., R. Co., 41 Ill. App. 607; Smitha *v.* Louisville, etc., R. Co., 86 Tenn. 198, 6 S. W. 209; Memphis, etc., R. Co. *v.* Holloway, 9 Baxt. (Tenn.) 188; Gulf, etc., R. Co. *v.* Vaughn, (Tex. Civ. App. 1890) 16 S. W. 775; Ormsby *v.* Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. 706.

Such a stipulation is not applicable, however, to a case where the nature of the injury to the animals cannot be reasonably discovered at once (Western R. Co. *v.* Harwell, 97 Ala. 341, 11 So. 781; Harned *v.* Missouri Pac. R. Co., 51 Mo. App. 482; Gulf, etc., R. Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109; Houston, etc., R. Co. *v.* Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; Ormsby *v.* Union Pac. R. Co., 4 Fed. 170); nor to damages for delay in transportation (St. Louis, etc., R. Co. *v.* Law, 68 Ark. 218, 57 S. W. 258; Louisville, etc., R. Co. *v.* Smith, 14 Ky. L. Rep. 814; Louisville, etc., R. Co. *v.* Bell, 13 Ky. L. Rep. 393); nor to a case where animals are found dead when the car containing them reaches the destination (Kansas, etc., R. Co. *v.* Ayers, 63 Ark. 331, 38 S. W. 515); nor to a case where the fault complained of is delivering different animals than those shipped (Wilson *v.* Wabash, etc., R. Co., 23 Mo. App. 50). Nor is such a stipulation applicable where the animals are removed by the agent of the carrier. Baker *v.* Missouri Pac. R. Co., 34 Mo. App. 98.

Taking an injured animal from the car at place of destination and allowing it to run on the commons held not to be a removal or mingling. Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017.

59. Kansas, etc., R. Co. *v.* Ayers, 63 Ark. 331, 38 S. W. 515; Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628; Cleveland, etc., R. Co. *v.* Newlin, 74 Ill. App. 638; Case *v.* Cleveland, etc., R. Co., 11 Ind. App. 517, 39 N. E. 426; Dawson *v.* St. Louis, etc., R. Co., 76 Mo. 514.

60. Texas, etc., R. Co. *v.* Hawkins, (Tex. Civ. App. 1895) 30 S. W. 1113; Gulf, etc., R. Co. *v.* Clarke, 5 Tex. Civ. App. 547, 24 S. W. 355; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

61. Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97; North British, etc., Ins. Co. *v.* Central Vermont R. Co., 9 N. Y. App. Div. 4, 40 N. Y. Suppl. 1113, 75 N. Y. St. 427 [*affirmed* in 158 N. Y. 726, 53 N. E. 1128]; Central Vermont R. Co. *v.* Soper, 59 Fed. 879, 21 U. S. App. 24, 8 C. C. A. 341.

A limitation to sixty days was sustained where it afforded ample time under the circumstances for instituting suit. Thompson *v.* Chicago, etc., R. Co., 22 Mo. App. 321.

A forty-day limitation has been sustained where the circumstances did not render it unreasonable. Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Gulf, etc, R. Co. *v.* White, (Tex. Civ. App. 1895) 32 S. W. 322. *Contra,* see Gulf, etc., R. Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109.

But by statute in Texas it is now provided that the time for bringing suit cannot thus be limited to less than two years. Missouri, etc., R. Co. *v.* Withers, 16 Tex. Civ. App. 506, 40 S. W. 1073; St. Louis, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1895) 32 S. W. 225.

The burden of proof is upon the carrier setting up the limitation to show the reasonableness of the stipulation. Texas, etc., R. Co. *v.* Reeves, 90 Tex. 499, 38 S. W. 564.

Such a limitation, however, has been held not applicable to an action for damages due to delay (Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211, 27 S. W. 110; Gulf, etc., R. Co. *v.* Elliott, (Tex. Civ. App. 1894) 26 S. W. 636); nor to an action against a carrier not strictly for the loss of or damage to the goods during transportation (Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Gulf, etc., R. Co. *v.* Gray, (Tex. Civ. App. 1894) 24 S. W. 837).

4. Waiver of Such Limitations. The requirement as to making claim for damages within the time and in the manner specified may be waived by failing to object to the form of a defective notice, or by entertaining and proceeding to consider and negotiate with reference to the claim,[62] or by misleading the owner as to the necessity of giving notice.[63] And a substantial compliance with the stipulation is all that is required.[64] But waiver cannot be predicated upon the acts of an agent, where it is specified in the contract that no agent shall have authority to waive the terms thereof.[65] A limitation of time within which action shall be brought may be waived by any conduct of the carrier calculated to induce, and which has induced, the owner to delay the bringing of suit beyond the time stipulated.[66]

P. Benefits of Insurance. In the absence of any special contract the carrier is not entitled to the benefit of insurance taken by the shipper, and the shipper may sue the carrier for damages, although he has not collected the insurance money, and, so far as he has collected it, he is entitled to recover as trustee for the insurance company, which is, on payment of the insurance, subrogated to the shipper's claim against the carrier.[67] The insurance company may stipulate with the insured (shipper) that the latter shall proceed in the first instance against the carrier, and hold the company liable only for any loss not thus satisfied.[68] And it has been said that where a policy of insurance contains such a stipulation the carrier cannot by agreement in the bill of lading become entitled to the benefit of the insurance, especially where his own liability arises from negligence.[69]

Commencement of suit under such a stipulation is the filing of a petition or complaint, with instructions to issue citation thereon. Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302. See also, generally, Actions, III [1 Cyc. 739].

62. *Georgia.*— Central R. Co. *v.* Pickett, 87 Ga. 734, 13 S. E. 750.

Illinois.— Wabash R. Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273; Chicago, etc., R. Co. *v.* Grimes, 71 Ill. App. 397.

Indiana.— Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198.

Iowa.— Hudson *v.* Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550.

Kentucky.— Owen *v.* Louisville, etc., R. Co., 87 Ky. 626, 10 Ky. L. Rep. 554, 9 S. W. 698, 841; Louisville, etc., R. Co. *v.* Lazarus, 13 Ky. L. Rep. 461.

Michigan.— Soper *v.* Pontiac, etc., R. Co., 113 Mich. 443, 71 N. W. 853.

Mississippi.— Illinois Cent. R. Co. *v.* Bogard, 78 Miss. 11, 27 So. 879.

Missouri.— Ward *v.* Missouri Pac. R. Co., 158 Mo. 226, 58 S. W. 28; Rice *v.* Kansas Pac. R. Co., 63 Mo. 314; Richardson *v.* Chicago, etc., R. Co., 62 Mo. App. 1; Harned *v.* Missouri Pac. R. Co., 51 Mo. App. 482; Hess *v.* Missouri Pac. R. Co., 40 Mo. App. 202.

New Hampshire.— Merrill *v.* American Express Co., 62 N. H. 514.

New York.— Falkenberg *v.* Erie R. Co., 28 Misc. (N. Y.) 165, 59 N. Y. Suppl. 44.

North Carolina.— U. S. Watch Case Co. *v.* Southern Express Co., 120 N. C. 351, 27 S. E. 74.

Oregon.—Bennett *v.* Northern Pac. Express Co., 12 Oreg. 49, 6 Pac. 160.

Texas.— International, etc., R. Co. *v.* Underwood, 62 Tex. 21.

See 9 Cent. Dig. tit. "Carriers," § 544 *et seq.*

63. Marrus *v.* New Haven Steamboat Co., 30 Misc. (N. Y.) 421, 62 N. Y. Suppl. 474.

64. Atchison, etc., R. Co. *v.* Collins, 47 Kan. 11, 27 Pac. 99; Atchison, etc., R. Co. *v.* Temple, 47 Kan. 7, 27 Pac. 98, 13 L. R. A. 362; Hinkle *v.* Southern R. Co., 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685.

65. Missouri, etc., R. Co. *v.* Kirkham, 63 Kan. 255, 65 Pac. 261.

66. Wood *v.* Southern R. Co., 118 N. C. 1056, 24 S. E. 704; Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Galveston, etc., R. Co. *v.* Kelley, (Tex. Civ. App. 1894) 26 S. W. 470; Galveston, etc., R. Co. *v.* Seligman, (Tex. Civ. App. 1893) 23 S. W. 298.

67. *New York.*— Goodrich *v.* Thompson, 44 N. Y. 324; Merrick *v.* Brainard, 38 Barb. (N. Y.) 574.

Pennsylvania.— Gales *v.* Hailman, 11 Pa. St. 515.

South Carolina.— Burnside *v.* Union Steam Boat Co., 10 Rich. (S. C.) 113.

Texas.— Gulf, etc., R. Co. *v.* Zimmerman, 81 Tex. 605, 17 S. W. 239.

United States.— The Guiding Star, 53 Fed. 936; Hall *v.* Nashville, etc., R. Co., 11 Fed. Cas. No. 5,940, 3 Am. L. T. Rep. (U. S. Cts.) 79.

See 9 Cent. Dig. tit. "Carriers." § 552.

As to a contract requiring shipper to insure see *supra*, II, E, 3, g.

68. Inman *v.* South Carolina R. Co., 129 U. S. 128, 9 S. Ct. 249, 32 L. ed. 612.

69. Willock *v.* Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; Gulf, etc., R. Co. *v.* Zimmerman, 81 Tex. 605, 17 S. W. 239.

But this view seems not to be sound. The carrier may in his own behalf take insurance against his liability arising from negligence.[70] Therefore if it is stipulated in the bill of lading that the carrier is entitled to the benefit of insurance on the goods, this stipulation will take precedence over that in the insurance policy requiring the insured (shipper) to proceed against the carrier before asking indemnity from the insurance company.[71] But it seems that even under such a stipulation the carrier can only offset insurance money actually received by the shipper.[72] A statute forbidding the carrier from restricting common-law liability is not infringed by a stipulation for the benefit of insurance on the goods.[73]

Q. Sale of Damaged Goods. The duty of the carrier as bailee to protect the owner, even where the loss is not one for which the carrier would be liable, involves and authorizes sale of the goods where the completion of the transportation becomes impossible, and their detention would result in further loss or damage, as where the goods are of a perishable nature.[74] But if practicable, the carrier should give notice to the shipper and await his orders before selling.[75] And if, without involving further damage, the carrier can by transshipment send the goods to their destination it is his duty to do so.[76]

R. Actions For Loss or Damage — 1. Parties Plaintiff — a. Owner. If the action against the carrier is in tort it should be brought by the owner of the goods, whether he be consignor or consignee or a third person.[77] But it is not necessary that the ownership should be absolute; a bailee has such special property in the goods that he may maintain action for damage thereto.[78] Any one having a beneficial interest in the goods may maintain the action.[79] In case of

70. Jackson Co. *v.* Boylston Mut. Ins. Co., 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 6 S. Ct. 750, 1176, 29 L. ed. 873; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 10 Biss. (U. S.) 18, 19 Fed. Cas. No. 11,112, 12 Chic. Leg. N. 89.

71. Mercantile Mut. Ins. Co. *v.* Calebs, 20 N. Y. 173; Roos *v.* Philadelphia, etc., R. Co., 199 Pa. St. 378, 49 Atl. 344; Wager *v.* Providence Ins. Co., 150 U. S. 99, 14 S. Ct. 55, 37 L. ed. 1013; Rintoul *v.* New York Cent., etc., R. Co., 21 Blatchf. (U. S.) 439, 17 Fed. 905, 20 Fed. 313.

72. Cincinnati, etc., R. Co. *v.* Spratt, 2 Duv. (Ky.) 4; Inman *v.* South Carolina R. Co., 129 U. S. 128, 9 S. Ct. 249, 32 L. ed. 612.

73. British, etc., Mar. Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661.

No special consideration is necessary to sustain such a stipulation embodied in the contract of shipment. Missouri Pac. R. Co. *v.* International Mar. Ins. Co., 84 Tex. 149, 19 S. W. 459.

74. Hull *v.* Missouri Pac. R. Co., 60 Mo. App. 593; The Bobolink, 6 Sawy. (U. S.) 146, 3 Fed. Cas. No. 1,588; Astsrup *v.* Lewy, 19 Fed. 536.

As to sale of damaged goods to determine measure of recovery for the injury see *infra*, II, R, 4, c, (III), (B).

75. Alabama, etc., R. Co. *v.* Brichetto, 72 Miss. 891, 18 So. 421; The Joshua Barker, Abb. Adm. (U. S.) 215, 13 Fed. Cas. No. 7,547.

76. Owen *v.* Outerbridge, 26 Can. Supreme Ct. 272.

This duty arises from the relation of the carrier to the owner as agent, involved in the necessity of the case, the carrier being bound to act under such circumstances for the best interests of all concerned. Searle *v.* Scovell, 4 Johns. Ch. (N. Y.) 218.

77. *Indiana.*— Law *v.* Hatcher, 4 Blackf. (Ind.) 364.

Mississippi.—Waters *v.* Mobile, etc., R. Co., 74 Miss. 534, 21 So. 240.

Missouri.— Harvey *v.* Terre Haute, etc., R. Co., 6 Mo. App. 585.

New York.— Thompson *v.* Fargo, 49 N. Y. 188, 10 Am. Rep. 342; Green *v.* Clark, 5 Den. (N. Y.) 497.

Tennessee.— W——, etc., R. Co. *v.* Kelly, 1 Head (Tenn.) 158.

Wisconsin.— Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

England.— Dawes *v.* Peck, 8 T. R. 330, 3 Esp. 12, 4 Rev. Rep. 675.

See 9 Cent. Dig. tit. "Carriers," §§ 256 *et seq.*, 568.

One who is both consignor and consignee has *prima facie* the right to sue. Louisville, etc., R. Co. *v.* Wathen, 22 Ky. L. Rep. 82, 49 S. W. 185; Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583.

78. Great Western R. Co. *v.* McComas, 33 Ill. 185; U. S. Express Co. *v.* Council, 84 Ill. App. 491; Moran *v.* Portland Steam Packet Co., 35 Me. 55; Murray *v.* Warner, 55 N. H. 546, 20 Am. Rep. 227; Freeman *v.* Birch, 3 Q. B. 492, note *a*, 43 E. C. L. 835, 1 N. & M. 420, 28 E. C. L. 543. See also, generally, Bailments, 5 Cyc. 157.

One who has no interest in the property cannot sue for injury thereto. Lockhart *v.* Western, etc., R. Co., 73 Ga. 472, 54 Am. Rep. 883.

79. Southern Express Co. *v.* Caperton, 44 Ala. 101. 4 Am. Rep. 118; Boston, etc., R.

common ownership, each owner may sue for his interest.[80] If the action is for breach of contract the owner may sue if he is the party with whom or for whose benefit the contract was made.[81]

b. Consignee. The presumption that title to the goods passes to the consignee on delivery to the carrier[82] will sustain an action by the consignee as owner, either in tort[83] or for breach of contract, the contract of shipment being presumed to have been made for his benefit.[84]

c. Assignee of Bill of Lading. Where title passes by indorsement or transfer of the bill of lading the indorsee or transferee as the owner may sue for loss or injury.[85]

d. Consignor as Owner. Where the consignor continues in fact the owner of

Co. *v.* Warrior Mower Co., 76 Me. 251; D'Anjou *v.* Deagle, 3 Harr. & J. (Md.) 206.

80. Newport News, etc., R. Co. *v.* Nixon, 16 Ky. L. Rep. 319; Baughman *v.* Louisville, etc., R. Co., 14 Ky. L. Rep. 268; Day *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489.

The several owners of articles shipped in one box may sue jointly, although the box is addressed to one of them. Metcalfe *v.* London, etc., R. Co., 4 C. B. N. S. 307, 27 L. J. C. P. 205, 6 Wkly. Rep. 498, 93 E. C. L. 307.

81. Cincinnati, etc., R. Co. *v.* Case, 122 Ind. 310, 23 N. E. 797; Davis *v.* James, 5 Burr. 2680. Thus, if the contract is made by an agent, the action may be brought by the owner. Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412; Elkins *v.* Boston, etc., R. Co., 19 N. H. 337, 51 Am. Dec. 184.

Where an express company contracts with a transportation company to perform the contract of transportation, the owner may maintain his action directly against the transportation company. New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

82. See *supra*, II, L, 4, a.

But the presumption may be overcome by evidence that consignee is not the real owner so as to sustain an action by the consignor. Cobb *v.* Illinois Cent. R. Co., 88 Ill. 394; Price *v.* Powell, 3 N. Y. 322; Ogden *v.* Coddington, 2 E. D. Smith (N. Y.) 317.

83. *Alabama.*— South, etc., Alabama R. Co. *v.* Wood, 72 Ala. 451.

California.— Webb *v.* Winter, 1 Cal. 417.

Indiana.— Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55.

Kentucky.— Adams Express Co. *v.* Tingle, 10 Ky. L. Rep. 358.

Missouri.— Kirkpatrick *v.* Kansas City, etc., R. Co., 86 Mo. 341.

New York.— Price *v.* Powell, 3 N. Y. 322.

Pennsylvania.— Arbuckle *v.* Thompson, 37 Pa. St. 170.

United States.— The Geiser, 19 Fed. 877; Hall *v.* Nashville, etc., R. Co., 11 Fed. Cas. No. 5,940, 3 Am. L. T. Rep. (U. S. Cts.) 79.

England.— Dutton *v.* Solomonson, 3 B. & P. 582, 7 Rev. Rep. 883.

See 9 Cent. Dig. tit. "Carriers," §§ 256 *et seq.*, 568.

A consignee who has made advances on the goods has such interest therein as to be entitled to maintain action for loss or injury. Adams *v.* Bissell, 28 Barb. (N. Y.) 382; Burritt *v.* Rench, 4 McLean (U. S.) 325, 4 Fed. Cas. No. 2,201.

84. *Alabama.*— Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602.

Indiana.— Pennsylvania Co. *v.* Poor, 103 Ind. 553, 3 N. E. 253.

Kentucky.— Smith *v.* Lewis, 3 B. Mon. (Ky.) 229.

New York.— Green *v.* Clark, 13 Barb. (N. Y.) 57.

Pennsylvania.—Griffith *v.* Ingledew, 6 Serg. & R. (Pa.) 429, 9 Am. Dec. 444.

See 9 Cent. Dig. tit. "Carriers," § 256 *et seq.*

But if contract was really for the benefit of consignor the consignee has no right of action for breach thereof. Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629; Louisville, etc., R. Co. *v.* Ft. Wayne Electric Co., 21 Ky. L. Rep. 1544, 55 S. W. 918; Dows *v.* Cobb, 12 Barb. (N. Y.) 310; Cudahy Packing Co. *v.* Dorsey, (Tex. Civ. App. 1901) 63 S. W. 548. It seems to have been thought, however, that the consignee may recover although another is entitled to the benefit of the recovery. Mobile, etc., R. Co. *v.* Williams, 54 Ala. 168; Southern Express Co. *v.* Armstead, 50 Ala. 350.

85. *California.*— Dodge *v.* Meyer, 61 Cal. 405.

Illinois.— Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326.

Massachusetts.— Newcomb *v.* Boston, etc., R. Corp., 115 Mass. 230.

Missouri.— Kirkpatrick *v.* Kansas City, etc., R. Co., 86 Mo. 341.

New York.— Merchants' Bank *v.* Union R., etc., Co., 69 N. Y. 373.

United States.— The Steamship Thames *v.* Seaman, 14 Wall. (U. S.) 98, 20 L. ed. 804; Robinson *v.* Memphis, etc., R. Co., 9 Fed. 129.

See 9 Cent. Dig. tit. "Carriers," § 270.

Action for breach of contract.— But it is said that the indorsee or transferee cannot sue for breach of contract, inasmuch as the bill of lading is not a negotiable instrument. Knight *v.* St. Louis, etc., R. Co., 141 Ill. 110, 30 N. E. 543; Adams *v.* The Brig Pilgrim, 1 Ohio Dec. (Reprint) 477, 10 West. L. J. 141. *Contra*, see Robinson *v.* Memphis, etc., R. Co., 9 Fed. 129. See also, generally, ASSIGNMENTS, 4 Cyc. 1.

the property he may maintain the action.[86] But if the consignor is the mere agent of the consignee in delivering the goods for transportation, the right of action is in the consignee.[87] Where the consignor delivers to the carrier in pursuance of a contract of sale to the consignee, but no title passes by reason of failure of the consignor to complete his contract, the title remains in the consignor, and he is the proper party to maintain the action.[88] But if the transaction is such as to vest title in the consignee, then the consignee is the proper party to bring suit.[89]

e. Consignor as Contracting Party. The consignor, as the party with whom the contract of shipment is made, is, according to many authorities, the proper party to bring suit for breach of the contract, regardless of his interest in the property.[90] And if the consignor is not the party entitled to the benefit of

86. *Indiana.*— Law *v.* Hatcher, 4 Blackf. (Ind.) 364.

Kentucky.— Adams Express Co. *v.* Bleich, 5 Ky. L. Rep. 122.

Maryland.— Moore *v.* Sheridine, 2 Harr. & M. (Md.) 453.

Massachusetts.— Sanford *v.* Housatonic R. Co., 11 Cush. (Mass.) 155.

Minnesota.— Jarrett *v.* Great Northern R. Co., 74 Minn. 477, 77 N. W. 304.

Missouri.— Landes *v.* Pacific R. Co., 50 Mo. 346.

Nebraska.— Union Pac. R. Co. *v.* Metcalf, 50 Nebr. 452, 69 N. W. 961.

New York.— Price *v.* Powell, 3 N. Y. 322; Withers *v.* New Jersey Steamboat Co., 48 Barb. (N. Y.) 455.

Ohio.— Bernstine *v.* Union Express Co., 40 Ohio St. 451.

Texas.— Missouri Pac. R. Co. *v.* Scott, 4 Tex. Civ. App. 76, 26 S. W. 239.

Vermont.— Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 349.

See 9 Cent. Dig. tit. "Carriers," § 262 *et seq.*

87. Driscoll *v.* Nichols, 5 Gray (Mass.) 488; Thompson *v.* Fargo, 49 N. Y. 188, 10 Am. Rep. 342, 63 N. Y. 479; Green *v.* Clarke, 12 N. Y. 343; Southern R. Co. *v.* Deakins, 107 Tenn. 522, 64 S. W. 477; Harrison *v.* Stewart, Taney (U. S.) 485, 11 Fed. Cas. No. 6,145.

88. *Alabama.*— Louisville, etc., R. Co. *v.* Allgood, 113 Ala. 163, 20 So. 986.

Colorado.— Martin *v.* McLaughlin, 5 Colo. 387.

Georgia.— Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

Kansas.— Atchison, etc., R. Co. *v.* Consolidated Cattle Co., 59 Kan. 111, 52 Pac. 71.

Missouri.— Hance *v.* Wabash, etc., R. Co., 62 Mo. App. 60; Bergner *v.* Chicago, etc., R. Co., 13 Mo. App. 499.

Virginia.— Spence *v.* Norfolk, etc., R. Co., 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578.

Wisconsin.— Ralph *v.* Chicago, etc., R. Co., 32 Wis. 177, 14 Am. Rep. 725.

England.— Coats *v.* Chaplin, 3 Q. B. 483, 2 G. & D. 522, 6 Jur. 1123, 11 L. J. Q. B. 315, 43 E. C. L. 831; Duff *v.* Budd, 3 B. & B. 177, 6 Moore C. P. 469, 23 Rev. Rep. 609, 7 E. C. L. 671; Brown *v.* Hodgson, 2 Campb. 36, 4 Taunt. 189; Coombs *v.* Bristol, etc., R. Co., 3 H. & N. 510, 27 L. J. Exch. 401, 6 Wkly. Rep. 725.

See 9 Cent. Dig. tit. "Carriers," § 262 *et seq.*

89. *Colorado.*— McLaughlin *v.* Martin, 12 Colo. App. 268, 55 Pac. 195.

Illinois.— Illinois Cent. R. Co. *v.* Miller, 32 Ill. App. 259.

Kentucky.—Louisville, etc., R. Co. *v.* Spalding, 7 Ky. L. Rep. 211.

Louisiana.— Leberman *v.* New Orleans, etc., Steamship Co., 28 La. Ann. 412.

New York.— Potter *v.* Lansing, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310.

United States.— Blum *v.* The Caddo, 1 Woods (U. S.) 64, 3 Fed. Cas. No. 1,573; Meigs *v.* Hagan, 86 Fed. 926.

See 9 Cent. Dig. tit. "Carriers," § 256 *et seq.*

The mere fact that consignor has right of stoppage *in transitu* does not entitle him to maintain action against the carrier for loss of or injury to the goods. Northern Pac. R. Co. *v.* Lewis, 89 Ill. App. 30; Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Blum *v.* The Caddo, 1 Woods (U. S.) 64, 3 Fed. Cas. No. 1,573.

90. *Arkansas.*—Cantwell *v.* Pacific Express Co., 58 Ark. 487, 25 S. W. 503.

Illinois.— Northern Line Packet Co. *v.* Shearer, 61 Ill. 263.

Indiana.—Pennsylvania Co. *v.* Clark, 2 Ind. App. 146, 27 N. E. 586.

Massachusetts.— Finn *v.* Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128; Blanchard *v.* Page, 8 Gray (Mass.) 281; Alden *v.* Pearson, 3 Gray (Mass.) 342.

Missouri.— Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965; Atchison *v.* Chicago, etc., R. Co., 80 Mo. 213.

Tennessee.— Carter *v.* Graves, 9 Yerg. (Tenn.) 446.

Texas.— Parks *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. 708; Galveston, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1894) 26 S. W. 782; Texas, etc., R. Co. *v.* Klepper, (Tex. Civ. App. 1893) 24 S. W. 567.

England.— Dunlop *v.* Lambert, 6 Cl. & F. 600, 7 Eng. Reprint 824.

See 9 Cent. Dig. tit. "Carriers," § 256 *et seq.*

If the action is in tort the consignor cannot recover without showing a general or

the recovery, he holds the proceeds for the benefit of the actual party in interest.[91]

2. FORM OF ACTION; PLEADING; VARIANCE — a. In Tort or on Contract; Variance. In an ordinary action against the carrier for loss of or injury to the goods plaintiff has an election to sue in tort or on contract.[92] In tort the action is for neglect or breach of duty in the course of the general employment of carrier, that is, an action on the case.[93] But for misdelivery or wrongful appropriation of the goods by the carrier, or refusal to deliver amounting to a conversion, trover will lie,[94] but not for mere loss of or injury to the goods, even though such as to render the carrier liable, if there has been no misfeasance.[95] Replevin may be maintained upon refusal of the carrier to deliver goods in his possession to the person entitled thereto.[96] The action on contract may be either in assumpsit, for breach of the general duty of the carrier, that is, on implied contract, or on the special contract entered into, if any, at the time the goods were received by the carrier for transportation.[97] It seems to have been generally held that where the shipment is under a special contract, the action must be based on a breach of such

special interest in the property. Carter *v.* Graves, 9 Yerg. (Tenn.) 446. And see *supra*, II, R, 1, a.

91. Ohio, etc., R. Co. *v.* Emrich, 24 Ill. App. 245; Illinois Cent. R. Co. *v.* Schwartz, 13 Ill. App. 490; Finn *v.* Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128; American Roofing Co. *v.* Memphis, etc., Packet Co., 5 Ohio N. P. 146.

It will be presumed, in the absence of a showing to the contrary, that the suit was commenced and prosecuted with the knowledge and consent of the consignee entitled to the benefit of the recovery. Southern Express Co. *v.* Craft, 49 Miss. 480, 19 Am. Rep. 4.

The statutory provision requiring actions to be brought in the name of the real party in interest does not preclude the consignor from suing for a breach of the contract, although the title in the goods has vested in the consignee. Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

92. *Nebraska.*— Denman *v.* Chicago, etc., R. Co., 52 Nebr. 140, 71 N. W. 967.

New Jersey.— Mershon *v.* Hobensack, 22 N. J. L. 372.

New York.— Catlin *v.* Adirondack Co., 11 Abb. N. Cas. (N. Y.) 377 [*reversing* 20 Hun (N. Y.) 191].

Pennsylvania.— Smith *v.* Seward, 3 Pa. St. 342.

Tennessee.— Carter *v.* Graves, 9 Yerg. (Tenn.) 446.

United States.— Central Trust Co. *v.* East Tennessee, etc., R. Co., 70 Fed. 764.

See 9 Cent. Dig. tit. "Carriers," § 564.

93. U. S. Express Co. *v.* Council, 84 Ill. App. 491; Waters *v.* Mobile, etc., R. Co., 74 Miss. 534, 21 So. 240; San Antonio, etc., R. Co. *v.* Graves, (Tex. Civ. App. 1899) 49 S. W. 1103.

The action on the case against a carrier is of very ancient use. Smith *v.* Seward, 3 Pa. St. 342; Bretherton *v.* Wood, 3 B. & B. 54, 6 Moore C. P. 141, 9 Price 408, 23 Rev. Rep. 556, 7 E. C. L. 602; Tattan *v.* Great Western R. Co., 2 E. & E. 844, 6 Jur. N. S. 800, 29 L. J. Q. B. 184, 8 Wkly. Rep. 606, 105 E. C. L. 844. See also, generally, CASE, ACTION ON, *post* 681.

Against carrier as warehouseman.—The action against the carrier while holding the goods as warehouseman should, it seems, be in tort. Missouri, etc., R. Co. *v.* Byrne, (Indian Terr. 1899) 49 S. W. 41; Welch *v.* Concord R. Co., 68 N. H. 206, 44 Atl. 304.

94. Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334; Bullard *v.* Young, 3 Stew. (Ala.) 46; Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496, 11 S. W. 511; Johnson *v.* Strader, 3 Mo. 359; Packard *v.* Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Delaware Bank *v.* Smith, 1 Edm. Sel. Cas. (N. Y.) 351.

95. *Alabama.*— Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334.

Georgia.— Southern Express Co. *v.* Palmer, 48 Ga. 85.

Massachusetts.— Bowlin *v.* Nye, 10 Cush. (Mass.) 416.

New Hampshire.— Moses *v.* Norris, 4 N. H. 304.

New York.— Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767.

Demand.—To support an action against the carrier for failure to deliver there must be a demand, unless a demand would be of no avail. Louisville, etc., R. Co. *v.* Meyer, 78 Ala. 597; Robinson *v.* Austin, 2 Gray (Mass.) 564.

96. Evansville, etc., R. Co. *v.* Marsh, 57 Ind. 505. But not where the goods have merely been detained without such demand as to render the possession of the carrier unlawful. Woodward *v.* Grand Trunk R. Co., 46 N. H. 524.

In an action for damages it is error to render judgment for the plaintiff for possession of the goods. Brookstone *v.* Westcott Express Co., 29 Misc. (N. Y.) 634, 61 N. Y. Suppl. 72.

97. For illustrations of actions *ex contractu* see *infra*, II, R, 2, b.

Action to recover proceeds of goods sold by the carrier should be in assumpsit. Stevens *v.* Sayward, 3 Gray (Mass.) 108.

special contract, and not upon the breach of the carrier's common-law duty.[98] But the better rule is that the special contract containing conditions in favor of the carrier is properly a defensive weapon to be used by the carrier when sued, and that the shipper may disregard it and sue for breach of common-law duty.[99] On the other hand, in an action on the special contract there can be no recovery for breach of common-law duty, no special contract being proven.[1] In declaring on the special contract it must be correctly set out or the action will fail on account of variance.[2] In determining whether to bring action on the case or in assumpsit, it was important under the strict rules of common-law procedure to bear in mind some distinctions between those forms of action.[3] But the difference in form of allegation in the declarations on case and in assumpsit is very slight, there being in each instance an allegation that defendant "undertook and

98. *Georgia.*—Boaz *v.* Central R., etc., Co., 87 Ga. 463, 13 S. E. 711.

Indiana.— Snow *v.* Indiana, etc., R. Co., 109 Ind. 422, 9 N. E. 702; Hall *v.* Pennsylvania Co., 90 Ind. 459; Indianapolis, etc., R. Co. *v.* Remmy, 13 Ind. 518; Parrill *v.* Cleveland, etc., R. Co., 23 Ind. App. 638, 55 N. E. 1026; Baltimore, etc., R. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Indianapolis, etc., R. Co. *v.* Forsythe, 4 Ind. App. 326, 29 N. E. 1138.

Missouri.—Harris *v.* Hannibal, etc., R. Co., 37 Mo. 307.

Ohio.— Davidson *v.* Graham, 2 Ohio St. 131.

Vermont.— Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

West Virginia.— Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

See 9 Cent. Dig. tit. "Carriers," § 564.

If the action is on breach of a common-law duty the owner cannot recover for breach of special contract in not complying with its terms as to a particular time named for carrying out the transportation. Bedell *v.* Richmond, etc., R. Co., 94 Ga. 22, 20 S. E. 262.

Where owner sues in assumpsit on the common counts the bill of lading is not admissible in evidence. Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664. *Contra,* Hill *v.* Georgia, etc., R. Co., 43 S. C. 461, 21 S. E. 337.

99. Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17.

Exemptions specially pleaded.— If the carrier, sued in general assumpsit, relies on exemptions in a special contract, it should be specially pleaded. Nashville, etc., R. Co. *v.* Parker, 123 Ala. 683, 27 So. 323.

1. Southern Express Co. *v.* Palmer, 48 Ga. 85; Jeffersonville, etc., R. Co. *v.* Ensley, 50 Ind. 378; Jeffersonville, etc., R. Co. *v.* Worland, 50 Ind. 339; Gann *v.* Chicago Great Western R. Co., 72 Mo. App. 34; Hughes *v.* Great Western R. Co., 14 C. B. 637, 2 C. L. R. 136, 18 Jur. 1001, 23 L. J. C. P. 153, 78 E. C. L. 637.

2. *Connecticut.*— Camp *v.* Hartford, etc., Steamboat Co., 43 Conn. 333.

Maryland.— Ferguson *v.* Cappeau, 6 Harr. & J. (Md.) 394.

New York.— Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329; Stone *v.* Knowlton, 3 Wend. (N. Y.) 374.

Pennsylvania.— Stump *v.* Hutchinson, 11 Pa. St. 533.

West Virginia.— Baltimore, etc., R. Co. *v.* Skeels, 3 W. Va. 556.

See 9 Cent. Dig. tit. "Carriers," § 569.

As to variance in general, between the allegations and the proofs see the following cases:

Alabama.—Alabama Great Southern R. Co. *v.* Grabfelder, 83 Ala. 200, 3 So. 432.

Georgia.— Central R. Co. *v.* Pickett, 87 Ga. 734, 13 S. E. 750; Central R., etc., Co. *v.* Avant, 80 Ga. 195, 5 S. E. 78.

Indiana.— Harrison *v.* Hixson, 4 Blackf. (Ind.) 226.

Maine.— Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

Missouri.— E. O. Stanard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704; Atchison *v.* Chicago, etc., R. Co., 80 Mo. 213.

North Carolina.—Waters *v.* Richmond, etc., R. Co., 110 N. C. 338, 14 S. E. 802, 16 L. R. A. 834.

Wisconsin.— Nudd *v.* Wells, 11 Wis. 407.

See 9 Cent. Dig. tit. "Carriers," § 574.

3. See, generally, ASSUMPSIT, ACTION OF, 4 Cyc. 317; CASE, ACTION ON, *post* 681.

For instance, if the suit were in contract against joint defendants, no recovery could be had unless joint liability of all the defendants were shown, while if the action were in tort judgment might be recovered against one or more of joint defendants, although others were found not to be liable. Smith *v.* Seward, 3 Pa. St. 342; Pozzi *v.* Shipton, 8 A. & E. 963, 8 L. J. Q. B. 1, 1 P. & D. 4, 35 E. C. L. 931; Bretherton *v.* Wood, 3 B. & B. 54, 6 Moore C. P. 141, 9 Price 408, 23 Rev. Rep. 556, 7 E. C. L. 602.

In the action on contract the consideration must be alleged, while there is no necessity of alleging consideration in the action in tort. Smith *v.* Seward, 3 Pa. St. 342; Wright *v.* McKee, 37 Vt. 161.

The consignor could not sue in tort without allegation of ownership, as the ownership would be presumed to be in the consignee, while on contract it would be presumed that the consignor, being a party to the contract, would be entitled to bring action thereon. Pennsylvania Co. *v.* Poor, 103 Ind. 553, 3 N. E. 253.

agreed," the characteristic difference being that in the action on contract, it is alleged that he did so upon consideration, while in the action in tort no such allegation is necessary.[4]

b. Declaration, Complaint, or Petition. The material allegations in an action against the carrier for loss of or injury to the goods are: (1) ownership of plaintiff, or such other connection with the transaction as to entitle him to sue;[5] (2) delivery of the goods to the carrier;[6] (3) acceptance of the goods[7] by the latter as a common carrier for hire;[8] (4) consideration for the undertaking, if the action

4. Smith *v.* Seward, 3 Pa. St. 342.

In an action in tort it is important that there be an allegation of negligence, which would not be necessary in the action on contract, although commonly inserted. Wright *v.* McKee, 37 Vt. 161.

With reference to the statute of limitations it may be important to determine whether the action is in tort or on contract. Southern R. Co. *v.* Rosenberg, 29 Ala. 287, 30 So. 32.

Under the code procedure, as adopted in most of the states, it is specifically required that the facts constituting plaintiff's cause of action shall be stated, and the technical distinction between the form of action in tort and that on contract is no longer preserved, so that the common-law tests for determining which form of action has been adopted by the pleader are no longer available. It will usually be practicable, however, taking the whole pleading together, to determine whether the complaint is that defendant was negligent, or that, on the other hand, he violated the implied conditions of the contract arising out of his acceptance of the goods for transportation. However, the distinction between remedies available in action in tort and on contract have largely disappeared under the code procedure, and it is usually immaterial whether the action be treated as of one form or the other. Tuggle *v.* St. Louis, etc., R. Co., 62 Mo. 425. And see Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

5. **In tort** plaintiff should allege ownership, general or special, but the fact that he is the consignee will show presumptive ownership. Pennsylvania Co. *v.* Clark, 2 Ind. App. 146, 27 N. E. 586; U. S. Mail Line Co. *v.* Carrollton Furniture Mfg. Co., 101 Ky. 658, 42 S. W. 342. And see *supra*, II, R, 1, b.

If the action is on contract, according to the weight of authority the consignor may sue as the party with whom the contract was made and therefore entitled to recover for its breach. Stimpson *v.* Gilchrist, 1 Me. 202; and *supra*, II, R, 1, e. But if it appears that the consignor contracted only as agent, then the action should not be maintained in his name. Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412. It has been said, however, that the consignor suing on contract should allege his ownership. Butler *v.* Pittsburgh, etc., R. Co., 18 Ind. App. 656, 46 N. E. 92.

6. **Delivery** of the goods to defendant should be averred but a general averment to this effect is sufficient. Jordan *v.* Hazard, 10 Ala. 221; Sommerville *v.* Merrill, 1 Port. (Ala.) 107; New England Mfg. Co. *v.* Starin, 60 Conn. 369, 22 Atl. 953; Chicago, etc., R. Co. *v.* Grimes, 71 Ill. App. 397; Martin *v.* Ft. Worth, etc., R. Co., 3 Tex. Civ. App. 556, 22 S. W. 1007.

7. **Acceptance** by defendant for transportation in the capacity of common carrier should also be alleged. Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965; Smith *v.* King's Mountain R. Co., 3 S. C. 53.

As warehouseman.— Where it is sought to charge defendant with breach of duty as warehouseman it is not necessary to show a special charge for such duty. White *v.* Humphery, 11 Q. B. 43, 12 Jur. 417, 63 E. C. L. 43. An allegation that defendant undertook to transport the goods back to the shipper on failure of the consignee to accept will not show liability as warehouseman but as common carrier. Aronson *v.* Cleveland, etc., R. Co., 70 Pa. St. 68. Where the allegations of the petition charge defendant as warehouseman it is error to instruct with reference to his liability as common carrier. Porter *v.* Chicago, etc., R. Co., 20 Iowa 73.

8. **Acceptance for hire.**—As a common carrier does not assume greater liability than that of a bailee where the transportation is gratuitous (see *supra*, II, C) it should be alleged that defendant accepted the goods for transportation as a common carrier for hire (Bristol *v.* Rensselaer, etc., R. Co., 9 Barb. (N. Y.) 158). But probably in an action on the case it is not essential to allege that the transportation was for compensation, it being sufficient, perhaps, to allege the receipt of the goods and negligence resulting in loss or damage. Hall *v.* Cheney, 36 N. H. 26.

That defendant was a **common carrier** should be alleged in this connection. Louisville, etc., R. Co. *v.* Gerson, 102 Ala. 409, 14 So. 873; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Kain *v.* Kansas City, etc., R. Co., 29 Mo. App. 53; Mershon *v.* Hobensack, 22 N. J. L. 372; Bristol *v.* Rensselaer, etc., R. Co., 9 Barb. (N. Y.) 158. But it is sufficient to allege that defendant is a railroad company where by statute railroad companies are common carriers. Denver, etc., R. Co. *v.* Cahill, 8 Colo. App. 158, 45 Pac. 285; Toledo, etc., R. Co. *v.* Roberts, 71 Ill. 540; Pennsylvania Co. *v.* Clark, 2 Ind. App. 146, 27 N. E. 586; Dunbar *v.* Port Royal, etc., R. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860.

In an action of assumpsit it seems that it is not necessary to allege that defendant was a common carrier, it being open to plaintiff, under the allegation that defendant undertook to transport the goods, to show the character

is on contract;[9] (5) breach of duty;[10] (6) resulting damage.[11] These elements of the right of action are not usually set out in this order, but they will usually all be found in the forms of declaration or complaint, whether at common law or under code procedure.[12] It is not necessary to allege that it was defendant's duty to carry the goods safely, such duty being implied by law from the relation of com-

of defendant's business as determining the nature of the undertaking. Mershon *v.* Hobensack, 22 N. J. L. 372.

9. Consideration.— While in an action for breach of contract there should be an allegation that the undertaking was for a compensation, it is not essential to aver that there was a payment or tender of the freight, prepayment not being essential unless demanded. Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296; Ferguson *v.* Cappeau, 6 Harr. & J. (Md.) 394; Jarrett *v.* Great Northern R. Co., 74 Minn. 477, 77 N. W. 304; Waterman *v.* Vermont Cent. R. Co., 25 Vt. 707. But if the foundation of the action is refusal of the carrier to deliver at the end of the transportation, there should be an averment of payment or tender of freight charges in order to discharge the carrier's lien (Jeffersonville, etc., R. Co. *v.* Gent, 35 Ind. 39; and *supra*, II, N, 3, a); unless it appears that plaintiff's claim for damages was sufficient to offset defendant's claim for freight (Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123; 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880; Ewart *v.* Kerr, 2 McMull (S. C.) 141, Rice (S. C.) 203; and *supra*, II, N, 3, b).

10. In actions ex contractu no express allegation of negligence or fault on the part of defendant is necessary, it being sufficient to charge loss of or injury to the goods in violation of the terms of the implied contract. Nashville, etc., R. Co. *v.* Parker, 123 Ala. 683, 27 So. 323; Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33. Allegation of loss and value is sufficient without specifying the loss to plaintiff on account of non-delivery. Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. Rep. 258.

If the action is in tort there should be an allegation either of fault or culpable misconduct. Gray *v.* The Steamboat Reveille, 6 Wis. 61. A general allegation, however, of neglect or misconduct is sufficient without a statement of the particulars.

Connecticut.— Lang *v.* Brady, 73 Conn. 707, 49 Atl. 199.

Illinois.—East St. Louis Connecting R. Co. *v.* Wabash, etc., R. Co., 123 Ill. 594, 15 N. E. 45.

Louisiana.— Kelly *v.* Benedict, 5 Rob. (La.) 138, 39 Am. Dec. 530.

Massachusetts.— Medfield School Dist. *v.* Boston, etc., R. Co., 102 Mass. 552, 3 Am. Rep. 502.

Michigan.— Great Western R. Co. *v.* Hawkins, 18 Mich. 427.

Minnesota.— McCauley *v.* Davidson, 10 Minn. 418.

Missouri.— McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; Carlisle *v.* Keokuk Northern Line Packet Co., 82 Mo. 40.

Nebraska.— Union Pac. R. Co. *v.* Vincent, 58 Nebr. 171, 78 N. W. 457.

See 9 Cent. Dig. tit. "Carriers," § 569.

As contra, however, holding that a general averment of negligence, without specification of the particular fault charged, is not sufficient as against a motion for more specific statement see Rubens *v.* Ludgate Hill Steamship Co., 2 N. Y. Suppl. 30, 17 N. Y. St. 17, 21 Abb. N. Cas. (N. Y.) 464.

If specific acts are averred, even though a general allegation of negligence is sufficient, the evidence will be confined to those alleged. Lachner *v.* Adams Express Co., 72 Mo. App. 13.

Under a statutory form, it was held that negligence of the carrier was a legal implication where negligence is essential to fix liability, though the words of the form did not involve an averment of negligence. Nashville, etc., R. Co. *v.* Parker, 123 Ala. 683, 27 So. 323.

11. See, generally, CONTRACTS; DAMAGES; NEGLIGENCE; PLEADING.

12. For forms of declaration, complaint, or petition: In assumpsit. See Syms *v.* Chaplin, 5 A. & E. 634, 5 Dowl. P. C. 429, 6 L. J. K. B. 25, 1 N. & P. 129, 31 E. C. L. 761. In tort. See Hall *v.* Cheney, 36 N. H. 26; Mershon *v.* Hobensack, 22 N. J. L. 372; Wright *v.* McKee, 37 Vt. 161, 2 Chit. Pl. 487; Harrison *v.* London, etc., R. Co., 2 B. & S. 122, 8 Jur. N. S. 740, 31 L. J. Q. B. 113, 6 L. T. Rep. N. S. 466, 110 E. C. L. 122; Sanquer *v.* London, etc., R. Co., 16 C. B. 163, 3 C. L. R. 811, 81 E. C. L. 163; Metcalfe *v.* London, etc., R. Co., 4 C. B. N. S. 307, 27 L. J. C. P. 205, 6 Wkly. Rep. 498, 93 E. C. L. 307; Simons *v.* Great Western R. Co., 2 C. B. N. S. 619, 89 E. C. L. 619; Collard *v.* South Eastern R. Co., 7 H. & N. 79, 7 Jur. N. S. 950, 30 L. J. Exch. 393, 4 L. T. Rep. N. S. 410, 9 Wkly. Rep. 697; Hudson *v.* Baxendale, 2 H. & N. 575, 27 L. J. Exch. 93, 6 Wkly. Rep. 83. A complaint in substantially the following form was held in Catlin *v.* Adirondack Co., 11 Abb. N. Cas. (N. Y.) 377, to indicate an action in tort: That at the several times hereinafter mentioned the defendant was a corporation, duly created and existing under the laws of the state of New York, and engaged in carrying goods for hire. That on or about (date) plaintiffs delivered to and left in the possession of the defendant at (place) three trunks, to be conveyed as freight to (place). That the defendant undertook and became responsible to the plaintiffs for the due and safe transportation of said trunks to their said destination. That such trunks were unduly delayed in transportation, to the great annoyance and inconven-

mon carrier to the goods.[13] Where the action is for non-delivery there should be an allegation of demand.[14] But if breach of contract is alleged demand is immaterial.[15]

c. Defenses. No special discussion of the defenses available to the carrier is necessary, the general rules as to exceptions to his common-law liability and limitation of such liability by special contract having been heretofore fully considered. If the action is in tort or on implied contract, a special contract limiting liability or imposing conditions thereon, so far as valid, must be set up by the carrier as a special defense.[16]

3. Evidence; Presumptions; Burden of Proof[17]**— a. Burden in General.** The plaintiff has of course the burden of proving the essential elements of his cause of action, as required to be set out in his complaint.[18] If the action is for injury to the goods the burden is on the plaintiff to show that they were in good con-

ience of the plaintiff, and were not delivered at their said destination at (place) until on or about (date). That said transportation should not have occupied more than —— days. That after said trunks had been received by the plaintiffs at their destination aforesaid, and the charges for their transportation duly paid, it was found that each and every one of said three trunks had been broken open since their delivery to the defendant, and while said defendant was responsible to the plaintiffs for their safety, and numerous articles, of the aggregate value of (amount) unlawfully taken therefrom. Wherefore, etc. In Porter *v.* Chicago, etc., R. Co., 20 Iowa 73, a petition in substantially the following form was held to set out a cause of action against defendant as warehouseman. and not as common carrier: On (date) defendant was engaged in the business of common carrier and warehouseman, running and operating a railroad from (place) to (place), and having a warehouse at the latter place, and on said date plaintiff delivered to defendant at Chicago (certain described goods), to be transported to said (place), under and in accordance with the terms and conditions of a certain written contract, a copy of which is hereto annexed, etc., and plaintiff further avers that said goods were duly transported by defendant to their said warehouse in (place), and were therein so carelessly and negligently kept that the aforesaid goods were entirely lost and destroyed, and defendant utterly failed and refused to deliver the same to this plaintiff on demand. Wherefore plaintiff asks judgment, etc.

13. Lang *v.* Brady, 73 Conn. 707, 49 Atl. 199; Wright *v.* McKee, 37 Vt. 161.

14. Michigan Southern, etc., R. Co. *v.* Bivens, 13 Ind. 263; Jarrett *v.* Great Northern R. Co., 74 Minn. 477, 77 N. W. 304.

15. Erskine *v.* Steamboat Thames, 6 Mo. 371; Ludwig *v.* Meyre, 5 Watts & S. (Pa.) 435.

Admission of non-delivery.—Where the carrier, being sued for non-delivery, pleads that the goods were never received, he thereby admits non-delivery. Hot Springs R. Co. *v.* Hudgins, 42 Ark. 485.

16. *Alabama.*— Nashville, etc., R. Co. *v.* Parker, 123 Ala. 683, 27 So. 323.

California.— Michalitschke *v.* Wells, 118 Cal. 683, 50 Pac. 847.

Illinois.— Louisville, etc., R. Co. *v.* Cunningham, 88 Ill. App. 289.

Kansas.— Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899; Atchison, etc., R. Co. *v.* Ditmars, 3 Kan. App. 459, 43 Pac. 833.

Missouri.— Oxley *v.* St. Louis, etc., R. Co., 65 Mo. 629.

Texas.— Atchison, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1894) 28 S. W. 98.

See 9 Cent. Dig. tit. "Carriers," § 720 *et seq.*; and *supra*, II, E.

Contra.— Baltimore, etc., R. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. 1106.

Under the general issue defendant may show exemption from liability for loss of goods by reason of a common-law exception. Southern Express Co. *v.* Womack, 1 Heisk. (Tenn.) 256.

Under the statutory general denial the defendant may show that the goods described in the complaint were not received. Great Western Despatch South Shore Line *v.* Glenny, 41 Ohio St. 166.

17. See, generally, Evidence.

18. See *supra*, II, R, 2, b.

Illustrations.— Thus, he must show that defendant is a common carrier (Ringgold *v.* Haven, 1 Cal. 108; Citizens' Bank *v.* Nantucket Steam Boat Co., 2 Story (U. S.) 16, 5 Fed. Cas. No. 2,730), and that the goods were delivered to the carrier for transportation (Fitzgerald *v.* Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341; Hipp *v.* Southern R. Co., 50 S. C. 129, 27 S. E. 623; The Willie D. Sandhoval, 92 Fed. 286; U. S. *v.* Pacific Express Co., 15 Fed. 867; Manning *v.* Hoover, Abb. Adm. (U. S.) 188, 16 Fed. Cas. No. 9,044), of which fact, however, the receipt, acknowledgment, or bill of lading issued by the carrier is *prima facie* evidence (Lengsfield *v.* Jones, 11 La. Ann. 624; Harnett *v.* Westcott, 56 N. Y. Super. Ct. 213, 3 N. Y. Suppl. 7, 18 N. Y. St. 962; Stadhecker *v.* Combs, 9 Rich. (S. C.) 193; The California, 2 Sawy. (U. S.) 12, 4 Fed. Cas. No. 2,314, 5 Am. L. T. Rep. (U. S. Cts.) 132.

That the bill of lading or shipping receipt is only prima facie evidence as to the receipt of the goods see *supra*, II, G, 2, h, (vi).

dition when delivered to the carrier, that is, that the bad condition complained of resulted while the goods were in the carrier's possession.[19] The presumption, however, arises from the fact of the receipt of the goods by the carrier without objection or exception noted in the bill of lading or shipping receipt,[20] that so far as the condition was apparent on ordinary inspection the goods were in good condition.[21] The burden is also on plaintiff to prove non-delivery by the carrier.[22] But slight evidence of non-delivery is sufficient to throw the burden on the carrier of accounting for the goods.[23] So in an action for damage to the goods it is for plaintiff to prove that the damage occurred while the goods were in the possession of the carrier as such, and not after his liability as carrier had terminated by the completion of his contract to transport and deliver the goods.[24] The burden is on plaintiff to show the value of the goods lost.[25]

b. Burden as to Carrier's Liability — (i) *As to Loss Excepted at Common*

19. Marquette, etc., R. Co. *v.* Langton, 32 Mich. 251; Brooks *v.* Dinsmore, 6 N. Y. St. 281; Missouri Pac. R. Co. *v.* Breeding, (Tex. Civ. App. 1890) 16 S. W. 184; The Vincenzo T., 10 Ben. (U. S.) 228, 28 Fed. Cas. No. 16,948.

Thus, in an action against the second of two connecting carriers for injury to the goods, the burden is on plaintiff to show that the injury occurred after the goods came into the possession of defendant. Western R. Co. *v.* Harwell, 97 Ala. 341, 11 So. 781; Millam *v.* Southern R. Co., 58 S. C. 247, 36 S. E. 571. *Contra*, see Paramore *v.* Western R. Co., 53 Ga. 383. As to the conflict of authorities on this subject see *supra*, II, M, 7.

According to the English rule (see *supra*, II, M, 2, a) the first carrier may be sued for any breach of the duty to transport, whether on the first line or a connecting line. Scotthorn *v.* South Staffordshire R. Co., 8 Exch. 341, 17 Jur. 214, 22 L. J. Exch. 121, 7 R. & Can. Cas. 810, 1 Wkly. Rep. 154; Bristol, etc., R. Co. *v.* Collins, 7 H. L. Cas. 194, 5 Jur. N. S. 1367, 29 L. J. Exch. 41; Coxon *v.* Great Western R. Co., 5 H. & N. 274, 29 L. J. Exch. 165, 1 L. T. Rep. N. S. 442; Crouch *v.* Great Western R. Co., 2 H. & N. 491; Muschamp *v.* Lancaster, etc., R. Co., 5 Jur. 656, 8 M. & W. 421, 2 R. & Can. Cas. 607.

20. But if the recital in the bill of lading is that the contents and condition are unknown there will be no presumption, at least as to a bad condition not apparent on ordinary inspection. Wentworth *v.* Ship Realm, 16 La. Ann. 18; Nelson *v.* Stephenson, 5 Duer (N. Y.) 538; The Columbo, 3 Blatchf. (U. S.) 521, 6 Fed. Cas. No. 3,040, 35 Hunt. Mer. Mag. 449, 19 Law Rep. 376, 13 Leg. Int. (Pa.) 361. Even where the bill recites that the contents are unknown it will be presumed that the goods were properly packed. English *v.* Ocean Steam Nav. Co., 2 Blatchf. (U. S.) 425, 8 Fed. Cas. No. 4,490.

21. Montgomery, etc., R. Co. *v.* Moore, 51 Ala. 394; Henry *v.* Central R., etc., Co., 89 Ga. 815, 15 S. E. 757; Breed *v.* Mitchell, 48 Ga. 533; Kerr *v.* The Norman, 1 Newb. Adm. 525, 14 Fed. Cas. No. 7,732; The Martha, Olcott (U. S.) 140, 16 Fed. Cas. No. 9,145. *Contra*, Brooks *v.* Dinsmore, 3 N. Y. St. 587. And see *supra*, II, G, 2, b, (v).

22. Sehneideau *v.* Pennington, 21 La. Ann. 299; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510; Roberts *v.* Chittenden, 88 N. Y. 33; Hirsch *v.* Hudson River Line, 26 Misc. (N. Y.) 823, 57 N. Y. Suppl. 272; The Falcon, 3 Blatchf. (U. S.) 64, 8 Fed. Cas. No. 4,617, 30 Hunt. Mer. Mag. 201.

But non-delivery may be shown by acts of the carrier with reference to the loss of the goods indicating an admission of non-delivery. South, etc., Alabama R. Co. *v.* Wilson, 78 Ala. 587; Morley *v.* Eastern Express Co., 116 Mass. 97; Bennett *v.* Northern Pac. Express Co., 12 Oreg. 49, 6 Pac. 160.

Proof that owner made inquiries for the goods of the carrier after they should have been delivered is admissible in evidence in an action against the carrier to show their loss. Ingledew *v.* Northern R. Co., 7 Gray (Mass.) 86.

23. Woodbury *v.* Frink, 14 Ill. 279; Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288; Schroeder *v.* Hudson River R. Co., 5 Duer (N. Y.) 55; The Falcon, 3 Blatchf. (U. S.) 64, 8 Fed. Cas. No. 4,617, 30 Hunt. Mer. Mag. 201. It has even been held that proof of delivery to the carrier being shown, the burden is in the first instance on the carrier to establish delivery by him. Wheeler *v.* St. Louis, etc., R. Co., 3 Mo. App. 358.

24. *Alabama.*— South, etc., Alabama R. Co. *v.* Wood, 71 Ala. 215, 46 Am. Rep. 309 [*explaining* 66 Ala. 167, 41 Am. Rep. 749].

California.— Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268.

Kansas.— Atchison, etc., R. Co. *v.* Richardson, 53 Kan. 157, 35 Pac. 1114.

Missouri.— Nave *v.* Pacific Express Co., 19 Mo. App. 563.

Texas.— Missouri Pac. R. Co. *v.* Heath, (Tex. 1891) 18 S. W. 477; Texas, etc., R. Co. *v.* Llano Live-Stock Co., (Tex. Civ. App. 1896) 33 S. W. 748.

Wisconsin.— Curtis *v.* Chicago, etc., R. Co., 18 Wis. 312.

See 9 Cent. Dig. tit. "Carriers," § 578.

Contra.— Peoria, etc., R. Co. *v.* U. S. Rolling Stock Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348.

25. Seller *v.* The Pacific, Deady (U. S.) 17, 21 Fed. Cas. No. 12,644, 1 Oreg. 409.

Law or by Contract—(A) *In General.* Proof of loss of or injury to the goods while in the carrier's possession as carrier throws upon him the burden of showing that the loss or injury occurred by reason of one of the excepted causes,[26] or that it was within some special exception made by contract.[27] Therefore, in the absence of any showing on the part of the carrier, or any exception contained in the contract (if plaintiff sues on a special contract), proof of the loss or injury is sufficient.[28] It is for the carrier to bring the case within one of the common law exceptions[29] if he relies on such exception as a defense.[30] So if the carrier seeks to escape liability on the ground that the loss of or injury to the goods is one excepted by a valid special contract, he has the burden of proving not only the making of such special contract,[31] but also that the loss or injury for which

26. See *supra*, II, D, 2.

27. See *supra*, II, E, 2; II, R, 2, c.

28. *Alabama.*— Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602.

Georgia.— Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240; Cohen *v.* Southern Express Co., 53 Ga. 128.

Illinois.— Chesapeake, etc., R. Co. *v.* Radbourne, 52 Ill. App. 203.

Indiana.— Pennsylvania Co. *v.* Liveright, 14 Ind. App. 518, 43 N. E. 162.

Iowa.— Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; Faust *v.* Chicago, etc., R. Co., 104 Iowa 241, 73 N. W. 623, 65 Am. St. Rep. 454; Angle *v.* Mississippi, etc., R. Co., 18 Iowa 555.

Kentucky.— Adams Express Co. *v.* Crawford, 8 Ky. L. Rep. 619.

Louisiana.—Silverman *v.* St. Louis, etc., R. Co., 51 La. Ann. 1785, 26 So. 447; Chapman *v.* New Orleans, etc., R. Co., 21 La. Ann. 224, 99 Am. Dec. 722.

Maine.—Dow *v.* Portland Steam Packet Co., 84 Me. 490, 24 Atl. 945; Little *v.* Boston, etc., R. Co., 66 Me. 239; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

Massachusetts.— Cass *v.* Boston, etc., R. Co., 14 Allen (Mass.) 448.

Missouri.— Kirby *v.* Adams Express Co., 2 Mo. App. 369.

New Hampshire.— Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

New York.— Westcott *v.* Fargo, 6 Lans. (N. Y.) 319, 63 Barb. (N. Y.) 349; Merritt *v.* Earle, 31 Barb. (N. Y.) 38; Blum *v.* Monahan, 36 Misc. (N. Y.) 179, 73 N. Y. Suppl. 162.

Pennsylvania.—Phœnix Pot-Works *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 284, 20 Atl. 1058; Adams Express Co. *v.* Holmes, (Pa. 1887) 9 Atl. 166; Grogan *v.* Adams Express Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360; Bell *v.* Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398.

South Carolina.—McCall *v.* Brock, 5 Strobh. (S. C.) 119; Smyrl *v.* Niolon, 2 Bailey (S. C.) 421, 23 Am. Dec. 146; Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131.

Texas.— St. Louis, etc., R. Co. *v.* Parmer, (Tex. Civ. App. 1895) 30 S. W. 1109; Missouri Pac. R. Co. *v.* Scott, 4 Tex. Civ. App. 76, 26 S. W. 239.

Vermont.— Day *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489.

Virginia.— Murphy *v.* Staton, 3 Munf. (Va.) 239.

Wisconsin.— Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713.

United States.— The E. M. Norton, 15 Fed. 686; The William Taber, 2 Ben. (U. S.) 329, 30 Fed. Cas. No. 17,757; Choate *v.* Crowninshield, 3 Cliff. (U. S.) 184, 5 Fed. Cas. No. 2,691; The Martha, Olcott (U. S.) 140, 16 Fed. Cas. No. 9,145; Soule *v.* Rodocanachi, Newb. Adm. 504, 22 Fed. Cas. No. 13,178; The Zone, 2 Sprague (U. S.) 19, 30 Fed. Cas. No. 18,220, 22 Law Rep. 725.

See 9 Cent. Dig. tit. "Carriers," § 578 *et seq.*

29. See *supra*, II, D, 2.

30. *Georgia.*— Van Winkle *v.* South Carolina R. Co., 38 Ga. 32.

Illinois.— Burke *v.* U. S. Express Co., 87 Ill. App. 505.

Iowa.— McCoy *v.* Keokuk, etc., R. Co., 44 Iowa 424.

Louisiana.— Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Grieff *v.* Suitzer, 11 La. Ann. 324.

Massachusetts.— Lewis *v.* Smith, 107 Mass. 334; Alden *v.* Pearson, 3 Gray (Mass.) 342.

Minnesota.— Lindsley *v.* Chicago, etc., R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692.

Missouri.— Green *v.* Indianapolis, etc., R. Co., 56 Mo. 556; Wolf *v.* American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Hill *v.* Sturgeon, 28 Mo. 323.

Pennsylvania.— Hays *v.* Kennedy, 3 Grant (Pa.) 351.

South Carolina.— Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19.

See 9 Cent. Dig. tit. "Carriers," § 578 *et seq.*

31. *Illinois.*— Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Kentucky.— Louisville, etc., R. Co. *v.* Hedger, 9 Bush (Ky.) 645, 15 Am. Rep. 740; Adams Express Co. *v.* Guthrie, 9 Bush (Ky.) 78.

Maryland.— Baltimore, etc., R. Co. *v.* Brady, 32 Md. 333.

Michigan.— McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; American Transp. Co. *v.* Moore, 5 Mich. 368.

Mississippi.—Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017.

Missouri.— Lupe *v.* Atlantic, etc., R. Co., 3 Mo. App. 77.

New York.— London, etc., F. Ins. Co. *v.*

action is brought falls within a specified exception contained in such special contract.[32]

Rome, etc., R. Co., 68 Hun (N. Y.) 598, 23 N. Y. Suppl. 231, 52 N. Y. St. 581.

Ohio.— Gaines *v.* Union Transp., etc., Co., 28 Ohio St. 418.

Pennsylvania.— Schaeffer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. Rep. 884.

Texas.— Missouri Pac. R. Co. *v.* Nicholson, 2 Tex. App. Civ. Cas. § 168.

United States.— Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17; The Staincliffe, 15 Fed. 350; The Peytona, 2 Curt. (U. S.) 21, 19 Fed. Cas. No. 11,058.

See 9 Cent. Dig. tit. "Carriers," § 722.

Assent or knowledge of shipper.— If the carrier relies on exemptions inserted in a receipt for the goods as constituting a contract he must show knowledge and assent on the part of the shipper. Graves *v.* Adams Express Co., 176 Mass. 280, 57 N. E. 462; Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243; Grossman *v.* Dodd, 63 Hun (N. Y.) 324, 17 N. Y. Suppl. 855, 43 N. Y. St. 375. And see *supra*, II, E, 5, b. But if the limitation is in the bill of lading as a portion of the contract of shipment, assent by the shipper will be presumed (see *supra*, II, E, 5, c) except in Illinois and a few other states where express assent must be shown (Wabash, etc., R. Co. *v.* Jaggerman, 115 Ill. 407, 4 N. E. 641; Field *v.* Chicago, etc., R. Co., 71 Ill. 458; Lake Shore, etc., R. Co. *v.* Davis, 16 Ill. App. 425), and where the question of assent will therefore be one for the determination of the jury (Erie, etc., Transp. Co. *v.* Dater, 91 Ill. 195, 33 Am. Rep. 51; Merchants' Despatch Transp. Co. *v.* Leysor, 89 Ill. 43; Merchants' Despatch Transp. Co. *v.* Theilbar, 86 Ill. 71; Field *v.* Chicago, etc., R. Co., 71 Ill. 458; The Anchor Line *v.* Dater, 68 Ill. 369; Chicago, etc., R. Co. *v.* Montfort, 60 Ill. 175; American Merchants' Union Express Co. *v.* Schier, 55 Ill. 140; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Adams Express Co. *v.* Haynes, 42 Ill. 89; Ohio, etc., R. Co. *v.* Emrich, 24 Ill. App. 245).

Consideration.— It seems that it is not incumbent, however, on the carrier relying on a special contract to show a special consideration therefor, the burden of proof of want of consideration being on the party seeking to defeat the contract. Brown *v.* Louisville, etc., R. Co., 36 Ill. App. 140; Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042. But if the receipt issued on delivery of the goods to the carrier was unqualified, and the carrier seeks to rely on a bill of lading subsequently issued relieving him from liability, such contract will be presumed to have been without consideration, in the absence of evidence to the contrary. Southard *v.* Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442, 619. As to consideration for special contract see *supra*, II, E, 3, c.

Special custom.— If carrier relies upon a special custom to relieve him from liability the burden is upon him to establish such custom. Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376, 18 Am. Rep. 340.

If carrier relies on act of shipper in selecting vehicles for the transportation of the goods as excusing the carrier's liability with reference thereto, the burden of showing knowledge on the part of the shipper as to the defects in the vehicle, or that they were plainly apparent or visible, is on the carrier. Harris *v.* Northern Indiana R. Co., 20 N. Y. 232.

It is for the connecting carrier to show that he accepted the goods under the terms of the contract with the first carrier if he relies on an exemption in such contract. Western R. Co. *v.* Harwell, 97 Ala. 341, 11 So. 781. And see *supra*, II, M, 6.

As to bill of lading delivered after shipment see *supra*, II, E, 5, d.

32. *Alabama.*— Montgomery, etc., R. Co. *v.* Moore, 51 Ala. 394.

Arkansas.— St. Louis, etc., R. Co. *v.* Lesser, 46 Ark. 236.

Georgia.— Savannah, etc., R. Co. *v.* Hoffmayer, 75 Ga. 410; Southern Express Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Illinois.— Toledo, etc., R. Co. *v.* Hamilton, 76 Ill. 393; Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Massachusetts.— Alden *v.* Pearson, 3 Gray (Mass.) 342.

Mississippi.— Johnson *v.* Alabama, etc., R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534; Mobile, etc., R. Co. *v.* Tupelo Furniture Mfg. Co., 67 Miss. 35, 7 So. 279, 19 Am. St. Rep. 262; Southern Express Co. *v.* Moon, 39 Miss. 822.

Missouri.— Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Nave *v.* Pacific Express Co., 19 Mo. App. 563; Schutter *v.* Adams Express Co., 5 Mo. App. 316.

New Hampshire.— Hall *v.* Cheney, 36 N. H. 26.

New York.—Arend *v.* Liverpool, etc., Steamship Co., 6 Lans. (N. Y.) 457, 64 Barb. (N. Y.) 118; Newstadt *v.* Adams, 5 Duer (N. Y.) 43; Koeningsheim *v.* Hamburg American Packet Co., 12 Daly (N. Y.) 123; Fenn *v.* Timpson, 4 E. D. Smith (N. Y.) 276; Bowden *v.* Fargo, 22 N. Y. Suppl. 890; Brooks *v.* Dinsmore, 3 N. Y. St. 587, 6 N. Y. St. 281.

Ohio.— U. S. Express Co. *v.* Backman, 28 Ohio St. 144; Davidson *v.* Graham, 2 Ohio St. 131.

Pennsylvania.— Verner *v.* Sweitzer, 32 Pa. St. 208.

South Carolina.— Baker *v.* Brinson, 9 Rich. (S. C.) 201, 67 Am. Dec. 548.

Wisconsin.— Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415.

United States.— The Propeller Niagara *v.* Cordes, 21 How. (U. S.) 7, 16 L. ed. 41; The Warren Adams, 74 Fed. 413, 38 U. S. App. 356, 20 C. C. A. 486; The Mascotte, 51 Fed. 605, 1 U. S. App. 251, 2 C. C. A. 399 [*affirming* 48 Fed. 119]; Christie *v.* The Craigton, 41

(B) *Carrier's Freedom From Negligence.* In many jurisdictions it is said that the carrier relying upon an exception made by common law or contract must not only show that the loss or injury falls within the exception, but also that it occurred without fault, that is, negligence, on the part of the carrier;[33] and it is specially so held with reference to a loss by fire, where that is a liability excepted

Fed. 62; Cumming *v.* The Barracouta, 40 Fed. 498; The Lydian Monarch, 23 Fed. 298; The Pharos, 9 Fed. 912; The Sabioncello, 7 Ben. (U. S.) 357, 21 Fed. Cas. No. 12,198; The Moravian, 2 Hask. (U. S.) 157, 17 Fed. Cas. No. 9,789; Turner *v.* The Black Warrior, McAll. (U. S.) 181, 24 Fed. Cas. No. 14,253; Hunt *v.* The Cleveland, 6 McLean (U. S.) 76, 12 Fed. Cas. No. 6,885, Newb. Adm. 221; Soule *v.* Rodocanachi, Newb. Adm. 504, 22 Fed. Cas. No. 13,178; The Martha, Olcott (U. S.) 140, 16 Fed. Cas. No. 9,145; Bazin *v.* Liverpool, etc., Steamship Co., 3 Wall. Jr. (U. S.) 229, 2 Fed. Cas. No. 1,152, 5 Am. L. Reg. 459, 37 Hunt. Mer. Mag. 449, 20 Law Rep. 129, 14 Leg. Int. (Pa.) 156.

See 9 Cent. Dig. tit. "Carriers," § 722.

Exception of perils of navigation are within this rule. The Polynesia, 16 Fed. 702; The Sloga, 10 Ben. (U. S.) 315, 22 Fed. Cas. No. 12,955; The William Taber, 2 Ben. (U. S.) 329, 30 Fed. Cas. No. 17,757; The Ocean Wave, 3 Biss. (U. S.) 317, 18 Fed. Cas. No. 10,416, 6 Alb. L. J. 407, 4 Chic. Leg. N. 486; The Mollie Mohler, 2 Biss. (U. S.) 505, 17 Fed. Cas. No. 9,701, 4 Am. L. T. Rep. (U. S. Cts.) 145; The Keokuk, 1 Biss. (U. S.) 522, 14 Fed. Cas. No. 7,721; The Compta, 4 Sawy. (U. S.) 375, 6 Fed. Cas. No. 3,069; The Emma Johnson, 1 Sprague (U. S.) 527, 8 Fed. Cas. No. 4,465; Bearse *v.* Ropes, 1 Sprague (U. S.) 331, 2 Fed. Cas. No. 1,192, 19 Law Rep. 548; King *v.* Shepherd, 3 Story (U. S.) 349, 14 Fed. Cas. No. 7,804, 7 Law Rep. 275, 2 West. L. J. 424; Hooper *v.* Rathbone, Taney (U. S.) 519, 12 Fed. Cas. No. 6,676; Muller *v.* Iginia, 17 Fed. Cas. No. 9,917. See also, generally, SHIPPING.

Leakage, rust, or breakage.— Where the bill of lading exempted the carrier from liability for "leakage, rust, or breakage, if properly stowed," held that the burden was on the carrier to show proper stowage. Edwards *v.* Steamer Cahawba, 14 La. Ann. 224; Western Mfg. Co. *v.* The Guiding Star, 37 Fed. 641.

33. *Alabama.*— Alabama Great Southern R. Co. *v.* Little, 71 Ala. 611; Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; South, etc., Alabama R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49.

Georgia.— Central, etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

Illinois.— Adams Express Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57.

Kentucky.— Louisville, etc., R. Co. *v.* Thompson, 13 Ky. L. Rep. 973.

Louisiana.— Mahon *v.* Steamer Olive Branch, 18 La. Ann. 107; Steamer Jean Webre *v.* Carter, 12 La. Ann. 446.

Minnesota.— Hinton *v.* Eastern R. Co., 72 Minn. 337, 75 N. W. 373; Shea *v.* Minneapolis, etc., R. Co., 63 Minn. 228, 65 N. W. 458; Hull *v.* Chicago, etc., R. Co., 41 Minn. 510, 43 N. W. 391, 16 Am. St. Rep. 722, 5 L. R. A. 587; Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353.

Mississippi.—Southern Express Co. *v.* Seide, 67 Miss. 609, 7 So. 547; Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017.

Missouri.— Crow *v.* Chicago, etc., R. Co., 57 Mo. App. 135; Davis *v.* Wabash, etc., R. Co., 13 Mo. App. 449; Drew *v.* Red Line Transit Co., 3 Mo. App. 495; Lupe *v.* Atlantic, etc., R. Co., 3 Mo. App. 77; Kirby *v.* Adams Express Co., 2 Mo. App. 369.

New York.— Heyl *v.* Inman Steamship Co., 14 Hun (N. Y.) 564; Giblin *v.* National Steamship Co., 8 Misc. (N. Y.) 22, 28 N. Y. Suppl. 69, 58 N. Y. St. 311.

North Carolina.— Hinkle *v.* Southern R. Co., 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685.

Ohio.— Union Express Co. *v.* Graham, 26 Ohio St. 595; Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285.

South Carolina.— Baker *v.* Brinson, 9 Rich. (S. C.) 201, 67 Am. Dec. 548; Swindler *v.* Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732.

Tennessee.— Turney *v.* Wilson, 7 Yerg. (Tenn.) 339, 27 Am. Dec. 515.

West Virginia.— Brown *v.* Adams Express Co., 15 W. Va. 812; Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

Wisconsin.— Kirst *v.* Milwaukee, etc., R. Co., 46 Wis. 489, 1 N. W. 89.

See 9 Cent. Dig. tit. "Carriers," § 725.

Reason for this view.— This rule is supported by the argument that the facts are peculiarly within the knowledge of the carrier, and it is practicable for him to show due care, at least in a general way, while it may be impracticable for the owner to show want of care, even though there has been in fact negligence in the transportation of the goods by the carrier.

Indiana.— Pittsburgh, etc., R. Co. *v.* Racer, 5 Ind. App. 209, 31 N. E. 853.

Louisiana.— Tardos *v.* Toulon, 14 La. Ann. 429, 74 Am. Dec. 435.

New York.— J. Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121; Newstadt *v.* Adams, 5 Duer (N. Y.) 43.

North Carolina.—Mitchell *v.* Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515.

Pennsylvania.— Pennsylvania R. Co. *v.* Miller, 87 Pa. St. 395; American Express Co. *v.* Sands, 55 Pa. St. 140.

South Carolina.— Johnstone *v.* Richmond, etc., R. Co., 39 S. C. 55, 17 S. E. 512.

See 9 Cent. Dig. tit. "Carriers," § 725.

in the contract.[34] But the better rule, and one which seems to be supported by the preponderance of authority, is that where the carrier shows the loss to be within an excepted cause, either at common law or under a valid contract exemption, he is not bound to go further and explain the particulars of the loss or injury for the purpose of showing that he was free from negligence in connection therewith, but that the burden of proving negligence such as will render the carrier liable notwithstanding the common-law or contract exception, is on the plaintiff.[35]

34. *Alabama.*— Louisville, etc., R. Co. *v.* Touart, 97 Ala. 514, 11 So. 756; Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

Georgia.— Berry *v.* Cooper, 28 Ga. 543.

Kentucky.— Merchants' Dispatch Transp. Co. *v.* Hoskins, 14 Ky. L. Rep. 927; Newport News, etc., Co. *v.* Holmes, 14 Ky. L. Rep. 853; Louisville, etc., R. Co. *v.* Barbour, 9 Ky. L. Rep. 934.

Minnesota.— Southard *v.* Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442, 619.

Mississippi.— Newberger Cotton Co. *v.* Illinois Cent. R. Co., 75 Miss. 303, 23 So. 186; Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017; Chicago, etc., R. Co. *v.* Moss, 60 Miss. 1003, 45 Am. Rep. 428.

New York.— Whitworth *v.* Erie R. Co., 45 N. Y. Super. Ct. 602.

Ohio.— U. S. Express Co. *v.* Backman, 28 Ohio St. 144.

Texas.— Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571, 63 S. W. 619; Houston, etc., R. Co. *v.* McFadden, 91 Tex. 194, 40 S. W. 216, 42 S. W. 593; Missouri Pac. R. Co. *v.* China Mfg. Co., 79 Tex. 26, 14 S. W. 785; Ryan *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589; Houston, etc., R. Co. *v.* Bath, 17 Tex. Civ. App. 697, 44 S. W. 595; Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; Galveston, etc., R. Co. *v.* Efron, (Tex. Civ. App. 1897) 38 S. W. 639; St. Louis, etc., R. Co. *v.* Martin, (Tex. Civ. App. 1896) 35 S. W. 28.

See 9 Cent. Dig. tit. "Carriers," § 725.

35. *Arkansas.*— St. Louis, etc., R. Co. *v.* Bone, 52 Ark. 26, 11 S. W. 958.

Georgia.— East Tennessee, etc., R. Co. *v.* Wright, 76 Ga. 532.

Indiana.— Indianapolis, etc., R. Co. *v.* Forsythe, 4 Ind. App. 326, 29 N. E. 1138.

Iowa.— Mitchell *v.* U. S. Express Co., 46 Iowa 214.

Kansas.— Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623; Kallman *v.* U. S. Express Co., 3 Kan. 205.

Louisiana.— Kelham *v.* Steamship Kensington, 24 La. Ann. 100; Kirk *v.* Folsom, 23 La. Ann. 584; Price *v.* Uriel, 10 La. Ann. 413.

Maine.— Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Missouri.— Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; George *v.* Chicago, etc., R. Co., 57 Mo. App. 358; Flynn *v.* St. Louis, etc., R. Co., 43 Mo. App. 424; Witting *v.* St. Louis, etc., R. Co., 28 Mo. App. 103; Heil *v.* St. Louis, etc., R. Co., 16 Mo. App. 363; Harvey *v.* Terre Haute, etc., R. Co., 6 Mo. App. 585.

New York.— Whitworth *v.* Erie R. Co., 87 N. Y. 413; Lamb *v.* Camden, etc., R., etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; Magnin *v.* Dinsmore, 38 N. Y. Super. Ct. 248; Sejalon *v.* Woolverton, 31 Misc. (N. Y.) 752, 64 N. Y. Suppl. 48.

North Carolina.— Smith *v.* North Carolina R. Co., 64 N. C. 235.

Ohio.— Childs *v.* Little Miami R. Co., 1 Cinc. Super. Ct. 480.

Pennsylvania.— Buck *v.* Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678, 30 Am. St. Rep. 800; Goldey *v.* Pennsylvania R. Co., 30 Pa. St. 242, 72 Am. Dec. 703.

United States.— Memphis, etc., R. Co. *v.* Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; The Pereire, 8 Ben. (U. S.) 301, 19 Fed. Cas. No. 10,979; Vaughan *v.* Six Hundred and Thirty Casks of Sherry Wine, 7 Ben. (U. S.) 506, 28 Fed. Cas. No. 16,900; The Delhi, 4 Ben. (U. S.) 345, 7 Fed. Cas. No. 3,770; The Rocket, 1 Biss. (U. S.) 354, 20 Fed. Cas. No. 11,975, 3 West. L. Month. 7; Wertheimer *v.* Pennsylvania R. Co., 17 Blatchf. (U. S.) 421, 1 Fed. 232; The Neptune, 6 Blatchf. (U. S.) 193, 17 Fed. Cas. No. 10,118, 8 Int. Rev. Rec. 114; The Invincible, 1 Lowell (U. S.) 225, 13 Fed. Cas. No. 7,055; Turner *v.* The Black Warrior, McAll. (U. S.) 181, 24 Fed. Cas. No. 14,253; Hunt *v.* The Cleveland, 6 McLean (U. S.) 76, 12 Fed. Cas. No. 6,885, Newb. Adm. 221; The Warren Adams, 74 Fed. 413, 38 U. S. App. 356, 20 C. C. A. 486; The Flintshire, 69 Fed. 471; The Hindoustan, 67 Fed. 794, 35 U. S. App. 173, 14 C. C. A. 650; The Barracouta, 39 Fed. 288; The Jefferson, 31 Fed. 489; The New Orleans, 26 Fed. 44; The Montana, 17 Fed. 377; Six Hundred and Thirty Casks of Sherry, 14 Blatchf. (U. S.) 517, 22 Fed. Cas. No. 12,918.

See 9 Cent. Dig. tit. "Carriers," § 725.

Loss by fire was held to be within the rule in the following cases:

Arkansas.— Little Rock, etc., R. Co. *v.* Corcoran, 40 Ark. 375; Little Rock, etc., R. Co. *v.* Harper, 44 Ark. 208; Little Rock, etc., R. Co. *v.* Talbot, 39 Ark. 523.

Indiana.— Insurance Co. of North America *v.* Lake Erie, etc., R. Co., 152 Ind. 333, 53 N. E. 382.

Kansas.—The Steam Boat Emily *v.* Carney, 5 Kan. 645.

New York.— Sutro *v.* Fargo, 41 N. Y. Super. Ct. 231.

Pennsylvania.— Colton *v.* Cleveland, etc., R. Co., 67 Pa. St. 211, 5 Am. Rep. 424.

Tennessee.— Louisville, etc., R. Co. *v.* Manchester Mills, 88 Tenn. 653, 14 S. W. 314.

United States.— The Buckeye, 7 Biss. (U. S.) 23, 4 Fed. Cas. No. 2,084.

See 9 Cent. Dig. tit. "Carriers," § 725.

This rule would seem to be especially applicable where the contract is that the carrier shall not be liable except in case of negligence,[36] or that the shipment is at the owner's risk,[37] or that the carrier shall not be liable for damages due to delay.[38]

(II) *As to Negligence of Carrier.* In general there is no obligation on plaintiff in an action for loss of or injury to the goods to show negligence, for the carrier's responsibility in the absence of particular limitation is much broader and proof of loss or injury is sufficient.[39] But if an issue arises as to negligence, as where the carrier seeks to escape liability by reason of a common-law exception or one embodied in a valid contract,[40] then evidence of a loss or injury which would not have resulted in the ordinary course of events, with proper care on the carrier's part, is sufficient to make out a *prima facie* case of negligence and throw on the carrier the burden of proving due care and vigilance.[41] So if plaintiff seeks to charge the carrier as warehouseman, proof of unexplained loss or damage is sufficient to make out a *prima facie* case.[42]

In some cases it is said that if the evidence of the loss bringing the case within an exception does not indicate the carrier's negligence, then the burden of proving such negligence is on the plaintiff. Patterson *v.* Clyde, 67 Pa. St. 500; Farnham *v.* Camden, etc., R. Co., 55 Pa. St. 53; New Jersey Steam Nav. Co. *v.* Boston Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

It is sufficient for defendant generally to prove the loss within an exception without showing affirmatively the particular and identical cause of loss. Hill *v.* Sturgeon, 35 Mo. 212, 86 Am. Dec. 149.

"The shipper makes a prima facie case against the carrier, when he shows the goods were not delivered. This casts the onus on the carrier, to show that the loss occurred from a danger of the river, or from fire; and he must also prove a *prima facie* case of diligence on his part. This, of course, implies a river-worthy vessel, properly furnished and appointed, competent and sufficient officers and crew, and care and vigilance to prevent danger, and to avert it when impending. Any deficiency in the skill or watchfulness of the officers or crew, in the matter of their special function; in the apparatus to extinguish fire, or in its whereabouts or readiness for prompt present use, or in prompt and vigorous effort to extinguish a fire when it originates, would fall short of proving a *prima facie* case of diligence." Grey *v.* Mobile Trade Co., 55 Ala. 387, 399, 28 Am. Rep. 729.

36. Adams Express Co. *v.* Loeb, 7 Bush (Ky.) 499; Bankard *v.* Baltimore, etc., R. Co., 34 Md. 197, 6 Am. Rep. 321; Platt *v.* Richmond, etc., R. Co., 108 N. Y. 358, 15 N. E. 393; Cochran *v.* Dinsmore, 49 N. Y. 249; Landsberg *v.* Dinsmore, 4 Daly (N. Y.) 490; Campe *v.* Weir, 28 Misc. (N. Y.) 243, 58 N. Y. Suppl. 1082; Schaller *v.* Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042. *Contra*, see Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793; Adams Express Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Louisville, etc., Mail Co. *v.* Levey, 11 Ky. L. Rep. 286.

37. Mobile, etc., R. Co. *v.* Jarboe, 41 Ala. 644; French *v.* Buffalo, etc., R. Co., 2 Abb. Dec. (N. Y.) 196, 4 Keyes (N. Y.) 108. *Contra*, see Witting *v.* St. Louis, etc., R. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Levering *v.* Union Transp., etc., Co., 42 Mo. 88, 97 Am. Dec. 320.

38. See *supra*, II, I, 3, g.

An excessive delay may be such as to indicate negligence, throwing upon the carrier the burden of showing that the delay was fairly within the exception of the contract. Falvey *v.* Northern Transp. Co., 15 Wis. 129. For the carrier is liable for delay occasioned by his negligence, notwithstanding such a stipulation. Nicholas *v.* New York Cent., etc., R. Co., 89 N. Y. 370; Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163.

39. Doan *v.* St. Louis, etc., R. Co., 38 Mo. App. 408. And see *supra*, II, R, 3, a.

40. See *supra*, II, R, 3, b, (I), (B).

41. *Kentucky.*—Ohio, etc., R. Co. *v.* Tabor, 98 Ky. 503, 17 Ky. L. Rep. 568, 1411, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685.

Missouri.—Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Ketchum *v.* American Merchants' Union Express Co., 52 Mo. 390; Heck *v.* Missouri Pac. R. Co., 51 Mo. App. 532; Flynn *v.* St. Louis, etc., R. Co., 43 Mo. App. 424.

New York.—Hutkoff *v.* Pennsylvania R. Co., 29 Misc. (N. Y.) 770, 61 N. Y. Suppl. 254; Morris *v.* Wier, 20 Misc. (N. Y.) 586, 46 N. Y. Suppl. 413.

Texas.—Philadelphia F. Assoc. *v.* Loeb, (Tex. Civ. App. 1900) 59 S. W. 617.

Wisconsin.—Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415.

United States.—Hudson River Lighterage Co. *v.* Wheeler Condenser, etc., Co., 93 Fed. 374; The Moravian, 2 Hask. (U. S.) 157, 17 Fed. Cas. No. 9,789.

See 9 Cent. Dig. tit. "Carriers," §§ 588, 729.

Breakage and leakage.—Where the contract exempts the carrier from liability for breakage or leakage, mere proof of breakage or leakage will not in itself throw the burden on the carrier. Roth *v.* Hamburg-American Packet Co., 59 N. Y. Super. Ct. 49, 12 N. Y. Suppl. 460, 35 N. Y. St. 89; The Olbers, 3 Ben. (U. S.) 148, 18 Fed. Cas. No. 10,477.

42. Boies *v.* Hartford, etc., R. Co., 37 Conn. 272, 9 Am. Rep. 347; Georgia R., etc., Co. *v.*

(III) *Live-Stock Cases.* The rules relating to the burden of proof in case of transportation of live stock are in principle the same as those with reference to goods,[43] but some particular questions arise in their application. Thus, inasmuch as the carrier is not liable for death of animals during transportation due to natural causes, or their inherent vice or natural disposition, mere proof that the animals died after delivery to the carrier and before the end of the transportation is not sufficient to establish liability, but the evidence must further show that the loss was due to human agency.[44] But if the loss or bad condition appears to have been due to human agency, then the carrier must show that it did not result from his negligence in order to escape liability on the ground that it was due only to delay or from causes within the common-law exemption or within a valid particular limitation.[45] But this he may do by general evidence of care and diligence in the transportation.[46] Where there is a stipulation by which the owner undertakes that he or some one representing him shall accompany the animals and attend to loading and unloading, feeding and watering, and their general care, proof of loss or injury in connection with these elements of transportation will not be sufficient to charge the carrier.[47] But such a contract does not relieve

Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197. But if in such a case plaintiff assumes the burden of proving that the loss by fire was due to negligence of defendant, he must sustain it by the evidence. Denton *v.* Chicago, etc., R. Co., 52 Iowa 161, 2 N. W. 1093, 35 Am. Rep. 263.

43. See *supra*, II, A, 9.

44. Hance *v.* Pacific Express Co., 48 Mo. App. 179, 66 Mo. App. 486; Pennsylvania R. Co. *v.* Raiordon, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. Rep. 670; Hussey *v.* The Saragossa, 3 Woods (U. S.) 380, 12 Fed. Cas. No. 6,949.

But proof that animals were in good condition when shipped is competent in connection with other evidence. Hendrick *v.* Boston, etc., R. Co., 170 Mass. 44, 48 N. E. 835.

Circumstantial evidence.— While the burden is on plaintiff to show that injuries complained of are not the result of the natural propensities of the animals themselves, he is not required to make such showing by positive evidence. Proof of the circumstances attending the injury may be enough to make out a *prima facie* case. Cash *v.* Wabash R. Co., 81 Mo. App. 109.

45. *Alabama.*— Richmond, etc., R. Co. *v.* Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69.

Kentucky.— Cincinnati, etc., R. Co. *v.* Grover, 11 Ky. L. Rep. 236; Crowley *v.* Louisville, etc., R. Co., 7 Ky. L. Rep. 743.

Minnesota.— Boehl *v.* Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333.

Missouri.— George *v.* Chicago, etc., R. Co., 57 Mo. App. 358; Haynes *v.* Wabash R. Co., 54 Mo. App. 582.

New York.— Hayman *v.* Philadelphia, etc., R. Co., 8 N. Y. St. 86.

Tennessee.—Louisville, etc., R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311.

Texas.— Missouri Pac. R. Co. *v.* Scott, 4 Tex. Civ. App. 76, 26 S. W. 239.

See 9 Cent. Dig. tit. "Carriers," § 958.

Proof of injuries resulting from known causes, explainable on no other ground than that of negligence, is sufficient to show the carrier's liability. Schaeffer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. Rep. 884.

Where the death rate of poultry during transportation was much greater than usual, it was held that this fact was some evidence that the loss was due to negligence. Hance *v.* Pacific Express Co., 66 Mo. App. 486.

46. Burke *v.* U. S. Express Co., 87 Ill. App. 505; Illinois Cent. R. Co. *v.* Teams, 75 Miss. 147, 21 So. 706; Louisville, etc., R. Co. *v.* Bigger, 66 Miss. 319, 6 So. 234. Even if the contract is that the carrier shall not be liable for any damage not resulting from his own negligence, the burden of proof remains on him to show that the injury, appearing to be due to human agency, was not the result of his negligence, but general evidence that the appliances were adequate, and that there was no fault in the transportation, is sufficient to rebut the presumption of negligence without a specific explanation as to how the injury happened. Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649.

47. *Alabama.*—Alabama Great Southern R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; Central R., etc., Co. *v.* Smitha, 85 Ala. 47, 4 So. 708.

Arkansas.—St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104.

Georgia.— Central R. Co. *v.* Bryant, 73 Ga. 722.

Kentucky.— Cincinnati, etc., R. Co. *v.* Grover, 11 Ky. L. Rep. 236; Crowley *v.* Louisville, etc., R. Co., 7 Ky. L. Rep. 743; Louisville, etc., R. Co. *v.* Hedger, 9 Bush (Ky.) 645, 15 Am. Rep. 740.

Missouri.— Clark *v.* St. Louis, etc., R. Co., 64 Mo. 440; McBeath *v.* Wabash, etc., R. Co., 20 Mo. App. 445.

Texas.— Texas, etc., R. Co. *v.* Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829.

See 9 Cent. Dig. tit. "Carriers," § 958.

Contra.— Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80.

Where contract recites that shipper has examined the car in which the animals were to be shipped and found it safe and suitable, the

the carrier from liability for loss or injury in other respects;[48] nor does it affect the carrier's liability where to his knowledge the owner or agent does not in fact accompany the animals for the purpose of giving them proper care.[49] As to other contractual limitations the carrier is usually required to show not only that the loss or injury was within the limitation, but occurred without negligence on the carrier's part.[50]

4. Measure of Damages[51]— **a. For Breach of Contract to Transport, or Negligent Delay.** In an action for damages for refusal to perform a contract to furnish transportation, the measure of damages is the loss of the benefit of the transportation, that is, the difference between the market value at the destination when the goods should have arrived, if carried in accordance with the contract, and the value at the same time at the point of shipment,[52] less what it would have cost the shipper under the contract to have had the goods transported, that is, freight charges and other necessary expenses.[53] Where the action is for negligent delay in transportation, the measure of damages is the decline in market value between the date when the goods should have been delivered, if transported with reasonable diligence, and the time when they were actually delivered,[54]

burden is on him to show that it was unsafe. Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649.

48. Illinois Cent. R. Co. *v.* Adams, 42 Ill. 474, 92 Am. Dec. 85; Louisville, etc., R. Co. *v.* Hawley, 10 Ky. L. Rep. 117; Bills *v.* New York Cent. R. Co., 84 N. Y. 5; Ft. Worth, etc., R. Co. *v.* Daggett, (Tex. Civ. App. 1894) 27 S. W. 186.

49. Cincinnati, etc., R. Co. *v.* Kern, 15 Ky. L. Rep. 656; Louisville, etc., R. Co. *v.* McCarty, 9 Ky. L. Rep. 683; Louisville, etc., R. Co. *v.* Martin, 8 Ky. L. Rep. 432; Louisville, etc., R. Co. *v.* Spalding, 8 Ky. L. Rep. 355.

50. Alabama, etc., R. Co. *v.* Sparks, 71 Miss. 757, 16 So. 263; Ball *v.* Wabash, etc., R. Co., 83 Mo. 574; Potter *v.* Sharp, 24 Hun (N. Y.) 179; Chesapeake, etc., R. Co. *v.* American Exchange Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449. But see *supra*, II, R, 3, b, (II).

51. See, generally, Damages.

52. Birney *v.* Wabash, etc., R. Co., 20 Mo. App. 470; Bracket *v.* McNair, 14 Johns. (N. Y.) 170, 7 Am. Dec. 447.

53. *Indiana.*— Michigan Southern R. Co. *v.* Caster, 13 Ind. 164.

Iowa.— Bridgman *v.* The Steamboat Emily, 18 Iowa 509.

Maine.— Nourse *v.* Snow, 6 Me. 208.

Michigan.— Ward's Cent., etc., Co. *v.* Elkins, 34 Mich. 439, 22 Am. Rep. 544.

Minnesota.— Cowley *v.* Davidson, 13 Minn. 92.

Pennsylvania.— O'Conner *v.* Forster, 10 Watts (Pa.) 418.

Texas.— Missouri, etc., R. Co. *v.* Witherspoon, (Tex. Civ. App. 1897) 38 S. W. 833.

United States.— Harvey *v.* Grand Trunk R. Co., 2 Hask. (U. S.) 124, 11 Fed. Cas. No. 6,180.

See 9 Cent. Dig. tit. "Carriers," § 239.

As to interest on the recovery see *infra*, II, R, 4, b, (II).

A carrier who by mistake forwards goods over a different line than that specified in the contract with the shipper is liable only for such damages as might reasonably have been within the contemplation of the parties. Central Trust Co. *v.* Georgia Pac. R. Co., 81 Fed. 277. But if the act is wilful, the carrier is liable for the full amount of the difference between the rate which the shipper has to pay and the rate which he would have had to pay had the carrier complied with his contract in the selection of the connecting route. Pond-Decker Lumber Co. *v.* Spencer, 86 Fed. 846, 58 U. S. App. 173, 30 C. C. A. 430.

Where the carrier refuses to receive goods for shipment when offered, without excuse, and subsequently receives and transports the same goods, he is liable to the shipper for any depreciation in value between the time when they were first offered and that when they were finally received. Chicago, etc., R. Co. *v.* Erickson, 91 Ill. 613, 33 Am. Rep. 70. But the subsequent acceptance for shipment under a new contract will not relieve the carrier from liability for breach of the first contract. Gann *v.* Chicago Great Western R. Co., 72 Mo. App. 34. If by reason of the refusal of the carrier to transport as agreed the owner is compelled to ship to another destination and over another line, the measure of damage is the difference between what was obtained for the goods, and what would have been obtained at the original destination, together with additional expense of transportation. Laurent *v.* Vaughn, 30 Vt. 90.

54. *Indian Territory.*— Missouri, etc., R. Co. *v.* Truskett, 2 Indian Terr. 633, 53 S. W. 444.

Kentucky.— Louisville, etc., R. Co. *v.* Smith, 14 Ky. L. Rep. 814.

Missouri.— Wilson *v.* Missouri Pac. R. Co., 66 Mo. App. 388.

New York.— Kent *v.* Hudson River R. Co., 22 Barb. (N. Y.) 278.

Texas.— Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Texas Pac. R. Co. *v.* Nicholson, 61 Tex. 491; Galveston, etc., R. Co. *v.* Thompson, (Tex. Civ. App. 1898) 44 S. W. 8; Texas, etc., R. Co. *v.* Boggs, (Tex. Civ. App. 1897) 40 S. W.

together with any resulting injury to the goods on account of the delay and expense occasioned thereby.[55] If the goods are, to the knowledge of the carrier, intended for a special market, the shipper is entitled also to damages for loss of such market.[56] If the shipment is made in performance of a special contract, known to the carrier, the damages for failure to transport will be the difference between the contract price at destination and market value at point of shipment, less freight.[57] Profits, speculative in their nature, cannot be included in the damages.[58] But so far as a loss incident to failure to furnish transportation according to contract is involved, it is the duty of the shipper to secure transportation otherwise, if possible, and he can recover only the difference between the freight contracted for and that which he was required to pay to secure the transportation.[59]

b. For Loss of or Injury to Goods — (i) *Real Loss Suffered.* In general the value of the goods lost, or of the damage sustained to the goods, is the meas-

20; Mexican Nat. R. Co. *v.* Garcia, (Tex. Civ. App. 1894) 26 S. W. 780.

England.— Collard *v.* South Eastern R. Co., 7 H. & N. 79, 7 Jur. N. S. 950, 30 L. J. Exch. 393, 4 L. T. Rep. N. S. 410, 9 Wkly. Rep. 697.

See 9 Cent. Dig. tit. "Carriers," § 451.

55. *Indian Territory.*— Missouri, etc., R. Co. *v.* Truskett, 2 Indian Terr. 633, 53 S. W. 444.

Kentucky.— Newport News, etc., Co. *v.* Mercer, 96 Ky. 475, 16 Ky. L. Rep. 555, 29 S. W. 301.

Massachusetts.— Smith *v.* New Haven, etc., R. Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166.

Missouri.— Gann *v.* Chicago Great Western R. Co., 72 Mo. App. 34; Armstrong *v.* Missouri Pac. R. Co., 17 Mo. App. 403.

Texas.— Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211, 27 S. W. 110; Texas, etc., R. Co. *v.* Truesdell, 21 Tex. Civ. App. 125, 51 S. W. 272; St. Louis Southwestern R. Co. *v.* Smith, 11 Tex. Civ. App. 550, 32 S. W. 828; San Antonio, etc., R. Co. *v.* Pratt, (Tex. Civ. App. 1895) 32 S. W. 705; Missouri, etc., R. Co. *v.* Darlington, (Tex. Civ. App. 1895) 30 S. W. 251; Gulf, etc., R. Co. *v.* McAulay, (Tex. Civ. App. 1894) 26 S. W. 475.

See 9 Cent. Dig. tit. "Carriers," § 451; and *supra*, II, I, 3, h.

If a portion of the goods increase in market value during the delay, that fact may be taken into account in diminution of the damage resulting from delay of the balance. Gulf, etc., R. Co. *v.* Hughes, (Tex. Civ. App. 1895) 31 S. W. 411.

56. Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415; Hamilton *v.* Western North Carolina R. Co., 96 N. C. 398, 3 S. E. 164; Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606; The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644. And see *supra*, II, I, 3, h, (v).

But he can only recover for depreciation in market value between the time when the goods should have arrived and the time when they could, after arrival, have been reasonably placed on the market. Glascock *v.* Chicago, etc., R. Co., 69 Mo. 589; Glasscock *v.* Chicago, etc., R. Co., 86 Mo. App. 114; Ayres *v.* Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226, 75 Wis. 215, 43 N. W. 1122.

57. International, etc., R. Co. *v.* Startz, (Tex. Civ. App. 1895) 33 S. W. 575; Gulf, etc., R. Co. *v.* Martin, (Tex. Civ. App. 1894) 28 S. W. 576.

But if the special contract is not known to carrier the damages will not be enhanced on account thereof. International, etc., R. Co. *v.* Hatchell, 22 Tex. Civ. App. 498, 55 S. W. 186; International, etc., R. Co. *v.* Startz, (Tex. Civ. App. 1895) 33 S. W. 575; Horne *v.* Midland R. Co., L. R. 8 C. P. 131, 42 L. J. C. P. 59, 28 L. T. Rep. N. S. 312, 21 Wkly. Rep. 481. Where the terms of the contract are not reasonably known to the carrier, the loss of profits thereon occasioned by breach of contract to transport will not include damages which could not have been within the probable contemplation of the parties. Steffen *v.* Mississippi River, etc., R. Co., 156 Mo. 322, 56 S. W. 1125.

58. *Illinois.*— Toledo, etc., R. Co. *v.* Roberts, 71 Ill. 540.

Louisiana.— Harrison *v.* New Orleans, etc., R. Co., 28 La. Ann. 777; Reading *v.* Donovan, 6 La. Ann. 491.

Massachusetts.— Harvey *v.* Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673.

Mississippi.— Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458.

Texas.—Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

See 9 Cent. Dig. tit. "Carriers," § 239.

59. Steffen *v.* Mississippi River, etc., R. Co., 156 Mo. 322, 56 S. W. 1125; Grund *v.* Pendergast, 58 Barb. (N. Y.) 216; Spann *v.* Erie Boatman's Transp. Co., 11 Misc. (N. Y.) 680, 33 N. Y. Suppl. 566, 67 N. Y. St. 354; Bigelow *v.* Chicago, etc., R. Co., 104 Wis. 109, 80 N. W. 95; Lumberman's Min. Co. *v.* Gilchrist, 55 Fed. 677, 6 U. S. App. 599, 5 C. C. A. 239.

Until shipper is advised that carrier will not perform his contract there is no obligation to secure transportation otherwise. Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674.

When carrier does send goods to the destination without additional expense or other injury to the shipper, there can be no recovery for breach of contract in not sending them as agreed. The Protection, 102 Fed. 516, 42 C. C. A. 489.

ure of recovery for the loss or injury for which the carrier is responsible.[60] If, the goods being damaged or lost in part, the consignee refuses to accept the remainder and the carrier sells them, the shipper is entitled to recover the proceeds of the sale, less charges for care and for expense of the sale, but the carrier is not entitled to any deduction on account of freight,[61] nor on account of expenses incurred.[62] As the consignee should do what he reasonably can to reduce the damages, he may recover from the carrier any reasonable expense for searching for and regaining possession of the goods, including a reward offered for their return,[63] also the expense of putting in salable condition.[64] The recovery

60. Hand *v.* Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; Cole *v.* Rankin, (Tenn. Ch. 1896) 42 S. W. 72; The Lillie Hamilton, 18 Fed. 327.

Carrier who has undertaken to carry and deliver a draft is accountable for the value of the draft, and not merely for the loss sustained by the owner as the subsequent result of inability to collect it. Jones *v.* Wells, 28 Cal. 259. But the carrier may show payment, insolvency of the maker, or invalidity in reduction of damages. Zeigler *v.* Wells, 23 Cal. 179, 83 Am. Dec. 87.

Consignee who has only a qualified interest, as, for instance, a lien for advances, can only recover the value of such interest. Burritt *v.* Rench, 4 McLean (U. S.) 325, 4 Fed. Cas. No. 2,201.

If cattle injured in transportation are retained by the consignee after they reach their destination for the purpose of ascertaining the real extent of the injury, the recovery will be limited to the actual loss which finally appears to have been suffered, and will not extend to cover a greater amount which appeared to be the damage when the animals reached their destination. Gulf, etc., R. Co. *v.* Godair, 3 Tex. Civ. App. 514, 22 S. W. 777.

If goods shipped in pursuance of a sale are lost and the shipper recovers the purchase-price from the consignee he cannot have damages from the carrier. Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237. And if the seller secures some rebate or discount from the consignee, the amount so received should go in mitigation of damages. Stevens *v.* Sayward, 8 Gray (Mass.) 215; The Carlotta, 9 Ben. (U. S.) 1, 5 Fed. Cas. No. 2,413. So if the consignee has sold the goods and received the price he cannot recover of the carrier more than nominal damages and costs, although he may be liable by reason of warranty or fraud in making the sale. Henry *v.* Central R., etc., Co., 89 Ga. 815, 15 S. E. 757.

Loss of damaged goods.—Thus, if the goods have been injured by a fire for which the carrier is not responsible, and they are subsequently lost, he is liable only for the goods in their damaged condition. Yazoo, etc., R. Co. *v.* Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543.

Vendor who has shipped goods in pursuance of a sale for a stipulated price cannot recover more than the difference between the value of the goods as delivered and what he would have received for them if delivered in accordance with the contract of transportation. Missouri, etc., R. Co. *v.* Witherspoon, 18 Tex. Civ. App. 615, 45 S. W. 424.

Where carrier delivers goods to consignee without requiring payment of a draft, according to the directions of the consignee, the amount of recovery cannot exceed the value of the goods. Louisville, etc., R. Co. *v.* Hartwell, 99 Ky. 436, 18 Ky. L. Rep. 745, 36 S. W. 183, 38 S. W. 1041.

Where the goods are lost the measure of damage is their market value, and not their rental value or the damages resulting from loss of use. Mitchell *v.* Weir, 19 N. Y. App. Div. 183, 45 N. Y. Suppl. 1085 [*affirming* 19 Misc. (N. Y.) 530, 43 N. Y. Suppl. 1123]; Missouri Pac. R. Co. *v.* Hewett, 2 Tex. App. Civ. Cas. § 273.

61. Stevens *v.* Sayward, 3 Gray (Mass.) 108.

As to the sale of damaged goods to ascertain amount of damage see *infra*, II, R, 4, c, (III), (B).

62. Hardman *v.* Brett, 37 Fed. 803, 2 L. R. A. 173.

63. *Kansas.*— North Missouri R. Co. *v.* Akers, 4 Kan. 453, 96 Am. Dec. 183.

Massachusetts.— Greenfield Bank *v.* Leavitt, 17 Pick. (Mass.) 1, 28 Am. Dec. 268.

Mississippi.—Stricker *v.* Leathers, 68 Miss. 803, 9 So. 821, 13 L. R. A. 600.

New York.— Richmond *v.* Union Steamboat Co., 87 N. Y. 240; Robertson *v.* National Steamship Co., 60 N. Y. Super. Ct. 132, 17 N. Y. Suppl. 459, 42 N. Y. St. 694.

Texas.— Gulf, etc., R. Co. *v.* York, Tex. App. Civ. Cas. § 813.

See 9 Cent. Dig. tit. "Carriers," §§ 599, 963.

Extent and limits of rule.— Indeed, it is said that as to expense and the loss of time resulting from the loss of the goods there may be a recovery even in addition to the full value. Evans *v.* Rudy, 34 Ark. 383; Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390. But as to the expense of going to the place of delivery to investigate as to the loss or damage there can be no recovery (Western Mfg. Co. *v.* The Guiding Star, 37 Fed. 641); nor can there be recovery for hunting up the property and defending the title in an action (Jackson *v.* The Julia Smith, 6 McLean (U. S.) 484, 13 Fed Cas. No. 7,136, Newb. Adm. 61. And see Baxendale *v.* London, etc., R. Co., L. R. 10 Exch. 35, 44 L. J. Exch. 20, 32 L. T. Rep. N. S. 330, 23 Wkly. Rep. 167).

64. Winne *v.* Illinois Cent. R. Co., 31 Iowa 583; Galveston, etc., R. Co. *v.* Tuckett, (Tex. Civ. App. 1894) 25 S. W. 150, 25 S. W. 670.

for loss of the goods should include freight paid in advance, inasmuch as the carrier is not entitled to freight where the goods are not delivered under the contract.[65] The carrier is also liable for custom-house duties which have been paid on the goods,[66] and he would no doubt be liable for commissions on the sale of the goods which the shipper had paid or become liable for, but he is not entitled to rebate from the value at destination on account of factor's commissions, which would have been paid in case of sale had the goods been delivered, as he has nothing to do with such sales.[67]

(11) *INTEREST.* In many cases it is said that plaintiff recovering judgment for loss of or injury to the goods is entitled to interest from the date of the loss, that is, from the time when the goods should have been delivered,[68] while in other cases it is said that the allowance of interest is within the discretion of the jury,[69] and in still others that no interest is allowable except by way of penalty for misconduct or fraud.[70]

65. Sherman *v.* Inman Steamship Co., 26 Hun (N. Y.) 107; Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441; Gulf, etc., R. Co. *v.* Kemp, (Tex. Civ. App. 1895) 30 S. W. 714; Galveston, etc., R. Co. *v.* Kelley, (Tex. Civ. App. 1894) 26 S. W. 470; Missouri Pac. R. Co. *v.* Barnes, 2 Tex. App. Civ. Cas. §§ 575, 579; The Hugo, 61 Fed. 860.

That carrier is not entitled to recover freight where the goods are lost see *supra*, II, N, 1, e.

66. Vietor *v.* International Nav. Co., 45 N. Y. Super. Ct. 129.

But carrier is entitled to reduction for any rebate on such duties allowed by the custom-house. The Mangalore, 23 Fed. 463. If the custom-house duties have not been paid no rebate on account of such duties should be made. The Surrey, 30 Fed. 223.

If the goods have been shipped in fraud of the revenue laws, without payment of the tax due thereon, the amount of tax which should have been paid may be taken into account in determining the value of the goods at their destination. Toledo, etc., R. Co. *v.* Kichler, 48 Ill. 438.

67. Kyle *v.* Laurens R. Co., 10 Rich. (S. C.) 382, 70 Am. Dec. 231.

68. *Alabama.*— Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44.

District of Columbia.— Baltimore, etc., R. Co. *v.* Dougherty, 7 App. Cas. (D. C.) 378.

Illinois.— Northern Transp. Co. *v.* McClary, 66 Ill. 233.

Kentucky.— Chesapeake, etc., R. Co. *v.* Webb, 8 Ky. L. Rep. 44.

Massachusetts.— Forbes *v.* Boston, etc., R. Co., 133 Mass. 154; Spring *v.* Haskell, 4 Allen (Mass.) 112.

Michigan.— Ward's Cent., etc., Co. *v.* Elkins, 34 Mich. 439, 22 Am. Rep. 544.

Minnesota.— Cowley *v.* Davidson, 13 Minn. 92.

Missouri.— Lachner *v.* Adams Express Co., 72 Mo. App. 13.

New York.— Magnin *v.* Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Sherman *v.* Wells, 28 Barb. (N. Y.) 403.

South Carolina.—Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123; Kyle *v.* Laurens R. Co., 10 Rich. (S. C.) 382, 70 Am. Dec. 231.

Texas.— Southern Pac. Co. *v.* Anderson, (Tex. Civ. App. 1901) 63 S. W. 1023; Texas, etc., R. Co. *v.* Truesdell, 21 Tex. Civ. App. 125, 51 S. W. 272; Galveston, etc., R. Co. *v.* Efron, (Tex. Civ. App. 1897) 38 S. W. 639; Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; Mexican Nat. R. Co. *v.* Garcia, (Tex. Civ. App. 1894) 26 S. W. 780; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Rio Grande R. Co. *v.* Munoz, (Tex. Civ. App. 1893) 23 S. W. 531; Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529, 23 S. W. 1004; Galveston, etc., R. Co. *v.* Johnson, (Tex. 1892) 19 S. W. 867.

Vermont.— Laurent *v.* Vaughn, 30 Vt. 90.

Wisconsin.— Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

United States.— Insurance Co. of North America *v.* St. Louis, etc., R. Co., 9 Fed. 811; Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 403, 30 Fed. Cas. No. 18,006, 1 Biss. (U. S.) 447, 30 Fed. Cas. No. 18,007, 5 Leg. Op. (Pa.) 92; The Miletus, 5 Blatchf. (U. S.) 335, 17 Fed. Cas. No. 9,545; The Gold Hunter, Blatchf. & H. (U. S.) 300, 10 Fed. Cas. No. 5,513.

See 9 Cent. Dig. tit. "Carriers," § 601.

69. Harris *v.* Delaware, etc., R. Co., 61 N. Y. 656; Black *v.* Camden, etc., R., etc., Co., 45 Barb. (N. Y.) 40; Richmond *v.* Bronson, 5 Den. (N. Y.) 55.

70. Lakeman *v.* Grinnell, 5 Bosw. (N. Y.) 625; Watkinson *v.* Laughton, 8 Johns. (N. Y.) 213; Fowler *v.* Davenport, 21 Tex. 626; Texas, etc., R. Co. *v.* Martin, 2 Tex. App. Civ. Cas. § 342.

The right to interest depends, no doubt, to some extent on statutory provisions (Horner *v.* Missouri Pac. R. Co., 70 Mo. App. 285; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 447, 37 L. ed. 292), and to some extent on whether the cause of action against the carrier of the goods is to be deemed *ex contractu* or *ex delicto* (Clines *v.* Frisbee, 5 Rob. (La.) 192; Morgan *v.* Bell, 4 Mart. (La.) 615).

As to interest on recovery for damages due to delay see *supra*, II, I, 3, h, (VI).

(III) *EXEMPLARY DAMAGES.* Exemplary or punitive damages may be allowed for wilful breach of duty on the part of the carrier.[71]

(IV) *SPECIAL DAMAGES.*[72] In addition to the value of the property lost or the amount of direct damage thereto the plaintiff in an action against the carrier may recover special damages, such as loss of a sale under a contract of which the carrier had knowledge,[73] and for the profits which would have been directly derived from the use of the property under circumstances with which the carrier was acquainted;[74] but not remote and speculative profits.[75]

(V) *ABANDONMENT ON ACCOUNT OF DAMAGE.* Where the goods are injured during transportation, or part of them are lost, the consignee, it is said, cannot abandon the consignment and sue for the full value, but must accept the goods as tendered, or the portion tendered, and sue for damages.[76] But where the goods

71. Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657; Strickler *v.* Leathers, 68 Miss. 803, 9 So. 821, 13 L. R. A. 600; Silver *v.* Kent, 60 Miss. 124; Gray *v.* Wells, etc., Express Co., (Tex. Civ. App. 1897) 40 S. W. 845.

72. As to special damages resulting from delay see *supra*, II, I, 3, h.

73. Gray *v.* St. Louis, etc., R. Co., 54 Mo. App. 666; Galt *v.* Archer, 7 Gratt. (Va.) 307; Schmidt *v.* The Steam-Ship Pennsylvania, 4 Fed. 548; Schultze *v.* Great Eastern R. Co., 19 Q. B. D. 30, 56 L. J. Q. B. 442, 57 L. T. Rep. N. S. 438, 35 Wkly. Rep. 683; McMahon *v.* Field, 7 Q. B. D. 591, 50 L. J. Q. B. 852, 45 L. T. Rep. N. S. 381; Hales *v.* London, etc., R. Co., 4 B. & S. 66, 32 L. J. Q. B. 292, 8 L. T. Rep. N. S. 421, 11 Wkly. Rep. 856, 116 E. C. L. 66.

74. *Georgia.*— Central, R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

Mississippi.— Silver *v.* Kent, 60 Miss. 124.

Ohio.— Cincinnati Chronicle Co. *v.* White Line Transit Co., 1 Cinc. Super. Ct. 300.

Wisconsin.— Thomas, etc., Mfg. Co. *v.* Wabash, etc., R. Co., 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725.

England.— Great Western R. Co. *v.* Redmayne, L. R. 1 C. P. 329.

See 9 Cent. Dig. tit. "Carriers," § 599 *et seq.*

75. *Georgia.*— East Tennessee, etc., R. Co. *v.* Herrman, 92 Ga. 384, 17 S. E. 344; Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502.

Illinois.— Chicago, etc., R. Co. *v.* Hale, 83 Ill. 360, 25 Am. Rep. 403.

Louisiana.— Burke *v.* Clarke, 11 La. 206.

New York.— Bennett *v.* Drew, 3 Bosw. (N. Y.) 355.

Texas.— Alderson *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. 617.

United States.— Bazin *v.* Liverpool, etc., Steamship Co., 3 Wall. Jr. (U. S.) 229, 2 Fed. Cas. No. 1,152, 5 Am. L. Reg. 459, 37 Hunt. Mer. Mag. 449, 20 Law Rep. 129, 14 Leg. Int. (Pa.) 156.

England.— British Columbia, etc., Spar, etc., Co. *v.* Nettleship, L. R. 3 C. P. 499, 37 L. J. C. P. 235, 18 L. T. Rep. N. S. 604; Woodger *v.* Great Western R. Co., L. R. 2 C. P. 318, 26 L. J. C. P. 177, 15 L. T. Rep. N. S. 579, 15 Wkly. Rep. 383; Wilson *v.* Lancashire, etc., R. Co., 9 C. B. N. S. 632, 7 Jur. N. S. 862, 30 L. J. C. P. 232, 3 L. T. Rep. N. S. 859, 9 Wkly. Rep. 635, 99 E. C. L. 632; Gee *v.* Lancashire, etc., R. Co., 6 H. & N. 211, 6 Jur. N. S. 1118, 30 L. J. Exch. 11, 3 L. T. Rep. N. S. 328, 9 Wkly. Rep. 103.

Miscarriage of animal.— Where by reason of negligence in transportation of cows intended to be kept for breeding purposes the negligence of the carrier caused miscarriages to result to some of the animals, it was held that it was not necessary to show that the carrier had notice that some of the cows were with calf in order to charge him with damages resulting from such miscarriages, it not appearing that any special or unusual care was required in the transportation by reason of the condition of the cows. New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292. In an action against a railroad company to recover damages for injuries to a mare, causing abortion and premature birth of a colt, held that evidence of the value of the colt, had it been born uninjured, was not admissible, such damage being too speculative. Texas, etc., R. Co. *v.* Randle, 18 Tex. Civ. App. 348, 44 S. W. 603.

76. *Indiana.*— Michigan Southern, etc., R. Co. *v.* Bivens, 13 Ind. 263.

Louisiana.— Corso *v.* New Orleans, etc., R. Co., 48 La. Ann. 1286, 20 So. 752; Henderson *v.* Ship Maid of Orleans, 12 La. Ann. 352.

New York.— Mills *v.* National Steamship Co., 5 N. Y. Suppl. 258, 25 N. Y. St. 856.

South Carolina.— Shaw *v.* South Carolina R. Co., 5 Rich. (S. C.) 462, 57 Am. Dec. 768.

Texas.— Galveston, etc., R. Co. *v.* Van Winkle, 3 Tex. App. Civ. Cas. § 443.

See 9 Cent. Dig. tit. "Carriers," § 604.

Contra.— But there are authorities to the effect that the shipper need not accept a partial performance, but may refuse to receive the goods as damaged, or the portion of the consignment offered, and have full compensation for the entire value. Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408; Monell *v.* Northern Cent. R. Co., 16 Hun (N. Y.) 585; Texas, etc., R. Co. *v.* Martin, 2 Tex. App. Civ. Cas. § 342.

As to whether carrier may recover pro rata freight for part performance see *supra*, II, N, 1, e, (III).

are so materially damaged as to destroy their value, the consignee may of course refuse to accept and sue for the full value.[77]

c. Evidence as to Value or Damage — (1) *Value at Time and Place For Delivery.* The general rule as to measure of damage for loss of the goods is their value at the time and place where they should have been delivered under the contract.[78] As to time, this is the rule when the action is brought for breach of the express or implied obligation of the carrier.[79] But if the action is for conversion, then the value is to be determined with reference to the time when the conversion took place.[80] As to the place with reference to which the value of the goods is to be measured, it is the place of destination, and not that of shipment.[81] It may, however, be stipulated that the value is to be determined at the place of shipment.[82] In case of injury to the goods the place of destination is also to be taken as the basis for determining the damage, the measure being the difference between what the goods were worth at the place of destination as injured, and what they would have been worth if delivered in good order.[83]

77. Brand *v.* Weir, 27 Misc. (N. Y.) 212, 57 N. Y. Suppl. 731.

78. Spring *v.* Haskell, 4 Allen (Mass.) 112.

It is not necessary to specially allege value at place of destination, as the law fixes the measure of damage. Missouri, etc., R. Co. *v.* Chittin, (Tex. Civ. App. 1897) 40 S. W. 23.

79. Chicago, etc., R. Co. *v.* Dickinson, 74 Ill. 249; Adams Express Co. *v.* McDonald, 1 Bush (Ky.) 32; Atchison, etc., R. Co. *v.* Lawler, 40 Nebr. 356, 58 N. W. 968; The Compta, 5 Sawy. (U. S.) 137, 6 Fed. Cas. No. 3,070.

80. Union R., etc., Co. *v.* Trauhe, 59 Mo. 355; Baltimore, etc., R. Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; Ludwig *v.* Meyre, 5 Watts & S. (Pa.) 435; Houston, etc., R. Co. *v.* Stewart, 1 Tex. App. Civ. Cas. § 1246.

Value at time of destruction.— It is said that where the action is on account of the destruction of the goods, the value should be estimated at the time of destruction. Galveston, etc., R. Co. *v.* Efron, (Tex. Civ. App. 1897) 38 S. W. 639; Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; Missouri, etc., R. Co. *v.* Cook, 8 Tex. Civ. App. 376, 27 S. W. 769.

Value at time of demand.— So where the carrier holds as bailee the value is to be determined at the time of demand. Caldwell *v.* Southern Express Co., 1 Flipp. (U. S.) 85, 4 Fed. Cas. No. 2,303, 3 Centr. L. J. 416.

Where goods were delivered contrary to instructions and were sold by the person to whom they were delivered, held in an action against the carrier that the plaintiff was entitled to recover the highest market price attained by such goods between the time of wrongful delivery and the time of bringing suit, suit having been brought within a reasonable time. Arrington *v.* Wilmington, etc., R. Co., 51 N. C. 68, 72 Am. Dec. 559.

81. *California.*— Hart *v.* Spalding, 1 Cal. 213; Ringgold *v.* Haven, 1 Cal. 108.

District of Columbia.— Baltimore, etc., R. Co. *v.* Dougherty, 7 App. Cas. (D. C.) 378.

Illinois.— Chicago, etc., R. Co. *v.* Dickinson, 74 Ill. 249.

Kentucky.— Adams Express Co. *v.* McDonald, 1 Bush (Ky.) 32.

Louisiana.— Lewis *v.* The Ship Success, 18 La. Ann. 1.

Maine.— Little *v.* Boston, etc., R. Co., 66 Me. 239.

Nebraska.— Atchison, etc., R. Co. *v.* Lawler, 40 Nebr. 356, 58 N. W. 968.

New York.— Davis *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 543.

Ohio.— McGregor *v.* Kilgore, 6 Ohio 358, 27 Am. Dec. 260.

Pennsylvania.— Warden *v.* Greer, 6 Watts (Pa.) 424.

Tennessee.— Louisville, etc., R. Co. *v.* Mason, 11 Lea (Tenn.) 116.

Texas.— Southern Pac. Co. *v.* D'Arcais, (Tex. Civ. App. 1901) 64 S. W. 813; Texas, etc., R. Co. *v.* Davis, 2 Tex. App. Civ. Cas. § 191.

England.— O'Hanlan *v.* Great Western R. Co., 6 B. & S. 484, 11 Jur. N. S. 797, 34 L. J. Q. B. 154, 12 L. T. Rep. N. S. 490, 18 Wkly. Rep. 741, 118 E. C. L. 484; Rice *v.* Baxendale, 7 H. & N. 96, 30 L. J. Exch. 371.

See 9 Cent. Dig. tit. "Carriers," § 600 *et seq.*

And this is true in actions in tort for the conversion or destruction of the property, as well as in those for breach of contract. Sturgeon *v.* St. Louis, etc., R. Co., 65 Mo. 569; Union R., etc., Co. *v.* Traube, 59 Mo. 355; Texas, etc., R. Co. *v.* Sims, (Tex. Civ. App. 1894) 26 S. W. 634.

Where goods were wrongfully taken from carrier by legal process, it was held that the damages were properly measured by the value of the goods at the place where they were taken. Van Winkle *v.* U. S. Mail Steamship Co., 37 Barb. (N. Y.) 122.

82. Illinois Cent. R. Co. *v.* Langdon, 71 Miss. 146, 14 So. 452.

But such a contract is invalid under a statute prohibiting carriers from limiting their common-law liability. International, etc., R. Co. *v.* Parish, 18 Tex. Civ. App. 130, 43 S. W. 1066.

83. *Iowa.*— Hudson *v.* Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550.

And the rule referring the measure of damage to the place of destination is also applicable where goods are taken for transportation to a point beyond defendant's line.[84] If the loss or damage occurs at the port of shipment it is thought that the value should be measured with reference to that place,[85] but if after leaving the place of shipment, then the recovery is to be determined by the value at destination.[86]

(II) *Estimation of Value; Deduction of Freight.* In determining the value at point of destination, the unpaid freight should be deducted, for while the shipper is not bound to pay freight where the carrier fails to perform his obligation to deliver in good condition, yet he should not have the advantage of the increased value of the goods due to their transportation,[87] that is, the shipper

Louisiana.— Silverman *v.* St. Louis, etc., R. Co., 51 La. Ann. 1785, 26 So. 447; Henderson *v.* Ship Maid of Orleans, 12 La. Ann. 352; Oakey *v.* Russell, 6 Mart. N. S. (La.) 58.

Missouri.— Matney *v.* Chicago, etc., R. Co., 75 Mo. App. 233; Heil *v.* St. Louis, etc., R. Co., 16 Mo. App. 363.

New York.— King *v.* Sherwood, 22 N. Y. App. Div. 548, 48 N. Y. Suppl. 34.

Texas.— Gulf, etc., R. Co. *v.* Butler, (Tex. Civ. App. 1901) 63 S. W. 650; Gulf, etc., R. Co. *v.* Staton, (Tex. Civ. App. 1899) 49 S. W. 277; San Antonio, etc., R. Co. *v.* Wright, 20 Tex. Civ. App. 136, 49 S. W. 147; Texas, etc., R. Co. *v.* Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829; Missouri, etc., R. Co. *v.* Cobb, (Tex. Civ. App. 1896) 36 S. W. 500; Texas, etc., R. Co. *v.* Berchfield, 12 Tex. Civ. App. 145, 33 S. W. 1022; Texas, etc., R. Co. *v.* Avery, (Tex. Civ. App. 1895) 33 S. W. 704; Reeves *v.* Texas, etc., R. Co., 11 Tex. Civ. App. 514, 32 S. W. 920; Houston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1895) 31 S. W. 556; Gulf, etc., R. Co. *v.* Simmons, (Tex. Civ. App. 1894) 28 S. W. 825; Galveston, etc., R. Co. *v.* Herring, (Tex. Civ. App. 1894) 28 S. W. 580; Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286; Texas, etc., R. Co. *v.* Klepper, (Tex. Civ. App. 1893) 24 S. W. 567; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Galveston, etc., R. Co. *v.* Silegman, (Tex. Civ. App. 1893) 23 S. W. 298; Galveston, etc., R. Co. *v.* Johnson, (Tex. 1892) 19 S. W. 867; Missouri Pac. R. Co. *v.* Breeding, (Tex. App. 1890) 16 S. W. 184.

United States.— Estill *v.* New York, etc., R. Co., 41 Fed. 849; Western Mfg. Co. *v.* The Guiding Star, 37 Fed. 641; The Surrey, 30 Fed. 223; The Colonel Ledyard, 1 Sprague (U. S.) 530, 6 Fed. Cas. No. 3,027.

See 9 Cent. Dig. tit. "Carriers," § 600.

Where animals were shipped, and different animals, of an inferior quality, delivered, it was held that the measure of damages was the difference in value between the two lots at the place of delivery. Memphis, etc., Packet Co. *v.* Abell, 17 Ky. L. Rep. 191, 30 S. W. 658.

Where the goods are damaged in transportation, it has, however, been held that the measure of value is the difference between their value at the place of shipment and as delivered at the destination. Black *v.* Camden, etc., R., etc., Co., 45 Barb. (N. Y.) 40; Harrison *v.* Stewart, Taney (U. S.) 485, 11 Fed. Cas. No. 6,145. And this is no doubt the true measure where there is a refusal to ship on account of the failure of the carrier to provide facilities for carrying out his contract. International, etc., R. Co. *v.* Startz, (Tex. Civ. App. 1895) 33 S. W. 575.

84. St. Louis, etc., R. Co. *v.* Deshong, 63 Ark. 443, 39 S. W. 260; Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507; Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161.

85. Krohn *v.* Oechs, 48 Barb. (N. Y.) 127; Lakeman *v.* Grinnell, 5 Bosw. (N. Y.) 625; Edminson *v.* Baxter, 5 Hayw. (Tenn.) 112, 9 Am. Dec. 751; Dusar *v.* Murgatroyd, 1 Wash. (U. S.) 13, 8 Fed. Cas. No. 4,199.

86. The Steam-Boat Emily *v.* Carney, 5 Kan. 645; Krohn *v.* Oechs, 48 Barb. (N. Y.) 127.

It seems that changes in foreign values are not to be regarded (The Surrey, 30 Fed. 223), and that depreciation of foreign currency is not to be considered (Rice *v.* Ontario Steamboat Co., 56 Barb. (N. Y.) 384; The Patrick Henry, 1 Ben. (U. S.) 292, 18 Fed. Cas. No. 10,805).

87. *Alabama.*— Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44.

Georgia.— Taylor *v.* Collier, 26 Ga. 122.

Illinois.— Northern Transp. Co. *v.* McClary, 66 Ill. 233.

Indiana.— Louisville, etc., R. Co. *v.* Craycraft, 12 Ind. App. 203, 39 N. E. 523.

Kentucky.— Cincinnati, etc., R. Co. *v.* Spratt, 2 Duv. (Ky.) 4.

Louisiana.— Porter *v.* Curry, 7 La. 233.

Massachusetts.— Massachusetts L. & T. Co. *v.* Fitchburg R. Co., 143 Mass. 318, 9 N. E. 669; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154.

Michigan.— Marquette, etc., R. Co. *v.* Langton, 32 Mich. 251.

New York.—Rice *v.* Ontario Steamboat Co., 56 Barb. (N. Y.) 384; Marshall *v.* New York Cent. R. Co., 45 Barb. (N. Y.) 502.

South Carolina.—Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123.

Texas.— International, etc., R. Co. *v.* Nicholson, 61 Tex. 550.

See 9 Cent. Dig. tit. "Carriers," § 603.

As to freight paid see *supra*, II, R, 4, b, (I).

But there need be no allowance on account of unpaid freight where the defendant makes

is entitled to the net value at the place of destination;[88] and the estimation is to be on the basis of the wholesale, rather than the retail, value.[89] The market value is the test,[90] and this is true even as to goods which are not shipped for sale or traffic.[91] But if there is no market value, then the intrinsic value will govern.[92] And if special damage will result by injury or delay, the carrier is liable so far as such special damage is reasonably within the contemplation of both parties.[93]

(III) *Evidence as to Value or Damage*—(A) *In General.* While the market value is usually the basis for estimating the measure of plaintiff's recovery, there are cases in which no such measure is applicable. If the parties have agreed upon a valuation, as, for instance, where the shipper in compliance with a regulation requiring the value to be stated as the basis for estimating the compensation to be paid, has placed a valuation upon the goods, such valuation will control in an action against the carrier for loss.[94] Goods which have no market value, such as second-hand furniture, clothing, and the like, will be estimated at the real value to the owner.[95] As to property having a special value, owing to particular circumstances, the carrier may be held liable for such special value so far as reasonably known to him.[96] It is evident from the foregoing illustrations that

no claim therefor (Bamberg *v.* South Carolina R. Co., 9 S. C. 61, 30 Am. Rep. 13); or where no amount of freight charge is shown (Gray *v.* Missouri River Packet Co., 64 Mo. 47).

88. *Missouri.*—Atkisson *v.* Steamboat Castle Garden, 28 Mo. 124.

New York.—Watkinson *v.* Laughton, 8 Johns. (N. Y.) 213.

Pennsylvania.—Gillingham *v.* Dempsey, 12 Serg. & R. (Pa.) 183.

Tennessee.—Dean *v.* Vaccaro, 2 Head (Tenn.) 488, 75 Am. Dec. 744.

Texas.—Fowler *v.* Davenport, 21 Tex. 626.

United States.—Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 403, 30 Fed. Cas. No. 18,006, 1 Biss. (U. S.) 447, 30 Fed. Cas. No. 18,007, 5 Leg. Op. (Pa.) 192.

See 9 Cent. Dig. tit. "Carriers," § 602.

89. Wallace *v.* Vigus, 4 Blackf. (Ind.) 260; Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366.

90. Missouri, etc., R. Co. *v.* Wells, 24 Tex. Civ. App. 304, 58 S. W. 842.

But market value is not to be determined by reference to any temporary inflation or depression, but the average market. Smith *v.* Griffith, 3 Hill (N. Y.) 333, 38 Am. Dec. 639.

If price has been fixed by contract, that price will govern. Magnin *v.* Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442.

91. Harris *v.* Panama R. Co., 58 N. Y. 660; Gulf, etc., R. Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109.

92. Missouri, etc., R. Co. *v.* Davidson, (Tex. Civ. App. 1901) 60 S. W. 278; Texas, etc., R. Co. *v.* Fambrough, (Tex. Civ. App. 1900) 55 S. W. 188; Missouri, etc., R. Co. *v.* Chittim, (Tex. Civ. App. 1897) 40 S. W. 23.

If goods have a peculiar value for a certain use, which is known to the carrier, such peculiar value must be considered. Hackett *v.* Boston, etc., R. Co., 35 N. H. 390; Smith *v.* Griffith, 3 Hill (N. Y.) 333, 38 Am. Dec. 639.

93. Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302. And see *supra*, II, I, 3, h, (III).

94. Coupland *v.* Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Southern Express Co. *v.* Wood, 98 Ga. 268, 25 S. E. 436; Chicago, etc., R. Co. *v.* Miller, 79 Ill. App. 473; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 349. At least the value thus stated will be evidence as to the real value. Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87; Weil *v.* Express Co., 7 Phila. (Pa.) 88.

An agreement as to the indemnity to be paid in case of total loss will not furnish the basis of recovery of damages for partial loss. Woodburn *v.* Cincinnati, etc., R. Co., 40 Fed. 731.

95. Denver, etc., R. Co. *v.* Frame, 6 Colo. 382; Missouri, etc., R. Co. *v.* Davidson, (Tex. Civ. App. 1901) 60 S. W. 278; Texas, etc., R. Co. *v.* Cook, 2 Tex. App. Civ. Cas. § 659; International, etc., R. Co. *v.* Nicholson, 61 Tex. 550.

But circumstances of inconvenience to the owner, resulting from loss of the use of such property, cannot be included. Adams Express Co. *v.* Hoeing, 9 Ky. L. Rep. 814; Chesapeake, etc., R. Co. *v.* Webb, 8 Ky. L. Rep. 44.

Property such as a portrait must be valued according to the worth to the owner, taking into account also probable expense of reproduction, if practicable. Green *v.* Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Houston, etc., R. Co. *v.* Ney, (Tex. Civ. App. 1900) 58 S. W. 43.

But a museum collection it has been held is to be estimated by its value at the nearest market, rather than the value of the owner's time in making the collection. Yoakum *v.* Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411.

96. *Kansas.*—Missouri Pac. R. Co. *v.* Nevin, 31 Kan. 385, 2 Pac. 795.

Massachusetts.—Cushing *v.* Wells, 98 Mass. 550.

New York.—Reed *v.* Rome, etc., R. Co., 48 Hun (N. Y.) 231, 16 N. Y. St. 58; Bennett *v.* Drew, 3 Bosw. (N. Y.) 355.

in some cases the damage resulting from failure of the carrier to perform his obligation can be only approximately estimated, and in such cases the best evidence attainable will be received.[97]

(B) *Showing What Damaged Goods Sold For.* If the goods have sustained injury during transportation for which the carrier is liable, the measure of damage will of course be the difference between their value in a sound condition, and as injured, and to show the amount of such difference evidence as to what the damaged goods sold for at public auction[98] or at other fair sale may be admissible.[99]

III. CARRIERS OF PASSENGERS.

A. Who Are Carriers of Passengers; Public Calling; Duty to Carry —

1. NATURE OF EMPLOYMENT — a. Definition. It has already been indicated[1] that

Vermont.— Winchell *v.* National Express Co., 64 Vt. 15, 23 Atl. 728.

United States.— Estill *v.* New York, etc., R. Co., 41 Fed. 849.

England.— Schultze *v.* Great Eastern R. Co., 19 Q. B. D. 30, 56 L. J. Q. B. 442, 57 L. T. Rep. N. S. 438, 35 Wkly. Rep. 683.

See 9 Cent. Dig. tit. "Carriers," § 606.

Architect's plans.— The measure of damage for loss of architect's plans are held to be the reasonable expense of procuring new plans. Mather *v.* American Express Co., 138 Mass. 55, 52 Am. Rep. 258. Where architect's plans were shipped by express, to be entered in competition for a prize, it was held that the measure of damage for their loss was not the value of the time and labor in making the plans, but the value of the plaintiff's chance of obtaining the premium. The loss or injury for which the carrier is liable must be the proximate consequence of the injury. Adams Express Co. *v.* Egbert, 36 Pa. St. 360, 78 Am. Dec. 382.

97. See, generally, EVIDENCE.

For instance, the value of a portion of the goods lost may be estimated with reference to the value of the remaining goods, or the total value of the whole. Marquis *v.* Wood, 29 Misc. (N. Y.) 590, 61 N. Y. Suppl. 251; Crawford *v.* Southern R. Co., 56 S. C. 136, 34 S. E. 80; Missouri Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643. So the price at which similar articles have been sold, or contracted to be sold, may be shown. Clements *v.* Burlington, etc., R. Co., 74 Iowa 442, 38 N. W. 144; Cole *v.* Rankin, (Tenn. Ch. 1896) 42 S. W. 72; Houston, etc., R. Co. *v.* Ney, (Tex. Civ. App. 1900) 58 S. W. 43. And although the value at destination, and not at place of shipment, is to be ascertained, if there is no evidence of value at destination, proof of the value at the place of shipment is admissible (Echols *v.* Louisville, etc., R. Co., 90 Ala. 366, 7 So. 655; South, etc., R. Co. *v.* Wood, 72 Ala. 451; Rome R. Co. *v.* Sloan, 39 Ga. 636; Marshall *v.* New York Cent. R. Co., 45 Barb. (N. Y.) 502; Richmond *v.* Bronson, 5 Den. (N. Y.) 55; Kerr *v.* The Norman, Newb. Adm. 525, 14 Fed. Cas. No. 7,732), and conversely, where the bill of lading provides that the value at place of shipment shall govern, evidence of the value at the destination is admissible, in the absence of better evidence (Caples *v.* Louisville, etc., R. Co., 17 Mo. App. 14; Harris *v.* Panama R. Co., 58 N. Y. 660). And where there is no attainable evidence as to the market value at the point of destination, or the goods have no market value at that point, their value at the nearest reasonably accessible market will furnish the basis for an approximation as to value (Harris *v.* Panama R. Co., 58 N. Y. 660; East Tennessee, etc., R. Co. *v.* Hale, 85 Tenn. 69, 1 S. W. 620; Louisville, etc., R. Co. *v.* Mason, 11 Lea (Tenn.) 116; Houston, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1895) 31 S. W. 556); but in general proof of value or cost price at another place is immaterial (Hendrick *v.* Boston, etc., R. Co., 170 Mass. 44, 48 N. E. 835).

98. **In Louisiana** it has been said that the amount of damage must be established in this manner. Smith *v.* Barque W. H. Wall, 18 La. Ann. 724; Elkin *v.* New York, etc., Steamship Co., 14 La. Ann. 647; Henderson *v.* Ship Maid of Orleans, 12 La. Ann. 352. But the failure to make a public sale will not preclude the owner from recovering the actual amount of damage as otherwise established. Greenwood *v.* Cooper, 10 La. Ann. 796. And where the goods as damaged are unsalable the owner is under no obligation to send them to an auction to be sold as a prerequisite to recovery of his damages. Elkin *v.* New York, etc., Steamship Co., 14 La. Ann. 647.

Outside of Louisiana, there is no general requirement that the owner shall proceed by public sale with damaged goods to have the amount of his damage determined, but he may prove it in any competent manner. Shackelford *v.* Patrick, 1 Mill (S. C.) 311, 12 Am. Dec. 632.

99. Little Rock, etc., R. Co. *v.* Miller Coal Co., (Ark. 1899) 51 S. W. 1054; Cassilay *v.* Young, 4 B. Mon. (Ky.) 265, 39 Am. Dec. 505; The Queen, 78 Fed. 155; Magdeburg Gen. Ins. Co. *v.* Paulson, 29 Fed. 530; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; The Columbus, Abb. Adm. (U. S.) 37, 6 Fed. Cas. No. 3,041, Abb. Adm. (U. S.) 97, 6 Fed. Cas. No. 3,042; Pendall *v.* Rench, 4 McLean (U. S.) 259, 19 Fed. Cas. No. 10,917; Foster *v.* The British Oak, 9 Fed. Cas. No. 4,966, 7 Leg. Int. (Pa.) 203.

1. See *supra*, I, B, 2.

public carriers of passengers, like common carriers of goods, are engaged in a public calling which imposes upon them a duty to serve all without discrimination; and that while they are not bailees of the persons of their passengers (although they may be as to their baggage),[2] they owe to their passengers a degree of care and protection different from that which may be exacted of persons who do not thus hold themselves out as serving the public in such capacity. Therefore the question whether one who furnishes transportation to individuals is a public carrier or not may be important for the purpose of determining his duty as to serving all who may apply, and also the care and prudence which he is required to exercise. For either purpose a public carrier of passengers may be defined as "one who undertakes for hire to carry all persons, indifferently, who may apply for passage."[3] It will be seen hereafter that the question as to the duty to exercise care and prudence in performing the undertaking is not dependent on compensation being made in any particular case.[4]

b. Who Are Passenger Carriers. Railroad companies are by the nature of their business public carriers of passengers, and bound to carry to the extent of the capacity of their passenger trains all suitable persons who apply for transportation in a proper way.[5] If persons are by proper authority taken for transportation upon freight trains, the companies are liable with reference to them as passengers.[6] But it is competent for the railroad company to regulate the method of conducting its business so as not to allow passengers to ride on freight trains. And although the act of the conductor of the freight train, in violation of such regulations, in allowing a passenger to ride thereon who is not chargeable with knowledge of the lack of authority on the part of the conductor may make such person a passenger,[7] yet actual notice of want of authority, or implied notice arising from the general method of conducting the company's business, may deprive a person taking passage on a freight train, even with the conductor's consent, of any right to be considered a passenger.[8] And a railroad company may occasionally carry passengers on its freight trains without thereby making itself a common carrier of passengers on such trains.[9] The same principles are applicable to construction trains, or trains on portions of a railroad used entirely for the transportation of materials, and one who may be allowed in a particular instance to ride on trains of that character is not entitled to the protection due to a passenger, unless the company has expressly or impliedly authorized the use of such trains for the carrying of passengers.[10] So a railroad company is not a carrier of

2. See *infra*, III, I.

3. Thompson Carriers Pass. 26, note 1 [*quoted* in Richmond *v.* Southern Pac. Co., (Oreg. 1902) 67 Pac. 947; Thompson-Houston Electric Co. *v.* Simon, 20 Oreg. 60, 25 Pac. 147, 23 Am. St. Rep. 86, 10 L. R. A. 251].

Another definition is: "Such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing." Bouvier L. Dict. [*quoted* in Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 673, 36 S. E. 202, 50 L. R. A. 673].

4. See *infra*, III, B, 5.

5. Tarbell *v.* Central Pac. R. Co., 34 Cal. 616; Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524.

6. Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901; Allen *v.* Lake Shore, etc., R. Co., 57 Ohio St. 79, 47 N. E. 1037.

7. Dunn *v.* Grand Trunk R. Co., 58 Me. 187, 4 Am. Rep. 267.

8. Smith *v.* Louisville, etc., R. Co., 124 Ind. 394, 24 N. E. 753; Eaton *v.* Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98. And see *infra*, III, B, 1, b, (II).

If some freight trains are allowed for the carriage of passengers, the passenger has a right to rely on the conductor of the freight train in determining whether such train is permitted to the use of passengers or not. Miller *v.* Missouri Pac. R. Co., 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673; Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; Lucas *v.* Milwaukee, etc., R. Co., 33 Wis. 41, 14 Am. Rep. 735.

9. Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

10. Menaugh *v.* Bedford Belt R. Co., 157 Ind. 20, 60 N. E. 694; Nashville, etc., R. Co. *v.* Messino, 1 Sneed (Tenn.) 220; Shoemaker *v.* Kingsbury, 12 Wall. (U. S.) 369, 20 L. ed. 432; Wade *v.* Lutcher, etc., Cypress Lumber Co., 74 Fed. 517, 41 U. S. App. 45, 20 C. C. A. 515; Albion Lumber Co. *v.* De Nobra, 72 Fed. 739, 44 U. S. App. 347, 19 C. C. A. 168; Sheerman *v.* Toronto, etc., R. Co., 34 U. C. Q. B. 451; Graham *v.* Toronto, etc., R. Co., 23 U. C. C. P. 541.

passengers with reference to a person who is allowed to ride on a hand-car.[11] Where one railroad company is operating its trains on the line of another road, the company operating the train, and not the one owning the road, is deemed the carrier as to passengers.[12] The receiver or trustee operating a railroad is a carrier of passengers.[13] Street railway companies are common carriers of passengers.[14] Those who carry passengers by means of stage-coach,[15] omnibus,[16] steamboat,[17] or ferry[18] are public carriers. Indeed, it has been said that the use of an elevator for the lifting or lowering of persons in a building constitutes the owner a public carrier of passengers.[19]

2. Duty to Carry — a. Without Discrimination. The public character of the business imposes on one who undertakes it the duty of carrying without discrimination all persons who apply, so far as practicable. A railroad company therefore has no right to discriminate by selling tickets to some persons and refusing them to others without good excuse.[20] The duty to serve the public without dis-

11. Hoar *v.* Maine Cent. R. Co., 70 Me. 65, 35 Am. Rep. 299.

12. *Arkansas.*— Eureka Springs R. Co. *v.* Timmons, 51 Ark. 459, 11 S. W. 690.

California.—Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147.

Illinois.— Hannibal, etc., R. Co. *v.* Martin, 111 Ill. 219.

New York.— Sias *v.* Rochester R. Co., 169 N. Y. 118, 62 N. E. 132, 56 L. R. A. 859.

United States.— Haff *v.* Minneapolis, etc., R. Co., 4 McCrary (U. S.) 622, 14 Fed. 558.

England.— Wright *v.* Midland R. Co., L. R. 8 Exch. 137, 42 L. J. Exch. 89, 29 L. T. Rep. N. S. 436, 21 Wkly. Rep. 460.

Where one company operates the trains of another road over its tracks it is the carrier. Schopman *v.* Boston, etc., R. Co., 9 Cush. (Mass.) 24, 55 Am. Dec. 411; Smith *v.* St. Louis, etc., R. Co., 85 Mo. 418, 55 Am. Rep. 380; Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424. Otherwise if it furnishes only the motive power. Keep *v.* Indianapolis, etc., R. Co., 3 McCrary (U. S.) 208, 9 Fed. 625.

The owner of a train or boat leased for an excursion, the crew being furnished with the train or boat, is the carrier as to passengers conveyed, though under the general direction of the manager of the excursion. Cuddy *v.* Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; White *v.* Norfolk, etc., R. Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489; Collins *v.* Texas, etc., R. Co., 15 Tex. Civ. App. 169, 39 S. W. 643.

In case of common use of a station track each company is liable to its passengers for injuries by reason of defective condition of the station. Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 23 Pac. 151, 19 Am. St. Rep. 129, 7 L. R. A. 414.

Where there is a common operation of trains on track used in common by two companies, the tickets of each being good on trains of the other, each is liable for injuries to a passenger on any of the trains. Jones *v.* Pennsylvania R. Co., 19 D. C. 178.

13. Lamphear *v.* Buckingham, 33 Conn. 237; Jones *v.* Pennsylvania R. Co., 19 D. C. 178; Klein *v.* Jewett, 26 N. J. Eq. 474; Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675.

14. Dean *v.* Chicago General R. Co., 64 Ill. App. 165; Pray *v.* Omaha St. R. Co., 44 Nebr. 167, 62 N. W. 447, 48 Am. St. Rep. 717; Spellman *v.* Lincoln Rapid Transit Co., 36 Nebr. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316; Van de Venter *v.* Chicago City R. Co., 26 Fed. 32.

It is immaterial that the line of a street railway is constructed on private property. East Omaha St. R. Co. *v.* Godola, 50 Nebr. 906, 70 N. W. 491.

15. Bennett *v.* Dutton, 10 N. H. 481.

Hearses are not vehicles used for carrying passengers. Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795.

16. Parmelee *v.* McNulty, 19 Ill. 556.

17. Jencks *v.* Coleman, 2 Sumn. (U. S.) 221, 13 Fed. Cas. No. 7,258.

Points not on regular route.— The liability of the owner as carrier is not affected by the fact that the boat is let to run between points not on its regular route. White *v.* Norfolk, etc., R. Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489.

18. Spivey *v.* Farmer, 3 N. C. 519.

19. Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; Western Union Tel. Co. *v.* Woods, 88 Ill. App. 375; Field *v.* French, 80 Ill. App. 78. And see *infra*, III, F, 1, c, (v).

This was said only in determining the degree of care required in the operation of such an elevator. It is evident that the owners of elevators, being under no obligation to carry indiscriminately any who may apply, are not, in the proper sense of the term, common carriers. Seaver *v.* Bradley, 179 Mass. 329, 60 N. E. 795.

20. Indianapolis, etc., R. Co. *v.* Rinard, 46 Ind. 293; State *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

Arrangement with connecting line.—Though the owner of a stage line made arrangements with the owner of a connecting stage line with reference to through transportation, he is bound, notwithstanding such arrangements, to give equal accommodations to those passengers coming over another line not connecting as to those transported on the connecting line. Bennett *v.* Dutton, 10 N. H. 481.

Colored passengers.— Railroads may be re-

crimination does not necessarily imply equal accommodations to different and competing bus and baggage lines, for the purpose of bringing passengers and their baggage, at such stations.[21] It has therefore been held by some courts that it is valid for a carrier of passengers to give an exclusive privilege for soliciting passengers on trains and keeping busses and hacks on inclosed portions of the station grounds, so long as reasonable accommodations are afforded to the public in general for reaching and leaving the station.[22] But by other courts it has been thought that to grant a monopoly of this kind is against public policy, and that such an arrangement is void.[23]

b. Refusal For Good Cause. The duty to serve the public, however, without discrimination does not prevent the making and enforcement of reasonable regulations as to the business so as to exclude from trains or other vehicles of transportation persons who, by reason of intoxication, bad character, or indecent conduct, are likely to be, or have rendered themselves, obnoxious to other passengers.[24]

B. Who Are Passengers — 1. When Relation Commences — a. Intent to Become Passenger — (I) *Before Transportation Commences.* The relation of carrier and passenger commences when a person with the good-faith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers. In case of a railroad this relation arises not merely when the passenger enters the train with the ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier, with intention to take a train in due course.[25] But one who is about the carrier's premises, with-

quired by statute to furnish equal, but separate, accommodations for hire to colored passengers. Smith *v.* State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432. And see *infra*, III, C, 1, b.

Damages for refusal.— If a passenger entitled to accommodations is refused he may recover damages (Wallen *v.* McHenry, 3 Humphr. (Tenn.) 244), which may include, in addition to actual damages, something for the indignity, vexation, and disgrace to which he has been subjected (Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641). But in declaring against the carrier for refusing to carry there must be an averment that plaintiff offered, or was ready and willing, to pay fare. Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62.

Palace or sleeping-cars.— An unobjectionable passenger who applies for accommodations in a palace-car, for which he is willing to pay, cannot be rejected if the accommodations of the car have not already been exhausted. The same rule against discriminations applies in case of a palace or sleeping-car as in any other case of passenger carriage. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688.

21. See cases cited *supra*, II, B, 5.

22. New York, etc., R. Co. *v.* Scovill, 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157; Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; Old Colony R. Co. *v.* Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661.

23. Indianapolis Union R. Co. *v.* Dohn, 153 Ind. 10, 53 N. E. 937, 74 Am. St. Rep. 274, 45 L. R. A. 427; State *v.* Reed, 76 Miss. 211, 24 So. 308, 71 Am. St. Rep. 528, 43 L. R. A. 134; Montana Union R. Co. *v.* Langlois, 9 Mont. 419, 24 Pac. 209, 18 Am. St. Rep. 745, 8 L. R. A. 753.

24. Pittsburgh, etc., R. Co. *v.* Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Freedon *v.* New York Cent., etc., R. Co., 24 N. Y. App. Div. 306, 48 N. Y. Suppl. 584; Stevenson *v.* West Seattle Land, etc., Co., 22 Wash. 84, 60 Pac. 51; Brown *v.* Memphis, etc., R. Co., 7 Fed. 51.

It is proper to exclude gamblers whose purpose in traveling upon a train is to ply their vocation (Thurston *v.* Union Pac. R. Co., 4 Dill. (U. S.) 321, 23 Fed. Cas. No. 14,019, 13 Alb. L. J. 393, 8 Chic. Leg. N. 323, 22 Int. Rev. Rec. 251), persons who insist on carrying with them animals, in violation of reasonable regulations (Daniel *v.* North Jersey St. R. Co., 64 N. J. L. 603, 46 Atl. 625), or persons who desire to prosecute an independent business, to the disadvantage of the carrier (Barney *v.* Oyster Bay, etc., Steamboat Co., 67 N. Y. 301, 23 Am. Rep. 115; Jencks *v.* Coleman, 2 Sumn. (U. S.) 221, 13 Fed. Cas. No. 7,258).

It is not proper to exclude a blind person simply on account of his blindness, if he is competent to care for himself (Zackery *v.* Mobile, etc., R. Co., 74 Miss. 520, 21 So. 246, 60 Am. St. Rep. 529, 36 L. R. A. 546, 75 Miss. 746, 23 So. 434, 65 Am. St. Rep. 617, 41 L. R. A. 385), a woman of bad character who is not likely to make herself obnoxious to other passengers (Brown *v.* Memphis, etc., R. Co., 4 Fed. 37, 5 Fed. 499), nor a person who has simply on a previous and separate occasion refused to pay his fare (State *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543).

25. Chicago, etc., R. Co. *v.* Jennings, 89 Ill. App. 335; Illinois Cent. R. Co. *v.* Treat, 75 Ill. App. 327; Jeffersonville, etc., R. Co. *v.*

out intent to be transported in due course, or after the abandonment of such intent, is not a passenger.[26] One who enters upon the premises or takes passage on the train of a railway, with intent to become a passenger, but by mistake as to the proper place or proper train is not, by reason of such mistake itself, precluded from the rights of a passenger.[27]

(II) *Purchase of Ticket or Intent to Pay Fare.* The previous purchase of a ticket is not essential to the beginning of the relation of passenger and carrier, where it is not by the rules or known usage of the company made a condition precedent to the acceptance of the passenger.[28] If there is an intent to pay fare, or do whatever else is required to entitle the person to transportation, he becomes a passenger by implied acceptance, although his fare has not yet been paid or his ticket called for.[29]

Riley, 39 Ind. 568; Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778; Choate *v.* Missouri Pac. R. Co., 67 Mo. App. 105; Exton *v.* Central R. Co., 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508.

Manifestation by outward act of intention to become a passenger is not essential. Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 18 S. Ct. 68, 42 L. ed. 491.

Presence of a person in the waiting-room about train time is notice of intention to become a passenger. Texas, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1897) 39 S. W. 124.

A street-car passenger, transferring from one car to another in the street, is a passenger during such transfer. Citizens' St. R. Co. *v.* Merl, 134 Ind. 609, 33 N. E. 1014. He may recover as a passenger for injury received by reason of the falling of a piece of the electric trolley. Keator *v.* Scranton Traction Co., 191 Pa. St. 102, 44 Wkly. Notes Cas. (Pa.) 128, 43 Atl. 86, 71 Am. St. Rep. 758, 44 L. R. A. 546. See also *infra*, note 42.

26. Chicago, etc., R. Co. *v.* Stewart, 77 Ill. App. 66; Heinlein *v.* Boston, etc., R. Co., 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676.

As to the care to be exercised for the safety of those who come upon the carrier's premises accompanying, or to meet, passengers see *infra*, III, F, 3, b, (VI); III, F, 3, c, (VI).

Children or newsboys who climb upon the platforms of street-cars without the consent of the conductor, for the purpose of securing a ride without payment of fare, are not entitled to protection as passengers, there being no intent to enter into that relation. Udell *v.* Citizens St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336; Jackson *v.* St. Paul City R. Co., 74 Minn. 48, 76 N. W. 956; Padgitt *v.* Moll, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854; Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268; Fleming *v.* Brooklyn City R. Co., 1 Abb. N. Cas. (N. Y.) 433. But if the conductor consents that a child be carried, though he has no intention of paying fare, he is entitled to protection as a passenger. Metropolitan St. R. Co. *v.* Moore, 83 Ga. 453, 10 S. E. 730. And see *infra*, III, B, 1, b, (II).

27. *Indiana.*— Cincinnati, etc., R. Co. *v.* Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37.

Michigan.— Baldwin *v.* Grand Trunk R. Co., (Mich. 1901) 87 N. W. 380.

Minnesota.— Finnegan *v.* Chicago, etc., R. Co., 48 Minn. 378, 51 N. W. 122, 15 L. R. A. 399.

New York.— Schurr *v.* Houston, 10 N. Y. St. 262.

Texas.— International, etc., R. Co. *v.* Gilbert, 64 Tex. 536; Garry *v.* Gulf, etc., R. Co., 17 Tex. Civ. App. 129, 42 S. W. 576; Missouri, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1897) 40 S. W. 350.

The passenger having by reason of a proper intent entered upon his journey does not, by going upon cars at an improper place, or in an improper manner, or by stepping off the cars upon the platform for a temporary purpose, terminate his relation as passenger nor deprive himself of the right to protection to which he is entitled as passenger, unless his act constitutes contributory negligence, or unless the circumstances are such as to negative the implied acceptance of him as a passenger by the carrier. Wilmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 17 S. W. 490; Martin *v.* Southern R. Co., 51 S. C. 150, 28 S. E. 303; Missouri, etc., R. Co. *v.* Williams, 91 Tex. 255, 42 S. W. 855; Ormond *v.* Hayes, 60 Tex. 180; St. Louis, etc., R. Co. *v.* Humphreys, (Tex. Civ. App. 1901) 62 S. W. 791; Alabama Great Southern R. Co. *v.* Coggins, 88 Fed. 455, 60 U. S. App. 140, 32 C. C. A. 1.

28. Western, etc., R. Co. *v.* Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848; West Chicago St. R. Co. *v.* Manning, 170 Ill. 417, 48 N. E. 958; Holt *v.* Hannibal, etc., R. Co., 87 Mo. App. 203.

29. *Arkansas.*— St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

Connecticut.— Gardner *v.* New Haven, etc., Co., 51 Conn. 143, 50 Am. Rep. 12.

Illinois.— Ohio, etc., R. Co. *v.* Muhling, 30 Ill. 9, 81 Am. Dec. 336; Frink *v.* Schroyer, 18 Ill. 416.

Iowa.— Russ *v.* The Steamboat War Eagle, 14 Iowa 363.

Massachusetts.— McKimble *v.* Boston, etc., R. Co., 139 Mass. 542, 2 N. E. 97.

Mississippi.— Alabama, etc., R. Co. *v.* Beardsley, 79 Miss. 417, 30 So. 660; Hurt *v.* Southern R. Co., 40 Miss. 391. But see Pow-

(III) *Fraud.* One who fraudulently attempts to secure transportation by attempting to pass himself off as one entitled to be carried without a ticket, or by representing that he is the person entitled to transportation under a non-transferable ticket, or like fraudulent acts, is not a passenger, although he is being transported, and it matters not whether he has actually perpetrated a fraud by deceiving the conductor of the train, or is on the train with intent to secure transportation by doing so.[30]

b. Acceptance by Carrier — (I) *Necessity For; What Constitutes.* To give rise to the relation of passenger and carrier there must be not only an intent on the part of the former to avail himself of the facilities of the latter for transportation, but also an express or implied acceptance by the latter of the former as a passenger. Until there is an acceptance, that is, until within the express or implied knowledge of the carrier or his employees the person seeking to become a passenger has indicated his intention to become a passenger, which intention has been in some way acquiesced in, at least to the extent of not refusing transportation, the relation does not arise, even though the purpose of the person attempting to become a passenger is to pay fare when required.[31] But just as there may

ell *v.* East Tennessee, etc., R. Co., (Miss. 1891) 8 So. 738.

Missouri.— Cross *v.* Kansas City, etc., R. Co., 56 Mo. App. 664; Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555.

New York.— Cleveland *v.* New Jersey Steamboat Co., 68 N. Y. 306; Morris *v.* New York, etc., R. Co., 73 Hun (N. Y.) 560, 26 N. Y. Suppl. 342, 56 N. Y. St. 231; Bartlett *v.* New York, etc., Ferry, etc., Co., 57 N. Y. Super. Ct. 348, 8 N. Y. Suppl. 309, 29 N. Y. St. 357.

Pennsylvania.— Ham *v.* Delaware, etc., Canal Co., 142 Pa. St. 617, 21 Atl. 1012.

South Carolina.—Iseman *v.* South Carolina, etc., R. Co., 52 S. C. 566, 30 S. E. 488; Martin *v.* Southern R. Co., 51 S. C. 150, 28 S. E. 303.

Texas.— Missouri, etc., R. Co. *v.* Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096; Houston, etc., R. Co. *v.* Washington, (Tex. Civ. App. 1895) 30 S. W. 719.

Virginia.— Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

Washington.— Cogswell *v.* West St., etc., Electric R. Co., 5 Wash. 46, 31 Pac. 411.

United States.— The Wasco, 53 Fed. 546; Secord *v.* St. Paul, etc., R. Co., 5 McCrary (U. S.) 515, 18 Fed. 221.

See 9 Cent. Dig. tit. "Carriers," § 974.

30. *Colorado.*— Atchison, etc., R. Co. *v.* Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822.

Illinois.— Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613; Toledo, etc., R. Co. *v.* Brooks, 81 Ill. 245; Rice *v.* Illinois Cent. R. Co., 22 Ill. App. 643.

Indiana.— Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

Iowa.— Ramm *v.* Minneapolis, etc., R. Co., 94 Iowa 296, 62 N. W. 751; Way *v.* Chicago, etc., R. Co., 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431, 73 Iowa 463, 35 N. W. 525.

Massachusetts.— Planz *v.* Boston, etc., R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835.

Minnesota.— McVeety *v.* St. Paul, etc., R. Co., 45 Minn. 268, 47 N. W. 809, 22 Am. St. Rep. 728, 11 L. R. A. 174.

United States.— Condran *v.* Chicago, etc., R. Co., 67 Fed. 522, 32 U. S. App. 182, 14 C. C. A. 506.

See 9 Cent. Dig. tit. "Carriers," § 975.

From the mere fact that a person has attempted to secure transportation which has been refused to him, it is not to be presumed without further evidence that he intended a fraud by remaining on the train, the presumption being, on the contrary, that he intended to pay his fare when required. Florida Southern R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; Galveston, etc., R. Co. *v.* Snead, 4 Tex. Civ. App. 31, 23 S. W. 277; Robostelli *v.* New York, etc., R. Co., 33 Fed. 796.

The intent to take a child through without paying fare, although the child is old enough to be required to pay, there being, however, no intent to defraud, will not prevent the child becoming a passenger. Austin *v.* Great Western R. Co., L. R. 2 Q. B. 442, 36 L. J. Q. B. 201, 16 L. T. Rep. N. S. 320, 15 Wkly. Rep. 863.

Question for jury.—The question of fraudulent intent is for the jury. Great Northern R. Co. *v.* Harrison, 2 C. L. R. 1136, 10 Exch. 376, 23 L. J. Exch. 308, 2 Wkly. Rep. 626.

31. *Kentucky.*— Louisville, etc., R. Co. *v.* Moss, 13 Ky. L. Rep. 684.

Missouri.— Schaefer *v.* St. Louis, etc., R. Co., 128 Mo. 64, 30 S. W. 331; Farber *v.* Missouri Pac. R. Co., 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350.

Oregon.— Haase *v.* Oregon R., etc., Co., 19 Oreg. 354, 24 Pac. 238.

Pennsylvania.— Bricker *v.* Philadelphia, etc., R. Co., 132 Pa. St. 1, 18 Atl. 983, 19 Am. St. Rep. 585.

United States.— Farley *v.* Cincinnati, etc., R. Co., 108 Fed. 14, 47 C. C. A. 156.

One who boards a train, knowing that it is for a particular class of excursionists, of which he is not one, does not become a passenger. Fitzgibbon *v.* Chicago, etc., R. Co., 108

be sufficient intent to become a passenger before transportation actually commences,[32] so there may be an implied acceptance as to persons seeking transportation before they have entered into the train or other conveyance and it has started toward its destination. Those who by express or implied assent are waiting in the passenger room or in a standing car, for the departure of a train, or are crossing the premises of the carrier for the purpose of going upon a train, or are in the act of mounting the car steps, are passengers, provided their acts are such as are presumed to be known and assented to by the agents of the railroad company having authority in the matter, and regardless of whether or not a ticket has been purchased, if no rule or regulation of the company is being violated.[33] But the mere fact of intention to go on board a car, which intention has not been, by acts or otherwise, indicated to the servants of the railroad company, does not render the person having such intention a passenger, although he may be entitled to transportation.[34] It matters not that the person gets on board a train at an

Iowa 614, 79 N. W. 477, 93 N. W. 276. But if the servants of the carrier permit a person to ride as a passenger on a special excursion train, the carrier cannot claim that he is thereby relieved from liability to such person as a passenger. Texarkana, etc., R. Co. *v.* Anderson, 67 Ark. 123, 53 S. W. 673.

A person entitled to transportation on a pass stepped on the front platform of the baggage-car as the train left the station, and by reason of the door being locked was unable to get into the passenger coaches until a collision occurred, causing his death. It was held that such person was not a passenger for whose safety the railroad company was responsible. Illinois Cent. R. Co. *v.* O'Keefe, 168 Ill. 115, 48 N. E. 294, 61 Am. St. Rep. 68, 39 L. R. A. 148.

32. See *supra*, III, B, 1, a, (I).

33. *Georgia.*—Central R., etc., Co. *v.* Perry, 58 Ga. 461.

Illinois.— Chicago, etc., R. Co. *v.* Chancellor, 60 Ill. App. 525.

Iowa.— Allender *v.* Chicago, etc., R. Co., 37 Iowa 264.

Maine.— Rogers *v.* Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; Shannon *v.* Boston, etc., R. Co., 78 Me. 52, 2 Atl. 678.

Maryland.—Baltimore, etc., R. Co. *v.* State, 63 Md. 135.

Massachusetts.— Young *v.* New York, etc., R. Co., 171 Mass. 33, 50 N. E. 455, 41 L. R. A. 193.

New York.— Buffett *v.* Troy, etc., R. Co., 40 N. Y. 168; Wells *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 365, 49 N. Y. Suppl. 510; Gordon *v.* Grand St., etc., R. Co., 40 Barb. (N. Y.) 546.

North Carolina.— Phillips *v.* Southern R. Co., 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163.

United States.— Grimes *v.* Pennsylvania Co., 36 Fed. 72.

See 9 Cent. Dig. tit. "Carriers," § 984 *et seq.*

One who goes into a waiting-room with the intention of purchasing a ticket is entitled to protection as a passenger, for he is a person entitled to purchase a ticket, even though the agent should refuse to sell him a ticket when requested. Norfolk, etc., R. Co. *v.* Galliher, 89 Va. 639, 16 S. E. 935. And the carrier will be liable for the unlawful acts of its ticket agent in wrongfully causing his arrest for passing counterfeit money. St. Louis, etc., R. Co. *v.* Franklin, (Tex. Civ. App. 1898) 44 S. W. 701.

Where a person sought to procure transportation on an omnibus, it was held that he became entitled to protection as a passenger, when he indicated to the driver of the omnibus his desire to get on board, and the driver indicated, by checking the omnibus, his intention to accept the person as a passenger. Brien *v.* Bennett, 8 C. & P. 724, 34 E. C. L. 984. Similar decisions have been made with reference to street-cars. Citizens' St. R. Co. *v.* Merl, 26 Ind. App. 284, 59 N. E. 491; Gordon *v.* West End St. R. Co., 175 Mass. 181, 55 N. E. 990; McDonough *v.* Metropolitan R. Co., 137 Mass. 210; Gaffney *v.* St. Paul City R. Co., 81 Minn. 459, 84 N. W. 304; Smith *v.* St. Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Carney *v.* Cincinnati St. R. Co., 8 Ohio S. & C. Pl. Dec. 587. So where a railway train started while a person was attempting to climb up the steps to the platform under circumstances justifying him in doing so, it was held that he was a passenger. Washington, etc., R. Co. *v.* Patterson, 9 App. Cas. (D. C.) 423. But one who has signaled a street-car to stop does not become a passenger until the driver, by checking the speed of the car, has indicated an intention to accept such person as a passenger. Donovan *v.* Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; Baltimore Traction Co. *v.* State, 78 Md. 409, 28 Atl. 397.

34. *Illinois.*— Chicago, etc., R. Co. *v.* Jennings, 190 Ill. 478, 60 N. E. 818; Spannagle *v.* Chicago, etc., R. Co., 31 Ill. App. 460.

Indiana.— Indiana Cent. R. Co. *v.* Hudelson, 13 Ind. 325, 74 Am. Dec. 254.

Massachusetts.— Jones *v.* Boston, etc., R., 163 Mass. 245, 39 N. E. 1019; Webster *v.* Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; June *v.* Boston, etc., R. Co., 153 Mass. 79, 26 N. E. 238.

Mississippi.— Georgia Pac. R. Co. *v.* Robinson, 68 Miss. 643, 10 So. 60.

Missouri.— Schepers *v.* Union Depot R. Co., 126 Mo. 665, 29 S. W. 712.

United States.— Southern R. Co. *v.* Smith,

unusual or unauthorized place; if he is entitled to transportation he becomes a passenger from the time he gets on board the train.[35]

(11) *Authority of Agents.* While in general those who have authority to determine whether or not a person shall take transportation on a train or other conveyance have authority to accept a passenger, either expressly or by acquiescence, yet the question of authority of the agent or servant to do so becomes under some circumstances a matter of controlling importance. Thus, where a person goes upon a freight train, charged with knowledge, by reason of the general course of business of the carrier, or by reason of rules or regulations known to him, that passengers are not allowed to ride on freight trains, and that conductors of freight trains have no authority to allow them to do so, he does not become a passenger, although he may have the assent of the conductor to his act, and even though the conductor accepts a ticket or payment of fare.[36] But if it is customary for the carrier to allow passengers to ride on some freight trains, and if the person seeking transportation has no notice, express or implied, that passengers are not permitted to ride on the freight train in question, he may rely on the act of the conductor in authorizing him to go upon such train, even though such act be without authority, or contrary to the conductor's instructions.[37] The conductor of a train, however, has no authority to invite a person to ride without payment of fare and as a mere personal favor, and one thus riding is not a passenger.[38] Persons accepting invitations from employees not having the control of

86 Fed. 292, 52 U. S. App. 708, 30 C. C. A. 58, 40 L. R. A. 746.

35. Hannibal, etc., R. Co. *v.* Martin, 111 Ill. 219; Illinois Cent. R. Co. *v.* Axley, 47 Ill. App. 307; Dewire *v.* Boston, etc., R. Co., 148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166.

One who goes upon a train before it is ready for passengers, and without authority, does not become a passenger by that act. Brown *v.* Scarboro, 97 Ala. 316, 12 So. 289.

36. *Illinois.*— Cleveland, etc., R. Co. *v.* Best, 169 Ill. 301, 48 N. E. 684.

Kansas.—St. Joseph, etc., R. Co. *v.* Wheeler, 35 Kan. 185, 10 Pac. 461.

Massachusetts.— Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446.

Missouri.— Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

New York.— Eaton *v.* Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513.

Tennessee.— Sands *v.* Southern R. Co., (Tenn. 1901) 64 S. W. 478; Louisville, etc., R. Co. *v.* Hailey, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549.

Texas.—Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98; International, etc., R. Co. *v.* Hanna, (Tex. Civ. App. 1900) 58 S. W. 548; De Palacios *v.* Rio Grande, etc., R. Co., (Tex. Civ. App. 1898) 45 S. W. 612; St. Louis Southwestern R. Co. *v.* White, (Tex. Civ. App. 1896) 34 S. W. 1042.

Wisconsin.— Lucas *v.* Milwaukee, etc., R. Co., 33 Wis. 41, 14 Am. Rep. 735.

See also *supra*, III, A, 1, b; and 9 Cent. Dig. tit. "Carriers," § 982.

37. *Arkansas.*— Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550.

Indiana.— Lawrenceburgh, etc., R. Co. *v.* Montgomery, 7 Ind. 474.

Louisiana.— Hanson *v.* Mansfield R., etc., Co., 38 La. Ann. 111, 58 Am. Rep. 162.

Maine.— Dunn *v.* Grand Trunk R. Co., 58 Me. 187, 4 Am. Rep. 267.

Missouri.— Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; Zuendt *v.* Missouri Pac. R. Co., (Mo. 1889) 10 S. W. 491; McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706.

New York.— Edgerton *v.* New York, etc., R. Co., 35 Barb. (N. Y.) 193, 389.

Tennessee.— Chattanooga Rapid Transit Co. *v.* Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886.

Texas.— International, etc., R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; International, etc., R. Co. *v.* Cock, (Tex. 1890) 14 S. W. 242; International, etc., R. Co. *v.* Irvine, 64 Tex. 529; Texas, etc., R. Co. *v.* Garcia, 62 Tex. 285; Galveston, etc., R. Co. *v.* Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

Utah.— Everett *v.* Oregon Short Line, etc., R. Co., 9 Utah 340, 34 Pac. 289.

West Virginia.— Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

Wisconsin.— Lucas *v.* Milwaukee, etc., R. Co., 33 Wis. 41, 14 Am. Rep. 735.

38. *Kansas.*— Kansas City, etc., R. Co. *v.* Berry, 53 Kan. 112, 36 Pac. 53, 42 Am. St. Rep. 278.

Kentucky.— Louisville, etc., R. Co. *v.* Scott, 22 Ky. L. Rep. 30, 56 S. W. 674, 50 L. R. A. 381.

Massachusetts.— Wilton *v.* Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11.

Minnesota.— Gradin *v.* St. Paul, etc., R. Co., 30 Minn. 217, 14 N. W. 881.

Missouri.— Murphy *v.* St. Louis, etc., R. Co., 43 Mo. App. 342; Siegrist *v.* Arnot, 10 Mo. App. 197.

New York.— Lewis *v.* Delaware, etc., Canal

the train or any apparent right to give permission to ride thereon, such as brakemen, engineers, yard-masters or baggagemen, are of course not entitled to be considered as passengers.[39] While it would seem reasonable that newsboys or children who are permitted to ride on a car gratuitously, with knowledge that the employee giving the permission has no authority to do so, are not passengers,[40] such doctrine is not supported by the weight of authority, and there are many cases holding that a child accepting the invitation of a person in charge of a railroad or street-car to ride thereon, without any payment of fare being intended, becomes a passenger, with reference to whose safety the carrier has the same liability as with reference to a paying passenger.[41]

2. Continuance and Termination of Relation. Where the relation of carrier and passenger is once established it continues until terminated by the voluntary act of the passenger, or the act of the carrier, under circumstances justifying its termination, and extends to the arrival of the passenger at his destination, and a temporary departure from the train for some good or reasonable cause, without the intent to abandon the transportation, will not end the relation.[42] At the end

Co., 145 N. Y. 508, 40 N. E. 248, 65 N. Y. St. 374.

Pennsylvania.— Creed *v.* Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693.

Texas.— Bullock *v.* Houston, etc., R. Co., (Tex. Civ. App. 1900) 55 S. W. 184.

A passenger on a train by invitation of a general agent of the railroad company, for the purpose of performing some service for the company, is a passenger. Thompson *v.* Yazoo, etc., R. Co., 47 La. Ann. 1107, 17 So. 503. But permission from the superintendent of a railway company to ride on a car known to be for the use of employees only does not make such person a passenger. McCauley *v.* Tennessee Coal, etc., Co., 93 Ala. 356, 9 So. 611.

39. *Illinois.*—Ohio, etc., R. Co. *v.* Allender, 59 Ill. App. 620.

Indiana.—Evansville, etc., R. Co. *v.* Barnes, 137 Ind. 306, 36 N. E. 1092; Chicago, etc., R. Co. *v.* Field, 7 Ind. App. 172, 34 N. E. 406.

Louisiana.— Candiff *v.* Louisville, etc., R. Co., 42 La. Ann. 477, 7 So. 601; Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497.

New York.— Finley *v.* Hudson Electric R. Co., 64 Hun (N. Y.) 373, 19 N. Y. Suppl. 621, 46 N. Y. St. 202.

Tennessee.— Sands *v.* Southern R. Co., (Tenn. 1901) 64 S. W. 478.

Texas.— Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; Gulf, etc., R. Co. *v.* Campbell, 76 Tex. 174, 13 S. W. 19; Galaviz *v.* International, etc., R. Co., 15 Tex. Civ. App. 61, 38 S. W. 234.

Virginia.— Virginia Midland R. Co. *v.* Roach, 83 Va. 375, 5 S. E. 175.

United States.— Chicago, etc., R. Co. *v.* Bryant, 65 Fed. 969, 27 U. S. App. 681, 13 C. C. A. 249.

Engines.— While the employees in charge of a train may, under some circumstances, be authorized to allow a person to ride on the engine as a passenger, the presumption is against any such authority. Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; Merrill *v.* Eastern R. Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; Robertson *v.* New York, etc., R. Co., 22 Barb. (N. Y.) 91; Rucker *v.* Missouri Pac. R. Co., 61 Tex. 499; Wilcox *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 487, 33 S. W. 379.

Hand-cars.— One who accepts transportation on a hand-car is chargeable with notice of the fact that employees operating hand-cars have no authority to accept passengers for transportation thereon. Hoar *v.* Maine Cent. R. Co., 70 Me. 65, 35 Am. Rep. 299; Willis *v.* Atlantic, etc., R. Co., 120 N. C. 508, 26 S. E. 784; Cincinnati, etc., R. Co. *v.* Morley, 4 Ohio Cir. Ct. 559; Rathbone *v.* Oregon R. Co., (Oreg. 1901) 66 Pac. 909.

Payment to a brakeman of money for the privilege of riding on the train does not entitle the person so riding to be considered a passenger. Brevig *v.* Chicago, etc., R. Co., 64 Minn. 168, 66 N. W. 401; Janny *v.* Great Northern R. Co., 63 Minn. 380, 65 N. W. 450; McNamara *v.* Great Northern R. Co., 61 Minn. 296, 63 N. W. 726; Atchison, etc., R. Co. *v.* Johnson, 3 Okla. 41, 41 Pac. 641; Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118.

40. Ecliff *v.* Wabash, etc., R. Co., 64 Mich. 196, 31 N. W. 180; Marks *v.* Rochester R. Co., 41 N. Y. App. Div. 66, 58 N. Y. Suppl. 210; Duff *v.* Allegheny Valley R. Co., 91 Pa. St. 458, 36 Am. Rep. 675. And see *supra*, III, B, 1, a, (I).

41. *Arkansas.*— Little Rock Traction, etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

Connecticut.— Brennan *v.* Fair Haven, etc., R. Co., 45 Conn. 284, 29 Am. Rep. 679.

Illinois.— Chicago, etc., R. Co. *v.* Casey, 9 Ill. App. 632.

Missouri.— Buck *v.* People's St. R., etc., Co., 108 Mo. 179, 18 S. W. 1090; Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555.

New Jersey.— Danbeck *v.* New Jersey Traction Co., 57 N. J. L. 463, 31 Atl. 1038.

Pennsylvania.— Hestonville Pass. R. Co. *v.* Grey, 1 Walk. (Pa.) 513.

That persons riding free are passengers see *infra*, III, B, 5, a.

42. Atlanta Consol. St. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41; Brunswick, etc., R. Co. *v.* Moore, 101 Ga. 684, 28 S. E. 1000; Rosen-

of the journey the relation of carrier and passenger continues until the passenger has had a reasonable opportunity to depart from the train or car in safety.[43] After the passenger has departed from the car, and has had reasonable time and opportunity to avoid further danger from the operation of the car, or further necessity of relation with the servants of the carrier, he ceases to be a passenger and stands toward the carrier as one of the general public.[44]

3. PERSONS PURSUING SPECIAL CALLINGS ON TRAINS. One is not deprived of the protection of a passenger when carried on a passenger train by arrangement with the railroad company, by the fact that he is there for the purpose of transacting some business or carrying on some occupation with the consent of the company. Thus one who pays for the privilege of selling popcorn on passenger trains is a passenger while engaged in the prosecution of his business on the trains.[45] Likewise postal clerks, carried under an arrangement with the United States government with reference to the transportation and handling of mail, are passengers while thus being transported.[46] For the same reason messengers carried under

berg *v.* Third Ave. R. Co., 47 N. Y. App. Div. 323, 61 N. Y. Suppl. 1052; Doran *v.* East River Ferry Co., 3 Lans. (N. Y.) 105; Conroy *v.* Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419.

A passenger alighting from a train for any reasonable purpose, with intention to reënter the train before it starts, is a passenger while on the platform. Watson *v.* Oxanna Land Co., 92 Ala. 320, 8 So. 770; Lemery *v.* Great Northern R. Co., 83 Minn. 47, 85 N. W. 908. So one who leaves a car merely to avoid a collision does not lose his right to protection as a passenger. Gradert *v.* Chicago, etc., R. Co., 109 Iowa 547, 80 N. W. 559. But by leaving the train without the consent of those in charge at an intermediate station at which the train does not ordinarily stop, but where it is delayed for some purpose incident to its operation, a passenger abandons for the time being his rights as such and assumes all risks incident to his movements. Lemery *v.* Great Northern R. Co., 83 Minn. 47, 85 N. W. 908.

While transferring from one car to another for the purpose of continuing the journey the relation of passenger continues. Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901; Baltimore, etc., R. Co. *v.* State, 60 Md. 449; St. Louis Southwestern R. Co. *v.* Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741. See also *supra*, note 25.

43. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Gray, (Ind. App. 1901) 59 N. E. 1000.

Kentucky.— South Covington, etc., St. R. Co. *v.* Beatty, 20 Ky. L. Rep. 1845, 50 S. W. 239.

Massachusetts.— Dodge *v.* Boston, etc., Steamship Co., 148 Mass. 207, 19 N. E. 373, 12 Am. St. Rep. 541, 2 L. R. A. 83.

New York.— Wandell *v.* Corbin, 49 Hun (N. Y.) 608, 1 N. Y. Suppl. 795, 17 N. Y. St. 718.

Texas.— Texas, etc., R. Co. *v.* Dick, (Tex. Civ. App. 1901) 63 S. W. 895; Gulf, etc., R. Co. *v.* Glenk, 9 Tex. Civ. App. 599, 30 S. W. 278.

United States.— Chicago, etc., R. Co. *v.* Wood, 104 Fed. 663, 44 C. C. A. 118; Chesapeake, etc., R. Co. *v.* King, 99 Fed. 251, 40 C. C. A. 432.

See 9 Cent. Dig. tit. "Carriers," § 992.

Where a passenger remained on a train for an unreasonable time after it reached its destination, that being the terminus of the road, he thereby ceased to be a passenger. Chicago, etc., R. Co. *v.* Frazer, 55 Kan. 582, 40 Pac. 923.

44. *Arkansas.*— St. Louis, etc., R. Co. *v.* Beecher, 65 Ark. 64, 44 S. W. 715.

Georgia.— King *v.* Georgia Cent. R. Co., 107 Ga. 754, 33 S. E. 839.

Illinois.—West Chicago St. R. Co. *v.* Walsh, 78 Ill. App. 595; Hanson *v.* Urbana, etc., Electric St. R. Co., 75 Ill. App. 474.

Louisiana.— Schneidau *v.* New Orleans, etc., R. Co., 48 La. Ann. 866, 19 So. 918.

Maryland.— Central R. Co. *v.* Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425.

Massachusetts.— Creamer *v.* West End St. R. Co., 156 Mass. 320, 31 N. E. 391, 32 Am. St. Rep. 456, 16 L. R. A. 490; Allerton *v.* Boston, etc., R. Co., 146 Mass. 241, 15 N. E. 621; Johnson *v.* Boston, etc., R. Co., 125 Mass. 75.

Missouri.— Hendrick *v.* Chicago, etc., R. Co., 136 Mo. 548, 38 S. W. 297.

New York.— Platt *v.* Forty-Second St., etc., Ferry R. Co., 2 Hun (N. Y.) 124, 4 Thomps. & C. (N. Y.) 406; Lasker *v.* Third Ave. R. Co., 27 Misc. (N. Y.) 824, 57 N. Y. Suppl. 395.

Ohio.— Pittsburgh, etc., R. Co. *v.* Krouse, 30 Ohio St. 222.

Oregon.— Smith *v.* City R. Co., 29 Oreg. 539, 46 Pac. 136, 780.

Tennessee.— Chattanooga Electric R. Co. *v.* Boddy, 105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885.

Texas.— Davis *v.* Houston, etc., R. Co., (Tex. Civ. App. 1900) 59 S. W. 844.

45. Com. *v.* Vermont, etc., R. Co., 108 Mass. 7, 11 Am. Rep. 301.

One who pays for the privilege of conducting a bar on a steamboat is a passenger and not an employee while conducting his business on the boat. Yeomans *v.* Contra Costa Steam Nav. Co., 44 Cal. 71.

46. *Indiana.*— Cleveland, etc., R. Co. *v.* Ketcham, 133 Ind. 346, 33 N. E. 116, 36 Am. St. Rep. 550, 19 L. R. A. 339.

Kentucky.— Louisville, etc., R. Co. *v.* Kingman, 18 Ky. L. Rep. 82, 35 S. W. 264.

arrangement with express companies, to have control of goods carried for such companies on passenger trains, are passengers.[47] Other persons engaged in occupations involving their transportation on passenger trains, but not employees of the railroad company, such, for instance, as porters of palace-cars,[48] or persons employed about a private car,[49] have been held to be entitled to the same protection against injury resulting from the management of the train as passengers.[50] Where a railroad company simply furnishes the motive power for a special train, having no control over the management of the train itself, as in case of a circus train, the company is not so related to persons riding on the train as to be charged with the duty of their protection as passengers.[51]

4. Carrier's Employees. It is evident that the liability of the carrier for injuries to passengers is different from that of an employer with reference to injuries to employees in his service.[52] Therefore the rules of carrier's liability as to passengers do not apply to employees in the operation of the cars or other vehicles in which passengers are being transported.[53] Nor are employees who are being carried back and forth to and from their work, whether on construction trains or passenger trains, and although they have no connection with the operation of the train and are carried outside of the hours of employment for which they are paid, to be considered as passengers.[54] But as it is customary to give

Missouri.— Mellor *v.* Missouri Pac. R. Co., 105 Mo. 455, 14 S. W. 758, 16 S. W. 849, 10 L. R. A. 36.

New York.— Seybolt *v.* New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75.

South Carolina.— Hammond *v.* Northeastern R. Co., 6 Rich. (S. C.) 130, 24 Am. Rep. 467.

Texas.— Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; Houston, etc., R. Co. *v.* Hampton, 64 Tex. 427; Houston, etc., R. Co. *v.* McCullough, 22 Tex. Civ. App. 208, 55 S. W. 392; International, etc., R. Co. *v.* Davis, 17 Tex. Civ. App. 340, 43 S. W. 540.

Virginia.— Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811.

United States.— Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165.

England.— Collett *v.* London, etc., R. Co., 16 Q. B. 984, 15 Jur. 1053, 20 L. J. Q. B. 411, 71 E. C. L. 984.

Contra.— Foreman *v.* Pennsylvania R. Co., 195 Pa. St. 499, 46 Atl. 109; Pennsylvania R. Co. *v.* Price, 96 Pa. St. 256.

See 9 Cent. Dig. tit. "Carriers," § 979.

47. *Arkansas.*— Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597.

California.— Yeomans *v.* Contra Costa Steam Nav. Co., 44 Cal. 71.

Illinois.— Blank *v.* Illinois Central R. Co., 80 Ill. App. 475.

Kentucky.— See Kentucky Cent. R. Co. *v.* Thomas, 6 Ky. L. Rep. 599.

New York.— Blair *v.* Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55.

Texas.—San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

United States.— Voight *v.* Baltimore, etc., R. Co., 79 Fed. 561.

See 9 Cent. Dig. tit. "Carriers," § 978.

One not in the employ of the express company, and not carried under contract with it, but traveling with the regular express messenger for the purpose of assisting him and learning the business, and without the permission of the railroad company, is not a passenger. Union Pac. R. Co. *v.* Nichols, 8 Kan. 505, 12 Am. Rep. 475.

Although contracts limiting liability of the carrier to the passenger are not valid, a contract by which the express company relieves the railroad company from all liability for injury to its messengers, and by which also the messenger, as a part of his contract of employment, agrees to save the express company harmless from any liability for his injury, is valid. Baltimore, etc., R. Co. *v.* Voigt, 176 U. S. 498, 20 S. Ct. 385, 44 L. ed. 560. See also *infra*, III, D, 3, f.

48. Jones *v.* St. Louis Southwestern, etc., R. Co., 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718. But see *contra*, Hughson *v.* Richmond, etc., R. Co., 2 App. Cas. (D. C.) 98.

49. Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

50. Where by arrangement between a lumber company and a railroad company the latter agreed to carry the employees of the former to and from work, an employee thus riding is a passenger. Trinity Valley R. Co. *v.* Stewart, (Tex. Civ. App. 1901) 62 S. W. 1085.

51. Robertson *v.* Old Colony R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482.

Where a railroad company furnishes a special train, manned with its own crew, for the purpose of transporting a company of soldiers, the soldiers occupy the relation to the railroad company of passengers. Galveston, etc., R. Co. *v.* Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

52. McQueen *v.* Central Union Pac. R. Co., 30 Kan. 689, 1 Pac. 139; Miller *v.* Cornwall R. Co., 154 Pa. St. 473, 26 Atl. 779; Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384.

53. Gillshannon *v.* Stony Brook R. Corp., 10 Cush. (Mass.) 228.

54. *Illinois.*— St. Louis, etc., R. Co. *v.* Waggoner, 90 Ill. App. 556.

free transportation to employees as a part of the consideration for their services, an employee so riding, not for the purpose of rendering any service but for his own pleasure or advantage, is a passenger.[55] Where a passenger renders service as an employee, at the request of the servants of the carrier, and is injured while so engaged, he is with reference to such injury to be deemed an employee and not a passenger, having gone outside of his relation as passenger in performing the service and incurred other dangers than those involved in that relation.[56]

5. Persons Traveling on Passes — a. Free Passengers. While it is no doubt true, as indicated in the definition,[57] that public carriers of passengers are those who carry passengers for hire, there is not in the case of carriers of passengers a distinction as to liability between passengers carried for compensation and those carried gratuitously analogous to that recognized as to carriers of goods between cases where goods are carried for compensation and those where they are carried free.[58] One who is accepted for transportation as a passenger, without any compensation to be rendered, is nevertheless entitled to all the care and protection which the carrier is under obligation to furnish to paying passengers.[59]

b. Persons Traveling on Drover's Passes, or Under Similar Arrangements. Persons are, however, frequently transported on so-called passes, who are not in fact gratuitous passengers, because the right to ride without payment of special

Kansas.— Kansas Pac. R. Co. *v.* Salmon, 11 Kan. 83.

Massachusetts.—Gillshannon *v.* Stony Brook R. Corp., 10 Cush. (Mass.) 228.

New York.— Vick *v.* New York Cent., etc., R. Co., 95 N. Y. 267, 47 Am. Rep. 36; Russell *v.* Hudson River R. Co., 17 N. Y. 134.

North Carolina.— Wright *v.* Northampton, etc., R. Co., 122 N. C. 852, 29 S. E. 100.

Ohio.— Manvill *v.* Cleveland, etc., R. Co., 2 Ohio Dec. (Reprint) 359, 2 West. L. Month. 495.

Rhode Island.— Ionnone *v.* New York, etc., R. Co., 21 R. I. 452, 44 Atl. 592, 79 Am. St. Rep. 812, 46 L. R. A. 730.

Tennessee.—Chattanooga Rapid Transit Co. *v.* Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886.

See 9 Cent. Dig. tit. "Carriers," § 976.

An employee permitted to ride on a passenger train, in consideration of services rendered independent of the general service for which he is engaged, may be a passenger. O'Donnell *v.* Allegheny R. Co., 50 Pa. St. 490.

Where employees of a railroad company borrow a car and engine for their own purposes, by permission of the company's yardmaster, and one of them is killed while riding thereon, the relation of carrier and passenger does not exist between the employee so killed and the railroad company. Davis *v.* Chicago, etc., R. Co., 45 Fed. 543.

55. *Georgia.*— Central R. Co. *v.* Henderson, 69 Ga. 715.

Illinois.— Illinois Cent. R. Co. *v.* O'Keefe, 63 Ill. App. 102.

Kentucky.—Louisville, etc., R. Co. *v.* Scott, 22 Ky. L. Rep. 30, 56 S. W. 674, 50 L. R. A. 381.

Louisiana.— Dobson *v.* New Orleans, etc., R. Co., 52 La. Ann. 1127, 27 So. 670.

Massachusetts.— Dickinson *v.* West End St. R. Co., 177 Mass. 365, 59 N. E. 60, 83 Am. St. Rep. 284, 52 L. R. A. 326.

Utah.— Williams *v.* Oregon Short Line R. Co., 18 Utah 210, 54 Pac. 991, 72 Am. St. Rep. 777.

United States.—Whitney *v.* New York, etc., R. Co., 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615.

An employee directed to go to a particular point on the line of a railroad for the purpose of performing services there, and riding on an employee's pass in doing so, is a passenger. Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101; McGucken *v.* Western New York, etc., R. Co., 77 Hun (N. Y.) 69, 28 N. Y. Suppl. 298, 59 N. Y. St. 846.

56. *Alabama.*— Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, 3 So. 764.

Indiana.— Everhart *v.* Terre Haute, etc., R. Co., 78 Ind. 292, 41 Am. Rep. 567.

Kansas.— Atchison, etc., R. Co. *v.* Lindley, 42 Kan. 714, 22 Pac. 703, 16 Am. St. Rep. 515, 6 L. R. A. 646.

Missouri.— Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

Nebraska.— Woolsey *v.* Chicago, etc., R. Co., 39 Nebr. 798, 58 N. W. 444, 25 L. R. A. 79.

A passenger who has rendered services appropriate to an employee, but has returned to his position as passenger, is entitled thereafter to the usual protection due to passengers. Cumberland Valley R. Co. *v.* Myers, 55 Pa. St. 288.

57. See *supra*, III, A, 1, a.

58. See *supra*, II, C.

59. *Illinois.*— Benner Livery, etc., Co. *v.* Busson, 58 Ill. App. 17.

Indiana.— Russell *v.* Pittsburgh, etc., R. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214, 55 L. R. A. 253; Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271; Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101.

Iowa.— Rose *v.* Des Moines Valley R. Co., 39 Iowa 246.

Maryland.— State *v.* Western Maryland R. Co., 63 Md. 433.

compensation therefor is given in part consideration of payment which is principally for other services. Thus one who travels on a drover's pass, which is issued in connection with the transportation of live stock for hire, is not a free passenger, but a passenger for compensation.[60] And those who are carried on freight trains to look after live stock which is being transported, and as an incident to such transportation, are entitled to protection as passengers.[61]

C. Rules and Regulations and Their Enforcement by Expulsion or Otherwise — 1. In General — a. Power to Make Regulations. Without regard to any statutory authority, a carrier of passengers has, under the common law, the right to make reasonable rules and regulations for the conduct of his business.[62]

Massachusetts.—Doyle *v.* Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157; Littlejohn *v.* Fitchburg R. Co., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; Todd *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49.

Missouri.— Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 799; Dorsey *v.* Atchison, etc., R. Co., 83 Mo. App. 528; Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555.

New York.— Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Perkins *v.* New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282.

Pennsylvania.— Buffalo, etc., R. Co. *v.* O'Hara, 3 Pennyp. (Pa.) 190, 12 Wkly. Notes Cas. (Pa.) 473.

Texas.— Gulf, etc., R. Co. *v.* McGown, 65 Tex. 640.

United States.— Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468, 14 L. ed. 502; *In re* California Nav., etc., Co., 110 Fed. 670; Bryant *v.* Chicago, etc., R. Co., 53 Fed. 997, 4 C. C. A. 146, 12 U. S. App. 115; Hospes *v.* Chicago, etc., R. Co., 29 Fed. 763; Waterbury *v.* New York Cent., etc., R. Co., 21 Blatchf. (U. S.) 314, 17 Fed. 671.

See 9 Cent. Dig. tit. "Carriers," § 974.

As to limitation of liability by contract see *infra*, III, D, 3, f.

Employees carried on passes issued to them by virtue of their employment and as a part of the usage or contract under which they are employed are not gratuitous passengers. Doyle *v.* Fitchburg R. Co., 166 Mass. 492, 44 N. E. 611, 55 Am. St. Rep. 417, 33 L. R. A. 844.

One who secures transportation free by invitation of the conductor of a train having no authority to permit persons to ride without pay does not become a passenger. Stalcup *v.* Louisville, etc., R. Co., 16 Ind. App. 584, 45 N. E. 802. And see *supra*, III, B, 1, b, (II).

60. Little Rock, etc., R. Co. *v.* Miles, 40 Ark. 298, 48 Am. Rep. 10.

61. *Delaware.*— Flinn *v.* Philadelphia, etc., R. Co., 1 Houst. (Del.) 469.

Illinois.— Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210; New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809; Pennsylvania Co. *v.* Greso, 79 Ill. App. 127.

Indiana.— Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

Kentucky.— Louisville, etc., R. Co. *v.* Bell, 100 Ky. 203, 38 S. W. 3.

Missouri.— Carroll *v.* Missouri Pac. R. Co., 88 Mo. 239, 57 Am. Rep. 382.

Ohio.— Cleveland, etc., R. Co. *v.* Curran, 19 Ohio St. 1, 2 Am. Rep. 362.

Pennsylvania.— Hanover Junction, etc., R. Co. *v.* Anthony, 3 Walk. (Pa.) 210.

Texas.—International, etc., R. Co. *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

Utah.— Saunders *v.* Southern Pac. Co., 13 Utah 275, 44 Pac. 932.

Wisconsin.— Lawson *v.* Chicago, etc., R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

United States.— New York Cent., etc., R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Waterbury *v.* New York Cent., etc., R. Co., 21 Blatchf. (U. S.) 314, 17 Fed. 671.

See 9 Cent. Dig. tit. "Carriers," § 980.

As to limitation of liability by contract see *infra*, III, D, 3, f.

A person thus transported is not an employee of the railroad company, and does not, as a railroad employee, assume the risk incident to the transportation. St. Louis, etc., R. Co. *v.* Nelson, (Tex. Civ. App. 1898) 44 S. W. 179.

One who secures transportation on a freight train, under the fraudulent pretense that he is accompanying live stock, is not a passenger. Richmond, etc., R. Co. *v.* Burnsed, 70 Miss. 437, 12 So. 958, 35 Am. St. Rep. 656.

Persons who are employed to look after live stock in course of transportation may not be entitled to the privileges and comforts of passengers, but are entitled to have the usual precautions taken with reference to their safety as passengers. Indianapolis, etc., R. Co. *v.* Beaver, 41 Ind. 493; Omaha, etc., R. Co. *v.* Crow, 47 Nebr. 84, 66 N. W. 21.

Where one railroad receives from another railroad a car of live stock, with a man in charge thereof who is traveling free under contract with the first company, of which it has knowledge, the person thus carried is a passenger for hire. Delaware, etc., R. Co. *v.* Ashley, 67 Fed. 209, 28 U. S. App. 375, 14 C. C. A. 368.

62. Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163; Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62; Gray *v.* Cincinnati Southern R. Co., 11 Fed. 683.

The authority to make rules is of course

b. Regulations Must Be Reasonable. The passenger is not bound to comply with rules or regulations of the company which are unreasonable.[63] But such rules as tend to the comfort, order, and safety of passengers may be made and enforced, if reasonable with reference to the subject-matter and uniform in respect to the persons affected.[64] No regulation, however, can be enforced which is in contravention of law.[65]

c. Notice of Regulations. As the validity of a regulation does not depend upon contract, express or implied, but upon the general power of the carrier to control his business, therefore there is not the necessity which exists with reference to a special contract regulation of bringing it home to the passenger so that his assent thereto shall appear. The passenger is bound to take notice of reasonable regulations,[66] and if they are so posted or otherwise published that passengers may conveniently advise themselves with reference thereto it is sufficient.[67] How-

primarily in the directors of the corporation, if the carrier be a corporation, but by delegation such authority may be exercised by the superintendent, or by an agent having charge of a station as applicable to that particular station. Com. *v.* Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; Smith *v.* Chamberlain, 38 S. C. 529, 17 S. E. 371, 19 L. R. A. 710.

63. South. Florida R. Co. *v.* Rhodes, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733; Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352.

64. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

Fixing time for keeping office open.— A regulation with reference to a station agent at a village which required him to keep his office open for business only from seven A. M. to seven P. M. is reasonable. Louisville, etc., R. Co. *v.* Wright, 18 Ind. App. 125, 47 N. E. 491.

Forbidding leaving cars in motion.—A regulation of a street-car company that passengers must not leave its cars while they are in motion is reasonable. Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349.

Forbidding passengers from riding on platform of car is reasonable. Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409; Montgomery *v.* Buffalo R. Co., 24 N. Y. App. Div. 454, 48 N. Y. Suppl. 849; McMillan *v.* Federal St., etc., R. Co., 172 Pa. St. 523, 33 Atl. 560.

Prohibiting passengers from taking dogs with them in passenger-cars, and requiring payment for carrying dogs in baggage-cars is reasonable. Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532.

Prohibiting the taking of dangerous articles into the cars is reasonable. Dowd *v.* Albany R. Co., 47 N. Y. App. Div. 202, 62 N. Y. Suppl. 179.

Relating to collection of street-car fares.— To facilitate collection of fares in street-cars it may be required that while the conductor is taking up fares passengers shall not go past him from one part of the car to another. Faber *v.* Chicago, Great Western R. Co., 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789.

Requiring tickets.— A regulation that freight conductors shall not permit passengers without tickets to ride on their trains from ticket stations is upheld. McCook *v.* Northrup, 65 Ark. 225, 45 S. W. 547.

Setting apart particular cars for particular persons.—The carrier may by reasonable regulation set apart particular cars for particular classes of passengers for the purpose of promoting the convenience and good order of the passengers. Thus, a car may be set apart for ladies, and gentlemen who are accompanied by ladies, from which gentlemen not thus accompanied may be excluded. Peck *v.* New York Cent., etc., R. Co., 70 N. Y. 587; Texas, etc., R. Co. *v.* Johnson, 2 Tex. App. Civ. Cas. § 185; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495. But colored persons cannot be excluded from such car merely on account of color. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641; Brown *v.* Memphis, etc., R. Co., 5 Fed. 499.

65. Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 722, 28 L. R. A. 773; Decuir *v.* Benson, 27 La. Ann. 1.

Reasonableness whether question at law or fact.— Whether a general regulation relating to the safety, comfort, or conduct of passengers is reasonable is a question of law for the court. Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740; Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532; Montgomery *v.* Buffalo R. Co., 165 N. Y. 139, 58 N. E. 770; Vedder *v.* Fellows, 20 N. Y. 126. But if its reasonableness under the circumstances of the particular case is involved then the question is one of mixed law and fact. Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62; Morris *v.* Atlantic Ave. R. Co., 116 N. Y. 552, 22 N. E. 1097, 27 N. Y. St. 667; Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451; Houston, etc., R. Co. *v.* Jackson, (Tex. Civ. App. 1901) 61 S. W. 440; Houston, etc., R. Co. *v.* White, (Tex. Civ. App. 1901) 61 S. W. 436; Brown *v.* Memphis, etc., R. Co., 7 Fed. 51. It is said, however, that as regulations are not necessarily by-laws, their validity depending on their reasonableness is a question for the jury. State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

66. Johnson *v.* Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199.

67. Whitesell *v.* Crane, 8 Watts & S. (Pa.) 369; Trotlinger *v.* East Tennessee, etc., R. Co., 11 Lea (Tenn.) 533; Gulf, etc., R. Co. *v.* Moody, (Tex. Civ. App. 1895) 30 S. W. 574.

ever, rules relating to the method in which employees shall conduct the business of the carrier, and regulating their authority, are not supposed to be known to the public, and a passenger is not charged with notice thereof, unless they are brought home to him.[68]

2. Regulations as to Paying Fare or Producing Ticket —a. Payment of Fare — (I) *In General.* The right of the carrier to exact payment in advance as a condition of the right of the passenger to transportation is unquestioned; yet as to regulations with reference to time and manner of payment some difficulties have arisen.[69] On demand of the conductor or other agent or servant properly empowered for the purpose, however, the passenger is under obligation to make payment, or produce a ticket showing payment, and such payment should be in legal tender money if required.[70] A regulation by which more fare is required of one person than of another under similar conditions is unreasonable, and cannot be enforced.[71]

(II) *Tender of Fare.* While the tender of more than the amount, with the requirement of the making of change may perhaps, under the ordinary usages of such business, be sufficient, yet the person making the tender cannot expect the agent or servant of the carrier to be prepared to make change in any amount, no matter how large, and there must be a reasonable approximation of the amount tendered to the fare.[72] The tender may be made, of course, to any agent or employee authorized to accept payment, but a tender to a brakeman on a freight train is not sufficient.[73]

But a posted notice as to the validity and effect of an unlimited ticket is not binding on the purchaser of such ticket. Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

68. Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

As to how far a passenger is chargeable with notice of rules of the company as to the authority of a conductor on a freight train to receive passengers see *supra*, III, B, 1, b, (II). And before the servants of the carrier attempt to enforce such rules as against the passenger, reasonable notice thereof should be given to him. Ft. Clark St. R. Co. *v.* Ebaugh, 49 Ill. App. 582; Compton *v.* Van Volkenburgh, 34 N. J. L. 134; Lane *v.* East Tennessee, etc., R. Co., 5 Lea (Tenn.) 124.

By allowing agents or servants to continue to act in violation of such rules and regulations as are made for their guidance the carrier waives the same with reference to the public. San Antonio, etc., R. Co. *v.* Lynch, (Tex. Civ. App. 1900) 55 S. W. 517; Texas, etc., R. Co. *v.* Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410; Eddy *v.* Rowell, (Tex. Civ. App. 1894) 26 S. W. 875.

But the previous existence of a contrary custom does not make it improper for the carrier to introduce and enforce a rule on the subject. Hobbs *v.* Texas, etc., R. Co., 49 Ark. 357, 5 S. W. 586.

69. For instance, it was attempted at one time by carriers in California to require payment of fare in gold, and no doubt such regulation was valid, but with reference to a passenger whose transportation had commenced before payment, it was held that the obligation to pay had become a debt, discharge of which could be made in any legal tender money. Tarbell *v.* Central Pac. R. Co., 34 Cal. 616. In the same case it is said that prepayment of fare is not essential to the creation of the relation of carrier and passenger, it being sufficient to allege that the passenger was ready and willing, and offered to pay the carrier such sum of money as the latter was legally entitled to charge. Tarbell *v.* Central Pac. R. Co., 34 Cal. 616. And see Pickford *v.* Grand Junction R. Co., 9 Dowl. P. C. 766, 5 Jur. 731, 8 M. & W. 372, 2 R. & Can. Cas. 592.

Where a maximum rate of fare is fixed by law the carrier cannot require payment of fare at that rate in gold coin instead of paper currency, which is legal tender, though of less value. Lewis *v.* New York Cent. R. Co., 49 Barb. (N. Y.) 330.

70. Jersey City, etc., R. Co. *v.* Morgan, 52 N. J. L. 60, 18 Atl. 904.

71. Phillips *v.* Southern R. Co., 114 Ga. 284, 40 S. E. 268; State *v.* Omaha, etc., R. Co., 113 Iowa 30, 84 N. W. 983, 86 Am. St. Rep. 357, 52 L. R. A. 315; Coy *v.* Detroit, etc., R. Co., 125 Mich. 616, 85 N. W. 6.

72. Thus it has been held that the tender of a five-dollar bill for a five-cent fare on a street-car is not a reasonable tender. Barker *v.* Central Park, etc., R. Co., 151 N. Y. 237, 45 N. E. 550, 56 Am. St. Rep. 626, 35 L. R. A. 489; Muldowney *v.* Pittsburg, etc., Traction Co., 8 Pa. Super. Ct. 335, 43 Wkly. Notes Cas. (Pa.) 52. But in Barrett *v.* Market St. R. Co., 81 Cal. 296, 22 Pac. 859, 15 Am. St. Rep. 61, 6 L. R. A. 336, it is held that while the tender must be reasonably approximate to the amount of the fare, the carrier was under obligation to furnish change, and that a tender of a five-dollar bill for a five-cent fare was not unreasonable.

73. Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457.

As to payment to brakeman see also *supra*, III, B, 1, b, (II).

(III) *Mistake of Conductor.*[74] If by mistake the conductor accepts a less amount than that due, the passenger does not, through such mistake, acquire the right to ride to his destination, but the mistake must be corrected on demand of the additional amount, and if not paid the passenger may be ejected for non-payment.[75]

(IV) *Mistake of Passenger.*[76] If the passenger by his own mistake, and without fault of the servants of the carrier, takes the wrong train, he is not entitled to transportation to the next stopping place without payment, but may be ejected as any other person on refusing to pay fare.[77]

b. Purchase of Ticket — (I) *In General.* If the carrier sees fit, by proper regulation, to require the passenger to procure a ticket before entering the train for transportation, such regulation may be enforced by the proper servants of the carrier.[78]

(II) *Extra Charge Upon Failure to Purchase.* Instead of excluding a passenger for not having procured a ticket[79] the carrier may properly exact a sum in addition to the amount which would have been charged for a ticket to the same destination, and such extra charge will not be unlawful as a discrimination,[80]

On street-cars it is sometimes arranged that fare be paid by dropping the amount in a box on the car, without intervention of the conductor. Nye v. Marysville, etc., St. R. Co., 97 Cal. 461, 32 Pac. 530; Corbett *v.* Twenty-Third St. R. Co., 42 Hun (N. Y.) 587; Perry *v.* Pittsburgh Union Pass. R. Co., 153 Pa. St. 236, 25 Atl. 772.

74. See *infra*, III, C, 3, e, (I).

75. Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163; Lake Erie, etc., R. Co. *v.* Mayo, 4 Ind. App. 413, 30 N. E. 1106; Curtis *v.* Louisville City R. Co., 94 Ky. 573, 15 Ky. L. Rep. 351, 23 S. W. 363, 21 L. R. A. 649; Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

76. See *infra*, III, C, 3, e, (II).

77. Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37; Illinois Cent. R. Co. *v.* Billington, 17 Ky. L. Rep. 271, 30 S. W. 885; New York, etc., R. Co. *v.* Feely, 163 Mass. 205, 40 N. E. 20; Missouri, etc., R. Co. *v.* Dawson, 10 Tex. Civ. App. 19, 29 S. W. 1106. But while on the train by mistake he is a passenger. See *supra*, III, B, 1, a, (I).

78. *Illinois.*— Illinois Cent. R. Co. *v.* Louthan, 80 Ill. App. 579; Chicago, etc., R. Co. *v.* Boger, 1 Ill. App. 472.

Indiana.— Pittsburgh, etc., R. Co. *v.* Vandyne, 57 Ind. 576, 26 Am. Rep. 68.

Michigan.—Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354.

New York.— Corwin *v.* Long Island R. Co., 2 N. Y. City Ct. 106.

Ohio.— Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457.

Texas.— International, etc., R. Co. *v.* Goldstein, 2 Tex. App. Civ. Cas. § 274.

Vermont.— Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337.

See 9 Cent. Dig. tit. "Carriers," § 1027.

79. See *infra*, III, C, 3.

80. *Illinois.*—Arnold *v.* Illinois Cent. R. Co., 83 Ill. 273, 25 Am. Rep. 383; St. Louis, etc., R. Co. *v.* South, 43 Ill. 176, 92 Am. Dec. 103; Chicago, etc., R. Co. *v.* Parks, 18 Ill. 460, 68 Am. Dec. 562.

Indiana.— Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771; Indianapolis, etc., R. Co. *v.* Rinard, 46 Ind. 293.

Iowa.— Ellsworth *v.* Chicago, etc., R. Co., 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173; Hoffbauer *v.* Delhi, etc., R. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278; State *v.* Chovin, 7 Iowa 204.

Kentucky.— Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498.

Louisiana.— McGowen *v.* Morgan's Louisiana, etc., R., etc., Co., 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817.

Minnesota.— State v. Hungerford, 39 Minn. 6, 38 N. W. 628; Du Laurans *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am. Rep. 102.

Ohio.— Cincinnati, etc., R. Co. *v.* Skillman, 39 Ohio St. 444.

Oregon.— Poole *v.* Northern Pac. R. Co., 16 Oreg. 261, 19 Pac. 107, 8 Am. St. Rep. 289.

Pennsylvania.— Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L. R. A. 529.

Tennessee.— Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451.

See 9 Cent. Dig. tit. "Carriers," § 1005.

Discount to purchasers.— The requirement for the purchase of a ticket may be enforced by giving a discount to those who purchase tickets instead of imposing an extra charge on those who do not. Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163; State *v.* Goold, 53 Me. 279.

Payment for further transportation.— If the passenger on the train desires to pay for further transportation, he may be required to pay the extra amount for not having purchased the ticket, although he has no opportunity to secure such ticket. Lake Erie, etc., R. Co. *v.* Quisenberry, 48 Ill. App. 338; Easton *v.* Waters, (Tex. App. 1890) 16 S. W. 540. *Contra*, Phettiplace *v.* Northern Pac. R. Co., 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483.

and the payment of the extra amount required may be enforced by expulsion from the train of one who refuses to pay.[81]

(III) *Opportunity to Purchase.*[82] As a condition precedent, however, to the enforcement of such regulation by expulsion of the passenger, the carrier must have afforded to the passenger a reasonable opportunity to procure a ticket. And if such reasonable opportunity has not been afforded, the passenger has the right to have the regular fare accepted for his transportation.[83] If the passenger arrives at the station too late to buy a ticket before entering upon the train, or does not attempt to do so, he is subject to the regulation.[84] But if there is no ticket office, or it is not kept open during a reasonable time before the departure of the train, so that a ticket may be bought, the regulation is not applicable.[85]

3. Exclusion or Rejection For Failure or Refusal to Comply With Regulations — a. In General. A proper method of enforcing a reasonable rule or regulation of the carrier as to the conduct of passengers is by ejecting from the train one who refuses to comply, and it is immaterial whether the violation of the rule is

The extra charge is not regarded as payment for transportation, but as a reasonable penalty for not complying with the requirement for the purchase of a ticket. Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L. R. A. 529.

Under statutes.— It is said that where by statute a maximum fare is fixed, the passenger cannot, in the absence of some provision therefor in the statute, be required to pay an extra amount on the train for not having procured a ticket. Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345, 45 Pac. 975; Zagelmeyer *v.* Cincinnati, etc., R. Co., 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514.

81. *Connecticut.*— Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Georgia.— Phillips *v.* Southern R. Co., 114 Ga. 284, 40 S. E. 268.

Illinois.— St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Lake Erie, etc., R. Co. *v.* Quisenberry, 48 Ill. App. 338; Chicago, etc., R. Co. *v.* Brisbane, 24 Ill. App. 463.

Indiana.— Toledo, etc., R. Co. *v.* Wright, 68 Ind. 586, 34 Am. Rep. 277; Evansville, etc., R. Co. *v.* Gilmore, 1 Ind. App. 468, 27 N. E. 992.

Kentucky.— Snellbaker *v.* Paducah, etc., R. Co., 94 Ky. 597, 15 Ky. L. Rep. 380, 23 S. W. 509; Wicks *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 605.

Louisiana.— McGowen *v.* Morgan's Louisiana, etc., R., etc., Co., 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817.

New Hampshire.— Hilliard *v.* Goold, 34 N. H. 230, 66 Am. Dec. 765.

South Carolina.— Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

Texas.— Houston, etc., R. Co. *v.* Faulkner, (Tex. Civ. App. 1901) 63 S. W. 655.

See 9 Cent. Dig. tit. "Carriers," § 1433.

82. See *infra*, III, C, 3, c, (II).

83. *Georgia.*— Phillips *v.* Southern R. Co., 114 Ga. 284, 40 S. E. 268; Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352; Georgia, Southern, etc., R. Co. *v.* Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53; Georgia, etc., Co. *v.* Murden, 86 Ga. 434, 12 S. E. 630.

Illinois.— Illinois Cent. R. Co. *v.* Johnson, 67 Ill. 312; Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

Indiana.— Cleveland, etc., R. Co. *v.* Beckett, 11 Ind. App. 547, 39 N. E. 429.

Minnesota.— Du Laurans *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am. Rep. 102.

New York.— Nellis *v.* New York Cent. R. Co., 30 N. Y. 505; Chase *v.* New York Cent. R. Co., 26 N. Y. 523; Porter *v.* New York Cent. R. Co., 34 Barb. (N. Y.) 353.

Oregon.— Poole *v.* Northern Pac. R. Co., 16 Oreg. 261, 19 Pac. 107, 8 Am. St. Rep. 289.

Texas.— Fordyce *v.* Manuel, 82 Tex. 527, 18 S. W. 657; Eddy *v.* Rider, 79 Tex. 53, 15 S. W. 113; Gulf, etc., R. Co. *v.* Sparger, (Tex. Civ. App. 1897) 39 S. W. 1001.

West Virginia.—White *v.* Chesapeake, etc., R. Co., 26 W. Va. 800.

Wisconsin.— Phettiplace *v.* Northern Pac. R. Co., 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483.

United States.— Harrison *v.* Fink, 42 Fed. 787.

See 9 Cent. Dig. tit. "Carriers," § 1006.

It has been held, however, that the rule requiring extra amount of fare if payment is made on the train, may be enforced regardless of any opportunity to purchase a ticket. Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

If the railroad company has been at fault in rendering it impracticable for the passenger to procure a ticket, the conductor, with knowledge of the facts, should not enforce the extra payment. Louisville, etc., R. Co. *v.* Wilsey, 11 Ky. L. Rep. 419, 12 S. W. 275, 5 L. R. A. 855.

84. Lake Erie, etc., R. Co. *v.* Mayo, 4 Ind. App. 413, 30 N. E. 1106; Union Pac. R. Co. *v.* Wolf, 54 Kan. 592, 38 Pac. 786.

85. Bowsher *v.* Chicago, etc., R. Co., 113 Iowa 16, 84 N. W. 958; Snellbaker *v.* Paducah, etc., R. Co., 94 Ky. 597, 15 Ky. L. Rep. 380, 23 S. W. 509; McGowen *v.* Morgan's Louisiana, etc., R., etc., Co., 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817; Forsee *v.* Alabama Great Southern R. Co., 63 Miss. 66, 56 Am. Rep. 801.

Time of keeping office open.— It is not

an inconvenience to other passengers or to the carrier in the particular instance, if the rule is a proper one.[86] The enforcement must be reasonable and in good faith, and the passenger should not be ejected if it appears to the servant acting for the company that failure to comply has been without fault on the part of the passenger.[87]

b. Disorderly Conduct; Obnoxious Persons. As the carrier has the right to exclude from his trains persons who by their conduct or condition cause annoyance or offense to other passengers, or interfere with the carrier's legitimate business, it is proper to expel such persons, though otherwise entitled to ride as passengers. Such right of expulsion may be exercised with reference to persons who have a contagious disease,[88] or are intoxicated,[89] or are unruly,[90] or use vulgar, indecent, or profane language.[91] And if the conduct or condition of the person

necessary that the ticket office be kept open until the very moment of departure of the train if the agent, in the usual course of the practicable discharge of his duties, has afforded opportunity for the purchase of tickets. Everett *v.* Chicago, etc., R. Co., 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207; State *v.* Hungerford, 39 Minn. 6, 38 N. W. 628. What is a reasonable time is to be determined by the jury with reference to the requirements, convenience, and demand of the public at the station in question. Everett *v.* Chicago, etc., R. Co., 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207.

Statutory provisions.— The matter is in some states regulated by statute. Where the requirement is that the office be kept open a certain time before the time fixed by schedule for departure of the train, it is not necessary that an opportunity be afforded for the purchase of a ticket after the schedule time for departure, although the train is late. St. Louis, etc., R. Co. *v.* South, 43 Ill. 176, 92 Am. Dec. 103; Illinois Cent. R. Co. *v.* Bauer, 66 Ill. App. 124; Chicago, etc., R. Co. *v.* Brisbane, 24 Ill. App. 463; Swan *v.* Manchester, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432. But if the statute requires that the office be kept open a certain length of time before the starting of the train, the passenger cannot be required to pay the excess if such regulation is not complied with, even though the office was kept open for the required time before the schedule time for departure. Atchison, etc., R. Co. *v.* Hogue, 50 Kan. 40, 31 Pac. 698; Atchison, etc., R. Co. *v.* Dwelle, 44 Kan. 394, 24 Pac. 500. If the statute as to keeping the office open for a specified time is not complied with the excess cannot be charged, even though the passenger did not apply for a ticket during that time. Missouri Pac. R. Co. *v.* McClanahan, 66 Tex. 530, 1 S. W. 576.

86. *Illinois.*— Ft. Clark St. R. Co. *v.* Ebaugh, 49 Ill. App. 582.

Iowa.—Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532.

New York.— Butler *v.* Steinway R. Co., 87 Hun (N. Y.) 10, 33 N. Y. Suppl. 845, 67 N. Y. St. 497; Montgomery *v.* Buffalo R. Co., 24 N. Y. App. Div. 454, 48 N. Y. Suppl. 849.

Oklahoma.— Decker *v.* Atchison, etc., R. Co., 3 Okla. 553, 41 Pac. 610.

Pennsylvania.— Com. *v.* Mansfield, 29 Leg. Int. (Pa.) 124.

Texas.— Gulf, etc., R. Co. *v.* Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009.

Virginia.— Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

See 9 Cent. Dig. tit. "Carriers," § 1439.

87. Hall *v.* Power, 12 Metc. (Mass.) 382, 46 Am. Dec. 698; Penfield *v.* Cleveland, etc., R. Co., 26 N. Y. App. Div. 413, 50 N. Y. Suppl. 79; Wightman *v.* Chicago, etc., R. Co., 73 Wis. 169, 40 N. W. 689, 9 Am. St. Rep. 778, 2 L. R. A. 185. One who sees fit to ride on a street-car is bound to submit to reasonable regulations with reference thereto, without regard to any excuse he may have for desiring to violate them. Montgomery *v.* Buffalo R. Co., 165 N. Y. 139, 58 N. E. 770.

Violation of a rule as to method of entering a train or like matter, while it may properly be enforced by preventing the act forbidden (Toledo, etc., R. Co. *v.* Williams, 77 Ill. 354; Illinois Cent. R. Co. *v.* Loutham, 80 Ill. App. 579), should not be made the ground for subsequent expulsion when the occasion for enforcing the rule has passed (Burke *v.* Missouri Pac. R. Co., 51 Mo. App. 491; Hart *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 521, 69 N. Y. Suppl. 906; Smith *v.* Manhattan R. Co., 18 N. Y. Suppl. 759, 45 N. Y. St. 865).

88. Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231.

89. Converse *v.* Washington, etc., R. Co., 2 MacArthur (D. C.) 504; Atchison, etc., R. Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; Hudson *v.* Lynn, etc., R. Co., 178 Mass. 64, 59 N. E. 647; Murphy *v.* Union R. Co., 118 Mass. 228; Edgerly *v.* Union St. R. Co., 67 N. H. 312, 36 Atl. 558.

90. Peavy *v.* Georgia R., etc., Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334; O'Laughlin *v.* Boston, etc., R., 164 Mass. 139, 41 N. E. 121; West Chester, etc., R. Co. *v.* Miles, 55 Pa. St. 209, 93 Am. Dec. 744; Gulf, etc., R. Co. *v.* Adams, 3 Tex. App. Civ. Cas. § 422.

91. Robinson *v.* Rockland, etc., R. Co., 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530; Eads *v.* Metropolitan R. Co., 43 Mo. App. 536.

Disturbance of other passengers.— But to constitute ground for expulsion the objectionable language must be used in a tone sufficiently loud to annoy and disturb other passengers. Chicago City R. Co. *v.* Pelletier, 134 Ill. 120, 24 N. E. 770.

One who protests with the conductor against what he considers unnecessary roughness in

is such as to reasonably warrant the anticipation of inconvenience or annoyance he may be expelled before any improper act has been committed.[92] The same right of control or expulsion may be exercised with reference to the waiting-room of the carrier.[93] The carrier may also exclude from his conveyance or premises persons who without his consent are attempting to make use thereof for carrying on an independent business of their own.[94]

c. **Refusal to Pay Fare, or Produce Ticket** — (i) *In General.* For refusal to pay the required fare for transportation the reasonable and usual remedy is expulsion.[95] So, if the ticket offered is void or otherwise not such as to entitle the person offering it to transportation at the time and on the train for which it is offered, the passenger refusing to pay fare or otherwise show himself entitled to transportation may be expelled.[96] It is a usual and reasonable requirement that

handling an intoxicated person does not thereby subject himself to expulsion. Weber *v.* Brooklyn, etc., R. Co., 47 N. Y. App. Div. 306, 62 N. Y. Suppl. 1.

The duty of the conductor to remove or control disorderly persons is incident to his business and the responsibility which he assumes in undertaking such duties for the safety and comfort of the passengers. Putnam *v.* Broadway, etc., R. Co., 55 N. Y. 108, 14 Am. Rep. 190.

The passenger is required to demean himself in such way as not to be offensive, vulgar, or obscene, or grossly disagreeable to his fellow passengers, or expose them to suffering or danger. For failure on his part in these respects he may be removed. Murphy *v.* Western, etc., R. Co., 23 Fed. 637.

Where, after a passenger had surrendered his ticket, the conductor improperly asked him a second time for his fare, and proceeded to eject him for non-payment, it was held that the subsequent use of improper language on the part of the passenger would not excuse his improper expulsion. Louisville, etc., R. Co. *v.* Wolfe, 128 Ind. 347, 27 N. E. 606, 25 Am. St. Rep. 436.

92. Lemont *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 180, 47 Am. Rep. 238; Vinton *v.* Middlesex R. Co., 11 Allen (Mass.) 304, 87 Am. Dec. 714; People *v.* Caryl, 3 Park. Crim. (N. Y.) 326.

As to refusing passage to obnoxious persons see *supra*, III, A, 2, b.

93. Chicago, etc., R. Co. *v.* Randolph, 65 Ill. App. 208; Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543; Com. *v.* Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; McKernan *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 354.

94. Com. *v.* Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; Barney *v.* The D. R. Martin, 11 Blatchf. (U. S.) 233, 2 Fed. Cas. No. 1,030, 8 Alb. L. J. 54, 8 Am. L. Rev. 169, 5 Chic. Leg. N. 535, 18 Int. Rev. Rec. 55, 21 Pittsb. Leg. J. (Pa.) 10. See also *supra*, III, A, 2, b.

95. *Alabama.*— Louisville, etc., R. Co. *v.* Johnson, 92 Ala. 204, 9 So. 269, 25 Am. St. Rep. 35.

California.— Cox *v.* Los Angeles Terminal R. Co., 109 Cal. 100, 41 Pac. 794; Nye *v.* Marysville, etc., St. R. Co., 97 Cal. 461, 32 Pac. 530.

Illinois.— Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59.

Indiana.— Baltimore, etc., R. Co. *v.* McDonald, 68 Ind. 316.

Iowa.— Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458.

Kentucky.— Cincinnati, etc., R. Co. *v.* Barkley, 13 Ky. L. Rep. 331.

Maine.— State *v.* Goold, 53 Me. 279.

Massachusetts.— Hudson *v.* Lynn, etc., R. Co., 178 Mass. 64, 59 N. E. 647.

Mississippi.— Memphis, etc., R. Co. *v.* Chastine, 54 Miss. 503.

Missouri.—Shular *v.* St. Louis, etc., R. Co., 92 Mo. 339, 2 S. W. 310.

New Jersey.— State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

Ohio.— Cincinnati, etc., R. Co. *v.* Skillman, 39 Ohio St. 444; Shelton *v.* Lake Shore, etc., R. Co., 29 Ohio St. 214.

See 9 Cent. Dig. tit. "Carriers," § 1416.

Where a passenger in a street-car had paid his fare in accordance with a posted notice by putting his money into a money-box, and the driver subsequently passing through the car to see that fares had been paid demanded another fare, with knowledge of the facts, it was held that expulsion for non-payment of the additional fare was wrongful. Perry *v.* Pittsburgh Union Pass. R. Co., 153 Pa. St. 236, 25 Atl. 772.

96. *Illinois.*— Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59; Terre Haute, etc., R. Co. *v.* Vanatta, 21 Ill. 188, 74 Am. Dec. 96; Chicago, etc., R. Co. *v.* Bannerman, 15 Ill. App. 100; St. Louis, etc., R. Co. *v.* Carroll, 13 Ill. App. 585.

Indiana.— Terre Haute, etc., R. Co. *v.* Fitzgerald, 47 Ind. 79.

Louisiana.— De Lucas *v.* New Orleans, etc., R. Co., 38 La. Ann. 930.

Michigan.— Keen *v.* Detroit Electric R. Co., 123 Mich. 247, 81 N. W. 1084.

Nebraska.— Post *v.* Chicago, etc., R. Co., 14 Nebr. 110, 15 N. W. 225, 45 Am. Rep. 100.

New York.— Henly *v.* Delaware, etc., R. Co., 28 Misc. (N. Y.) 499, 59 N. Y. Suppl. 857.

Texas.— Breen *v.* Texas, etc., R. Co., 50 Tex. 43.

Vermont.— Thorp *v.* Concord R. Co., 61 Vt. 378, 17 Atl. 791.

West Virginia.— Moore *v.* Ohio River R. Co., 41 W. Va. 160, 23 S. E. 539.

the passenger shall not only have a ticket, or other evidence of his right to transportation, but also shall present it when required by the conductor, or surrender it on demand, and for refusal to do so he may be expelled.[97]

(II) *Opportunity to Pay Fare or Produce Ticket.*[98] The passenger is entitled to a reasonable time in which to present his ticket or check or pay his fare before being expelled, and if he is acting in good faith the conductor has no right to eject him from the train without affording him a reasonable opportunity to make payment or to find and present his ticket or check, if lost or mislaid.[99]

(III) *Transportation on Freight Train.* Special conditions are sometimes attached to the privilege of transportation on freight trains, such as that the passenger shall have procured a ticket, or, in addition to a ticket, a permit to ride on such train, or the like, and one who insists on transportation on a freight train in violation of such conditions may be expelled.[1]

See 9 Cent. Dig. tit. "Carriers," § 1423.

Where a street-car transfer was good only when presented at the transfer point indicated, held that a passenger attempting to use a transfer ticket at a different point, though on the same route, might be expelled on refusal to pay the usual fare. Percy *v.* Metropolitan St. R. Co., 58 Mo. App. 75.

97. *Connecticut.*— Downs *v.* New York, etc., R. Co., 36 Conn. 287, 4 Am. Rep. 77; Havens *v.* Hartford, etc., R. Co., 28 Conn. 69.

Massachusetts.— Standish *v.* Narragansett Steamship Co., 111 Mass. 512, 15 Am. Rep. 66.

Michigan.— Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354.

Missouri.— Woods *v.* Metropolitan St. R. Co., 48 Mo. App. 125.

New Hampshire.— State *v.* Thompson, 20 N. H. 250.

New York.— Vedder *v.* Fellows, 20 N. Y. 126; Northern R. Co. *v.* Page, 22 Barb. (N. Y.) 130; Weaver *v.* Rome, etc., R. Co., 3 Thomps. & C. (N. Y.) 270.

Texas.— International, etc., R. Co. *v.* Goldstein, 2 Tex. App. Civ. Cas. § 274.

Canada.— Grand Trunk R. Co. *v.* Beaver, 22 Can. Supreme Ct. 498.

See 9 Cent. Dig. tit. "Carriers," § 1027.

Illustrations.— Thus, if the passenger has sold or disposed of his ticket, even though it is non-transferable, or has lost it, so that he is unable to exhibit it, and refuses to pay fare, he may be ejected. Downs *v.* New York, etc., R. Co., 36 Conn. 287, 4 Am. Rep. 77; Louisville, etc., R. Co. *v.* Maybin, 66 Miss. 83, 5 So. 401; Rogers *v.* Atlantic City R. Co., 57 N. J. L. 703, 34 Atl. 11; Ripley *v.* New Jersey R., etc., Co., 31 N. J. L. 388; Crawford *v.* Cincinnati, etc., R. Co., 26 Ohio St. 580. A passenger attempting to land from a steamboat without surrender of his ticket, claiming to have lost it, may be detained for a reasonable time for inquiry on the spot as to the circumstances and the truth of his claim. Standish *v.* Narragansett Steamship Co., 111 Mass. 512, 15 Am. Rep. 66. So, if the passenger having a check given him by one conductor fails to produce it on demand by a succeeding conductor, and refuses to pay fare, he may be expelled. Jerome *v.* Smith, 48 Vt. 230, 21 Am. Rep. 125; Price *v.* Chesapeake, etc., R. Co., 46 W. Va. 538, 33 S. E. 255. If the passenger refuses to comply with a reasonable regulation as to surrender or presentation of his ticket he may be expelled, even though the conductor has before seen such ticket, or has had knowledge of his purchase thereof. Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455. But in case of ejection of a passenger who has previously delivered up his ticket the presumption is against the carrier. Georgia R. Co. *v.* Homer, 73 Ga. 251. Where the purchaser of a round trip ticket in two parts offers to surrender the portion for the return trip, not having used the first part, he cannot be required to surrender the first part, even though the carrier's rules so provide. Chicago, etc., R. Co. *v.* Holdridge, 118 Ind. 281, 20 N. E. 837.

98. See *supra*, III, C, 2, b, (III).

99. *Connecticut.*— Maples *v.* New York, etc., R. Co., 38 Conn. 557, 9 Am. Rep. 434.

Illinois.— Chicago, etc., R. Co. *v.* Willard, 31 Ill. App. 435.

Iowa.— Curl *v.* Chicago, etc., R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308.

Michigan.— Ferguson *v.* Michigan Cent. R. Co., 98 Mich. 533, 57 N. W. 801.

Missouri.— Holt *v.* Hannibal, etc., R. Co., 87 Mo. App. 203.

North Carolina.— Clark *v.* Wilmington, etc., R. Co., 91 N. C. 506, 49 Am. Rep. 647.

Texas.— International, etc., R. Co. *v.* Wilkes, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515; Texas, etc., R. Co. *v.* Bond, 62 Tex. 442, 50 Am. Rep. 532.

See 9 Cent. Dig. tit. "Carriers," § 1417.

1. *Alabama.*— South, etc., Alabama R. Co. *v.* Huffman, 76 Ala. 492, 52 Am. Rep. 349.

Illinois.— Toledo, etc., R. Co. *v.* Patterson, 63 Ill. 304; Illinois Cent. R. Co. *v.* Nelson, 59 Ill. 110.

Indiana.— Indianapolis, etc., R. Co. *v.* Kennedy, 77 Ind. 507; Falkner *v.* Ohio, etc., R. Co., 55 Ind. 369; St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566.

Kansas.— Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

Michigan.— Thomas *v.* Chicago, etc., R. Co., 72 Mich. 355, 40 N. W. 463.

Missouri.— Claybrook *v.* Hannibal, etc., R. Co., 19 Mo. App. 432; Jones *v.* Wabash, etc., R. Co., 17 Mo. App. 158.

(iv) *When Time Limit Has Expired.* If the ticket contains a valid limitation as to the time within which it may be used, one who insists on transportation thereunder after the expiration of the limit may be expelled.[2]

(v) *When Provision as to Stamping Has Not Been Complied With.* Where round trip tickets are sold with the condition that they are to be stamped by an agent, on identification of the person presenting the ticket as the purchaser, or otherwise, one who insists on being transported under the return portion of the ticket without compliance with the condition may be expelled.[3]

d. Payment or Tender of Fare to Prevent Expulsion — (i) *Before Steps Taken For Expulsion.* If, before any steps are taken by the servants in charge of the train to eject the passenger for non-compliance with the rule as to paying fare or producing ticket, the passenger tenders the fare or otherwise shows himself able and willing to comply with the rules and regulations of the carrier he cannot be ejected.[4] If the conductor demands more than the fare

Nebraska.— Burlington, etc., R. Co. *v.* Rose, 11 Nebr. 177, 8 N. W. 433.

Pennsylvania.— Lake Shore, etc., R. Co. *v.* Greenwood, 79 Pa. St. 373.

Tennessee.— Lane *v.* East Tennessee, etc., R. Co., 5 Lea (Tenn.) 124.

See 9 Cent. Dig. tit. "Carriers," § 1419.

Reasonable opportunity to procure ticket.— If the condition, however, is that the passenger on a freight train must have provided himself with a ticket, the carrier cannot enforce the condition unless reasonable opportunity to procure a ticket has been offered.

Alabama.— Evans *v.* Memphis, etc., R. Co., 56 Ala. 246, 28 Am. Rep. 771.

Indiana.— St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566.

Kansas.— Brown *v.* Kansas City, etc., R. Co., 38 Kan. 634, 16 Pac. 942; Southern Kan. R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

Minnesota.—Reed *v.* Great Northern R. Co., 76 Minn. 163, 78 N. W. 974.

Missouri.— Cross *v.* Kansas City, etc., R. Co., 56 Mo. App. 664.

See 9 Cent. Dig. tit. "Carriers," § 1419.

2. *Georgia.*— Southern R. Co. *v.* Howard, 111 Ga. 842, 36 S. E. 213; Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209; Georgia Cent. R. Co. *v.* Ricks, 109 Ga. 339, 34 S. E. 570; Lewis *v.* Western, etc., R. Co., 93 Ga. 225, 18 S. E. 650.

Iowa.— Trezona *v.* Chicago Great Western R. Co., 107 Iowa 22, 77 N. W. 486, 43 L. R. A. 136.

Louisiana.—Rawitzky *v.* Louisville, etc., R. Co., 40 La. Ann. 47, 3 So. 387.

Maryland.— Pennington *v.* Philadelphia, etc., R. Co., 62 Md. 95.

Mississippi.— Illinois Cent. R. Co. *v.* Marlett, 75 Miss. 956, 23 So. 583.

New York.— Hill *v.* Syracuse, etc., R. Co., 63 N. Y. 101; Elmore *v.* Sands, 54 N. Y. 512, 13 Am. Rep. 617; Kelsey *v.* Michigan Cent. R. Co., 28 Hun (N. Y.) 460; Barker *v.* Coflin, 31 Barb. (N. Y.) 556.

Texas.— Texas, etc., R. Co. *v.* Demilley, (Tex. Civ. App. 1897) 41 S. W. 147; Gulf, etc., R. Co. *v.* Halbrook, 12 Tex. Civ. App. 475, 33 S. W. 1028.

West Virginia.— Grogan *v.* Chesapeake, etc., R. Co., 39 W. Va. 415, 19 S. E. 563.

See 9 Cent. Dig. tit. "Carriers," § 1425.

If the restriction does not appear on the ticket, but is based on some rule not known to him, a passenger attempting to use it in good faith in violation of the rule cannot be expelled. Maroney *v.* Old Colony, etc., R. Co., 106 Mass. 153, 8 Am. Rep. 305.

Where the privilege of stopping over can be secured under the regulations of the carrier only by applying to the conductor and having the privilege indorsed on the ticket, one who attempts to use such ticket not indorsed after having stopped over may be expelled. Beebe *v.* Ayres, 28 Barb. (N. Y.) 275; Dunphy *v.* Erie R. Co., 42 N. Y. Super. Ct. 128; Denny *v.* New York Cent., etc., R. Co., 5 Daly (N. Y.) 50.

3. *Alabama.*—McGhee *v.* Reynolds, 117 Ala. 413, 23 So. 68.

Georgia.— Georgia Cent. R. Co. *v.* Cannon, 106 Ga. 828, 32 S. E. 874; Southern R. Co. *v.* McKenzie, 102 Ga. 313, 29 S. E. 869; Morse *v.* Southern R. Co., 102 Ga. 302, 29 S. E. 865; Moses *v.* East Tennessee, etc., R. Co., 73 Ga. 356.

Maryland.— Western Maryland R. Co. *v.* Stocksdale, 83 Md. 245, 34 Atl. 880.

Michigan.—Edwards *v.* Lake Shore, etc., R. Co., 81 Mich. 364, 45 N. W. 827, 21 Am. St. Rep. 527.

Tennessee.— Sinnott *v.* Louisville, etc., R. Co., 104 Tenn. 233, 56 S. W. 836.

Texas.— Abram *v.* Gulf, etc., R. Co., 83 Tex. 61, 18 S. W. 321.

Virginia.— Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

United States.— Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 10 S. Ct. 50, 33 L. ed. 290.

See 9 Cent. Dig. tit. "Carriers," § 1424.

4. Kansas City, etc., R. Co. *v.* Holden, 66 Ark. 602, 53 S. W. 45; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126; Fordyce *v.* Belcher, 2 Tex. Civ. App. 29, 21 S. W. 179.

Having accepted regular fare from a passenger who claimed that he had obtained a ticket and lost it, held that the conductor could not afterward eject for refusal to pay an additional sum for not having a ticket. Louisville, etc., R. Co. *v.* Joplin, 21 Ky. L. Rep. 1380, 55 S. W. 206.

Mere willingness to pay the fare, not com-

which the passenger should be required to pay, the passenger need not tender the right amount, but may refuse to pay the amount demanded, and, if ejected, recover damages.[5] Where a child of immature years is in charge of a parent, on refusal of the parent to pay the lawful fare of the child the parent and child may both be ejected, although the fare for the parent has been paid or tendered.[6] Misconduct of the person who, after violation of the rules as to paying fare or producing ticket and threat of expulsion, has tendered full fare may be such as to amount to a forfeiture of his right to remain on the train so that the conductor may properly eject him.[7]

(II) *After Steps Taken For Expulsion.* After the person seeking transportation has refused to comply with the rules of the carrier as to payment of fare or production of ticket or otherwise, and the servants of the carrier have taken steps, by ringing for the stoppage of the train or the like, to eject him, he cannot then, by tendering compliance, entitle himself to transportation and make the subsequent ejection wrongful.[8] Nor, after being expelled from the

municated to the conductor, will not render the subsequent ejection wrongful. Texas Pac. R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

Tender made by third person.—If the tender is made by another person, although under no obligation to pay the fare of the one to be ejected, it should be accepted by the conductor, and a subsequent ejection will be wrongful. Baltimore, etc., R. Co. *v.* Norris, 17 Ind. App. 189, 46 N. E. 554; O'Brien *v.* New York Cent., etc., R. Co., 80 N. Y. 236; Guy *v.* New York, etc., R. Co., 30 Hun (N. Y.) 399; Ham *v.* Delaware, etc., Canal Co., 142 Pa. St. 617, 21 Atl. 1012; Louisville, etc., R. Co. *v.* Garrett, 8 Lea (Tenn.) 438, 41 Am. Rep. 640.

5. Curtis *v.* Louisville City R. Co., 94 Ky. 573, 15 Ky. L. Rep. 351, 23 S. W. 363, 21 L. R. A. 649; Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498; Adams *v.* Union R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273.

6. Philadelphia, etc., R. Co. *v.* Hoeflich, 62 Md. 300, 50 Am. Rep. 223; Braun *v.* Northern Pac. R. Co., 79 Minn. 404, 82 N. W. 675, 984, 79 Am. St. Rep. 497, 49 L. R. A. 319; Lake Shore, etc., R. Co. *v.* Orndorff, 55 Ohio St. 589, 45 N. E. 447, 60 Am. St. Rep. 716, 38 L. R. A. 140.

A child, however, may be ejected, notwithstanding the parent is accompanying it, without the ejection of the parent, if the parent has paid fare for himself but not for the child. Beckwith *v.* Cheshire R. Co., 143 Mass. 68, 8 N. E. 875.

On the other hand, if through mistake of the conductor in judging of the age of the child such child is wrongfully ejected for insufficient payment of fare, the parent in charge of the child may also leave the train and recover damages for ejection, although her fare had been accepted. Gibson *v.* East Tennessee, etc., R. Co., 30 Fed. 904.

Where several children were traveling with their parents, who refused to pay fare for any of them, and the conductor required that certain of the children should leave the train for whom fare should have been paid, held that another child, not required to leave the train, could not recover damages for unlawful ejection. Cox *v.* Los Angeles Terminal R. Co., 109 Cal. 100, 41 Pac. 749; Pittsburgh, etc., R. Co. *v.* Dewin, 86 Ill. 296.

The fact that an adult son traveling with his father is required to leave the train for violation of the rules of the carrier does not justify the expulsion of his father accompanying him and who has complied with the rules. Louisville, etc., R. Co. *v.* Maybin, 66 Miss. 83, 5 So. 401.

7. Gould *v.* Chicago, etc., R. Co., 5 McCrary (U. S.) 502, 18 Fed. 155. But in a particular case held that the misconduct was not such as to justify the conductor in refusing to accept the fare when tendered. Baltimore, etc., R. Co. *v.* Norris, 17 Ind. App. 189, 46 N. E. 554.

8. *Georgia.*— Georgia Southern R. Co. *v.* Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

Illinois.— Illinois Cent. R. Co. *v.* Bauer, 66 Ill. App. 124.

Iowa.— Hoffbauer *v.* Delhi, etc., R. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278.

Kansas.— Atchison, etc., R. Co. *v.* Dwelle, 44 Kan. 394, 24 Pac. 500.

Massachusetts.— O'Brien *v.* Boston, etc., R. Co., 15 Gray (Mass.) 20, 77 Am. Dec. 347.

New York.— Pease *v.* Delaware, etc., R. Co., 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699; Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455; People *v.* Jillson, 3 Park. Crim. (N. Y.) 234.

North Carolina.— Pickens *v.* Richmond, etc., R. Co., 104 N. C. 312, 10 S. E. 556.

Ohio.— Cincinnati, etc., R. Co. *v.* Skillman, 39 Ohio St. 444.

Tennessee.— Louisville, etc., R. Co. *v.* Harris, 9 Lea (Tenn.) 180, 42 Am. Rep. 668.

Texas.— Galveston, etc., R. Co. *v.* Turner, (Tex. Civ. App. 1893) 23 S. W. 83.

United States.— Harrison *v.* Fink, 42 Fed. 787.

See 9 Cent. Dig. tit. "Carriers," § 1435.

The conductor is not obliged to take back a passenger who has been put off the train for non-compliance with a rule; certainly not unless it be at a regular station, and ticket

train, can he by tender of fare or ticket for further transportation entitle himself to be transported on that train.[9] At any rate, one who has been ejected for refusal to pay fare or produce a ticket may be required, as a condition for further transportation, to pay fare from the point of commencement of the transportation for which he has not paid, as well as for further transportation on the same train.[10]

e. Mistake as to Right of Transportation — (I) *Conductor's Mistake*[11] — (A) *Generally.* If the passenger has done what is necessary under the rules of the carrier to entitle him to transportation, the carrier will be liable for his expulsion from the train by reason of mistake or want of judgment on the part of the conductor, although he acts in good faith.[12] But if the conductor has by mistake taken a less amount of fare than should have been required, and subsequently demands the balance, which the passenger refuses to pay, the latter may be expelled if he attempts to ride further than the distance for which he has paid.[13]

(B) *Mistake of First Conductor.* The same principles which govern the case where an agent wrongfully fails to furnish the passenger the evidence of right to transportation to which he is entitled[14] are applicable also where one conductor should furnish to the passenger the evidence to be presented to a succeeding conductor of the passenger's right to continue his journey, and if by mistake or negligence of the first conductor the passenger is ejected by the second conductor, although the act of the second conductor may be properly the fault of the first conductor, the carrier will be liable for the expulsion.[15] And if the conductor

or fare is tendered. Nelson *v.* Long Island R. Co., 7 Hun (N. Y.) 140.

9. Swan *v.* Manchester, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432; O'Brien *v.* Boston, etc., R. Co., 15 Gray (Mass.) 20, 77 Am. Dec. 347; State *v.* Campbell, 32 N. J. L. 309. *Contra*, see Louisville, etc., R. Co. *v.* Breckinridge, 99 Ky. 1, 17 Ky. L. Rep. 1303, 34 S. W. 702, where it is held that the person expelled at a regular station has the same right to further transportation as any other member of the general public.

10. *Alabama.*— Manning *v.* Louisville, etc., R. Co., 95 Ala. 392, 11 So. 8, 36 Am. St. Rep. 225, 16 L. R. A. 55.

Illinois.— Chicago, etc., R. Co. *v.* Adams, 60 Ill. App. 571.

Iowa.— Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458.

Missouri.— Davis *v.* Kansas City, etc., R. Co., 53 Mo. 317, 14 Am. Rep. 457.

New York.— Ward *v.* New York Cent., etc., R. Co., 56 Hun (N. Y.) 268, 9 N. Y. Suppl. 377, 30 N. Y. St. 604.

See 9 Cent. Dig. tit. "Carriers," § 1422.

11. See *supra*, III, C, 2, a, (III).

12. *Georgia.*— Atlanta Consol. St. R. Co. *v.* Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824; Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Indiana.— Chicago, etc., R. Co. *v.* Conley, 6 Ind. App. 9, 32 N. E. 96.

Massachusetts.— Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.) 465, 64 Am. Dec. 83.

Missouri.— Graham *v.* Pacific R. Co., 66 Mo. 536.

Nevada.— Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

New York.— Higgins *v.* Watervliet Turnpike, etc., R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Regner *v.* Glens Falls, etc., R. Co., 74 Hun (N. Y.) 202, 26 N. Y. Suppl. 625, 56 N. Y. St. 300.

Texas.— Gulf, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1896) 34 S. W. 449.

West Virginia.— Sheets *v.* Ohio River R. Co., 39 W. Va. 475, 20 S. E. 566.

Where a lunatic on a train in charge of his father, who had paid his fare, was left alone for a time without any evidence of his right to ride, and the conductor, in ignorance of his condition and not knowing that his fare had been paid, ejected him, held that the carrier was not liable, the conductor being in no way at fault. Willetts *v.* Buffalo, etc., R. Co., 14 Barb. (N. Y.) 585.

13. McCarthy *v.* Chicago, etc., R. Co., 41 Iowa 432; Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

14. See *infra*, III, C, 3, e, (III).

15. *California.*— Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320.

Illinois.— Ohio, etc., R. Co. *v.* Cope, 36 Ill. App. 97.

Indiana.— Lake Erie, etc., R. Co. *v.* Fix, 88 Ind. 381, 45 Am. Rep. 464; Pittsburg, etc., R. Co. *v.* Hennigh, 39 Ind. 509.

Maryland.— Philadelphia, etc., R. Co. *v.* Rice, 64 Md. 63, 21 Atl. 97.

Minnesota.— Appleby *v.* St. Paul City R. Co., 54 Minn. 169, 55 N. W. 1117, 40 Am. St. Rep. 308.

New York.— Ray *v.* Cortland, etc., Traction Co., 19 N. Y. App. Div. 530, 46 N. Y. Suppl. 521; Muckle *v.* Rochester R. Co., 79 Hun (N. Y.) 32, 29 N. Y. Suppl. 732, 61 N. Y. St. 193; Townsend *v.* New York Cent., etc., R. Co., 4 Hun (N. Y.) 217, 6 Thomps. & C. (N. Y.) 495.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Bambrey, (Pa. 1888) 16 Atl. 67.

knows, or has good reason to know, that the passenger is entitled to transportation, the carrier will be liable for expulsion, although the evidence of the right to ride which the passenger produces is technically irregular or insufficient.[16]

(II) *Passenger's Mistake*[17] — (A) *Generally.* On the other hand, the mistake of the passenger as to the sufficiency of his ticket to entitle him to ride, which is not due to any fault of the agents or servants of the carrier, will not excuse him from compliance with the rules and regulations, even though he acts in good faith, and he may be ejected.[18]

(B) *Taking Wrong Train.* In general it is the duty of the passenger to ascertain what train will take him to his destination, and if by mistake, without being misled by those authorized to act for the carrier in the matter, he takes the wrong train, or one which does not stop at his point of destination, he may properly be expelled.[19]

South Carolina.— Palmer *v.* Charlotte, etc., R. Co., 3 S. C. 580, 16 Am. Rep. 750.

Tennessee.— O'Rourke *v.* Citizens' St. R. Co., 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L. R. A. 614.

United States.— Scofield *v.* Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224; New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 12 S. Ct. 356, 36 L. ed. 71.

See 9 Cent. Dig. tit. "Carriers," § 1420.

Passenger's explanations.— It is unsafe to lay down a rule, as is done in Kansas City, etc., R. Co. *v.* Riley, 68 Miss. 765, 9 So. 443, 24 Am. St. Rep. 309, 13 L. R. A. 38, that the succeeding conductor must accept the explanation of the passenger as to a mistake claimed to have been made by the preceding conductor. See *infra*, III, C, 3, e, (III).

16. *Georgia.*— East Tennessee, etc., R. Co. *v.* King, 88 Ga. 443, 14 S. E. 708; Georgia R., etc., Co. *v.* Dougherty, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499.

Michigan.— Vining *v.* Detroit, etc., R. Co., 122 Mich. 248, 80 N. W. 1080.

Minnesota.— Krueger *v.* Chicago, etc., R. Co., 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487.

Mississippi.— Alabama, etc., R. Co. *v.* Holmes, 75 Miss. 371, 23 So. 187.

New York.— Homiston *v.* Long Island R. Co., 3 Misc. (N. Y.) 342, 22 N. Y. Suppl. 738, 52 N. Y. St. 1.

Pennsylvania.— Laird *v.* Pittsburg Traction Co., 166 Pa. St. 4, 3 Atl. 51.

For instance, it is said that an explanation to the conductor by one presenting an expired ticket of facts showing that the limitation was unreasonable is equivalent to an explanation to the carrier himself. Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399. But where a passenger had the return coupon of a round trip ticket, and did not produce the portion of the ticket entitling him to transportation going, held that the conductor was not bound to accept the passenger's statement that the first part of the ticket was by mistake taken up by another conductor. Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354.

17. See *supra*, III, C, 2, a, (IV).

18. Haggerty *v.* Flint, etc., R. Co., 59 Mich. 366, 26 N. W. 639, 60 Am. Rep. 301; Turner *v.* McCook, 77 Mo. App. 196; Rudy *v.* Rio Grande Western R. Co., 8 Utah 165, 30 Pac. 366; Consolidated Traction Co. *v.* Taborn, 58 N. J. L. 1, 32 Atl. 685.

Where a passenger entitled to a half-fare rate has failed to secure a proper ticket, through fault of the agent, and on explanation to the first conductor has been allowed to travel on half fare, he cannot complain if a subsequent conductor refuses him such privilege and ejects him from the train. St. Louis, etc., R. Co. *v.* Carroll, 13 Ill. App. 585.

19. *Alabama.*— South, etc., Alabama R. Co. *v.* Huffman, 76 Ala. 492, 52 Am. Rep. 349.

Indiana.— Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611.

Iowa.— Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458.

Kansas.— Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

Missouri.— Sira *v.* Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386.

New York.— Barker *v.* New York Cent. R. Co., 24 N. Y. 599; Page *v.* New York Cent. R. Co., 6 Duer (N. Y.) 523.

Oklahoma.— Noble *v.* Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483.

Wisconsin.— Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506.

United States.— Texas, etc., R. Co. *v.* Ludlam, 57 Fed. 481, 13 U. S. App. 540, 6 C. C. A. 454.

See 9 Cent. Dig. tit. "Carriers," § 1429.

Extent and limits of rule.— If, through the fault of such servants of the carrier, the passenger is induced to take an improper train, then the expulsion will be wrongful, and the carrier will be liable. Chicago, etc., R. Co. *v.* Spirk, 51 Nebr. 167, 70 N. W. 926; Elliott *v.* New York Cent., etc., R. Co., 53 Hun (N. Y.) 78, 6 N. Y. Suppl. 363, 24 N. Y. St. 835; Martin *v.* New York Cent., etc., R. Co., 1 N. Y. St. 738; Pennsylvania Co. *v.* Wentz, 37 Ohio St. 333; International, etc., R. Co. *v.* Smith, (Tex. 1886) 1 S. W. 565; International, etc., R. Co. *v.* Gilbert, 64 Tex. 536. But if the passenger knows that the information which he has received from the servant of the carrier is erroneous his expulsion will be proper. Johnson *v.* Philadelphia, etc., R. Co., 63 Md. 106. In some cases it has been held that when advised by the

(III) *Ticket Agent's Mistake* — (A) *Generally.* There is some authority for the proposition that if the agent selling a ticket makes a mistake as to the character of the ticket to which the passenger is entitled, and for which he pays, the mistake being one which would be apparent to the passenger on inspection, the latter cannot complain if he is ejected from a train on which the ticket furnished him does not entitle him to transportation.[20] But certainly where the passenger is not reasonably chargeable with knowledge as to the nature of the ticket furnished him by the agent he has a right to rely on the agent's representations and may recover for being ejected from a train on which he supposed he had a right to be transported, although, so far as the conductor ejecting him is concerned, the ticket was not good on that train under the rules of the carrier.[21] Moreover, if the agent assures him that something will be done which will entitle him to transportation on such train, he cannot lawfully be ejected therefrom, by reason of having relied on the agent's representations.[22] Indeed, many courts throw the responsibility for mistake of the agent as to the ticket furnished or as to representations made solely on the carrier, and require no precaution on the part of the passenger in the matter, proper explanation being made to the conductor as to the mistake.[23] On a similar principle, when the passenger has a

conductor that the train on which he is riding is not the proper one for reaching his destination, it is the passenger's duty to get off and wait for the proper train, and that he cannot recover damages for expulsion, although he has taken the train in pursuance of the misdirection of the carrier's servants, his remedy being to recover for the delay incident to such misdirection. Lake Shore, etc., R. Co. *v.* Pierce, 47 Mich. 277, 11 N. W. 157; International, etc., R. Co. *v.* Hassell, 62 Tex. 256, 50 Am. Rep. 525. If the passenger is on a train which does not stop at his destination, he may properly be required either to stop short of his destination, or pay the additional fare necessary to carry him to the next stopping place beyond his destination, and for failure to pay such additional fare may be expelled. Logan *v.* Hannibal, etc., R. Co., 77 Mo. 663; Fink *v.* Albany, etc., R. Co., 4 Lans. (N. Y.) 147; Noble *v.* Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483; Texas Pac. R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

20. The theory of these cases is that the ejection is proper by reason of failure of the passenger to show his right to transportation when required in accordance with the rules of the carrier, and that his only remedy is for breach of contract on account of the failure of the agent to furnish him the kind of ticket called for. Baggett *v.* Baltimore, etc., R. Co., 3 App. Cas. (D. C.) 522; Bradshaw *v.* South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481; Nolan *v.* New York, etc., R. Co., 41 N. Y. Super. Ct. 541; Houston, etc., R. Co. *v.* Ford, 53 Tex. 364.

Oral representations.— On the same theory it is said that the passenger has no right to rely on oral representations of the agent of the carrier which are contrary to the terms of the ticket which is given him, and that he may be ejected from a train on which the ticket does not entitle him to transportation, although he had the assurance of the agent that the ticket would be good on such train. Louisville, etc., R. Co. *v.* Breckinridge, 99 Ky. 1, 17 Ky. L. Rep. 1303, 34 S. W. 702; Petrie *v.* Pennsylvania R. Co., 42 N. J. L. 449; Gulf, etc., R. Co. *v.* Daniels, (Tex. Civ. App. 1895) 29 S. W. 426; Hall *v.* Memphis, etc., R. Co., 9 Fed. 585, 15 Fed. 57.

Question of fact.— It is said that in such a case the question whether the passenger was negligent in failing to discover the mistake in the ticket before taking the train was one for the jury. Gulf, etc., R. Co. *v.* Rather, 3 Tex. Civ. App. 72, 21 S. W. 951.

21. Hot Springs R. Co. *v.* Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913; Chicago, etc., R. Co. *v.* Griffin, 68 Ill. 499; Murdock *v.* Boston, etc., R. Co., 137 Mass. 293, 50 Am. Rep. 307.

22. Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857; Illinois Cent. R. Co. *v.* Davenport, 177 Ill. 110, 52 N. E. 266; Pittsburgh, etc., R. Co. *v.* Street, 26 Ind. App. 224, 59 N. E. 404; Houston, etc., R. Co. *v.* White, (Tex. Civ. App. 1901) 61 S. W. 436.

23. *District of Columbia.*— Carpenter *v.* Washington, etc., R. Co., 3 Mackey (D. C.) 225.

Georgia.— Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434.

Indiana.— Evansville, etc., R. Co. *v.* Cates, 14 Ind. App. 172, 41 N. E. 712.

Iowa.— Ellsworth *v.* Chicago, etc., R. Co., 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173.

Kentucky.— Louisville, etc., R. Co. *v.* Gaines, 99 Ky. 411, 18 Ky. L. Rep. 387, 36 S. W. 174, 59 Am. St. Rep. 465.

New York.— Tarbell *v.* Northern Cent. R. Co., 24 Hun (N. Y.) 51.

West Virginia.— Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022.

See 9 Cent. Dig. tit. "Carriers," § 1427.

As to excursion tickets.— The passenger may rely on the representations of the agent as to whether an excursion ticket will be good on a particular train, in the absence of any knowledge of a rule of the carrier to the contrary. South, etc., Alabama R. Co. *v.* Huffman, 76 Ala. 492, 52 Am. Rep. 349; Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E.

return ticket or coupon which must be stamped by the agent in order to make it good for return passage, the assurance of the agent that no stamping is necessary, or a refusal of the agent to stamp when properly requested, or inability of the passenger to find the proper agent on reasonable effort, will render the carrier liable if the conductor subsequently ejects the passenger because the ticket is not stamped as required.[24] Even as against the terms of the ticket itself it has been held that the passenger may rely on oral representations of the agent as to the sufficiency of the ticket which is furnished him,[25] for the passenger is not presumed to know that the agent is acting without authority.[26]

(B) *Proper Basis of Right to Recover.* The proper basis of the right of the passenger to recover for the act of the conductor in expelling him when he has secured from the proper agent the right to be transported is not, as suggested in some cases,[27] that such expulsion is a breach of contract, nor, as suggested in other cases,[28] that the conductor is in the wrong in not accepting the passenger's explanation, but that, although the conductor has acted properly under reasonable regulations in expelling the passenger for not having proper evidence of right to transportation, this expulsion is such as naturally results from the wrongful act of the agent which constitutes therefore the occasion for the expulsion and renders the carrier liable therefor.[29]

315. Where the agent gave the passenger an unused coupon of an excursion ticket, with the assurance that it would be accepted by the conductor, held that the carrier was liable for the ejection of the passenger by the conductor, although the coupon was not good for transportation under the rules of the company. Callaway *v.* Mellett, 15 Ind. App. 366, 44 N. E. 198.

24. Southern R. Co. *v.* Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536; Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; Pittsburgh, etc., R. Co. *v.* Street, 26 Ind. App. 224, 59 N. E. 404; Gregory *v.* Burlington, etc., R. Co., 10 Nebr. 250, 4 N. W. 1025; Mexican Cent. R. Co. *v.* Goodman, (Tex. Civ. App. 1897) 43 S. W. 580; Gulf, etc., R. Co. *v.* St. John, 13 Tex. Civ. App. 257, 35 S. W. 501; Russell *v.* Missouri, etc., R. Co., 12 Tex. Civ. App. 627, 35 S. W. 724; Missouri Pac. R. Co. *v.* Martino, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781.

Contra.— McGhee *v.* Reynolds, 129 Ala. 540, 29 So. 961; Pittsburgh, etc., R. Co. *v.* Daniels, 90 Ill. App. 154.

25. *Louisiana.*— Randall *v.* New Orleans, etc., R. Co., 45 La. Ann. 778, 13 So. 166.

Missouri.— Dillon *v.* Lindell R. Co., 64 Mo. App. 418.

New York.— Nelson *v.* Long Island R. Co., 7 Hun (N. Y.) 140.

Ohio.— Corry *v.* Cincinnati, etc., R. Co., 3 Ohio Dec. (Reprint) 82, 3 Wkly. L. Gaz. 90.

Texas.— Gulf, etc., R. Co. *v.* Rather, 3 Tex. Civ. App. 72, 21 S. W. 951.

United States.— Morrison *v.* The John L. Stephens, Hoffm. Op. 473, 17 Fed. Cas. No. 9,847.

See 9 Cent. Dig. tit. "Carriers," § 1428.

26. Mexican Cent. R. Co. *v.* Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778, 55 S. W. 372; San Antonio, etc., P. R. Co. *v.* Newman, 17 Tex. Civ. App. 606, 43 S. W. 915.

Where two railroads use the same track and have a joint agent the passenger may rely on the representations of such agent that a ticket sold for one will be good on the train of the other. Texas, etc., R. Co. *v.* Dye, (Tex. Civ. App. 1895) 33 S. W. 551.

Where ticket is apparently good the passenger has the right to insist on transportation thereunder in accordance with the representations of the agent, notwithstanding the general principle that as between conductor and passenger the ticket is the conclusive evidence of the passenger's right to transportation. Hufford *v.* Grand Rapids, etc., R. Co., 53 Mich. 118, 18 N. W. 580.

27. See, for instance, Chicago, etc., R. Co. *v.* Griffin, 68 Ill. 499.

28. See, for instance, Pennsylvania Co. *v.* Bray, 125 Ind. 229, 25 N. E. 439; Pittsburgh, etc., R. Co. *v.* Street, 26 Ind. App. 224, 59 N. E. 404; Evansville, etc., R. Co. *v.* Cates, 14 Ind. App. 172, 41 N. E. 712; Hufford *v.* Grand Rapids, etc., R. Co., 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859; Alabama, etc., R. Co. *v.* Holmes, 75 Miss. 371, 23 So. 187.

On this theory it has been decided that a company compelled to pay damages for ejection of a passenger who had a coupon sold by the agent of another company purporting to be good over the line of the former, but sold without authority, could not recover from the line selling the ticket the amount thus paid. Pennsylvania R. Co. *v.* Wabash, etc., R. Co., 157 U. S. 225, 15 S. Ct. 576, 39 L. ed. 682.

29. Kiley *v.* Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 82 Am. St. Rep. 460, 52 L. R. A. 626. And see *infra*, III, C, 5, a.

Connecting lines.— Where the agent of the first of two connecting lines sold a coupon ticket for the two lines and the conductor of the first took up the wrong coupon, and for that reason the passenger was expelled by the conductor of the second line, who refused to honor the coupon good for the first line, held that the first company was liable for the

4. Method of Expulsion; Liability For Wrongful Expulsion — a. What Constitutes Expulsion. In determining the liability of the carrier, where it is claimed that the expulsion has been either without cause, or in an improper manner, the question may arise whether or not there has been an expulsion in fact. To constitute such expulsion it is not necessary that any violence shall have been used. If the servant of the carrier, authorized to determine whether or not a person claiming to be a passenger shall be transported, notifies such person that he must leave the train or other vehicle, the person so notified may, without further resistance, depart therefrom and maintain an action for damages if the expulsion is without right, or at an improper place.[30]

b. Return of Fare. Where the expulsion is on the ground that the person claiming to be transported as a passenger has no right to transportation by reason of non-compliance with a contract requirement as to payment, the carrier, who is thus seeking to avoid the pretended contract on which the passenger relies, must return to him the consideration paid, or the portion thereof unearned.[31] The

expulsion. Louisville, etc., R. Co. *v.* Conrad, 4 Ind. App. 83, 30 N. E. 406. So where the transportation was delayed on the first line and the passenger was unable to make the connection on the second line called for by his ticket and he was expelled, held that the first company was liable therefor by reason of the failure of its agents to notify the conductor on the second line that the passenger was entitled to transportation. Watkins *v.* Pennsylvania R. Co., 21 D. C. 1.

Reason for rule.—As between the conductor and the passenger, the reasonable and proper rule is that the ticket is conclusive (Western Maryland R. Co. *v.* Stocksdale, 83 Md. 245, 34 Atl. 880; Frederick *v.* Marquette, etc., R. Co., 37 Mich. 342, 26 Am. Rep. 531; Woods *v.* Metropolitan St. R. Co., 48 Mo. App. 125; Pouilin *v.* Canadian Pac. R. Co., 52 Fed. 197, 6 U. S. App. 298, 3 C. C. A. 23; New York, etc., R. Co. *v.* Bennett, 50 Fed. 496, 6 U. S. App. 95, 1 C. C. A. 544; Mosher *v.* St. Louis, etc., R. Co., 23 Fed. 326); and if the passenger could, by using ordinary diligence, have discovered the mistake of the agent or of the preceding conductor in not furnishing him the proper evidence of his right to transportation, then he should not recover for expulsion, inasmuch as the expulsion is not the proximate cause of the wrongful act of the agent or previous conductor, the passenger's own negligence having intervened (Wiggins *v.* King, 91 Hun (N. Y.) 340, 36 N. Y. Suppl. 768, 71 N. Y. St. 861; Pouilin *v.* Canadian Pac. R. Co., 52 Fed. 197, 6 U. S. App. 298, 3 C. C. A. 23). The act of the conductor in applying the rules of the company with reference to the showing made by the passenger is proper, for he is not bound to accept the mere statements of the passenger which are contradicted by the circumstances as they appear to him. Mahoney *v.* Detroit St. R. Co., 93 Mich. 612, 53 N. W. 793, 32 Am. St. Rep. 528, 18 L. R. A. 335; Townsend *v.* New York Cent., etc., R. Co., 56 N. Y. 295, 15 Am. Rep. 419; Yorton *v.* Milwaukee, etc., R. Co., 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23.

30. *California.*— Kline *v.* Central Pac. R. Co., 39 Cal. 587.

Georgia.— Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Kentucky.— Bohannon *v.* Southern R. Co., 23 Ky. L. Rep. 1390, 65 S. W. 169.

New Jersey.— Consolidated Traction Co. *v.* Taborn, 58 N. J. L. 1, 32 Atl. 685.

New York.— Eddy *v.* Syracuse Rapid Transit R. Co., 50 N. Y. App. Div. 109, 63 N. Y. Suppl. 645; Ray *v.* Cortland, etc., Traction Co., 19 N. Y. App. Div. 530, 46 N. Y. Suppl. 521.

Texas.— Gulf, etc., R. Co. *v.* Kirkbride, 79 Tex. 457, 15 S. W. 495.

West Virginia.— Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

See 9 Cent. Dig. tit. "Carriers," § 1449.

But if departure from conveyance is dangerous at the particular instant because it is in motion, or otherwise, then the passenger will not be justified in incurring such immediate danger, unless it is apparent that the intention of the carrier's servant is that he shall incur such danger, and that his expulsion will be immediately effected by force if he does not comply with the direction. Bosworth *v.* Walker, 83 Fed. 58, 53 U. S. App. 562, 27 C. C. A. 402.

31. Thus, if the ejection is for refusal after paying the regular fare to pay an additional sum for not having previously purchased a ticket, the fare must be returned or the expulsion will be unlawful. Bland *v.* Southern Pac. R. Co., 55 Cal. 570, 36 Am. Rep. 50.

Further illustrations.— So it is said that if the expulsion is on the ground that the ticket has expired, the price paid for the ticket, or the portion thereof not already earned by transportation thereunder, must be given back. Burnham *v.* Grank Trunk R. Co., 63 Me. 298, 18 Am. Rep. 220. So where a parent and child were expelled for refusal of the parent to pay fare for the child, it was held that the amount paid by the parent for his own transportation must be repaid. Braun *v.* Northern Pac. R. Co., 79 Minn. 404, 82 N. W. 675, 984, 79 Am. St. Rep. 497, 49 L. R. A. 319; Lake Shore, etc., R. Co. *v.*

conductor has the right, however, to retain out of the money paid by the passenger the proper fare for transporting him to the place where he is expelled, even though he had no desire and expressed no intention to secure transportation to that place.[32] But it seems that there is no necessity, where the passenger's right to transportation under the ticket which he has surrendered has been forfeited, to return to him the ticket.[33] Where a passenger has a right to the return of the fare paid, or a portion thereof, the ejection will be wrongful, unless such return is previously made. It is not sufficient that the tender is made to him after expulsion.[34]

c. Place of Expulsion. When there is proper occasion for ejecting a person from the carrier's train or other vehicle for refusal to comply with proper rules and regulations, consisting of improper conduct, refusal to pay fare, present a ticket, or the like, there is in general no legal requirement that the expulsion be at a regular station or stopping place. The person who has no right to be conveyed, or to be further conveyed, may at any place, aside from the question of reasonable care for his safety, to be hereafter discussed,[35] be required to leave the carrier's conveyance and prevented from further enjoying the privileges thereof.[36] But in many states statutes have been passed requiring that ejectment for refusal to pay fare shall be only at a usual stopping place or station, or near a dwelling-house. These statutes are no doubt intended for the protection of persons who are ejected against the dangers and inconveniences which may arise from expulsion at points where they may suffer hardship.[37]

Orndorff, 55 Ohio St. 589, 45 N. E. 447, 60 Am. St. Rep. 716, 38 L. R. A. 140.

If the fare of a street-car passenger has been taken and he is then expelled for riding on the platform, contrary to a city ordinance, there being no room elsewhere, the fare paid must be given back. Hanna *v.* Nassau Electric R. Co., 18 N. Y. App. Div. 137, 45 N. Y. Suppl. 437.

32. Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596 [*overruling*, on this point, Du Laurans *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am. Rep. 102].

33. Wright *v.* Central R. Co., 78 Cal. 360, 20 Pac. 740. See also *infra*, III, D, 2.

34. Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

As to wrongful expulsion see *infra*, III, C, 4, d.

35. See *infra*, III, C, 4, e.

36. *Indiana.*— Scott *v.* Cleveland, etc., R. Co., 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154.

Iowa.— Brown *v.* Chicago, etc., R. Co., 51 Iowa 235, 1 N. W. 487.

Kentucky.— Louisville, etc., R. Co. *v.* Moss, 13 Ky. L. Rep. 684.

Maryland.— McClure *v.* Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345.

Michigan.— Great Western R. Co. *v.* Miller, 19 Mich. 305.

Minnesota.— Wyman *v.* Northern Pac. R. Co., 34 Minn. 210, 25 N. W. 349.

Ohio.— Cincinnati, etc., R. Co. *v.* Skillman, 39 Ohio St. 444.

South Carolina.— Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

Utah.— Rudy *v.* Rio Grande Western R. Co., 8 Utah 165, 30 Pac. 366.

United States.— Magee *v.* Oregon R., etc., Co., 46 Fed. 734.

See 9 Cent. Dig. tit. "Carriers," § 1445.

37. *Arkansas.*— St. Louis Southwestern R. Co. *v.* Harper, 69 Ark. 186, 61 S. W. 911, 86 Am. St. Rep. 190; Kansas City, etc., R. Co. *v.* Holden, 66 Ark. 602, 53 S. W. 45; McCook *v.* Northup, 65 Ark. 225, 45 S. W. 547; Hobbs *v.* Texas, etc., R. Co., 49 Ark. 357, 5 S. W. 586; St. Louis, etc., R. Co. *v.* Branch, 45 Ark. 524.

California.— Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

Illinois.— Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 7; Chicago, etc., R. Co. *v.* Peacock, 48 Ill. 253; Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133; Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81; Chicago, etc., R. Co. *v.* Roberts, 40 Ill. 503; Terre Haute, etc., R. Co. *v.* Vanatta, 21 Ill. 188, 74 Am. Dec. 96; Chicago, etc., R. Co. *v.* Parks, 18 Ill. 460, 68 Am. Dec. 562.

Indiana.— Lake Erie, etc., R. Co. *v.* Mayo, 4 Ind. App. 413, 30 N. E. 1106.

Missouri.— Lillis *v.* St. Louis, etc., R. Co., 64 Mo. 464, 27 Am. Rep. 255.

New Hampshire.— Baldwin *v.* Grand Trunk R. Co., 64 N. H. 596, 15 Atl. 411.

New York.— Loomis *v.* Jewett, 35 Hun (N. Y.) 313.

Texas.— Texas, etc., R. Co. *v.* Casey, 52 Tex. 112.

Utah.— Nichols *v.* Union Pac. R. Co., 7 Utah 510, 27 Pac. 693.

Vermont.— Stephen *v.* Smith, 29 Vt. 160.

Wisconsin.— Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506; Phettiplace *v.* Northern Pac. R. Co., 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483; Patry *v.* Chicago, etc., R. Co., 82 Wis. 408, 52 N. W. 312.

d. Liability For Wrongful Expulsion[38] — (i) *Rule Stated.* The carrier is liable for the wrongful acts of its servants in charge of the train or other conveyance in expelling persons therefrom, so far as such servants are acting within the scope of their authority.[39] Therefore the carrier is liable for the damages resulting from an unlawful expulsion by his servants, even though they act recklessly, wilfully, or maliciously, or in violation of their duty,[40] provided their acts are done in the discharge of their duty as servants of the carrier, and within the general scope of their duties.[41] With reference to passengers, that is, those entitled to be transported as distinct from trespassers or persons seeking to secure transportation without right, it is immaterial whether or not the employee of the company is acting within the scope of his authority, for it is the duty of the carrier to afford protection to the passenger.[42]

(ii) *Rule Applied.* In accordance with the general rule that the carrier is

See 9 Cent. Dig. tit. "Carriers," § 1446.

Application of statutes.— Such statutes, as they are usually framed, apply only to persons who are ejected for non-payment of fare, and it seems that in other cases the expulsion may be made at any reasonably safe place. St. Louis, etc., R. Co. *v.* Lewis, 69 Ark. 81, 61 S. W. 163; South Florida R. Co. *v.* Rhodes, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733; Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610. Thus it is held that for refusal to surrender his ticket a passenger may be put off at any safe place. Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138. Nor does such a regulation apply to one who, having been properly expelled from a train, attempts wrongfully to secure further transportation thereon without compliance with the proper requirements of the conductor. Chicago, etc., R. Co. *v.* Boger, 1 Ill. App. 472; Kent *v.* Mason, 1 Ill. App. 466.

Pleading and proving statute.— In an action brought in one state involving a statutory regulation as to expulsion in another state, the plaintiff, relying on the statute of the other state as showing the expulsion to have been unlawful, must aver and prove the statute. Great Western R. Co. *v.* Miller, 19 Mich. 305.

38. The peculiar duty of protection which the carrier owes to the passenger will be considered in a subsequent section. See *infra*, III, F, 2, c.

39. McIver *v.* Florida Cent., etc., R. Co., 110 Ga. 223, 36 S. E. 775; Cain *v.* Minneapolis, etc., R. Co., 39 Minn. 297, 39 N. W. 635; Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Young *v.* Pennsylvania R. Co., 115 Pa. St. 112, 7 Atl. 741.

Where a railroad company ran a special excursion train from which a person properly entitled to ride with the excursion was expelled by a person not connected with the railroad but acting as a manager of the excursion, held that the company was liable. Moore *v.* St. Louis, etc., R. Co., 67 Ark. 389, 55 S. W. 161.

A transfer company transporting passengers by rail across a bridge may be liable for a wrongful expulsion of a passenger from its trains by an agent of the bridge company. Union R., etc., Co. *v.* Kallaher, 114 Ill. 325, 2 N. E. 77.

A railroad company using a union station will be liable for wrongful expulsion of one of its passengers by a servant of the independent company managing the station. Penfield *v.* Cleveland, etc., R. Co., 26 N. Y. App. Div. 413, 50 N. Y. Suppl. 79.

Wrongful expulsion by the railroad conductor will not render the sleeping-car company liable, nor will such expulsion by the sleeping-car conductor render the railroad company liable. Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231.

40. There are cases holding that the carrier is not liable for wanton or wilful acts of his servants in such matter. Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455; Allegheny Valley R. Co. *v.* McLain, 91 Pa. St. 442; Pennsylvania Co. *v.* Toomey, 91 Pa. St. 256; Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. 822, 18 U. S. App. 279, 6 C. C. A. 597. But these cases seem not to be well considered, and are contrary to the weight of authority. But of course if the servant acts for his own ends, and not for the purpose of exercising his authority and of performing his duty as servant, then the carrier is not liable therefor. Chicago, etc., R. Co. *v.* Randolph, 65 Ill. App. 208; Marion *v.* Chicago, etc., R. Co., 59 Iowa 428, 13 N. W. 415, 44 Am. Rep. 687; Yazoo, etc., R. Co. *v.* Anderson, 77 Miss. 28, 25 So. 865; Murphy *v.* Central Park, etc., R. Co., 48 N. Y. Super. Ct. 96.

41. *District of Columbia.*— Converse *v.* Washington, etc., R. Co., 2 MacArthur (D. C.) 504.

Illinois.— North Chicago City R. Co. *v.* Gastka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481.

Michigan.— Lucas *v.* Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517.

New York.— Hoffman *v.* New York Cent., etc., R. Co., 87 N. Y. 25, 41 Am. Rep. 337.

Wisconsin.— Stone *v.* Chicago, etc., R. Co., 88 Wis. 98, 59 N. W. 457.

See 9 Cent. Dig. tit. "Carriers," § 1412.

42. St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971; Brunswick, etc., R. Co. *v.* Bostwick, 100 Ga. 96, 27 S. E. 725. And see as to injuries to passengers by wrongful acts of carrier's servants *infra*, III, F, 2.

liable for the wrongful acts of his servants within the scope of their employment, it is held that where a railway or street-car conductor expels a passenger from his train or car, either wrongfully, that is, where there is no right to expel, or negligently, the carrier is responsible for any resulting injury, for it is within the scope of the employment of the conductor to determine who is entitled to transportation on his train, and to expel therefrom those not so entitled, and it will be immaterial that the conductor in the wrongful or negligent act violates his instructions;[43] and the same liability extends to acts of persons employed by the conductor to assist him in the expulsion.[44] So if the driver of a street-car has authority to expel from the car those not entitled to transportation, the carrier will be liable for his wrongful or negligent acts in so doing.[45] A brakeman on a railroad, however, does not necessarily have the authority, in consequence of his general employment, to determine who is entitled to transportation, or to expel persons not so entitled.[46] What is said in this paragraph is applicable to trespassers as well as passengers.[47]

e. Negligent Expulsion — (i) *From Moving Train or Car.* In general it is negligence to expel a person from a train or car in motion, and the carrier will be liable for the injury resulting therefrom due to the act of a servant within the scope of his employment.[48] In some cases, however, it is said to be a

43. *California.*— Kline *v.* Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282; Turner *v.* North Beach, etc., R. Co., 34 Cal. 594.

Colorado.— Denver Tramway Co. *v.* Reed, 4 Colo. App. 500, 36 Pac. 557.

Illinois.— Sanders *v.* Illinois Cent. R. Co., 90 Ill. App. 582.

Indiana.— Terre Haute, etc., R. Co. *v.* Fitzgerald, 47 Ind. 79.

Massachusetts.— Holmes *v.* Wakefield, 12 Allen (Mass.) 580, 90 Am. Dec. 171.

Michigan.—Great Western R. Co. *v.* Miller, 19 Mich. 305.

Missouri.— Travers *v.* Kansas Pac. R. Co., 63 Mo. 421.

Nebraska.— Fremont, etc., R. Co. *v.* Root, 49 Nebr. 900, 69 N. W. 397.

New Hampshire.— Hilliard *v.* Goold, 34 N. H. 230, 66 Am. Dec. 765.

New York.— Schultz *v.* Third Ave. R. Co., 89 N. Y. 242.

Ohio.— Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78.

Texas.— Gulf, etc., R. Co. *v.* Conder, (Tex. Civ. App. 1900) 58 S. W. 58.

See 9 Cent. Dig. tit. "Carriers," § 1412.

44. Coleman *v.* New York, etc., R. Co., 106 Mass. 160; Jardine *v.* Cornell, 50 N. J. L. 485, 14 Atl. 590.

A conductor who has no authority to direct arrests does not render the carrier liable by causing arrest of a passenger after expulsion for alleged disorderly conduct. Cunningham *v.* Seattle Electric R., etc., Co., 3 Wash. 471, 28 Pac. 745.

45. Corbett *v.* Twenty-Third St. R. Co., 42 Hun (N. Y.) 587; Meyer *v.* Second Ave. R. Co., 8 Bosw. (N. Y.) 305; Healey *v.* City Pass. R. Co., 28 Ohio St. 23.

46. If it is found to be within the scope of brakeman's duty to expel, then for his wrongful or negligent acts the carrier is liable, although he may violate his instructions in doing so.

Alabama.— Southern R. Co. *v.* Wildman, 119 Ala. 565, 24 So. 764; Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303.

Arkansas.— St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

Kentucky.— Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 15 Ky. L. Rep. 390, 23 S. W. 652, 22 L. R. A. 72; Louisville, etc., R. Co. *v.* Moss, 13 Ky. L. Rep. 684.

Missouri.— Brennan *v.* Santa Fe, 72 Mo. App. 107.

New York.— Peck *v.* New York Cent., etc., R. Co., 70 N. Y. 587.

Texas.— Galveston, etc., R. Co. *v.* Lester, 24 Tex. Civ. App. 467, 59 S. W. 946; Texas, etc., R. Co. *v.* Black, 23 Tex. Civ. App. 119, 57 S. W. 330.

But if **without such authority**, then the brakeman's acts are not chargeable to the carrier. Marion *v.* Chicago, etc., R. Co., 59 Iowa 428, 13 N. W. 415, 44 Am. Rep. 687; Hartigan *v.* Michigan Cent. R. Co., 113 Mich. 122, 71 N. W. 452; Randall *v.* Chicago, etc., R. Co., 113 Mich. 115, 71 N. W. 450, 38 L. R. A. 666; Hughes *v.* New York, etc., R. Co., 36 N. Y. Super. Ct. 222; International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; Galaviz *v.* International, etc., R. Co., 15 Tex. Civ. App. 61, 38 S. W. 234.

47. Southern R. Co. *v.* Wildman, 119 Ala. 565, 24 So. 764; St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971; Wabash R. Co. *v.* Kingsley, 177 Ill. 558, 52 N. E. 931; Southern R. Co. *v.* Hunter, 74 Miss. 444, 21 So. 304.

48. *Alabama.*— Louisville, etc., R. Co. *v.* Whitman, 79 Ala. 328.

California.— Kline *v.* Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

Illinois.— Chicago City R. Co. *v.* Pelletier, 134 Ill. 120, 24 N. E. 770; St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488.

Iowa.— Law *v.* Illinois Cent. R. Co., 32 Iowa 534.

question for the jury whether under the circumstances such expulsion is negligent.[49]

(II) *At Improper Time or Place.* The servants of the carrier should not expel a passenger (or even a trespasser) at a time or place which is dangerous,[50] and the carrier will be liable in such a case not only for injuries directly suffered in connection with such expulsion, but also for subsequent injuries proximately due thereto, such as injury from other trains which the ejected person could not reasonably avoid, the probable consequences of improper exposure, and the like.[51] And it will be no answer that the person was injured by reason of his helplessness due to intoxication or like cause, if his condition was known to the servants of the carrier, and the consequent injury resulting from his expulsion could have been reasonably anticipated.[52] But to render the carrier liable for subsequent injuries it must appear that they were the proximate result of the expulsion, and could have been reasonably anticipated. Even as to persons who are partially incapacitated the carrier is not liable for subsequent injuries, unless there was negligence as to the time or place selected for the expulsion.[53]

(III) *In Improper Manner.* Reasonable and ordinary care must be used in a case where expulsion is proper.[54] Sufficient force may be used to effect the removal of the person from the train, where such expulsion is proper, the amount

Kentucky.— Louisville, etc., R. Co. *v.* Ferrell, 7 Ky. L. Rep. 607.

Louisiana.— Young *v.* Texas, etc., R. Co., 51 La. Ann. 295, 25 So. 69.

Missouri.— Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588.

New York.— Oppenheimer *v.* Manhattan R. Co., 18 N. Y. Suppl. 411, 45 N. Y. St. 134.

Ohio.— Cleveland City R. Co. *v.* Roebuck, 22 Ohio Cir. Ct. 99.

United States.— Gallena *v.* Hot Springs R. Co., 4 McCrary (U. S.) 371, 13 Fed. 116.

See 9 Cent. Dig. tit. "Carriers," § 1449.

Under a statute requiring that a railroad train shall be stopped before the ejection of a passenger, a carrier is liable for nominal damages, irrespective of any injury, if the statute is violated. Holt *v.* Hannibal, etc., R. Co., 87 Mo. App. 203.

49. Savannah, etc., R. Co. *v.* Godkin, 104 Ga. 655, 30 S. E. 378, 69 Am. St. Rep. 187; Union Pac. R. Co. *v.* Mitchell, 56 Kan. 324, 43 Pac. 244; Murphy *v.* Union R. Co., 118 Mass. 228; Healey *v.* City Pass. R. Co., 28 Ohio St. 23.

50. *Kentucky.*— Louisville, etc., R. Co. *v.* Gatewood, 14 Ky. L. Rep. 108.

Louisiana.— Young *v.* Texas, etc., R. Co., 51 La. Ann. 295, 25 So. 69.

Massachusetts.— Hudson *v.* Lynn, etc., R. Co., 178 Mass. 64, 59 N. E. 647.

Mississippi.— Eidson *v.* Southern R. Co., (Miss. 1898) 23 So. 369.

Missouri.— Book *v.* Chicago, etc., R. Co., 85 Mo. App. 76.

Pennsylvania.— Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. St. 519, 6 Atl. 545.

United States.— Gallena *v.* Hot Springs R. Co., 4 McCrary (U. S.) 371, 13 Fed. 116.

51. Louisville, etc., R. Co. *v.* Johnson, 108 Ala. 62, 19 So. 51, 31 L. R. A. 372; Central R. *v.* Glass, 60 Ga. 441; Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 7.

52. Johnson *v.* Louisville, etc., R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39; Louisville, etc., R. Co. *v.* Ellis, 97 Ky. 330, 17 Ky. L. Rep. 259, 30 S. W. 979; Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Louisville, etc., R. Co. *v.* Gatewood, 14 Ky. L. Rep. 108; Young *v.* Texas, etc., R. Co., 51 La. Ann. 295, 25 So. 69; Gill *v.* Rochester, etc., R. Co., 37 Hun (N. Y.) 107; Guy *v.* New York, etc., R. Co., 30 Hun (N. Y.) 399.

53. *District of Columbia.*— Burch *v.* Baltimore, etc., R. Co., 3 App. Cas. (D. C.) 346, 26 L. R. A. 129.

Indiana.— McClelland *v.* Louisville, etc., R. Co., 94 Ind. 276.

Iowa.— Haley *v.* Chicago, etc., R. Co., 21 Iowa 15.

Kentucky.— Brown *v.* Louisville, etc., R. Co., 103 Ky. 211, 19 Ky. L. Rep. 1873, 44 S. W. 648; Louisville, etc., R. Co. *v.* Logan, 88 Ky. 232, 10 Ky. L. Rep. 798, 10 S. W. 655, 21 Am. St. Rep. 332, 3 L. R. A. 80; Bohannon *v.* Southern R. Co., 23 Ky. L. Rep. 1390, 65 S. W. 169.

New Hampshire.— Edgerly *v.* Union St. R. Co., 67 N. H. 312, 36 Atl. 558.

North Carolina.— Roseman *v.* Carolina Cent. R. Co., 112 N. C. 709, 16 S. E. 766, 34 Am. St. Rep. 524, 19 L. R. A. 327.

Ohio.— Railway Co. *v.* Valleley, 32 Ohio St. 345, 30 Am. Rep. 601.

Texas.— Houston, etc., R. Co. *v.* Cohn, 22 Tex. Civ. App. 11, 53 S. W. 698.

Injurious consequences not the proximate result of the negligent expulsion are not chargeable to the carrier. Chicago, etc., R. Co. *v.* Spirk, 51 Nebr. 167, 70 N. W. 926; Hamilton *v.* Pittsburg, etc., R. Co., 183 Pa. St. 638, 38 Atl. 1085.

54. Brown *v.* Chicago, etc., R. Co., 51 Iowa 235, 1 N. W. 487.

If a person entitled to transportation is expelled, the carrier will be liable for the expulsion without regard to the care exercised. St. Louis, etc., R. Co. *v.* Osborn, 67 Ark. 399, 55 S. W. 142.

of force depending on the resistance offered.[55] But for injuries due to the use of unnecessary force or violence, the carrier will be liable. Even in the removal of trespassers no injury should be inflicted which may reasonably be avoided consistently with effecting the removal.[56] Although the expulsion is lawful, if unnecessary violence is wilfully employed by the carrier's servants, the carrier will be liable for exemplary as well as actual damages.[57]

(IV) *Resistance.* There is some authority for the proposition that a passenger whom the servants of the carrier are wrongfully attempting to remove from a train may resist, and if injury is inflicted in overcoming such resistance recovery may be had therefor.[58] But on this question the weight of authority seems to be that a passenger threatened with wrongful expulsion (especially one who is being rightfully expelled) has no right to resist the authority of the carrier's servants in control of the transportation, but should comply with their directions, being entitled to damages for wrongful expulsion, although no force has been used, but not entitled to recover for injuries received by reason of resistance to their authority, even though wrongfully exercised.[59]

55. *California.*—Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

Georgia.— Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163.

Illinois.— Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238; Chicago, etc., R. Co. *v.* Brisbane, 24 Ill. App. 463.

Missouri.— Lillis *v.* St. Louis, etc., R. Co., 64 Mo. 464, 27 Am. Rep. 255.

Pennsylvania.— McMillan *v.* Federal St., etc., R. Co., 172 Pa. St. 523, 33 Atl. 560.

South Carolina.— Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

See 9 Cent. Dig. tit. "Carriers," § 1450.

56. *Arkansas.*— St. Louis, etc., R. Co. *v.* Osborn, 67 Ark. 399, 55 S. W. 142.

Georgia.— Western, etc., R. Co. *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842.

Illinois.— North Chicago City R. Co. *v.* Gastka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481; Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59; Chicago, etc., R. Co. *v.* Barrett, 16 Ill. App. 17.

Indiana.— Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627; Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611; Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37; Lake Erie, etc., R. Co. *v.* Matthews, 13 Ind. App. 355, 41 N. E. 842.

Massachusetts.— Planz *v.* Boston, etc., R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835.

Michigan.— Lake Shore, etc., R. Co. *v.* Pierce, 47 Mich. 277, 11 N. W. 157.

Missouri.— Tanger *v.* Southwest Missouri Electric R. Co., 85 Mo. App. 28.

Nebraska.— Haman *v.* Omaha Horse R. Co., 35 Nebr. 74, 52 N. W. 830.

New Jersey.— Hayter *v.* Brunswick Traction Co., 66 N. J. L. 575, 49 Atl. 714; Haver *v.* Central R. Co., 64 N. J. L. 312, 45 Atl. 593; Jardine *v.* Cornell, 50 N. J. L. 485, 14 Atl. 590; New York, etc., R. Co. *v.* Haring, 47 N. J. L. 137, 54 Am. Rep. 123; State *v.* Ross, 26 N. J. L. 224.

New York.— Peck *v.* New York Cent., etc., R. Co., 70 N. Y. 587; Jackson *v.* Second Ave. R. Co., 47 N. Y. 274, 7 Am. Rep. 448; Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Hart *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 521, 69 N. Y. Suppl. 906.

Pennsylvania.—Barre *v.* Reading City Pass. R. Co., 155 Pa. St. 170, 26 Atl. 99; Biddle *v.* Hestonville, etc., Pass. R. Co., 112 Pa. St. 551, 4 Atl. 485.

Texas.— International, etc., R. Co. *v.* Leak, 64 Tex. 654; St. Louis, etc., R. Co. *v.* Huffman, (Tex. Civ. App. 1895) 32 S. W. 30.

United States.— Gallena *v.* Hot Springs R. Co., 4 McCrary (U. S.) 371, 13 Fed. 116.

See 9 Cent. Dig. tit. "Carriers," § 1451.

57. Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; Philadelphia, etc., R. Co. *v.* Larkin, 47 Md. 155, 28 Am. Rep. 442.

58. English *v.* Delaware, etc., Canal Co., 66 N. Y. 454, 23 Am. Rep. 69; Pittsburgh, etc., R. Co. *v.* Russ, 67 Fed. 662, 34 U. S. App. 14, 14 C. C. A. 612; Brown *v.* Memphis, etc., R. Co., 7 Fed. 51; U. S. *v.* Kane, 9 Sawy. (U. S.) 614, 19 Fed. 42.

The fact that a passenger wrongfully ejected subsequently secures transportation without additional payment or damage resulting from the delay does not defeat his right to recover damages for the wrongful ejection. Southern R. Co. *v.* Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536. But if after the ejection he is offered opportunity to continue his journey on the same train he cannot recover damages for delay. Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

Protection of baggage.— A passenger being ejected from a train has the right to use such force as is necessary to save his luggage from injury. Gulf, etc., R. Co. *v.* Moody, (Tex. Civ. App. 1895) 30 S. W. 574.

59. Crocker *v.* New London, etc., R. Co., 24 Conn. 249; Kiley *v.* Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 82 Am. St. Rep. 460, 52 L. R. A. 626; Chicago, etc., R. Co. *v.* Casazza, 83 Ill. App. 421; Schaefer *v.* North Chicago St. R. Co., 82 Ill. App. 473; North Chicago St. R. Co. *v.* Olds, 40 Ill. App. 421; Chicago, etc., R. Co. *v.* Wilson, 23 Ill. App.

5. Actions Based on Wrongful or Negligent Expulsion — a. Form of Action. The passenger who is wrongfully ejected may sue either in tort or on contract.[60] But tort is the form of action usually adopted, for the reason that the basis for recovery of damages is broader in that form of action than it would be in an action for breach of contract, and such an action may be maintained for the wrongful ejection itself, without regard to the mode of effecting it.[61]

b. Pleading. Plaintiff suing for wrongful expulsion should allege facts showing that the relation of passenger and carrier had arisen under which plaintiff was entitled to transportation.[62] Or, if the complaint is for wrongful expulsion

63; Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780; Atchison, etc., R. Co. *v.* Brown, 2 Kan. App. 604, 42 Pac. 588; Hall *v.* Memphis, etc., R. Co., 9 Fed. 585, 15 Fed. 57.

The act of resisting dangerous expulsion from a moving train will not constitute negligence defeating recovery for death resulting from being thus expelled. Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286.

A passenger who has paid his fare and is wrongfully threatened with expulsion on the ground of non-payment is not bound to submit to the unlawful exaction and pay again, with the mere right to recover back the money unlawfully exacted, but may refuse further payment and recover for unlawful expulsion. Chamberlain *v.* Lake Shore, etc., R. Co., 110 Mich. 614, 68 N. W. 423; Gulf, etc., R. Co. *v.* Copeland, 17 Tex. Civ. App. 55, 42 S. W. 239; Sprenger *v.* Tacoma Traction Co., 15 Wash. 660, 47 Pac. 17, 43 L. R. A. 706.

60. Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857; Sutton *v.* Southern R. Co., 101 Ga. 776, 29 S. E. 53; Chicago, etc., R. Co. *v.* Spirk, 51 Nebr. 167, 70 N. W. 926.

61. *California.*— Gorman *v.* Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157.

Colorado.— Denver Tramway Co. *v.* Cloud, 6 Colo. App. 445, 40 Pac. 779.

Georgia.— Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; Savannah City, etc., R. Co. *v.* Brauss, 70 Ga. 368.

Illinois.— Chicago, etc., R. Co. *v.* Peacock, 48 Ill. 253; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Chicago, etc., R. Co. *v.* Casazza, 83 Ill. App. 421.

New York.— Eddy *v.* Syracuse Rapid Transit R. Co., 50 N. Y. App. Div. 109, 63 N. Y. Suppl. 645.

Oklahoma.— Noble *v.* Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483.

Texas.— Mexican Cent. R. Co. *v.* Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778.

West Virginia.— Boster *v.* Chesapeake, etc., R. Co., 36 W. Va. 318, 15 S. E. 158.

United States.— Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. 822, 18 U. S. App. 279, 6 C. C. A. 597; Pouilin *v.* Canadian Pac. R. Co., 47 Fed. 858; Emigh *v.* Pittsburgh, etc., R. Co., 4 Biss. (U. S.) 114, 8 Fed. Cas. No. 4,449.

See 9 Cent. Dig. tit. "Carriers," § 1463.

There is some authority for the contention that where, as between the passenger and the conductor who causes his expulsion, there is no right to transportation shown, but the expulsion is the result of the fault of the agent of the carrier or previous conductor in not furnishing to the passenger the evidence of his right to transportation to which he was entitled, the action should be against the carrier for breach of the original contract to transport, and not in tort for wrongful ejection. Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 20 Ky. L. Rep. 516, 46 S. W. 209; Spink *v.* Louisville, etc., R. Co., 21 Ky. L. Rep. 778, 52 S. W. 1067; Graves *v.* Newark, etc., R. Co., 6 N. J. L. J. 307. But by better reason and the weight of authority an action of tort may be maintained even in such a case, for the wrong involved in the ejection is the proximate consequence of the wrong of the carrier's servants with reference to the transportation of the passenger, and is chargeable to the carrier as a tort. St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Pittsburgh, etc., R. Co. *v.* Reynolds, 55 Ohio St. 370, 45 N. E. 712, 60 Am. St. Rep. 706; Reynolds *v.* Railway Co., 13 Ohio Cir. Ct. 39; Lovings *v.* Norfolk, etc., R. Co., 47 W. Va. 582, 35 S. E. 962; McKay *v.* Ohio River R. Co., 34 W. Va. 65, 26 Am. St. Rep. 913, 11 S. E. 737, 9 L. R. A. 132.

62. Ohio, etc., R. Co. *v.* Craucher, 132 Ind. 275, 31 N. E. 941; Mykleby *v.* Chicago, etc., R. Co., 39 Minn. 54, 38 N. W. 763.

The facts essential to show the right to transportation should be alleged in the declaration, and it is not sufficient to make a mere general allegation that the ejectment was wrongful. Barnum *v.* Baltimore, etc., R. Co., 5 W. Va. 10.

If the complaint is of the use of unnecessary force, facts showing not merely use of force, but of unnecessary force, must be alleged. Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611.

Freedom from contributory negligence.— Plaintiff need not allege in his petition, in an action to recover for wrongful or negligent ejectment, that he was free from contributory negligence or fault in connection therewith. South Florida R. Co. *v.* Rhodes, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733; Louisville, etc., R. Co. *v.* Goben, 15 Ind. App. 123, 42 N. E. 1116; Lake Erie, etc., R. Co. *v.* Matthews, 13 Ind. App. 355, 41 N. E. 842.

from the station, it must show that plaintiff was there with intent as a passenger to be transported.[63] If it appears that the ejection was from a train, facts must be alleged showing the train to have been a proper one, as, for instance, that it was a train stopping at the destination to which plaintiff was entitled to transportation.[64]

c. Evidence. The burden of proof is on plaintiff seeking to recover damages for wrongful ejection as a passenger to show that he was rightfully on the vehicle where he was being transported.[65] For this purpose it may become important to show his intent, for which purpose evidence is admissible that he endeavored to procure a ticket before entering the car.[66] On the other hand, as disproving his good faith and purpose to pay fare, evidence that he had no money with him is competent.[67]

d. Measure of Damages — (I) *Expense; Loss of Time; Inconvenience.* A passenger wrongfully ejected may recover compensation for loss of time and additional expense due to the delay and inconvenience suffered.[68]

(II) *Physical and Mental Suffering.* If physical injuries are suffered from wrongful or negligent expulsion, or as a proximate result of such expulsion, or from the use of unnecessary force in connection with a rightful expulsion, recovery may be had therefor under the general rules which govern recovery for physical injuries in other cases of tort.[69] If the ejection is wrongful there may also be recovery by way of actual damages for mental pain and suffering, so called, including shame and mortification which resulted to plaintiff, and the humiliation to which he was subjected and the indignity put upon him.[70] The

63. Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337.

64. Lake Erie, etc., R. Co. *v.* Lucas, 18 Ind. App. 239, 47 N. E. 842; Turner *v.* McCook, 77 Mo. App. 196.

65. Georgia Cent. R. Co. *v.* Cannon, 106 Ga. 828, 32 S. E. 874.

66. Perkins *v.* Missouri, etc., R. Co., 55 Mo. 201.

67. Atchison, etc., R. Co. *v.* Cuniffe, (Tex. Civ. App. 1900) 57 S. W. 692.

It is not competent as bearing on plaintiff's good faith for defendant to show that on other occasions plaintiff had attempted to avoid payment of fare. English *v.* Delaware, etc., Canal Co., 4 Hun (N. Y.) 683.

68. *California.*— Proctor *v.* Southern California R. Co., 130 Cal. 20, 62 Pac. 306.

Georgia.— Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352.

Illinois.— Pennsylvania R. Co. *v.* Connell, 127 Ill. 419, 20 N. E. 89.

Texas.— Houston, etc., R. Co. *v.* Crone, (Tex. Civ. App. 1896) 37 S. W. 1074; International, etc., R. Co. *v.* Camphell, 1 Tex. Civ. App. 509, 20 S. W. 845.

Wisconsin.— Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506.

United States.— Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231; Quigley *v.* Central Pac. R. Co., 5 Sawy. (U. S.) 107, 20 Fed. Cas. No. 11,510, 27 Pittsb. Leg. J. (Pa.) 154.

See 9 Cent. Dig. tit. "Carriers," § 1485.

69. Pennsylvania R. Co. *v.* Connell, 127 Ill. 419, 20 N. E. 89; Louisville, etc., R. Co. *v.* Wolfe, 128 Ind. 347, 27 N. E. 606, 25 Am. St. Rep. 436; Cross *v.* Kansas City, etc., R. Co., 56 Mo. App. 664; Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231; and, generally, Damages.

70. *Alabama.*— Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

California.— Gorman *v.* Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157.

Illinois.—Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584; Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133; Chicago, etc., R. Co. *v.* Adams, 60 Ill. App. 571; Toledo, etc., R. Co. *v.* Kid, 29 Ill. App. 353.

Indiana.— Pennsylvania Co. *v.* Bray, 125 Ind. 229, 25 N. E. 439; Chicago, etc., R. Co. *v.* Holdridge, 118 Ind. 281, 20 N. E. 837; Lake Erie, etc., R. Co. *v.* Fix, 88 Ind. 381, 45 Am. Rep. 464; Louisville, etc., R. Co. *v.* Goben, 15 Ind. App. 123, 42 N. E. 1116; Chicago, etc., R. Co. *v.* Conley, 6 Ind. App. 9, 32 N. E. 96.

Iowa.— Curtis *v.* Sioux City, etc., R. Co., 87 Iowa 622, 54 N. W. 339.

Kansas.— Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937; Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

Kentucky.— Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 20 Ky. L. Rep. 516, 46 S. W. 209; Louisville, etc., R. Co. *v.* Wilsey, 9 Ky. L. Rep. 1008.

Minnesota.— Serwe *v.* Northern Pac. R. Co., 48 Minn. 78, 50 N. W. 1021; Carsten *v.* Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 20 Am. St. Rep. 589, 9 L. R. A. 688; Du Laurans *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am. Rep. 102.

Nevada.— Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

New Jersey.— Allen *v.* Camden, etc., Steamboat Ferry Co., 46 N. J. L. 198.

New York.— Harding *v.* New York, etc., R. Co., 36 Hun (N. Y.) 72.

Ohio.— Smith *v.* Pittsburg, etc., R. Co., 23 Ohio St. 10.

fear involved in the apprehension attending, or which may follow, expulsion from the train may also be taken into account.[71]

(III) *Proximate and Remote Damages.* Where the servant of the carrier who wrongfully ejected a passenger also causes his arrest on the charge of crime, the imprisonment and detention are proximate results which may properly be considered in assessing damages.[72] Personal injuries resulting from efforts to reach some place of security after expulsion are recoverable,[73] but not those resulting from unnecessary exposure or effort.[74] In determining what physical injuries are proximate it is competent to show the physical and mental condition of plaintiff which aggravated the injury, although such peculiar condition was not known to the carrier.[75] Plaintiff cannot, however, recover for the humiliation resulting from subsequent comments of persons not present,[76] nor injury to good name,[77] nor loss of work,[78] nor injury to business or professional reputation,[79] nor for having been compelled to borrow money to pay fare illegally exacted.[80] If the expulsion is not wrongful or in an improper manner the passenger cannot recover for wounded feelings. He cannot speculate in an action against the carrier by way of seeking recovery for an act which he must have known would follow his attempt to wrongfully secure transportation, or his negligence in not complying with the regulations of the carrier.[81]

(IV) *Mitigation of Damages.* Although the passenger who produces a ticket or is ready to pay fare may recover substantial damages for being ejected,[82] and the good faith of the carrier's servants in ejecting will not prevent recovery of such substantial damages, although competent to be shown for the purpose of affecting the amount of recovery,[83] yet the passenger has no right, even where the

Pennsylvania.— Laird *v.* Pittsburg Traction Co., 166 Pa. St. 4, 31 Atl. 51; Baltimore, etc., R. Co. *v.* Bambrey, (Pa. 1888) 16 Atl. 67.

Texas.— International, etc., R. Co. *v.* Leak, 64 Tex. 654; Hays *v.* Houston, etc., R. Co., 46 Tex. 272; Atchison, etc., R. Co. *v.* Cuniffe, (Tex. Civ. App. 1900) 57 S. W. 692; Gulf, etc., R. Co. *v.* Moody, (Tex. Civ. App. 1895) 30 S. W. 574.

Wisconsin.— Schmitt *v.* Milwaukee St. R. Co., 89 Wis. 195, 61 N. W. 834.

See 9 Cent. Dig. tit. "Carriers," § 1487.

To sustain a recovery for injured feelings, the mental injury must be connected with bodily injury or attended with circumstances of malice, insult, or humiliation. Snyder *v.* Wabash R. Co., 85 Mo. App. 495.

71. Louisville, etc., R. Co. *v.* Joplin, 21 Ky. L. Rep. 1380, 55 S. W. 206; Missouri Pac. R. Co. *v.* Kaiser, 82 Tex. 144, 18 S. W. 305; Allen *v.* Texas, etc., R. Co., (Tex. Civ. App. 1894) 27 S. W. 943.

72. Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488, 58 S. W. 58.

73. Bland *v.* Southern Pac. R. Co., 65 Cal. 626, 4 Pac. 672; Lake Erie, etc., R. Co. *v.* Cloes, 5 Ind. App. 441, 32 N. E. 588; Malone *v.* Pittsburgh, etc., R. Co., 152 Pa. St. 390, 25 Atl. 638.

74. *California.*— Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

Georgia.— Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Illinois.— Ohio, etc., R. Co. *v.* Burrow, 32 Ill. App. 161.

Louisiana.— Bader *v.* Southern Pac. Co., 52 La. Ann. 1060, 27 So. 584.

Missouri.— Spry *v.* Missouri, etc., R. Co., 73 Mo. App. 203.

Tennessee.—Louisville, etc., R. Co. *v.* Fleming, 14 Lea (Tenn.) 128.

Texas.— Galveston, etc., R. Co. *v.* Turner, (Tex. Civ. App. 1893) 23 S. W. 83.

75. Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; Coleman *v.* New York, etc., R. Co., 106 Mass. 160; Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588; Mann Boudoir Car Co. *v.* Dupre, 54 Fed. 646, 13 U. S. App. 183, 4 C. C. A. 540, 21 L. R. A. 289.

76. Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

77. Procter *v.* Southern California R. Co., 130 Cal. 20, 62 Pac. 306.

78. Carsten *v.* Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 20 Am. St. Rep. 589, 9 L. R. A. 688.

79. Schmitt *v.* Milwaukee St. R. Co., 89 Wis. 195, 61 N. W. 834.

80. Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312.

81. St. Louis, etc., R. Co. *v.* Trimble, 54 Ark. 354, 15 S. W. 899; Cincinnati, etc., R. Co. *v.* Cole, 29 Ohio St. 126, 23 Am. Rep. 729; Texas Pac. R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347; Russell *v.* Missouri, etc., R. Co., 12 Tex. Civ. App. 627, 35 S. W. 724; Murphy *v.* Western, etc., R. Co., 23 Fed. 637.

82. Zagelmeyer *v.* Cincinnati, etc., R. Co., 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514.

83. Georgia R. Co. *v.* Homer, 73 Ga. 251; Curtis *v.* Louisiana City R. Co., 94 Ky. 573, 15 Ky. L. Rep. 351, 23 S. W. 363, 21 L. R. A. 649; Willson *v.* Northern Pac. R. Co., 5 Wash.

ejection is unauthorized, to unnecessarily resist and thereby bring upon himself the exercise of force resulting in personal injury, and for injuries thus suffered, unless they were unnecessarily or maliciously inflicted, there can be no recovery.[84] In some cases it has been held that it is the duty of the passenger, even where there is no ground for eviction for non-payment of fare, to pay whatever additional fare is demanded, and thereby limit himself to a recovery of the amount so unlawfully exacted.[85] But, it is said with better reason that even though the amount demanded is trifling, the passenger may stand upon his legal rights, and, submitting to an unlawful ejection, recover damages therefor.[86]

(v) *Exemplary Damages.* In accordance with the theory which at one time received some support that a master is not liable for the wilful and malicious acts of his servant, it has been said by some courts that a railway company as carrier of passengers is not liable in exemplary damages for the malicious acts of its servants in expelling a passenger from the train.[87] In other cases it has been said that the corporation is not liable under such circumstances unless it had authorized or ratified the acts of its servant.[88] But the doctrine that a master is not liable for the wilful and malicious acts of the servant, even though within the scope of his general employment, is generally discarded, and with it the doctrine that a corporation cannot be rendered liable for exemplary damages by reason of its servant's acts, and the generally recognized rule is that the carrier may be mulcted in exemplary damages for the wrongful acts of its servant in expelling the passenger from a train, where such act is within the scope of the servant's employment, in all cases where natural persons, acting for themselves, would be liable for such damages.[89] And in a great variety of cases in which recovery has been sought against carriers for wrongful ejection, exemplary damages have been allowed where it has been shown that the act was accompanied with malice, wantonness, or gross negligence.[90] On the other hand, even though

621, 32 Pac. 468, 34 Pac. 146; Pittsburgh, etc., R. Co. *v.* Russ, 67 Fed. 662, 34 U. S. App. 14, 14 C. C. A. 612; Gibson *v.* East Tennessee, etc., R. Co., 30 Fed. 904; Hall *v.* Memphis, etc., R. Co., 15 Fed. 57; Brown *v.* Memphis, etc., R. Co., 7 Fed. 51.

84. Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238; Peabody *v.* Oregon R., etc., Co., 21 Oreg. 121, 26 Pac. 1053, 12 L. R. A. 823.

The passenger may resist so far as it is necessary to make it appear that his ejection is against his will. Pittsburgh, etc., R. Co. *v.* Russ, 67 Fed. 662, 34 U. S. App. 14, 14 C. C. A. 612.

If unnecessary violence used in a lawful ejection is provoked by the aggressions of the person evicted, which excite the passions of the servant properly effecting the eviction, recovery cannot be had therefor. City Electric R. Co. *v.* Shropshire, 101 Ga. 33, 28 S. E. 508.

85. Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354; Hall *v.* Memphis, etc., R. Co., 15 Fed. 57.

86. Jeffersonville R. Co. *v.* Rogers, 28 Ind. 1, 92 Am. Dec. 276; Lake Erie, etc., R. Co. *v.* Arnold, 8 Ind. App. 297, 34 N. E. 742; Yorton *v.* Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.

87. *California.*— Turner *v.* North Beach, etc., R. Co., 34 Cal. 594.

Missouri.— Rouse *v.* Metropolitan St. R. Co., 41 Mo. App. 298.

Oregon.— Sullivan *v.* Oregon R., etc., Co., 12 Oreg. 392, 7 Pac. 508, 53 Am. Rep. 364.

Rhode Island.— Hagan *v.* Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377.

United States.— Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 13 S. Ct. 261, 37 L. ed. 97; Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. 822, 18 U. S. App. 279, 6 C. C. A. 597.

See also cases cited *infra*, III, F, 5, b.

88. Ristine *v.* Blocker, (Colo. App. 1900) 61 Pac. 486; International, etc., R. Co. *v.* Miller, 9 Tex. Civ. App. 104, 28 S. W. 233; Vassau *v.* Madison Electric R. Co., 106 Wis. 301, 82 N. W. 152; Hinckley *v.* Chicago, etc., R. Co., 38 Wis. 194.

The prompt discharge by the company of a conductor guilty of unnecessary violence in evicting a passenger prevents the recovery of exemplary damages, but not recovery for wounded feelings. Western, etc., R. Co. *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842.

89. Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382.

Exemplary damages cannot be recovered in an action *ex contractu* for expulsion. Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 20 Ky. L. Rep. 516, 46 S. W. 209.

There can be no recovery of exemplary damages against a railroad company for unlawful ejection of a passenger by the conductor, unless such damages could have been recovered had the action been against the conductor himself. Townsend *v.* New York Cent., etc., R. Co., 56 N. Y. 295, 15 Am. Rep. 419.

90. *Alabama.*— Louisville, etc., R. Co. *v.* Bizzell, 131 Ala. 429, 30 So. 777.

Arkansas.— St. Louis, etc., R. Co. *v.* Davis, 56 Ark. 51, 19 S. W. 107.

the ejection had been wrongful, yet if accomplished without malice or unnecessary force, violence, or indignity, and with reasonable care, exemplary damages have been refused.[91] Where the ejection is due to the fault of an agent or prior conductor in not furnishing the passenger with proper evidence of his right to ride, and not to any fault of the conductor who expels him, it has been said that exemplary damages cannot be recovered.[92] But on the theory that the expulsion is the proximate result of the fault of such prior agent or conductor it may well be that exemplary damages may be recoverable, the fault of the agent or first conductor being found to be grossly negligent or wilful.[93]

(VI) *NOMINAL DAMAGES.* Where the object of the passenger in attempting to ride on a ticket which, while legally sufficient, is one which he knows will not be accepted, is for the purpose of recovering damages for wrongful expulsion, and not for the good-faith purpose of being transported, his recovery of damages will be only nominal.[94]

Connecticut.— Dalton *v.* Beers, 38 Conn. 529.

Georgia.— Southern R. Co. *v.* Walton, (Ga. 1901) 39 S. E. 897; Southern R. Co. *v.* Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536; Georgia R., etc., Co. *v.* Dougherty, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499; Georgia R. Co. *v.* Olds, 77 Ga. 673; Georgia R. Co. *v.* Homer, 73 Ga. 251.

Illinois.— Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126.

Indiana.— Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627; Louisville, etc., R. Co. *v.* Goben, 15 Ind. App. 123, 42 N. E. 1116.

Kansas.— Union Pac. R. Co. *v.* Mitchell, 56 Kan. 324, 43 Pac. 244; Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; Kansas Pac. R. Co. *v.* Kessler, 18 Kan. 523; Atchison, etc., R. Co. *v.* Long, 5 Kan. App. 644, 47 Pac. 993.

Kentucky.— Louisville, etc., R. Co. *v.* Joplin, 21 Ky. L. Rep. 1380, 55 S. W. 206; Louisville, etc., R. Co. *v.* Wilkinson, 15 Ky. L. Rep. 92; Louisville, etc., R. Co. *v.* Ferrell, 7 Ky. L. Rep. 607.

Maryland.— Philadelphia, etc., R. Co. *v.* Hoeflich, 62 Md. 300, 50 Am. Rep. 223; Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344.

Michigan.—Lucas *v.* Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517.

Mississippi.—Louisville, etc., R. Co. *v.* Maybin, 66 Miss. 83, 5 So. 401.

South Carolina.— Spellman *v.* Richmond, etc., R. Co., 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858; Hall *v.* South Carolina R. Co., 28 S. C. 261, 5 S. E. 623.

Tennessee.— Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451; Louisville, etc., R. Co. *v.* Fleming, 14 Lea (Tenn.) 128; Louisville, etc., R. Co. *v.* Garrett, 8 Lea (Tenn.) 438, 41 Am. Rep. 640.

Virginia.— Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130, 52 Am. Rep. 620.

United States.— Gallena *v.* Hot Springs R. Co., 4 McCrary (U. S.) 371, 13 Fed. 116.

See 9 Cent. Dig. tit. "Carriers," § 1489.

91. *Colorado.*— Denver Tramway Co. *v.* Cloud, 6 Colo. App. 445, 40 Pac. 779.

Illinois.— Toledo, etc., R. Co. *v.* Patterson, 63 Ill. 304.

Iowa.— Fitzgerald *v.* Chicago, etc., R. Co., 50 Iowa 79.

Kansas.— Atchison, etc., R. Co. *v.* Lamoreux, 5 Kan. App. 813, 49 Pac. 152.

Minnesota.— Pine *v.* St. Paul City R. Co., 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347; Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312.

Mississippi.— Forsee *v.* Alabama Great Southern R. Co., 63 Miss. 66, 56 Am. Rep. 801.

Missouri.— Brown *v.* Missouri, etc., R. Co., 64 Mo. 536.

New York.— Parker *v.* Long Island R. Co., 13 Hun (N. Y.) 319.

North Carolina.—Allen *v.* Wilmington, etc., R. Co., 119 N. C. 710, 25 S. E. 787.

Ohio.— Cincinnati, etc., R. Co. *v.* Cole, 29 Ohio St. 126, 23 Am. Rep. 729.

Tennessee.— Louisville, etc., R. Co. *v.* Guinan, 11 Lea (Tenn.) 98, 47 Am. Rep. 279.

Wisconsin.— Vassau *v.* Madison Electric R. Co., 106 Wis. 301, 82 N. W. 152; Patry *v.* Chicago, etc., R. Co., 77 Wis. 218, 46 N. W. 56.

92. Vicksburg R., etc., Co. v. Marlett, 78 Miss. 872, 29 So. 62; Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25; Eddy *v.* Syracuse Rapid Transit R. Co., 50 N. Y. App. Div. 109, 63 N. Y. Suppl. 645.

93. Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103; Callaway *v.* Mellett, 15 Ind. App. 366, 44 N. E. 198; Winters *v.* Cowen, 90 Fed. 99; Fell *v.* Northern Pac. R. Co., 44 Fed. 248.

Threat of expulsion.— Exemplary damages cannot be recovered for a mere threat of expulsion. Paine *v.* Chicago, etc., R. Co., 45 Iowa 569.

94. Southern R. Co. *v.* Barlow, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166.

Where one who is not entitled to transportation is ejected without injury or indignity at a place which by statute is not a proper place for putting a passenger off the train, and no actual damage consequent on such ejection at an improper place is shown, the recovery can be for nominal damages only. St. Louis, etc., R. Co. *v.* Branch, 45 Ark. 524;

D. Special Contracts; Fares; Tickets; Limitations — 1. Fare — a. Payment.[95] Looking at the relation of carrier and passenger as arising out of contract, it is evident that, while a person may be a passenger without payment, if accepted as such by the carrier,[96] nevertheless, to give rise to any contractual relation, consideration on the part of the passenger is essential.[97] If by contract the carrier is under obligation to furnish tickets, as, for instance, in exchange under the provisions of a mileage book, the passenger may recover damages for failure of the carrier through its proper agents to furnish such tickets showing the passenger to be entitled to transportation.[98]

b. Recovery of Overcharge. If the agents of the carrier exact a larger amount by way of fare than the carrier is entitled to, the passenger may recover back the excess charge, with interest.[99]

2. Tickets — a. Whether Ticket Is a Contract. There has been some diversity of opinion as to whether a railroad ticket, or other similar ticket entitling the passenger to transportation, is to be deemed a contract.[1] The ordinary ticket is not a contract but is evidence of the right to transportation furnished to the passenger in consequence of a contract to carry, and intended to enable the passenger to secure transportation, under the rules and regulations of the carrier in performance of such contract.[2] There is no question, however, on the other hand, that

Chicago, etc., R. Co. *v.* Roberts, 40 Ill. 503; Terre Haute, etc., R. Co. *v.* Vanatta, 21 Ill. 188, 74 Am. Dec. 96.

95. Payment of fare as a condition to the right of transportation has already been discussed. See *supra*, III, C, 2.

96. See *supra*, III, B, 5.

97. Thus a life pass issued without consideration is merely a revocable license. Turner *v.* Richmond, etc., R. Co., 70 N. C. 1.

One having a right to ride free on a railroad may be provided with a pass, which he may be required to exhibit, but if no pass is furnished, and no such requirement made, then the company should otherwise advise its conductors of his rights. Grimes *v.* Minneapolis, etc., R. Co., 37 Minn. 66, 33 N. W. 33.

98. Pittsburgh, etc., R. Co. *v.* Daniels, 90 Ill. App. 154.

Statutory provisions requiring the sale of mileage tickets exist in New York, and perhaps in other states. Corcoran *v.* New York Cent., etc., R. Co., 164 N. Y. 587, 58 N. E. 1086; Horton *v.* Erie R. Co., 65 N. Y. App. Div. 587, 72 N. Y. Suppl. 1018; Trolan *v.* New York Cent., etc., R. Co., 31 N. Y. App. Div. 320, 52 N. Y. Suppl. 257; Watson *v.* New York, etc., R. Co., 24 Misc. (N. Y.) 628, 54 N. Y. Suppl. 201.

99. Paine *v.* Chicago, etc., R. Co., 45 Iowa 569; Courts *v.* Louisville R. Co., 99 Ky. 574, 18 Ky. L. Rep. 415, 36 S. W. 548; Southern Pac. Co. *v.* Patterson, 7 Tex. Civ. App. 451, 27 S. W. 194.

Voluntary payment of overcharge, for the purpose of recovering the statutory penalty therefor, does not preclude such recovery. Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

Where the overcharge is in flagrant evasion of a statutory obligation, and oppressive in its nature, exemplary damages may be allowed. Galveston, etc., R. Co. *v.* Patterson, (Tex. Civ. App. 1898) 46 S. W. 848.

If, on failure of carrier to perform his contract, as for instance in case of transportation by ship, the passenger is carried to an intermediate point, and, on account of the wrecking of the vessel, is left there without an offer to complete the transportation, the entire passage money may be recovered. Brown *v.* Harris, 7 Gray (Mass.) 359.

1. See Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455; Dietrich *v.* Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711; Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470, 32 L. T. Rep. N. S. 709.

2. *Nebraska.*— Chollette *v.* Omaha, etc., R. Co., 26 Nebr. 159, 41 N. W. 1106, 4 L. R. A. 135.

New York.—Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Van Buskirk *v.* Roberts, 31 N. Y. 661.

Ohio.— Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457.

Pennsylvania.— Sleeper *v.* Pennsylvania R. Co., 100 Pa. St. 259, 45 Am. Rep. 380.

Vermont.— Jerome *v.* Smith, 48 Vt. 230, 21 Am. Rep. 125.

Virginia.—Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130, 52 Am. Rep. 620.

United States.— New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 12 S. Ct. 356, 36 L. ed. 71.

England.— Burke *v.* South Eastern R. Co., 5 C. P. D. 1, 44 J. P. 283, 49 L. J. C. P. 107, 41 L. T. Rep. N. S. 554, 28 Wkly. Rep. 306. But see Great Northern R. Co. *v.* Palmer, [1895] 1 Q. B. 862, 59 J. P. 166, 64 L. J. Q. B. 316, 72 L. T. Rep. N. S. 287, 15 Reports 296, 43 Wkly. Rep. 317.

As to baggage or luggage.— In connection with the discussion of the carrier's liability for the luggage of the passenger, it appears that an ordinary ticket is not deemed to constitute the contract of transportation, and therefore that conditions or limitations appearing thereon are not binding on the passenger unless assented to by him, the mere

the ticket may be in such form as to indicate that it is mutually intended and understood as a contract, the terms and conditions of which become binding on the passenger by signature and acceptance, or even by acceptance alone, without signature.[3] As to the ordinary ticket, however, it has been held that it does not preclude parol evidence to show the contract of transportation.[4] On the other hand, the ticket is *prima facie* evidence of the possessor's right to transportation.[5] The fact that the ticket is issued on Sunday does not affect the right of the passenger traveling thereunder to recover in an action *ex delicto* for injuries wrongfully inflicted upon him during such transportation.[6]

b. Authority of Agent. Any agent allowed to exercise general authority to sell tickets over the line of a carrier thereby binds the carrier,[7] and any act within the apparent scope of his authority in making such contract for transportation will be binding.[8] But representations as to the effect of a ticket, not made in connection with its sale, are without authority.[9] Nor can an agent authorized to sell bind the carrier by delegating his authority to another, as by putting tickets already stamped and prepared for delivery into the hands of a third person, without the carrier's knowledge or consent.[10]

c. Connecting Lines. In the absence of any arrangement between carriers operating connecting lines, there is no right on the part of either to bind the other by the sale of a ticket for through transportation over the two lines.[11] But joint arrangements are frequently made, by which tickets issued by one of such carriers are accepted by the other.[12] The usual arrangement is that by which each of the connecting carriers sells tickets for the through transportation, acting as principal with reference to his own line, and agent of the connecting carrier in contracting for transportation over the connecting line.[13] A ticket thus sold is not a through contract,[14] and the right of the purchaser, and the responsibility of

acceptance of the ticket not being sufficient in itself to show assent. See *infra*, III, I, 2, a.

Inserted or annexed conditions.— As to other conditions inserted in or annexed to an ordinary passenger ticket not treated as a part of the contract see *infra*, III, D, 3, a.

3. See *infra*, III, D, 3, a.

4. Van Buskirk *v.* Roberts, 31 N. Y. 661.

5. Pier *v.* Finch, 24 Barb. (N. Y.) 514.

6. Masterson *v.* Chicago, etc., R. Co., 102 Wis. 571, 78 N. W. 757.

7. Southern R. Co. *v.* Marshall, 23 Ky. L. Rep. 813, 64 S. W. 418; Winters *v.* Cowen, 90 Fed. 99.

8. Gulf, etc., R. Co. *v.* Moorman, (Tex. Civ. App. 1898) 46 S. W. 662.

9. Hanlon *v.* Illinois Cent. R. Co., 109 Iowa 136, 80 N. W. 223.

10. Comer *v.* Foley, 98 Ga. 678, 25 S. E. 671; Frank *v.* Ingalls, 41 Ohio St. 560.

As to authority of agent in general to accept passenger see *supra*, III, B, 1, b, (II).

As to effect of mistake of agent in sale of ticket see *supra*, III, C, 3, e, (III).

As to waiver of conditions by agent see *infra*, III, D, 3, e.

11. Oregon Short Line, etc., R. Co. *v.* Northern Pac. R. Co., 51 Fed. 465.

If an arrangement has existed by which one company had a right to sell tickets over the line of the other, the second company is bound to honor such a ticket even after the arrangement has terminated, if the purchaser had no notice. Pittsburg, etc., R. Co. *v.* Berryman, 11 Ind. App. 640, 36 N. E. 728.

12. **If the arrangement** is such that the parties jointly undertake the transportation, then the liability is that of partners or joint contractors, and each is liable for the entire transportation. Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. (D. C.) 300; Wylde *v.* Northern R. Co., 14 Abb. Pr. N. S. (N. Y.) 213; Nashville, etc., R. Co. *v.* Sprayberry, 8 Baxt. (Tenn.) 341, 35 Am. Rep. 705; Howe *v.* Gibson, 3 Tex. Civ. App. 263, 22 S. W. 826.

The mere fact, however, that each of two connecting lines sells through tickets, good on the other line, collecting the whole price and accounting to the others for their shares, or that such tickets are sold by joint agents, does not show a partnership arrangement. Ellsworth *v.* Tartt, 26 Ala. 733, 62 Am. Dec. 749; Chicago, etc., R. Co. *v.* Mulford, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; Hartan *v.* Eastern R. Co., 114 Mass. 44; Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222; Nashville, etc., R. Co. *v.* Sprayberry, 9 Heisk. (Tenn.) 852.

13. *Georgia.*— Spencer *v.* Lovejoy, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152.

Illinois.— Chicago, etc., R. Co. *v.* Mulford, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

New York.— Milnor *v.* New York, etc., R. Co., 53 N. Y. 363.

Pennsylvania.— Young *v.* Pennsylvania R. Co., 115 Pa. St. 112, 7 Atl. 741.

United States.— Cowen *v.* Winters, 96 Fed. 929, 37 C. C. A. 628.

See 9 Cent. Dig. tit. "Carriers," § 1033.

14. Chicago, etc., R. Co. *v.* Mulford, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; St.

the different companies are the same as though separate tickets had been purchased by him from each, and each is responsible for injury suffered on its own line, and not otherwise.[15] But the contract of the carrier selling the ticket may be for through transportation, and in such case the company selling the ticket is the principal, and the connecting carrier continuing the transportation of the passenger under such ticket is the agent of the carrier selling the ticket, for the purpose of carrying out the contract of transportation, and in such case the carrier selling the ticket will be liable for any fault of the connecting carrier or its servants.[16]

d. Assignability. An ordinary ticket, merely indicating a right to be transported by the carrier between two points named on his line, is assignable, and the right to be transported between the points thus indicated passes by delivery of the ticket.[17] But by a stipulation it may be made non-transferable, in which

Clair *v.* Kansas City, etc., R. Co., 77 Miss. 789, 28 So. 957; Talcott *v.* Wabash R. Co., 159 N. Y. 461, 54 N. E. 1; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354.

15. *Connecticut.*— Hood *v.* New York, etc., R. Co., 22 Conn. 1.

Illinois.— Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238.

Kansas.— Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199.

Maine.— Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

Massachusetts.— Hartan *v.* Eastern R. Co., 114 Mass. 44; Schopman *v.* Boston, etc., R. Corp., 9 Cush. (Mass.) 24, 55 Am. Dec. 41.

New York.— Koenke *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 457, 57 N. Y. Suppl. 325; Poole *v.* Delaware, etc., R. Co., 35 Hun (N. Y.) 29.

United States.— Keep *v.* Indianapolis, etc., R. Co., 3 McCrary (U. S.) 208, 9 Fed. 625.

In England a ticket for transportation over connecting lines is presumed to be the through contract of the company selling the ticket and the connecting carriers its agents. Thomas *v.* Rhymney R. Co., L. R. 6 Q. B. 266, 40 L. J. Q. B. 89, 24 L. T. Rep. N. S. 145, 19 Wkly. Rep. 477; Great Western R. Co. *v.* Blake, 7 H. & N. 987, 8 Jur. N. S. 1013, 31 L. J. Exch. 346, 10 Wkly. Rep. 388.

Connecting carrier a principal not an agent when.— If the ticket agent of a railroad company sells a ticket for transportation over a connecting line, the connecting carrier is not the agent of the corporation selling the ticket, but a principal, and the corporation selling the ticket is its agent for such purpose. Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238.

The liability of the first carrier will terminate when the passenger reaches the connecting carrier and becomes his passenger. Wabash, etc., R. Co. *v.* Wolff, 13 Ill. App. 437; Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

Where an agent acting for different roads sells tickets for transportation over such roads, he is the agent of each railroad with reference to the sale of the ticket over that road. Scott *v.* Cleveland, etc., R. Co., 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154.

Where there is a joint arrangement between two companies operating cars on the same track between certain points, tickets of either being good on the trains of the other between such points, the company whose agent sells the ticket is liable for wrongful ejectment of a passenger from the train of the other company. Barkman *v.* Pennsylvania R. Co., 89 Fed. 453.

Where two street-railway companies have an arrangement for transfer of passengers between them, a person paying his fare and receiving a transfer from one road to the other is a passenger on the second road when accepted, and can recover from that road for wrongful ejectment from its car. Jacobs *v.* Third Ave. R. Co., 33 Misc. (N. Y.) 802, 68 N. Y. Suppl. 623.

16. *District of Columbia.*— Watkins *v.* Pennsylvania R. Co., 21 D. C. 1; Jones *v.* Pennsylvania R. Co., 19 D. C. 178.

Illinois.— Chicago, etc., R. Co. *v.* Dumser, 161 Ill. 190, 43 N. E. 698.

Kansas.— Atchison, etc., R. Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199.

Nebraska.— Omaha, etc., R. Co. *v.* Crow, 54 Nebr. 747, 74 N. W. 1066, 69 Am. St. Rep. 741; Chollette *v.* Omaha, etc., R. Co., 26 Nebr. 159, 41 N. W. 1106, 4 L. R. A. 135.

North Carolina.— Washington *v.* Raleigh, etc., R. Co., 101 N. C. 239, 7 S. E. 789, 1 L. R. A. 830.

Texas.— Gulf, etc., R. Co. *v.* Cole, 8 Tex. Civ. App. 635, 28 S. W. 391.

Wisconsin.—Candee *v.* Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566.

Limitation of liability.— However, it seems that even where there is a contract for through transportation the first carrier may limit his liability under the contract to his own line. Moore *v.* Missouri, etc., R. Co., 18 Tex. Civ. App. 561, 45 S. W. 609; International, etc., R. Co. *v.* Campbell, 1 Tex. Civ. App. 509, 20 S. W. 845. *Contra*, Central R. Co. *v.* Combs, 70 Ga. 533, 48 Am. Rep. 582.

17. Spencer *v.* Lovejoy, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152; Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312; Carsten *v.* Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 20 Am. St. Rep. 589, 9 L. R. A. 688.

case no one other than the person to whom it is issued is entitled to transportation thereon.[18]

e. Construction and Effect. If a ticket is of doubtful meaning, or ambiguous, it should be construed most strongly against the carrier by whom it is issued, and in favor of the purchaser.[19] And if its terms in effect are dependent upon punches or marks not ordinarily intelligible to a purchaser, the latter may rely upon the representations of the agent with regard to this effect.[20] It is the duty of the passenger, however, to provide himself with the necessary evidence of his right to transportation.[21]

f. Forfeiture of Ticket. A carrier selling a ticket at a reduced rate, under an agreement that it shall not be transferred, may take it up as forfeited when presented by one not entitled to ride thereunder.[22] A ticket fraudulently obtained

18. Post *v.* Chicago, etc., R. Co., 14 Nebr. 110, 15 N. W. 225, 45 Am. Rep. 100; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689.

A train check, issued by the conductor in taking up a ticket, is not assignable or transferable, but is merely evidence of the right to transportation of the person to whom it is given. Walker *v.* Wabash, etc., R. Co., 15 Mo. App. 333; Cody *v.* Central Pac. R. Co., 4 Sawy. (U. S.) 114, 5 Fed. Cas. No. 2,940, 15 Alb. L. J. 52.

If purchaser has agreed not to transfer the ticket, a ticket broker who induces him to violate such agreement by selling a portion of the ticket to be used by another is guilty of an actionable wrong with reference to the carrier's contract. Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689.

In some states it is made a penal offense for any person other than the agent of the railroad company to sell its tickets. State *v.* Fry, 81 Ind. 7; People *v.* Warden New York City Prison, 157 N. Y. 116, 51 N. E. 1006, 68 Am. St. Rep. 763, 43 L. R. A. 264; State *v.* Ray, 109 N. C. 736, 14 S. E. 83, 14 L. R. A. 529; Jannin *v.* State, (Tex. Crim. 1899) 51 S. W. 1126.

Where non-transferable tickets were issued to a newspaper proprietor, with power to sell and transfer, it was held that such tickets were valid in the hands of the persons to whom they were thus sold, although by their terms limited to the first purchaser. Davis *v.* South Carolina, etc., R. Co., 107 Ga. 420, 33 S. E. 437.

19. Georgia R., etc., Co. *v.* Clarke, 97 Ga. 706, 25 S. E. 368; Cleveland, etc., R. Co. *v.* Kinsley, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245.

20. O'Rourke *v.* Citizens' St. R. Co., 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L. R. A. 614; Gulf, etc., R. Co. *v.* Copeland, 17 Tex. Civ. App. 55, 42 S. W. 239.

As to effect of mistake of agent or conductor in not furnishing the passenger the proper evidence of his right to transportation see *supra*, III, C, 3, e.

Where an agent undertook to so stamp and indorse the return portion of a ticket as to enable the owner to secure transportation thereon, held that the carrier was liable for the fault of such agent in failing to stamp it, by reason of which failure the passenger was ejected on his return trip. Northern Pac. R. Co. *v.* Pauson, 70 Fed. 585, 44 U. S. App. 178, 17 C. C. A. 287.

21. And unless his failure to do so is the result of some fault on the part of the carrier or his agents, the passenger will be entitled only to such transportation as he thus shows himself to be entitled to.

Georgia.— Comer *v.* Foley, 98 Ga. 678, 25 S. E. 671.

Indiana.— Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61; Pittsburgh, etc., R. Co. *v.* Nuzum, 60 Ind. 533.

New York.—Beebe *v.* Ayres, 28 Barb. (N. Y.) 275.

Ohio.— Shelton *v.* Lake Shore, etc., R. Co., 29 Ohio St. 214.

Texas.— International, etc., R. Co. *v.* Best, 93 Tex. 344, 55 S. W. 315.

United States.— Atchison, etc., R. Co. *v.* Cameron, 66 Fed. 709, 32 U. S. App. 67, 14 C. C. A. 358.

On the other hand, if the evidence of right to transportation which the passenger has is such as to show to the conductor his right to be transported, the conductor will not be justified in expelling him by reason of any defect due to the fault of the agent or previous conductor. Rouser *v.* North Park St. R. Co., 97 Mich. 565, 56 N. W. 937; Krueger *v.* Chicago, etc., R. Co., 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487; Laird *v.* Pittsburg Traction Co., 166 Pa. St. 4, 31 Atl. 51; Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022.

Further as to this subject see *supra*, III, C, 3, e.

22. Levinson *v.* Texas, etc., R. Co., 17 Tex. Civ. App. 617, 43 S. W. 901; Moore *v.* Ohio River R. Co., 41 W. Va. 160, 23 S. E. 539.

Offer to refund.— But it is said that the carrier cannot confiscate a mileage ticket purchased by a broker in a fictitious name without offering to refund the money paid. Morton *v.* Lake Erie, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 580, 7 Ohio N. P. 606.

Under a statute requiring railroads to issue mileage books, it was held that a company could not prescribe as a condition that if presented by another person than the one named therein the book should be taken up. Watson *v.* New York, etc., R. Co., 24 Misc. (N. Y.) 628, 54 N. Y. Suppl. 201.

Where mileage book was deposited by owner with a scalper as security, and without

from the carrier is subject to forfeiture in the hands of a purchaser, though he had no knowledge of the fraud.[23]

g. Redemption of Unused Ticket. The purchaser of a ticket who has not used it is not, as matter of law, entitled to have the amount paid therefor refunded to him.[24] But by statute it is sometimes provided that unused tickets, or portions of tickets not used, shall be redeemed by the carrier issuing them.[25]

3. Conditions and Limitations — a. In General. Where the ticket is not such as in form to constitute a special contract, conditions printed thereon are not binding on the purchaser unless assented to by him, expressly or by implication. The mere acceptance of the ticket is not enough to make them a part of the contract.[26] But if the ticket purports to constitute a mutual contract between the parties, reasonable conditions inserted therein are binding on the purchaser, being presumed to be assented to by him in the acceptance of the ticket itself.[27] If the

authority to permit its use by others, held that the act of the scalper in allowing its use by another would not justify its forfeiture. Mueller *v.* Chicago, etc., R. Co., 75 Minn. 109, 77 N. W. 566.

23. Frank *v.* Ingalls, 41 Ohio St. 560.

Issuance in assumed name.— Where the agent assents to the issuance of a mileage book in an assumed name, the carrier will be liable for the act of its conductor in taking up the book as forfeited when it is presented by the purchaser. Chicago, etc., R. Co. *v.* Pendergast, 75 Ill. App. 133.

Wrongful forfeiture.— The act of the conductor in wrongfully taking up a ticket as forfeited will not justify the passenger in refusing to pay fare except on condition that the book be returned, the ticket being one on which the passenger was not entitled to ride. Rahilly *v.* St. Paul, etc., R. Co., 66 Minn. 153, 68 N. W. 853.

24. Trezona *v.* Chicago Great Western R. Co., 107 Iowa 22, 77 N. W. 486, 43 L. R. A. 136.

25. Arnold *v.* Pennsylvania R. Co., 115 Pa. St. 135, 8 Atl. 213, 2 Am. St. Rep. 542; Ft. Worth, etc., R. Co. *v.* Cushman, 92 Tex. 623, 50 S. W. 1009; Levinson *v.* Texas, etc., R. Co., 17 Tex. Civ. App. 617, 43 S. W. 901.

Compliance with conditions of contract.— If conditions are by contract attached to the right to redeem, they must be complied with. Cooper *v.* London, etc., R. Co., 4 Exch. D. 88, 48 L. J. Exch. 434, 40 L. T. Rep. N. S. 324, 27 Wkly. Rep. 474.

26. *Georgia.*— Boyd *v.* Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146.

Massachusetts.— O'Regan *v.* Cunard Steamship Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484.

New York.— Nevins *v.* Bay State Steamboat Co., 4 Bosw. (N. Y.) 225.

Ohio.— Lake Shore, etc., R. Co. *v.* Mortal, 18 Ohio Cir. Ct. 562, 8 Ohio Cir. Dec. 134.

Tennessee.— Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

Texas.— San Antonio, etc., R. Co. *v.* Newman, 17 Tex. Civ. App. 606, 43 S. W. 915.

United States.— The Majestic, 56 Fed. 244; Mauritz *v.* New York, etc., R. Co., 23 Fed. 765.

In England it seems that conditions printed on the ticket are presumed to have been assented to, and are binding. Acton *v.* Castle Mail Packets Co., 8 Aspin. 73, 73 L. T. Rep. N. S. 158; Johnson *v.* Great Southern, etc., R. Co., Ir. R. 9 C. L. 108.

Reference on the face of a special ticket "See back" is not enough to make a condition printed on the back a part of the contract. The Majestic, 60 Fed. 624, 20 U. S. App. 503, 9 C. C. A. 161. *Contra*, Duff *v.* Great Northern R. Co., L. R. 4 Ir. 178, 41 L. T. Rep. N. S. 197.

27. *Georgia.*— Wenz *v.* Savannah, etc., R. Co., 108 Ga. 290, 33 S. E. 970; Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952.

Indiana.— Louisville, etc., R. Co. *v.* Nicholai, 4 Ind. App. 119, 30 N. E. 424.

Louisiana.— Granier *v.* Louisiana Western R. Co., 42 La. Ann. 880, 8 So. 614.

New Hampshire.— Eastman *v.* Maine Cent. R. Co., 70 N. H. 240, 46 Atl. 54.

New York.— Watson *v.* New York, etc., R. Co., 24 Misc. (N. Y.) 628, 54 N. Y. Suppl. 201.

North Carolina.— McRae *v.* Wilmington, etc., R. Co., 88 N. C. 526, 43 Am. Rep. 745.

South Carolina.— Daniels *v.* Florida Cent., etc., R. Co., 62 S. C. 1, 39 S. E. 762; Bethea *v.* Northeastern R. Co., 26 S. C. 91, 1 S. E. 372.

Tennessee.— Watson *v.* Louisville, etc., R. Co., 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454.

Texas.— Houston, etc., R. Co. *v.* Arey, 18 Tex. Civ. App. 457, 44 S. W. 894.

Utah.— Drummond *v.* Southern Pac. Co., 7 Utah 118, 25 Pac. 733.

Vermont.— Shedd *v.* Troy, etc., R. Co., 40 Vt. 88.

United States.— Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 10 S. Ct. 50, 33 L. ed. 290; Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. 822, 18 U. S. App. 279, 6 C. C. A. 597; New York, etc., R. Co. *v.* Bennett, 50 Fed. 496, 6 U. S. App. 95, 1 C. C. A. 544.

Signature of purchaser.— It is common to require signature of the purchaser to such ticket, and it may be presumed, where a signature is contemplated, but the purchaser is not in fact required to sign, that the conditions are not accepted by him, and the ticket has the effect of an ordinary ticket without conditions or limitations. Walker *v.* Price,

ticket is such as to constitute a special contract, then its terms will not be affected by any general representations of the carrier, by advertisement or otherwise, as to the effect of such tickets.[28] The conditions attached, even in case of a special contract ticket, must, however, be reasonable.[29]

b. Limitation as to Time. In the absence of any stipulation or limitation in the ticket it will be presumed to be unlimited as to the time when performance of the undertaking may be demanded.[30] But the purchaser is bound by, and must take notice of, limitations printed or stamped upon the face of the ticket as to the time within which it may be used.[31] In the construction of limitations as to time it is said that if, without fault of the passenger, he is delayed, so that he cannot complete his journey within the limitation of the ticket, then he is entitled, notwithstanding such limitation, to continue his journey to his destination.[32] In construing limitations as to time it has been held that the stipulation, "Not good for passage after" a certain number of days from date, or, "on and from date stamped on back," limits only the time of the commencement of the journey, so that, if the journey is commenced within the specified time the ticket remains

9 Kan. App. 720, 59 Pac. 1102. But in case of special tickets, such as mileage tickets, or tickets over connecting lines, the very terms of which imply an assent which it is required shall be given by signature, the failure to sign will not relieve the purchaser who accepts and uses the ticket from the limitations or conditions contained therein. Rahilly *v.* St. Paul, etc., R. Co., 66 Minn. 153, 68 N. W. 853; St. Clair *v.* Kansas City, etc., R. Co., 77 Miss. 789, 28 So. 957.

28. Dunlap *v.* Northern Pac. R. Co., 35 Minn. 203, 28 N. W. 240; Howard *v.* Chicago, etc., R. Co., 61 Miss. 194. It may be stipulated in the special contract that its terms cannot be altered, modified, or waived by an agent. Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163.

29. Dangerfield *v.* Atchison, etc., R. Co., 62 Kan. 85, 61 Pac. 405; O'Rourke *v.* Citizens' St. R. Co., 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L. R. A. 614.

By statute, limitation of liability by notice on a railroad ticket is sometimes prohibited. Phillips *v.* Georgia R., etc., Co., 93 Ga. 356, 20 S. E. 247; Rose *v.* Des Moines Valley R. Co., 39 Iowa 246.

30. Boyd *v.* Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146; Pennsylvania R. Co. *v.* Spicker, 105 Pa. St. 142; Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

31. *Alabama.*— McGhee *v.* Drisdale, 111 Ala. 597, 20 So. 391.

Iowa.— Trezona *v.* Chicago Great Western R. Co., 107 Iowa 22, 77 N. W. 486, 43 L. R. A. 136.

Louisiana.— Rawitzky *v.* Louisville, etc., R. Co., 40 La. Ann. 47, 3 So. 387; Coburn *v.* Morgan's Louisiana, etc., R. Co., 105 La. 398, 29 So. 882, 83 Am. St. Rep. 242.

Maryland.— Pennington *v.* Philadelphia, etc., R. Co., 62 Md. 95.

Massachusetts.— Boston, etc., R. Co. *v.* Trafton, 151 Mass. 229, 23 N. E. 829; Boston, etc., R. Co. *v.* Proctor, 1 Allen (Mass.) 267, 79 Am. Dec. 729.

Mississippi.— Howard *v.* Chicago, etc., R. Co., 61 Miss. 194.

New York.— Hill *v.* Syracuse, etc., R. Co., 63 N. Y. 101; Elmore *v.* Sands, 54 N. Y. 512, 13 Am. Rep. 617; Wentz *v.* Erie R. Co., 3 Hun (N. Y.) 241, 5 Thomps. & C. (N. Y.) 556; Boice *v.* Hudson River R. Co., 61 Barb. (N. Y.) 611; Barker *v.* Coflin, 31 Barb. (N. Y.) 556; Auerbach *v.* New York Cent., etc., R. Co., 60 How. Pr. (N. Y.) 382.

Ohio.— Powell *v.* Pittsburg, etc., R. Co., 25 Ohio St. 70.

Texas.— Missouri, etc., R. Co. *v.* Murphy, (Tex. Civ. App. 1896) 35 S. W. 66.

See 9 Cent. Dig. tit. "Carriers," § 1022.

Reasonableness and effect of time limit.— Such a limitation seems to be regarded as a part of the description of the right to transportation which the ordinary ticket is intended to indicate, and if the condition is reasonable it will be binding, without regard to any express assent. Hanlon *v.* Illinois Cent. R. Co., 109 Iowa 136, 80 N. W. 223. A time limit of one day is not unreasonable (Coburn *v.* Morgan's Louisiana, etc., R. Co., 105 La. 398, 29 So. 882, 83 Am. St. Rep. 242), especially if there is also a provision for refunding the purchase-price or any unused part thereof, if not used within that time (Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209; Illinois Cent. R. Co. *v.* Marlett, 75 Miss. 956, 23 So. 583). But the time limit must, in order to be binding, allow sufficient time for a person exercising ordinary diligence to accomplish the journey. Gulf, etc., R. Co. *v.* Wright, 10 Tex. Civ. App. 179, 30 S. W. 294. Where a distinction in rate is made between unlimited and limited tickets, a ticket with a time limitation comes within the latter clause. U. S. *v.* Egan, 47 Fed. 112.

32. Watkins *v.* Pennsylvania R. Co., 21 D. C. 1; Texas, etc., R. Co. *v.* Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400; Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399. *Contra*, Pennsylvania Co. *v.* Hine, 41 Ohio St. 276.

If the transportation is under a coupon ticket, each part representing a separate contract with the different connecting lines, delay caused by the fault of the carrier on one

good until its completion, if pursued continuously.[33] But if the stipulation is that the ticket is not to be good beyond a certain date it is to be construed as meaning that the transportation is to be completed by that time.[34]

c. Provision Against Detaching Coupons. It is frequently stipulated, where a ticket consists of two or more parts, to be separated by successive conductors, that each successive portion shall be invalid if detached,[35] the intention being that the whole of the ticket, or the remaining portion of it, shall be presented to the conductor, who shall detach therefrom the portion entitling the passenger to transportation over that part of the entire route which is under the control of such conductor.[36]

d. Stamping and Identification For Return Trip. A usual condition in excursion tickets sold for a round trip at reduced rates is that before the returning portion of the ticket is used it must be presented by the purchaser to an agent at the other end of the line, and there signed by the purchaser for the purpose of identifying him by means of his signature as the person who bought and signed the ticket when issued.[37] The conditions in such tickets sometimes pro-

line will not operate to extend the time limit as to transportation on subsequent lines. Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471.

33. *California.*— Lundy *v.* Central Pac. R. Co., 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100.

Kentucky.— Louisville, etc., R. Co. *v.* Stephen, 13 Ky. L. Rep. 687.

Missouri.— Evans *v.* St. Louis, etc., R. Co., 11 Mo. App. 463.

New York.— Auerbach *v.* New York Cent., etc., R. Co., 89 N. Y. 281, 42 Am. Rep. 290.

Texas.— Demilley *v.* Texas, etc., R. Co., 91 Tex. 215, 42 S. W. 540; Texas, etc., R. Co. *v.* Powell, 13 Tex. Civ. App. 212, 35 S. W. 841. But see Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471.

See 9 Cent. Dig. tit. "Carriers," § 1022.

34. Georgia Southern R. Co. *v.* Bigelow, 68 Ga. 219; Mitchell *v.* Southern R. Co., 77 Miss. 917, 27 So. 834; Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

If a ticket bears date prior to the purchase from the agent, and is limited to one day from date of sale, the passenger is entitled to passage within one day from the time of purchase. Ellsworth *v.* Chicago, etc., R. Co., 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173; Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022.

If the time expires on Sunday, on which day no trains are run, the passenger is entitled to transportation on the next day. Little Rock, etc., R. Co. *v.* Dean, 43 Ark. 529, 51 Am. Rep. 584.

The limitation, "Good for this trip only," refers to a continuous journey, and not to the time of making it. Pier *v.* Finch, 24 Barb. (N. Y.) 514.

35. A coupon ticket may contain a valid condition that coupons shall be detached only by the conductor, and in such case tender of a detached coupon is not sufficient to entitle the passenger to transportation. Boston, etc., R. Co. *v.* Chipman, 146 Mass. 107, 14 N. E. 940, 4 Am. St. Rep. 293; Walker *v.* Dry Dock, etc., R. Co., 33 How. Pr. (N. Y.) 327; Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

36. But it seems that such a stipulation should not be insisted upon where the detachment is without the fault of the passenger. Wightman *v.* Chicago, etc., R. Co., 73 Wis. 169, 40 N. W. 689, 9 Am. St. Rep. 778, 2 L. R. A. 185. And at any rate a practice of accepting detached portions will constitute a waiver of the provision. Pennsylvania Co. *v.* Bray, 125 Ind. 229, 25 N. E. 439; Thompson *v.* Truesdale, 61 Minn. 129, 63 N. W. 259, 52 Am. St. Rep. 579.

37. Such a condition is valid, and if the returning portion of the ticket is not stamped by the proper agent as required, the conductor may refuse to accept it.

Georgia.— Moses *v.* East Tennessee, etc., R. Co., 73 Ga. 356.

Louisiana.— Rawitzky *v.* Louisville, etc., R. Co., 40 La. Ann. 47, 3 So. 387.

Michigan.— Edwards *v.* Lake Shore, etc., R. Co., 81 Mich. 364, 45 N. W. 827, 21 Am. St. Rep. 527.

Pennsylvania.— Bowers *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 302, 27 Atl. 893.

Tennessee.— Watson *v.* Louisville, etc., R. Co., 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454.

Texas.— Reed *v.* Texas, etc., R. Co., (Tex. Civ. App. 1899) 50 S. W. 432.

United States.— Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 10 S. Ct. 50, 33 L. ed. 290.

See 9 Cent. Dig. tit. "Carriers," § 1024.

Passenger must make reasonable effort to comply with the conditions. Louisville, etc., R. Co. *v.* Wright, 18 Ind. App. 125, 47 N. E. 491; Western Maryland R. Co. *v.* Stocksdale, 83 Md. 245, 34 Atl. 880.

Perhaps if there is no agent to whom the application can be made within a reasonable time, or the agent should refuse to stamp or indorse a ticket when properly required to do so, the passenger would be entitled to transportation, that is, the carrier would be liable for his ejection on the ground that it was through the fault of the carrier's agent that such ejection resulted. Southern R. Co. *v.* Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536. See also *supra*, III, C, 3, e.

vide for identification, not only by signature, but by other means when required.[38]

e. Waiver of Conditions — (I) *In General.* It has been held that where a condition, such as that a mileage ticket shall be signed by the purchaser, has been ignored by the conductor and the passenger has been allowed to ride thereon repeatedly without signature, so that the omission to require signature is not to be deemed a mere oversight, the condition must be regarded as waived.[39] But it has been held with better reason that the mere failure, even on different occasions, to require compliance with the conditions of a ticket will not waive the conditions as to that ticket as to other trips.[40] And certainly the waiver as to one ticket will not constitute a waiver as to other tickets, although they are of the same character.[41]

(II) *Authority to Waive.* A general officer or an agent authorized to determine whether or not a passenger is entitled to transportation may waive the conditions in a ticket.[42] It may be stipulated, however, in the ticket itself that no employee has authority to waive the conditions.[43] In general a waiver by one conductor as to his portion of the route will not be binding on other conductors.[44]

Where the ticket is over connecting lines, and the identification and stamping is to be by the agent of the second line, the fault of such agent will not render the ejection of the returning passenger by the conductor on the first wrongful so as to subject that carrier to liability, the stipulation in the sale of the ticket being that the first carrier becomes bound only for the transportation over his own line. Mosher *v.* St. Louis, etc., R. Co., 127 U. S. 390, 8 S. Ct. 1324, 32 L. ed. 249.

38. Georgia Cent. R. Co. *v.* Cannon, 106 Ga. 828, 32 S. E. 874; Southern R. Co. *v.* Barlow, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166; Abram *v.* Gulf, etc., R. Co., 83 Tex. 61, 18 S. W. 321.

Sufficiency of identification. — Where the condition was that the holder of the ticket should, at the request of the conductor, sign his name thereto and otherwise identify himself as the original purchaser, it was held that on refusal of the conductor to allow the passenger to identify himself by signature he could not be required to furnish other identification. Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

Where purchaser can neither read nor write such conditions as those here considered are binding on the purchaser of the ticket, even though his attention has not been specifically called thereto. Watson *v.* Louisville, etc., R. Co., 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454.

39. Kent *v.* Baltimore, etc., R. Co., 45 Ohio St. 284, 12 N. E. 798, 4 Am. St. Rep. 539.

40. Sherman *v.* Chicago, etc., R. Co., 40 Iowa 45; Watson *v.* Louisville, etc., R. Co., 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454; Thorp *v.* Concord R. Co., 61 Vt. 378, 17 Atl. 791.

41. Hanlon *v.* Illinois Cent. R. Co., 109 Iowa 136, 80 N. W. 223; Keeley *v.* Boston, etc., R. Co., 67 Me. 163, 24 Am. Rep. 19; New York, etc., R. Co. *v.* Feely, 163 Mass. 205, 40 N. E. 20.

42. *Louisiana.*— Randall *v.* New Orleans, etc., R. Co., 45 La. Ann. 778, 13 So. 166.

New York.— Hardy *v.* New York, etc., R. Co., 12 N. Y. Suppl. 55, 34 N. Y. St. 902.

North Carolina.— Taylor *v.* Seaboard, etc., R. Co., 99 N. C. 185, 5 S. E. 750, 6 Am. St. Rep. 509.

Tennessee.—Louisville, etc., R. Co. *v.* Blair, 104 Tenn. 212, 55 S. W. 154.

Texas.— Missouri, etc., R. Co. *v.* Cook, 8 Tex. Civ. App. 376, 27 S. W. 769.

See 9 Cent. Dig. tit. "Carriers," § 1026.

But an agent or servant not authorized to determine that question, such as the servant in charge of the admission of passengers to the train, a baggage-master, or an agent giving information not in connection with the sale of the ticket, cannot bind the carrier by such waiver. Pennington *v.* Illinois Cent. R. Co., 69 Ill. App. 628; Wentz *v.* Erie R. Co., 3 Hun (N. Y.) 241, 5 Thomps. & C. (N. Y.) 556; Boice *v.* Hudson River R. Co., 61 Barb. (N. Y.) 611; Drummond *v.* Southern Pac. Co., 7 Utah 118, 25 Pac. 733; Central Trust Co. *v.* East Tennessee, etc., R. Co., 65 Fed. 332.

43. Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 10 S. Ct. 50, 33 L. ed. 290. And see International, etc., R. Co. *v.* Best, 93 Tex. 344, 55 S. W. 315; Reed *v.* Texas, etc., R. Co., (Tex. Civ. App. 1899) 50 S. W. 432; Ketcheson *v.* Southern Pac. Co., 19 Tex. Civ. App. 288, 46 S. W. 907.

Where the agent had authority to sell both limited and unlimited tickets, his sale of a ticket as an unlimited ticket will bind the carrier, although the ticket furnished is in fact limited, and stipulates that the conditions cannot be waived by an employee. Galveston, etc., R. Co. *v.* Kinnebrew, 7 Tex. Civ. App. 549, 27 S. W. 631.

44. Dangerfield *v.* Atchison, etc., R. Co., 62 Kan. 85, 61 Pac. 405; Cloud *v.* St. Louis, etc., R. Co., 14 Mo. App. 136; Hill *v.* Syracuse, etc., R. Co., 63 N. Y. 101; Bowers *v.*

f. Limitation of Liability by Contract — (I) *Rule Stated.* In analogy to the rule established by the great weight of authority in the case of carriers of goods, that any contract relieving the carrier from liability for negligence is invalid,[45] it is well settled that as the carrier of passengers is not liable in any event save for negligence, any contract limiting his liability is against public policy and void,[46] and the authorities are practically unanimous in support of the proposition that no contract, condition, or limitation will relieve the carrier from liability to a passenger carried for compensation for the consequences of the negligence of the carrier or his servants, nor modify that liability so as to in any way restrict it within the limits fixed by the common law.[47]

(II) *Rule Applied* — (A) *Generally.* The rule just stated is applicable to passengers who, though not paying the regular fare, are carried, though on so-called passes, not gratuitously, but in return for some benefit or advantage to the carrier.[48] Where, however, a person, though carried as a passenger, and for some compensation or advantage to the carrier, has a special privilege to which passengers in general are not entitled, there has been some difference of opinion as to whether the carrier can limit his liability. Thus, where one is carried on a freight train in order that he may accompany stock being shipped, it is held by the weight of authority that a stipulation in the contract exempting the carrier from liability for his own or his servant's negligence, is void;[49] but there are cases to the contrary.[50]

Pittsburgh, etc., R. Co., 158 Pa. St. 302, 27 Atl. 893.

45. See *supra*, II, E, 2, b.

46. New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627.

47. *Delaware.*—Flinn *v.* Philadelphia, etc., R. Co., 1 Houst. (Del.) 469.

Georgia.— Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209.

Illinois.— Pennsylvania Co. *v.* Greso, 79 Ill. App. 127.

Indiana.— Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93.

Iowa.— Rose *v.* Des Moines Valley R. Co., 39 Iowa 246.

Kentucky.— Louisville, etc., R. Co. *v.* Bell, 100 Ky. 203, 18 Ky. L. Rep. 735, 38 S. W. 3.

Massachusetts.—Doyle *v.* Fitchburg R. Co., 166 Mass. 492, 44 N. E. 611, 55 Am. St. Rep. 417, 33 L. R. A. 844.

Missouri.—Jones *v.* St. Louis Southwestern R. Co., 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718; Tibby *v.* Missouri Pac. R. Co., 82 Mo. 292.

Pennsylvania.—Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

Texas.— Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500; Ft. Worth, etc., R. Co. *v.* Rogers, 21 Tex. Civ. App. 605, 53 S. W. 366.

Wisconsin.— Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. Rep. 935, 33 L. R. A. 654.

United States.— New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Baltimore, etc., R. Co. *v.* McLaughlin, 73 Fed. 519, 43 U. S. App. 181, 19 C. C. A. 551.

See 9 Cent. Dig. tit. "Carriers," § 1252.

48. Camden, etc., R. Co. *v.* Bausch, (Pa. 1887) 7 Atl. 731; Williams *v.* Oregon Short Line R. Co., 18 Utah 210, 54 Pac. 991, 72 Am. St. Rep. 777; Grand Trunk R. Co. *v.* Stevens, 95 U. S. 655, 24 L. ed. 535.

One who, though riding on a free pass, pays for the privilege of a drawing-room car is a passenger for hire, and is not bound by a stipulation exempting the carrier from liability. Ulrich *v.* New York Cent., etc., R. Co., 13 Daly (N. Y.) 129.

49. *Illinois.*— Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331.

Indiana.— Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

Missouri.— Carroll *v.* Missouri Pac. R. Co., 88 Mo. 239, 57 Am. Rep. 382.

Ohio.— Knowlton *v.* Erie R. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Cleveland, etc., R. Co. *v.* Curran, 19 Ohio St. 1, 2 Am. Rep. 362.

Pennsylvania.— Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315.

Texas.— Texas, etc., R. Co. *v.* Avery, 19 Tex. Civ. App. 235, 46 S. W. 897.

Utah.— Saunders *v.* Southern Pac. Co., 13 Utah 275, 44 Pac. 932.

United States.— New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627.

See 9 Cent. Dig. tit. "Carriers," § 1253.

Risk not included.— If the contract with such person attempts to impose on him the risk of transportation, not incident to his taking care of his stock, it is invalid. Missouri Pac. R. Co. *v.* Tietken, 49 Nebr. 130, 68 N. W. 336, 59 Am. St. Rep. 526; Fitchburg R. Co. *v.* Nichols, 85 Fed. 945, 50 U. S. App. 297, 29 C. C. A. 500.

50. Poucher *v.* New York Cent. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Boswell *v.* Hudson River R. Co., 5 Bosw. (N. Y.) 699; Meuer *v.* Chicago, etc., R. Co., 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L. R. A. 81; Gallin *v.* London, etc., R. Co., L. R. 10 Q. B. 212, 44 L. J. Q. B. 89, 32 L. T. Rep. N. S. 550,

(B) *Express Messengers.* A similar difficulty has arisen as to express messengers carried on railroad trains under contract with the express company. The weight of authority seems to be that a contract by which the railroad company is relieved from liability for injuries to the messengers is valid.[51]

(C) *Mail Agents.* As to mail agents transported on trains it is said that a stipulation relieving the railroad company from liability for injury to them is not valid.[52]

(D) *Persons Riding Gratuitously.* In respect to the transportation of passengers who are carried gratuitously, that is, as a matter of favor and without any compensation or advantage whatever to the carrier, the weight of authority is that a stipulation entered into by such person as a condition of being transported that he will assume the risk of the transportation, and not look to the carrier for compensation for any injury resulting to him in connection therewith, is valid.[53]

(III) *Validity and Interpretation of Contract*—(A) *In General.* By

23 Wkly. Rep. 308; Bicknell *v.* Grand Trunk R. Co., 26 Ont. App. 431.

Employees of sleeping-car company.—As a railway company is under no obligation to provide sleeping-cars, a contract by which it relieves itself from liability for injuries to employees of a sleeping-car company, riding in such car attached to the train, is valid. Russell *v.* Pittsburgh, etc., R. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214, 55 L. R. A. 253.

Freight car attached to passenger train.—An agreement by the owner of a freight car that he shall be allowed to attach his car to a passenger train, with the condition that he will release the agent of the carrier from all liability for doing so, will not relieve the carrier from liability to him as a passenger for any injury received not occasioned by his car being so attached. Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

One who accompanies stock as servant of the owner, without knowledge of a contract by the owner limiting the carrier's liability as to such person, is not bound thereby. Coppock *v.* Long Island R. Co., 89 Hun (N. Y.) 186, 34 N. Y. Suppl. 1039, 69 N. Y. St. 11; Porter *v.* New York, etc., R. Co., 59 Hun (N. Y.) 177, 13 N. Y. Suppl. 491, 36 N. Y. St. 315.

Riding free in prosecution of independent business.—It has been held that a contract with one allowed to ride free on a passenger train in the prosecution of an independent business, by which he relieved the carrier from all liability for injuries received while so riding, is valid. Griswold *v.* New York, etc., R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Higgins *v.* New Orleans, etc., R. Co., 28 La. Ann. 133. *Contra*, Starr *v.* Great Northern R. Co., 67 Minn. 18, 69 N. W. 632.

Riding in baggage-car.—A contract by which a passenger, permitted as a special privilege to ride in the baggage-car, releases the carrier from liability for injuries received by him while so riding, is valid. Hosmer *v.* Old Colony R. Co., 156 Mass. 506, 31 N. E. 652. *Contra*, Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360.

Riding on freight train.—As a railway company is under no obligation to carry passengers on freight trains, it was held that a limitation of liability, assented to by a person allowed to ride on such train, was valid. Arnold *v.* Illinois Cent. R. Co., 83 Ill. 273, 25 Am. Rep. 383. *Contra*, Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

51. Blank *v.* Illinois Cent. R. Co., 182 Ill. 332, 55 N. E. 332; Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93; Bates *v.* Old Colony R. Co., 147 Mass. 255, 17 N. E. 633. *Contra*, Voight *v.* Baltimore, etc., R. Co., 79 Fed. 561. The railroad company is not entitled to the benefit of a contract between an express company and its messenger, by which the latter assumes all risk of injury while in the discharge of his duties. Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93.

Knowledge or assent of messenger.—It is said, however, that a contract between an express company and the railroad company, by which the latter is relieved from liability for injuries to messengers, is not binding on the messenger without knowledge and assent. Brewer *v.* New York, etc., R. Co., 124 N. Y. 59, 26 N. E. 324, 35 N. Y. St. 60, 21 Am. St. Rep. 647, 11 L. R. A. 483; Kenney *v.* New York Cent., etc., R. Co., 54 Hun (N. Y.) 143, 7 N. Y. Suppl. 255, 26 N. Y. St. 636; Chamberlain *v.* Pierson, 87 Fed. 420, 59 U. S. App. 55, 31 C. C. A. 157. But on the other hand it has been said that a messenger is bound to know that his rights rest on private contract between the two companies, and that he is bound thereby. Blank *v.* Illinois Cent. R. Co., 80 Ill. App. 475; Pittsburgh, etc., R. Co. *v.* Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L. R. A. 701.

52. Seybolt *v.* New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Illinois Cent. R. Co. *v.* Crudup, 63 Miss. 291. That express messengers and mail agents, riding on a train in the prosecution of their business, are passengers see *supra*, III, B, 3.

53. The argument in support of this doctrine is that the carrier may properly impose any condition it sees fit on the granting of a purely voluntary privilege.

Illinois.— Chicago, etc., R. Co. *v.* Hawk, 36 Ill. App. 327.

statute in some states carriers of passengers are prohibited from limiting their common-law liability;[54] but even in states where contracts to some extent limiting the carrier's liability are recognized, they are strictly construed, and enforced only so far as expressed in unequivocal terms.[55]

(B) *Transportation Over Connecting Lines.* A contract for transportation over connecting lines, in which there is a valid limitation of liability, inures to the benefit of the carriers transporting the passenger under such contract.[56]

(C) *What Law Governs.* The validity of the contract depends on the law of the state where it is made.[57]

Maine.—Rogers *v.* Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491.

Massachusetts.—Quimby *v.* Boston, etc., R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846.

New Jersey.—Kinney *v.* New Jersey Cent. R. Co., 32 N. J. L. 407, 90 Am. Dec. 675.

New York.—Ulrich *v.* New York Cent., etc., R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369; Bissell *v.* New York Cent. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Perkins *v.* New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Wells *v.* New York Cent. R. Co., 24 N. Y. 181.

Washington.—Muldoon *v.* Seattle City R. Co., 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787, 7 Wash. 528, 35 Pac. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794.

See 9 Cent. Dig. tit. "Carriers," § 1253.

Contra.—Payne *v.* Terre Haute, etc., R. Co., (Ind. App. 1901) 60 N. E. 362; Rose *v.* Des Moines Valley R. Co., 39 Iowa 246; Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360; Farmers' L. & T. Co. *v.* Baltimore, etc., R. Co., 102 Fed. 17; Chamberlain *v.* Pierson, 87 Fed. 420, 59 U. S. App. 55, 31 C. C. A. 157.

Pass need not be read.—One who takes transportation under a free pass containing a condition that he assumes all risk of personal injury is deemed to have accepted it on that condition, whether he has read it or not. Rogers *v.* Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491.

54. Under such statute a contract exempting the carrier from liability will not be valid, even though it is attached as a condition to some special privilege which might have sustained it at common law. Solan *v.* Chicago, etc., R. Co., 95 Iowa 260, 63 N. W. 692, 58 Am. St. Rep. 430, 28 L. R. A. 718; Brush *v.* S., etc., R. Co., 43 Iowa 554; Rose *v.* Des Moines Valley R. Co., 39 Iowa 246; Chicago, etc., R. Co. *v.* Posten, 59 Kan. 449, 53 Pac. 465; Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461; Ft. Worth, etc., R. Co. *v.* Rogers, 21 Tex. Civ. App. 605, 53 S. W. 366.

A statute prohibiting carriers from limiting their legal liability by express contract, held only applicable to carriers of goods. Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209.

55. Kenney *v.* New York Cent., etc., R. Co., 125 N. Y. 422, 26 N. E. 626, 35 N. Y. St. 447; Smith *v.* New York Cent. R. Co., 29 Barb. (N. Y.) 132.

Gross negligence.—It is frequently said that they are not valid as against injury resulting from gross negligence of the carrier or his employees. Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260; Illinois Cent. R. Co. *v.* O'Keefe, 63 Ill. App. 102; Indiana Cent. R. Co. *v.* Mundy, 21 Ind. 48, 83 Am. Dec. 339; Meuer *v.* Chicago, etc., R. Co., 5 S. D. 568, 59 N. W. 945, 49 Am. St. Rep. 898, 25 L. R. A. 81; Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848. But in New York, where a carrier is allowed to contract against liability for negligence of his servants, it is held that such a contract is effectual as to gross negligence of the servants. Perkins *v.* New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282. And see McCawley *v.* Furness R. Co., L. R. 8 Q. B. 57, 42 L. J. Q. B. 4, 27 L. T. Rep. N. S. 485, 21 Wkly. Rep. 140.

Safe machinery and track.—Limitations of liability as against culpability of the carrier himself in providing safe machinery or track are invalid. Bryan *v.* Missouri Pac. R. Co., 32 Mo. App. 228; Smith *v.* New York Cent. R. Co., 24 N. Y. 222; Smith *v.* New York Cent. R. Co., 29 Barb. (N. Y.) 132.

A minor is not bound by a limitation of liability. Chicago, etc., R. Co. *v.* Lee, 92 Fed. 318, 34 C. C. A. 365. See also, generally, INFANTS.

Widow or children, or next of kin, of a passenger whose death is caused by negligence of the carrier cannot be restricted in their right of recovery, if they have such right by law, by a contract entered into by the passenger himself. Doyle *v.* Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315; Clark *v.* Geer, 86 Fed. 447, 57 U. S. App. 473, 32 C. C. A. 295.

Limitation must be specially pleaded.—An agreement of the passenger to assume the risk, if relied on as a defense, must be specially pleaded. Citizens' St. R. Co. *v.* Twiname, 111 Ind. 587, 13 N. E. 55; McElwain *v.* Erie R. Co., 21 N. Y. Wkly. Dig. 21.

56. Kerrigan *v.* Southern Pac. R. Co., 81 Cal. 248, 22 Pac. 677; Russell *v.* Pittsburgh, etc., R. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214, 55 L. R. A. 253; Hall *v.* North Eastern R. Co., L. R. 10 Q. B. 437, 44 L. J. Q. B. 164, 33 L. T. Rep. N. S. 306, 23 Wkly. Rep. 860; Bicknell *v.* Grand Trunk R. Co., 26 Ont. App. 431.

57. *Illinois.*—Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210.

E. Performance of Contract or Duty to Transport — 1. On Proper Train or Conveyance — a. Particular Train and Route. Unless there is a special contract as to the train on which the passenger is to be transported he is not entitled to take any particular train, but he has the right to be transported in accordance with the reasonable regulations of the carrier.[58] The passenger must take the train which under the regulations of the carrier will take him to his destination. He has no right to transportation on a train which is not scheduled to stop at his destination.[59] If the same carrier runs trains over different routes between the same points, a passenger between such points may be required to take the shorter route and to pay extra fare for transportation if he goes by the longer.[60]

b. Right to Be Taken Up. The passenger has the right to be admitted to the proper train for transportation under his contract, and may recover damages if wrongfully refused admission to, or transportation on, such train.[61] As to regular passenger trains it is the duty of the carrier, in the exercise of reasonable care, to furnish the passenger opportunity to get on board the train at the usual passenger platform;[62] but as to freight trains carrying passengers, a custom to stop the car on which passengers are to be transported at some distance from the platform may be reasonable and proper, and the passenger cannot complain that, waiting on the regular passenger platform, he has no opportunity to enter the passenger-car of the freight train.[63] Opportunities for taking the proper train at the proper place must be afforded under reasonable regulations,[64] and a passenger desiring to

Louisiana.— Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286.

Massachusetts.—O'Regan *v.* Cunard Steamship Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484.

New York.— Dyke *v.* Erie R. Co., 45 N. Y. 113, 6 Am. Rep. 43.

Ohio.— Pittsburgh, etc., R. Co. *v.* Bishop, 7 Ohio Cir. Dec. 73, 13 Ohio Cir. Ct. 380.

Pennsylvania.— Camden, etc., R. Co. *v.* Bausch, (Pa. 1887) 7 Atl. 731.

Texas.— Mexican Nat. R. Co. *v.* Ware, (Tex. Civ. App. 1900) 60 S. W. 343.

See 9 Cent. Dig. tit. "Carriers," § 1263.

Limitation of rule.— It is said, however, that so far as such contract is to be performed in a state where the limitation is invalid such limitation will not be recognized. Burnett *v.* Pennsylvania R. Co., 176 Pa. St. 45, 34 Atl. 972. On the other hand, if by statute a limitation of liability is invalid where the contract is made, it will be recognized as invalid in any other state, although by the law of such state the contract would have been valid. Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210.

Contracts for interstate carriage are to be determined as to their validity by the common law, in the absence of any legislation on the subject by congress. Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. Rep. 935, 33 L. R. A. 654.

58. Spannagle *v.* Chicago, etc., R. Co., 31 Ill. App. 460; Claybrook *v.* Hannibal, etc., R. Co., 19 Mo. App. 432.

The sale of a ticket shortly before the arrival of a particular train, or while it is standing at the station, gives no specific right to transportation on that train, and it is not necessary to hold it beyond its regular time of starting in order to accommodate the purchaser of such ticket. Paulitsch *v.* New York Cent., etc., R. Co., 102 N. Y. 280, 6 N. E. 577.

59. Pittsburgh, etc., R. Co. *v.* Nuzum, 50 Ind. 141, 19 Am. Rep. 703; Pittsburgh, etc., R. Co. *v.* Lightcap, 7 Ind. App. 249, 34 N. E. 243; Sears *v.* Louisville, etc., R. Co., 22 Ky. L. Rep. 152, 56 S. W. 725; Duling *v.* Philadelphia, etc., R. Co., 66 Md. 120, 6 Atl. 592; St. Louis Southwestern R. Co. *v.* McCullough, 18 Tex. Civ. App. 534, 45 S. W. 324.

If a passenger takes a train which is scheduled to stop, he will be entitled to recover in an action in tort for failure of the carrier to stop the train at his destination. Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

60. Bennett *v.* New York Cent., etc., R. Co., 69 N. Y. 594, 25 Am. Rep. 250; Church *v.* Chicago, etc., R. Co., 6 S. D. 235, 60 N. W. 854, 26 L. R. A. 616.

If the passenger has the right to select the longer route, and also a right of stop-over, he may exercise his privilege of stopping over on the longer route. Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773.

61. Cleveland, etc., R. Co. *v.* Kinsley, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245; Northern Cent. R. Co. *v.* O'Conner, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449; Baltimore, etc., R. Co. *v.* Carr, 71 Md. 135, 17 Atl. 1052; Dickerman *v.* St. Paul Union Depot Co., 44 Minn. 433, 46 N. W. 907.

62. See *infra*, III, F, 3, c, (II).

63. Ohio, etc., R. Co. *v.* Brown, 46 Ill. App. 137; Connell *v.* Mobile, etc., R. Co., (Miss. 1890) 7 So. 344; Browne *v.* Raleigh, etc., R. Co., 108 N. C. 34, 12 S. E. 958. And see *infra*, III, E, 5, b.

64. Cleveland, etc., R. Co. *v.* Wade, 18 Ind. App. 346, 48 N. E. 12; Phillips *v.* Southern R. Co., 124 N. C. 123, 32 S. E. 388, 45 L. R. A.

take a train scheduled at a particular station may recover damages if he is not given the opportunity to do so by the stopping of the train.[65] As to street-cars, the duty is to stop in accordance with usual regulations on signal for the purpose of taking passengers, and failure to do so will render the company liable.[66] The carrier by rail is bound to give reasonable signals of the starting of its trains so that passengers may go on board.[67]

2. ACCOMMODATIONS — a. Duty to Furnish Transportation. As the ordinary unlimited ticket is not a contract to transport on any particular train,[68] it does not constitute a breach of contract that the passenger having a ticket cannot be accommodated by reason of the limited capacity of the train, and it seems that this is so even where the company advertises an excursion.[69] But if tickets are sold for a particular train the contract is broken if accommodation is not furnished, even though the capacity of the train is already overtaxed.[70]

b. Duty to Furnish Seats. The carrier is bound to furnish seats to passengers entitled to transportation, if practicable,[71] and the passenger may refuse to give up his ticket or pay fare if a seat is not furnished.[72]

c. Accommodations According to Contract. One who has purchased a ticket of a particular class is entitled to accommodations according to his ticket.[73] But in general the passenger who elects to remain on a particular train must accept the reasonable accommodations afforded him on such train.[74]

163; St. Louis Southern R. Co. *v.* Germany, (Tex. Civ. App. 1900) 56 S. W. 586.

65. Ballard *v.* Cincinnati, etc., R. Co., 15 Ky. L. Rep. 703; Wilson *v.* New Orleans, etc., R. Co., 63 Miss. 352; Purcell *v.* Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113.

If it is the custom to stop a particular train to let off passengers, persons waiting at such place to take passage on such train are not to be deemed trespassers. Lake Shore, etc., R. Co. *v.* Ward, 135 Ill. 511, 26 N. E. 520. And if by regulation or custom a train is to be stopped on signal for the taking on of passengers, the carrier will be liable in damages for not stopping the train and taking a passenger when the proper signal is given. Illinois Cent. R. Co. *v.* Siddons, 53 Ill. App. 607; Wilson *v.* New Orleans, etc., R. Co., 63 Miss. 352; San Antonio, etc., R. Co. *v.* Safford, (Tex. Civ. App. 1898) 48 S. W. 1105; Gulf, etc., R. Co. *v.* Barnett, 19 Tex. Civ. App. 626, 47 S. W. 1039; Morse *v.* Duncan, 14 Fed. 396. But see Lake Erie, etc., R. Co. *v.* People, 42 Ill. App. 387, holding that an advertisement that the train will stop only on signal at a certain station does not amount to a regulation that the train will stop there on signal so as to render the company liable for failure to stop.

66. Jackson Electric R., etc., Co. *v.* Lowry, 79 Miss. 431, 30 So. 634; Sexton *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 26, 57 N. Y. Suppl. 577.

67. Perry *v.* Central R. Co., 66 Ga. 746; Central R., etc., Co. *v.* Perry, 58 Ga. 461; Texas Trunk R. Co. *v.* Mullins, (Tex. App. 1891) 18 S. W. 790.

68. See *supra*, III, E, 1, a; and Hurst *v.* Great Western R. Co., 19 C. B. N. S. 310, 34 Jur. N. S. 730, 34 L. J. C. P. 264, 12 L. T. Rep. N. S. 634, 13 Wkly. Rep. 950, 115 E. C. L. 310.

69. Chicago, etc., R. Co. *v.* Fisher, 31 Ill. App. 36, holding that the duty of the carrier is to use reasonable care in furnishing accommodations, so far as practicable, to persons entitled to transportation.

70. Lafayette, etc., R. Co. *v.* Sims, 27 Ind. 59.

Absence of special contract.— The passenger must content himself with such reasonable accommodations as the carrier can afford, in the absence of special contract. Miller *v.* New Jersey Steamboat Co., 58 Hun (N. Y.) 424, 12 N. Y. Suppl. 301, 34 N. Y. St. 914.

71. Louisville, etc., R. Co. *v.* Patterson, 69 Miss. 421, 13 So. 697, 22 L. R. A. 259; Galveston, etc., R. Co. *v.* Morris, (Tex. Civ. App. 1901) 60 S. W. 813.

72. Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610.

Under such circumstances he is not entitled to transportation, and may be put off. St. Louis, etc., R. Co. *v.* Leigh, 45 Ark. 368, 55 Am. Rep. 558; Pittsburgh, etc., R. Co. *v.* Van Houten, 48 Ind. 90; Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627, 4 S. W. 5, 9 Am. St. Rep. 776.

The carrier has the right to assign each passenger to his position in the conveyance, in the exercise of his own discretion with reference to the control of the vehicle. Claypool *v.* McAllister, 20 Ill. 504.

73. Alabama, etc., R. Co. *v.* Drummond, 73 Miss. 813, 20 So. 7; St. Louis, etc., R. Co. *v.* Mackie, 71 Tex. 491, 9 S. W. 451, 10 Am. St. Rep. 766, 1 L. R. A. 667.

One who has a first-class ticket is entitled to transportation in a passenger coach, but not in a baggage-car. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404.

A passenger holding a second-class ticket cannot be required to ride in a smoking-car. Southern R. Co. *v.* Wood, 114 Ga. 159, 39 S. E. 922.

74. Louisville, R. Co. *v.* Smith, 10 Ky. L. Rep. 497.

3. CONTINUOUS TRIP ACCORDING TO TERMS OF CONTRACT; STOP-OVER PRIVILEGES. The passenger is entitled to transportation from the point indicated by his ticket as the beginning of his journey to his destination, and not in the reverse direction.[75] And a ticket for transportation between two points is good from any intermediate point to destination.[76] But in the absence of contract arising from special provisions, or implied from usage or regulation, a ticket entitles a passenger only to continuous transportation from the initial point to the end of his journey;[77] and if, after commencing the journey, he abandons it before reaching his destination, he is not entitled to complete it under the original ticket or payment of fare.[78] Nor is the passenger entitled, having commenced his journey on one train which will take him to his destination, to abandon it and take another train, though operated by the same carrier.[79] If the ticket is for transportation over connecting lines, the passenger is entitled to take only the train on the connecting line which corresponds to that on which he has traveled over the first line.[80] But under an ordinary coupon ticket, which amounts in effect to separate contracts of transportation over distinct lines, and with no special stipulations as to the journey being continuous, the passenger may stop off at any connecting point and subsequently avail himself of the coupons entitling him to transportation for the remainder of his journey.[81] By regulation the privilege of stopping over at an intermediate point and continuing the journey later under the same ticket is often given, but in such case the conditions prescribed by the regulation must be complied with.[82] The right to stop over at

If a passenger takes a freight train he assumes such inconvenience and risk as usually attend the operation of such train with reasonable skill and caution. Steele *v.* Southern R. Co., 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756.

75. Keeley *v.* Boston, etc., R. Co., 67 Me. 163, 24 Am. Rep. 19.

Where a mileage ticket specifies the number of miles that may be traveled on each of two connecting roads, the portion of the ticket unused on one road is not available for transportation on the other. Terre Haute, etc., R. Co. *v.* Fitzgerald, 47 Ind. 79.

76. Georgia R., etc., Co. *v.* Clarke, 97 Ga. 706, 25 S. E. 368.

77. *Minnesota.*— Wyman *v.* Northern Pac. R. Co., 34 Minn. 210, 25 N. W. 349.

New York.— Barker *v.* Coflin, 31 Barb. (N. Y.) 556.

Ohio.— Hatten *v.* Railroad Co., 39 Ohio St. 375.

Tennessee.— Louisville, etc., R. Co. *v.* Klyman, (Tenn. 1902) 67 S. W. 472, 56 L. R. A. 769.

Canada.—Coombs *v.* Reg., 24 Can. Supreme Ct. 13.

78. *California.*— Drew *v.* Central Pac. R. Co., 51 Cal. 425.

Illinois.— Churchill *v.* Chicago, etc., R. Co., 67 Ill. 390.

Iowa.— Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458.

Kentucky.— Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498.

Maryland.— McClure *v.* Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345.

Massachusetts.— Cheney *v.* Boston, etc., R. Co., 11 Metc. (Mass.) 121, 45 Am. Dec. 190.

New Jersey.— State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

New York.—Terry *v.* Flushing, etc., R. Co., 13 Hun (N. Y.) 359.

Texas.— Landers *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1899) 50 S. W. 528.

United States.—Roberts *v.* Koehler, 30 Fed. 94; Pierce *v.* Pennsylvania Co., 19 Fed. Cas. No. 11,146, 3 Cinc. L. Bul. 925.

See 9 Cent. Dig. tit. "Carriers," § 1056.

79. *New Jersey.*— Pennsylvania R. Co. *v.* Parry, 55 N. J. L. 551, 27 Atl. 914, 39 Am. St. Rep. 654, 22 L. R. A. 251.

New York.— Gale *v.* Delaware, etc., R. Co., 7 Hun (N. Y.) 670.

Ohio.— Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457.

Pennsylvania.— Oil Creek, etc., R. Co. *v.* Clark, 72 Pa. St. 231; Dietrich *v.* Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711.

Texas.— Gulf, etc., R. Co. *v.* Henry, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318.

80. Hamilton *v.* New York Cent. R. Co., 51 N. Y. 100.

81. Spencer *v.* Lovejoy, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152; Brooke *v.* Grand Trunk R. Co., 15 Mich. 332; Nichols *v.* Southern Pac. Co., 23 Oreg. 123, 31 Pac. 296, 37 Am. St. Rep. 664, 18 L. R. A. 55.

Continuous trip on one line.— Even under such a ticket the transportation on any one line must be continuous. Little Rock, etc., R. Co. *v.* Dean, 43 Ark. 529, 51 Am. Rep. 584.

82. Kelsey *v.* Michigan Cent. R. Co., 28 Hun (N. Y.) 460; Beebe *v.* Ayres, 28 Barb. (N. Y.) 275; Dunphy *v.* Erie R. Co., 42 N. Y. Super. Ct. 128; Breen *v.* Texas, etc., R. Co., 50 Tex. 43; Yorton *v.* Milwaukee, etc., R. Co., 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23.

Assurance of conductor.— The passenger has the right to rely on the assurances of the conductor as to the conditions with reference to stopping over. Wilsey *v.* Louisville, etc.,

an intermediate point on the passenger's journey is also sometimes given by statute.[83]

4. Transfer to Another Train or Line; Performance by Connecting Line — a. Transferring From One Car or Train to Another; Street-Car Transfers. Where it is necessary for the passenger to change cars or trains in the prosecution of the journey, reasonable notice thereof by the servants of the carrier is sufficient, and the passenger not governing himself by such notice cannot recover damages if he loses his connection.[84] If street-car lines are so operated that passengers are entitled to transfers from one line to another, a regulation requiring a transfer check is not unreasonable.[85] Where transfer checks are used the passenger must comply with the conditions thereof to be entitled to transportation on the connecting line.[86] If through fault of the agent or conductor the passenger is not furnished the proper transfer entitling him to ride on the connecting line, and is ejected therefrom, he may recover damages.[87] The right of transfer from one street-car line to another is sometimes provided for by statute.[88]

b. Transfer Between Connecting Lines. Where the passenger's route is over connecting lines of independent carriers, the first carrier discharges his duty when he delivers the passenger at the end of his own line, ready to continue the transportation on the connecting line;[89] and he will not be liable for any failure of the connecting carrier to perform his independent contract.[90] But if the first

R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498; Cherry *v.* Kansas City, etc., R. Co., 52 Mo. App. 499; New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 12 S. Ct. 356, 36 L. ed. 71.

Usage.—Where a usage is relied on as giving a right to stop over, the subsequent change of the usage by a rule will be binding on the passenger, although he has no notice thereof. Johnson *v.* Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199. And the mere fact that a passenger has been allowed on some occasions to stop over does not entitle him to do so on other occasions. Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458; Denny *v.* New York Cent., etc., R. Co., 5 Daly (N. Y.) 50.

The rule requiring continuous passage does not prevent a passenger on a steamboat from leaving the boat at places where it lands, returning thereto before it has departed. Dice *v.* Willamette Transp., etc., Co., 8 Oreg. 60, 34 Am. Rep. 575.

83. Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773; Carpenter *v.* Grand Trunk R. Co., 72 Me. 388, 39 Am. Rep. 340.

84. Barker *v.* New York Cent. R. Co., 24 N. Y. 599; Page *v.* New York Cent. R. Co., 6 Duer (N. Y.) 523.

The passenger has the right to rely on the information given him by the agent selling him the ticket with reference to the particular train, unless a different announcement is seasonably made by the train official in such manner as to charge the passenger with notice thereof. Dye *v.* Virginia Midland R. Co., 20 D. C. 63.

Sleeping-car passengers.—Where a passenger in a sleeping-car is to leave the car and take passage in an ordinary coach at an intermediate point, it is the duty of the servants of the sleeping-car to awaken him in sufficient time to enable him to prepare for and make the change. McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 909, 35 L. R. A. 252.

85. Percy *v.* Metropolitan St. R. Co., 58 Mo. App. 75.

If there has been a custom of transferring without check it cannot be changed without notice. Consolidated Traction Co. *v.* Taborn, 58 N. J. L. 1, 32 Atl. 685.

86. Heffron *v.* Detroit City R. Co., 92 Mich. 406, 52 N. W. 802, 31 Am. St. Rep. 601, 16 L. R. A. 345.

87. Kiley *v.* Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 82 Am. St. Rep. 460, 52 L. R. A. 626; Appleby *v.* St. Paul City R. Co., 54 Minn. 169, 55 N. W. 1117, 40 Am. St. Rep. 308; Muckle *v.* Rochester R. Co., 79 Hun (N. Y.) 32, 29 N. Y. Suppl. 732, 61 N. Y. St. 193; Laird *v.* Pittsburg Traction Co., 166 Pa. St. 4, 31 Atl. 51.

Contra.— Mahoney *v.* Detroit St. R. Co., 93 Mich. 612, 53 N. W. 793, 32 Am. St. Rep. 528, 18 L. R. A. 335, where it was held that the conductor on a connecting line was not bound to accept the passenger's statement as to payment of fare on the first line, and that his ejection for not having a transfer was proper, although it was the fault of the conductor on the first line that no transfer was given.

88. Cronin *v.* Highland St. R. Co., 144 Mass. 249, 10 N. E. 833; Wakefield *v.* South Boston R. Co., 117 Mass. 544; Pine *v.* St. Paul City R. Co., 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347; Jenkins *v.* Brooklyn Heights R. Co., 29 N. Y. App. Div. 8, 51 N. Y. Suppl. 216; Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

89. Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. (D. C.) 300; Davis *v.* Houston, etc., R. Co., (Tex. Civ. App. 1900) 59 S. W. 844.

90. *Georgia.*— Central R. *v.* Combs, 70 Ga. 533, 48 Am. Rep. 582.

Mississippi.—St. Clair *v.* Kansas City, etc., R. Co., 77 Miss. 789, 28 So. 957.

carrier has made a through contract for the entire transportation, then he will be liable for any failure or neglect on the part of the connecting carrier in carrying out the contract.[91]

5. Discharging Passenger at Destination — a. Duty to Stop at Destination. Where a ticket is sold on a particular train, for a specified destination, or the passenger on the train pays the conductor for transportation to a specified destination, the carrier is under obligation to stop the train at that point to allow the passenger to alight, and a refusal to carry him on that train to such destination will be a breach of contract.[92] But if without any assurance on which he has a right to rely, or contrary to the directions of the conductor, he takes passage for a continuous journey on a train, which under the rules of the carrier does not stop at his destination, he may be required to leave the train at the first stopping point before the destination is reached, or to pay fare to the next stopping place beyond his destination, and on refusal to comply he may properly be ejected from the train.[93] If the destination is a flag station, at which the train stops only on signal, the passenger must notify the carrier a reasonable time before reaching the destination of his desire to stop, and thereupon it is the duty of the carrier to let him off at his destination.[94] In general the conductor is under no obligation to stop the train to let off a passenger at a place where the train is not scheduled to stop, in the absence of any special contract.[95] But by express or implied con-

New York.— Jacobs *v.* Third Ave. R. Co., 34 Misc. (N. Y.) 512, 69 N. Y. Suppl. 981.

Texas.—Gulf, etc., R. Co. *v.* Looney, 85 Tex. 158, 19 S. W. 1039, 34 Am. St. Rep. 787, 16 L. R. A. 471; Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 15 Am. St. Rep. 862, 5 L. R. A. 777.

United States.— New York, etc., R. Co. *v.* Bennett, 50 Fed. 496, 6 U. S. App. 95, 1 C. C. A. 544.

See also *supra*, III, D, 2, c; and 9 Cent. Dig. tit. "Carriers," § 1064.

91. *Illinois.*— Chicago, etc., R. Co. *v.* Mulford, 59 Ill. App. 479.

Indiana.— Louisville, etc., R. Co. *v.* Conrad, 4 Ind. App. 83, 30 N. E. 406.

Missouri.— Cherry *v.* Kansas City, etc., R. Co., 61 Mo. App. 303.

New York.— Van Buskirk *v.* Roberts, 31 N. Y. 661; Thomas *v.* Mills, 4 E. D. Smith (N. Y.) 75.

Tennessee.— Carter *v.* Peck, 4 Sneed (Tenn.) 203, 67 Am. Dec. 604.

Even in case of independent contracts, the first carrier may be liable for any fault of its agent in issuing a ticket which deprives the passenger of transportation over a connecting line. Griffin *v.* Utica, etc., R. Co., 41 Hun (N. Y.) 448. And where the first carrier undertakes to secure accommodations for the passenger on a connecting line he will be liable in damages for failing to do so. Bussman *v.* Western Transit Co., 71 Fed. 654. If there is a through contract, the fact that there are agreements among the connecting roads as to the performance of the joint contract will be immaterial. Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445. But the first carrier, by selling a ticket over a connecting line, does not obligate himself that the transportation can be completed without change of cars. Atchison, etc., R. Co. *v.* Cameron, 66 Fed. 709, 32 U. S. App. 67, 14 C. C. A. 358.

92. Florida Southern R. Co. *v.* Katz, 23 Fla. 139, 1 So. 473; Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678; Hull *v.* East Line, etc., R. Co., 66 Tex. 619, 2 S. W. 831.

Excuse for failure to stop.— There may be a sufficient excuse under the particular circumstances of the case for refusal to stop which will relieve the carrier from any liability for carrying the passenger beyond his destination. Louisville, etc., R. Co. *v.* Dancy, 97 Ala. 338, 11 So. 796; Reed *v.* Duluth, etc., R. Co., 100 Mich. 507, 59 N. W. 144.

If a carrier by boat expressly contracts to land a passenger at a particular place, with knowledge of the peculiar danger attending such landing, the danger is no defense in an action for damages for breach of the contract. Porter *v.* Steamboat New England No. 2, 17 Mo. 290.

93. Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780; Lake Shore, etc., R. Co. *v.* Pierce, 47 Mich. 277, 11 N. W. 157; Trotlinger *v.* East Tennessee, etc., R. Co., 11 Lea (Tenn.) 533.

The ejection may properly be at the preceding stopping place. Logan *v.* Hannibal, etc., R. Co., 77 Mo. 663; Fink *v.* Albany, etc., R. Co., 4 Lans. (N. Y.) 147; Caldwell *v.* Lake Shore, etc., R. Co., 8 Pa. Co. Ct. 467; Texas, etc., R. Co. *v.* Ludlam, 57 Fed. 481, 13 U. S. App. 540, 6 C. C. A. 454.

A passenger with a ticket for a station at which the train does not stop has the right to ride to an intermediate station at which it does stop. Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130, 52 Am. Rep. 620.

94. Georgia Cent. R. Co. *v.* Dorsey, 106 Ga. 826, 32 S. E. 873; Chattanooga, etc., R. Co. *v.* Lyon, 89 Ga. 16, 15 S. E. 24, 32 Am. St. Rep. 72, 15 L. R. A. 857.

95. *Kentucky.*— Louisville, etc., R. Co. *v.* Miles, 100 Ky. 84, 18 Ky. L. Rep. 580, 37 S. W. 486.

tract the carrier may be bound to stop at a specified station, regardless of his custom or regulations, and the act of the agent in selling a ticket for a particular train to a specified station, or of the conductor in receiving fare for transportation to such station, will bind the carrier and render him liable for damages in disregarding such contract.[96] A passenger having the right to stop at a particular station, and carried by without his consent, and without giving him reasonable opportunity to leave the train, may recover whatever damages he may have suffered by reason of the breach of contract, or for the tort involved in subsequent wrongful ejection for refusal to pay further fare.[97]

b. Duty to Stop Train at Platform. The carrier should stop the train at the usual platform for discharging passengers at the place of destination, and cannot require the passenger to alight at an unusual or unsuitable place.[98] It is also

Mississippi.— Wells *v.* Alabama Great Southern R. Co., 67 Miss. 24, 6 So. 737.

Missouri.— Kellett *v.* Chicago, etc., R. Co., 22 Mo. App. 356.

Oklahoma.—See Noble *v.* Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483.

Pennsylvania.— Dietrich *v.* Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711.

Wisconsin.— Plott *v.* Chicago, etc., R. Co., 63 Wis. 511, 23 N. W. 412.

See 9 Cent. Dig. tit. "Carriers," § 1068.

If by statutory regulation the train is required to stop at the station in question, the passenger may recover damages for failure of the carrier to comply with the provision. Ohio, etc., R. Co. *v.* People, 29 Ill. App. 561; Cable *v.* Southern R. Co., 122 N. C. 892, 29 S. E. 377; Thomas *v.* Charlotte, etc., R. Co., 38 S. C. 485, 17 S. E. 226. But in the absence of statutory provision to the contrary, a railroad company may adopt a regulation that certain of its trains shall not stop at designated stations, and one traveling as a passenger on such railroad is bound to inquire whether the train upon which he takes passage stops at the station or place to which he is going. This power of regulation, however, is subject to statutory control. Pennsylvania Co. *v.* Wentz, 37 Ohio St. 333.

96. *Arkansas.*— St. Louis, etc., R. Co. *v.* Adcock, 52 Ark. 406, 12 S. W. 874.

Georgia.— Western R. Co. *v.* Young, 51 Ga. 489; Georgia R., etc., Co. *v.* McCurdy, 45 Ga. 288, 12 Am. Rep. 577.

Illinois.— Chicago, etc., R. Co. *v.* Fisher, 66 Ill. 152.

Indiana.— Evansville, etc., R. Co. *v.* Wilson, 20 Ind. App. 5, 50 N. E. 90.

Mississippi.— Humphries *v.* Illinois Cent. R. Co., 70 Miss. 453, 12 So. 155.

New York.— Martin *v.* New York Cent., etc., R. Co., 1 N. Y. St. 738.

Texas.— Texas, etc., R. Co. *v.* Cole, 66 Tex. 562, 1 S. W. 629; San Antonio, etc., R. Co. *v.* Dykes, (Tex. Civ. App. 1898) 45 S. W. 758.

United States.— Texas, etc., R. Co. *v.* Ludlam, 57 Fed. 481, 13 U. S. App. 540, 6 C. C. A. 454; Brulard *v.* The Alvin, 45 Fed. 766.

See 9 Cent. Dig. tit. "Carriers," § 1068.

The representation of the ticket agent in connection with the sale of a ticket that it may be used on a particular train may be relied on by the passenger as constituting an agreement that the train will stop at such place. Atkinson *v.* Southern R. Co., 114 Ga. 146, 39 S. E. 888, 55 L. R. A. 223; Lake Shore, etc., R. Co. *v.* Pierce, 47 Mich. 277, 11 N. W. 157; Miller *v.* King, 21 N. Y. App. Div. 192, 47 N. Y. Suppl. 534.

Representations of servants without authority to determine whether the train shall stop at a particular station, or in excess of such authority, will not give rise to a contract binding on the carrier in that respect. Alabama Great Southern R. Co. *v.* Carmichael, 90 Ala. 19, 8 So. 87, 9 L. R. A. 388; St. Louis, etc., R. Co. *v.* Atchison, 47 Ark. 74, 14 S. W. 468; Ohio, etc., R. Co. *v.* Hatton, 60 Ind. 12; Dillon *v.* Lindell R. Co., 71 Mo. App. 631.

97. *Illinois.*—Illinois Cent. R. Co. *v.* Chambers, 71 Ill. 519.

Indiana.— Evansville, etc., R. Co. *v.* Kyte, 6 Ind. App. 52, 32 N. E. 1134.

Kentucky.— Louisville, etc., R. Co. *v.* Cayce, 17 Ky. L. Rep. 1389, 34 S. W. 896.

Louisiana.— Dave *v.* Morgan's Louisiana, etc., R., etc., Co., 47 La. Ann. 576, 17 So. 128.

Mississippi.— Thompson *v.* New Orleans, etc., R. Co., 50 Miss. 315, 19 Am. Rep. 12; Mobile, etc., R. Co. *v.* McArthur, 43 Miss. 180.

Texas.— Missouri, etc., R. Co. *v.* Hennesey, 20 Tex. Civ. App. 316, 49 S. W. 917.

Damages consequent on being put off the train, as well as those involved in the wrongful ejection, may be recovered. Winkler *v.* St. Louis, etc., R. Co., 21 Mo. App. 99; Galveston, etc., R. Co. *v.* Crispi, 73 Tex. 236, 11 S. W. 187; Gulf, etc., R. Co. *v.* Head, (Tex. App. 1891) 15 S. W. 504.

98. Louisville, etc., R. Co. *v.* Johnston, 79 Ala. 436; White Water R. Co. *v.* Butler, 112 Ind. 598, 14 N. E. 599; Stewart *v.* St. Paul City R. Co., 78 Minn. 110, 80 N. W. 855.

In case of freight trains carrying passengers, a usage is not improper of stopping the car carrying passengers at some distance from the passenger platform, provided a reasonable opportunity to alight is afforded. St. Louis, etc., R. Co. *v.* Neal, 66 Ark. 543, 51 S. W. 1060; Southern R. Co. *v.* Howard, 111 Ga. 842, 36 S. E. 218; Cleveland, etc., R. Co. *v.* Maxwell, 59 Ill. App. 673. And see *supra*, III, E, 1, b.

obligatory that the train be stopped for a reasonable length of time to allow passengers, in the exercise of due diligence, to get off without danger.[99] General notice to the passengers on the train, for the purpose of enabling them to alight at the proper station, is all that is required, personal notice to each passenger of the station where he is to alight not being necessary,[1] and it is the duty of the passenger to get off at the proper place.[2]

c. Duty in Connection With Alighting of Passenger. The carrier discharges his duty with reference to the alighting of the passenger when he gives him reasonable opportunity to alight. There is no obligation in the ordinary case to furnish assistance.[3] There is no duty to awaken a passenger in order to advise him that his destination is reached and enable him to get off the train, and even a promise of the conductor to do so[4] will be regarded as a personal favor for breach of which the carrier will not be liable.[5] In general all the passenger is entitled to is that the usual notice be given that the train is approaching the station, and any promise to give special notice will be deemed beyond the authority of the conductor, and not binding on the carrier.[6]

6. DELAY. With reference to the time within which the carrier shall complete the transportation after it has been commenced, the carrier's duty is to use due care and skill. The announcement of schedules for the arrival and departure of trains does not give rise to a contract that as to a particular train the schedule will be complied with, the liability for not complying being one based on negligence in the proper operation of the train in connection with the business of the carrier.[7] For unreasonable delay, occasioned by the fault or negligence of the

99. Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Dawson *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 801; Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Galveston, etc., R. Co. *v.* Crispi, 73 Tex. 236, 11 S. W. 187; Fordyce *v.* Dillingham, (Tex. Civ. App. 1893) 23 S. W. 550. And see *infra*, III, F, 3, c, (III).

1. Texas Midland R. Co. *v.* Terry, (Tex. Civ. App. 1901) 65 S. W. 697; St. Louis Southwestern R. Co. *v.* Ricketts, 22 Tex. Civ. App. 515, 54 S. W. 1090; Houston, etc., R. Co. *v.* Cohn, 22 Tex. Civ. App. 11, 53 S. W. 698.

2. *Illinois.*— Chicago, etc., R. Co. *v.* Randolph, 53 Ill. 510, 5 Am. Rep. 60.

Indiana.— Ohio, etc., R. Co. *v.* Applewhite, 52 Ind. 540.

Missouri.—Martindale *v.* Kansas City, etc., R. Co., 60 Mo. 508.

Texas.— St. Louis Southwestern R. Co. *v.* McCullough, 18 Tex. Civ. App. 534, 45 S. W. 324; Gulf, etc., R. Co. *v.* Ryan, (Tex. App. 1892) 18 S. W. 866.

Wisconsin.— Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506.

3. Selby *v.* Detroit R. Co., 122 Mich. 311, 81 N. W. 106. And see *infra*, III, F, 3, c, (I).

If the passenger is suffering from a disability, making assistance necessary, or requiring a longer delay, notice of the fact should be given to the conductor. New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607, 97 Am. Dec. 478.

4. Nichols *v.* Chicago, etc., R. Co., 90 Mich. 203, 51 N. W. 364; Wilson *v.* New Orleans, etc., R. Co., 68 Miss. 9, 8 So. 330; Texas Pac. R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347; Texas, etc., R. Co. *v.* Alexander, (Tex. Civ. App. 1895) 30 S. W. 1113.

5. Nunn *v.* Georgia R. Co., 71 Ga. 710, 51 Am. Rep. 284; Sevier *v.* Vicksburg, etc., R. Co., 61 Miss. 8, 48 Am. Rep. 74; St. Louis Southwestern R. Co. *v.* McCullough, 18 Tex. Civ. App. 534, 45 S. W. 324; Missouri, etc., R. Co. *v.* Kendrick, (Tex. Civ. App. 1895) 32 S. W. 42.

If a passenger is under disability, and the conductor undertakes to wake him and assist him in getting off, the carrier may be liable for his being put off after his destination is passed. Weightman *v.* Louisville, etc., R. Co., 70 Miss. 563, 12 So. 586, 35 Am. St. Rep. 660, 19 L. R. A. 671.

6. Gage *v.* Illinois Cent. R. Co., 75 Miss. 17, 21 So. 657; Missouri, etc., R. Co. *v.* Miller, 20 Tex. Civ. App. 570, 50 S. W. 168; St. Louis, etc., R. Co. *v.* McCullough, (Tex. Civ. App. 1895) 33 S. W. 285. But see Louisville, etc., R. Co. *v.* Quick, 125 Ala. 553, 28 So. 14, holding that the passenger has a right to rely on a special promise, and is under no obligation to listen for the general call. See also Chicago, etc., R. Co. *v.* Boyles, 11 Tex. Civ. App. 522, 33 S. W. 247.

Misinformation, or failure to call the name of the station, due to the fault of a servant within the scope of his authority, will render the carrier liable for injuries resulting therefrom. Pennsylvania Co. *v.* Hoagland, 78 Ind. 203; Louisville, etc., R. Co. *v.* Jenkins, 15 Ky. L. Rep. 239; Louisville, etc., R. Co. *v.* Mask, 64 Miss. 738, 2 So. 360; Carson *v.* Leathers, 57 Miss. 650; Texas, etc., R. Co. *v.* Pollard, 2 Tex. App. Civ. Cas. § 481.

7. Savannah, etc., R. Co. *v.* Bonaud, 58 Ga. 180; Sears *v.* Eastern R. Co., 14 Allen (Mass.) 433, 92 Am. Dec. 780; Gordon *v.*

servants in charge of the carrier's business, the carrier will be liable,[8] even though the fault of such servants is wilful.[9] For delay caused by the elements, without negligence on the part of the carrier, there is no liability.[10]

7. Actions For Damages For Breach of Contract of Transportation — a. Form of Action. An action for being refused transportation in accordance with contract,[11] or for refusal to put the passenger off at his destination,[12] is for breach of contract, and the damages recoverable are those recoverable in such an action.[13] If no actual damages are shown, the breach of the contract will authorize the recovery of nominal damages only.[14] But the breach of the contract may also involve a tort, that is, a breach of the carrier's common-law duty, and in such case other damages than those incident to breach of contract may be recovered.[15] The technical form of the action is, however, in general immaterial, recovery being allowed in accordance with the wrong indicated by the facts as alleged.[16]

b. Pleading. In an action for refusal to transport, plaintiff must allege that he was ready and willing to pay the legal or reasonable fare for such transportation.[17] If the action is for refusal to let the passenger off at his destination, and for carrying him beyond, plaintiff must allege that the place at which he desired to stop was one at which by law, or by the carrier's regulations, it was the duty of the carrier to stop the train.[18]

Manchester, etc., R. Co., 52 N. H. 596, 13 Am. Rep. 97; Hurst *v.* Great Western R. Co., 19 C. B. N. S. 310, 11 Jur. N. S. 730, 34 L. J. C. P. 264, 12 L. T. Rep. N. S. 634, 13 Wkly. Rep. 950, 115 E. C. L. 310.

False advertisements.—The carrier may be liable to a passenger misled by false advertisements and misrepresentations. Denton *v.* Great Northern R. Co., 5 E. & B. 860, 2 Jur. N. S. 185, 25 L. J. Q. B. 129, 4 Wkly. Rep. 240, 85 E. C. L. 860.

8. Van Buskirk *v.* Roberts, 31 N. Y. 661.

9. Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388.

10. Van Horn *v.* Templeton, 11 La. Ann. 52; Alabama, etc., R. Co. *v.* Purnell, 69 Miss. 652, 13 So. 472; Compton *v.* Long Island R. Co., 1 N. Y. St. 554; Houston, etc., R. Co. *v.* Rogers, 16 Tex. Civ. App. 19, 40 S. W. 201.

11. Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 30 S. E. 968; Goins *v.* Western R. Co., 68 Ga. 190.

12. Evansville, etc., R. Co. *v.* Kyte, 6 Ind. App. 52, 32 N. E. 1134.

13. *Illinois.*— Illinois Cent. R. Co. *v.* Demars, 44 Ill. 292.

Kentucky.— Southern R. Co. *v.* Marshall, 23 Ky. L. Rep. 813, 64 S. W. 418.

Massachusetts.— Murdock *v.* Boston, etc., R. Co., 133 Mass. 15, 43 Am. Rep. 480.

Texas.— Chicago, etc., R. Co. *v.* Boyles, 11 Tex. Civ. App. 522, 33 S. W. 247; St. Louis, etc., R. Co. *v.* Thomas, (Tex. Civ. App. 1894) 27 S. W. 419; International, etc., R. Co. *v.* Flores, (Tex. Civ. App. 1894) 26 S. W. 899.

Wisconsin.— Walsh *v.* Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376.

14. Texarkana, etc., R. Co. *v.* Anderson, 67 Ark. 123, 53 S. W. 673; Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391.

15. *Arkansas.*— Fordyce *v.* Nix, 58 Ark. 136, 23 S. W. 967.

California.— Sheldon *v.* Steamship Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193.

Indiana.— Lake Erie, etc., R. Co. *v.* Acres, 108 Ind. 548, 9 N. E. 453; Cleveland, etc., R. Co. *v.* Kinsley, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245.

Mississippi.— Alabama, etc., R. Co. *v.* Hanes, 69 Miss. 160, 13 So. 246.

New Jersey.— Runyan *v.* Central R. Co., 65 N. J. L. 228, 47 Atl. 422.

North Carolina.—Purcell *v.* Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

See 9 Cent. Dig. tit. "Carriers," § 1075.

16. Seals *v.* Augusta Southern R. Co., 102 Ga. 817, 29 S. E. 116; Louisville, etc., R. Co. *v.* Storms, 15 Ky. L. Rep. 333; New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660, 74 Am. Dec. 785; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

Where a passenger is ejected from the train by reason of the wrongful act of the agent or previous conductor in not providing him with the necessary evidence of his right to transportation, such wrong, and not the ejection from the train, is the basis of the action. McGhee *v.* Reynolds, 117 Ala. 413, 23 So. 68; Marshall *v.* St. Louis, etc., R. Co., 78 Mo. 610. And see *supra*, III, C, 3, e.

17. Tarbell *v.* Central Pac. R. Co., 34 Cal. 616; Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771; St. Louis, etc., R. Co. *v.* Thomas, (Tex. Civ. App. 1894) 27 S. W. 419.

18. Ohio, etc., R. Co. *v.* Swarthout, 67 Ind. 567, 33 Am. Rep. 104; Ohio, etc., R. Co. *v.* Hatton, 60 Ind. 12; Louisville, etc., R. Co. *v.* Cayce, 17 Ky. L. Rep. 1389, 34 S. W. 896; Matthews *v.* Charleston, etc., R. Co., 38 S. C. 429, 17 S. E. 225, 37 Am. St. Rep. 773.

If the complaint is that the refusal to let the passenger off at his destination was a breach of a special contract, which is alleged, it is not necessary to also allege that such was a usual place for stopping the train. Evansville, etc., R. Co. *v.* Wilson, 20 Ind. App. 5, 50 N. E. 90.

c. Damages — (i) *Actual and Proximate Pecuniary Damages.* For breach of contract in refusing the passenger transportation, or carrying him beyond his destination, the passenger is entitled to recover damages for his trouble and inconvenience suffered, and expense and loss of time involved, either as incident to the refusal to transport, or consequent thereon.[19] The damages recoverable are limited to those which are proximate, and not remote or contingent.[20] There is some conflict as to what injuries consequent to being carried past the passenger's destination will be deemed the proximate result thereof. In some cases the injury resulting from having to walk to the destination, and inconvenience, danger, and sickness incurred in doing so are allowed.[21] On the other hand it has been held that sickness and exposure resulting from being wrongfully carried beyond the destination, and put off at a place not in itself dangerous, and in a proper and careful manner, was too remote to be charged to the fault of the carrier.[22] Loss of profits in an enterprise which is interfered with by delay of the passenger in reaching his destination, the danger of such loss not having been known to the carrier, is not to be allowed.[23]

(ii) *Physical and Mental Suffering.* For improper refusal to stop at the passenger's destination, and carrying him beyond, the carrier is liable, not only for the actual pecuniary damage suffered, but also for any physical or mental suffering due to injury or anxiety incident to the failure to allow the passenger to depart from the train, or consequent upon his being carried to a point away from

19. *Alabama.*—East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315.

Louisiana.— Airey *v.* Pullman Palace Car Co., 50 La. Ann. 648, 23 So. 512.

New York.—Ward *v.* Vanderbilt, 4 Abb. Dec. (N. Y.) 521, 1 Keyes (N. Y.) 70, 34 How. Pr. (N. Y.) 144; Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333.

Texas.— International, etc., R. Co. *v.* Terry, 62 Tex. 380, 50 Am. Rep. 529; Houston, etc., R. Co. *v.* McKenzie, (Tex. Civ. App. 1897) 41 S. W. 831; Texas, etc., R. Co. *v.* Hartnett, (Tex. Civ. App. 1896) 34 S. W. 1057; Missouri, etc., R. Co. *v.* Byas, 9 Tex. Civ. App. 572, 29 S. W. 1122; Texas, etc., R. Co. *v.* Pollard, 2 Tex. App. Civ. Cas. § 481.

Washington.— Ransberry *v.* North American Transp., etc., Co., 22 Wash. 476, 61 Pac. 154.

United States.— Gray *v.* Cincinnati Southern R. Co., 11 Fed. 683; Morrison *v.* The John L. Stephens, Hoffm. Op. 473, 17 Fed. Cas. No. 9,847.

England.— Le Blanche *v.* London, etc., R. Co., 1 C. P. D. 286, 45 L. J. C. P. 521, 34 L. T. Rep. N. S. 667, 24 Wkly. Rep. 808; Hamlin *v.* Great Northern R. Co., 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Exch. 20, 5 Wkly. Rep. 76.

See 9 Cent. Dig. tit. "Carriers," § 1082.

Where a passenger is ejected from the train by reason of the wrong of an agent or previous conductor in not furnishing him the evidence of his right to ride actual damages may be recovered. Alabama Great Southern R. Co. *v.* Heddleston, 82 Ala. 218, 3 So. 53; Hall *v.* Memphis, etc., R. Co., 15 Fed. 57.

20. Yonge *v.* Pacific Mail Steam Ship Co., 1 Cal. 353; Benson *v.* New Jersey R., etc., Co., 9 Bosw. (N. Y.) 412.

Where a woman passenger holding a child was injured by being compelled to stand, on account of the crowded condition of the train, her injury was proximate to the fault of the carrier in not furnishing her a seat. Texas, etc., R. Co. *v.* Rea, (Tex. Civ. App. 1901) 65 S. W. 1115.

21. Cincinnati, etc., R. Co. *v.* Eaton, 94 Ind. 474, 48 Am. Rep. 179; Kentucky Cent. R. Co. *v.* Biddle, 17 Ky. L. Rep. 1363, 34 S. W. 904; Pickens *v.* South Carolina, etc., R. Co., 54 S. C. 498, 32 S. E. 567.

Damages for sickness resulting from unnecessary detention of the train in an unhealthy place held to be recoverable. Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333.

22. Corrister *v.* Kansas City, etc., R. Co., 25 Mo. App. 619; Francis *v.* St. Louis Transfer Co., 5 Mo. App. 7; Childs *v.* New York, etc., R. Co., 77 Hun (N. Y.) 539, 28 N. Y. Suppl. 894, 60 N. Y. St. 276; Gulf, etc., R. Co. *v.* Head, (Tex. Civ. App. 1891) 15 S. W. 504; Hobbs *v.* London, etc., R. Co., L. R. 10 Q. B. 111, 44 L. J. Q. B. 49, 32 L. T. Rep. N. S. 352, 23 Wkly. Rep. 520.

23. Georgia R. Co. *v.* Hayden, 71 Ga. 518, 51 Am. Rep. 274; Southern R. Co. *v.* Myers, 87 Fed. 149, 58 U. S. App. 131, 32 C. C. A. 19; Foster *v.* Cleveland, etc., R. Co., 56 Fed. 434.

In an action for loss of time by reason of wrongful delay of the carrier in taking the passenger to his destination, the passenger cannot recover what he would have earned at his destination, no definite occupation or employment being within his contemplation. North American Transp., etc., Co. *v.* Morrison, 178 U. S. 262, 20 S. Ct. 869, 44 L. ed. 1061. But in such case the jury should take into consideration the question of whether or not the passenger would have procured employment had he been at his destination during the time he was delayed. Ransberry *v.* North American Transp., etc., Co., 22 Wash. 476, 61 Pac. 154.

his destination.[24] But for mere negligence, not accompanied with or resulting in physical injury, it is generally said that the carrier is not liable for damages by way of compensation for mental suffering.[25]

(III) *Exemplary Damages.* Where the breach of duty as to transporting the passenger, or delivering him at his destination within a reasonable time, is attended with circumstances of wilfulness, gross negligence, insult, or indignity, exemplary damages may be recovered.[26] But in general, where there is breach of contract only, or negligence not accompanied with circumstances of aggravation, no exemplary damages are allowed.[27]

F. Personal Injuries to Passengers — 1. Degree of Care Required as to Safety of Passenger — a. Carrier Not Insurer; Liable Only For Negligence. A carrier of passengers is not absolutely liable for the safety of the passenger as the carrier of goods is for the safety of the goods. His liability is bottomed on negligence.[28] Therefore, in the sense in which carriers of goods are said to be insurers

24. *Alabama.*— Louisville, etc., R. Co. *v.* Quick, 125 Ala. 553, 28 So. 14; East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315.

Kentucky.— Kentucky Cent. R. Co. *v.* Biddle, 17 Ky. L. Rep. 1363, 34 S. W. 904; Memphis, etc., Packet Co. *v.* Nagel, 15 Ky. L. Rep. 742; Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367; Dawson *v.* Louisville, etc., R. Co., 6 Ky. L. Rep. 668.

Mississippi.— Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

New York.— Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333.

Texas.— Texas, etc., R. Co. *v.* Hartnett, (Tex. Civ. App. 1896) 34 S. W. 1057; Pullman Palace Car Co. *v.* Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96; Texas, etc., R. Co. *v.* Mansell, (Tex. Civ. App. 1893) 23 S. W. 549.

Wisconsin.— Stutz *v.* Chicago, etc., R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

United States.— The Willamette Valley, 71 Fed. 712; Morrison *v.* The John L. Stephens, Hoffm. Op. 473, 17 Fed. Cas. No. 9,847.

See 9 Cent. Dig. tit. "Carriers," § 1082.

Where a white woman passenger is compelled to ride in a coach intended for negroes, the carrier is liable in breach of contract for the mental pain and humiliation suffered as a direct result thereof, although there is no physical injury. Missouri, etc., R. Co. *v.* Ball, (Tex. Civ. App. 1901) 61 S. W. 327; Texas, etc., R. Co. *v.* Johnson, 2 Tex. App. Civ. Cas. § 185.

25. Illinois Cent. R. Co. *v.* Siddons, 53 Ill. App. 607; Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; Strange *v.* Missouri Pac. R. Co., 61 Mo. App. 586; Martin *v.* Columbia, etc., R. Co., 32 S. C. 592, 10 S. E. 960; Texas, etc., R. Co. *v.* Armstrong, (Tex. Civ. App. 1897) 41 S. W. 833.

26. *Alabama.*— Alabama Great Southern R. Co. *v.* Sellers, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17.

Georgia.— Savannah City, etc., R. Co. *v.* Brauss, 70 Ga. 368.

Kentucky.— Memphis, etc., Packet Co. *v.* Nagel, 97 Ky. 9, 16 Ky. L. Rep. 748, 29 S. W. 743; Louisville, etc., R. Co. *v.* Grundy, 12 Ky. L. Rep. 293; Dawson *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 801.

Mississippi.— Jackson Electric R., etc., Co. *v.* Lowry, 79 Miss. 431, 30 So. 634; Wilson *v.* New Orleans, etc., R. Co., 63 Miss. 352; New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660, 74 Am. Dec. 785.

Missouri.— Hicks *v.* Hannibal, etc., R. Co., 68 Mo. 329.

New York.— Cagney *v.* Manhattan R. Co., 2 N. Y. Suppl. 410.

South Carolina.— Pickens *v.* South Carolina, etc., R. Co., 54 S. C. 498, 32 S. E. 567; Samuels *v.* Richmond, etc., R. Co., 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

United States.— Morse *v.* Duncan, 14 Fed. 396; Morrison *v.* The John L. Stephens, Hoffm. Op. 473, 17 Fed. Cas. No. 9,847.

See 9 Cent. Dig. tit. "Carriers," § 1083.

27. *Indiana.*— Cleveland, etc., R. Co. *v.* Quillen, 22 Ind. App. 496, 53 N. E. 1024.

Kentucky.— Louisville, etc., R. Co. *v.* Jackson, 18 Ky. L. Rep. 296, 36 S. W. 173; Carter *v.* Illinois Cent. R. Co., 17 Ky. L. Rep. 1352, 34 S. W. 907.

Mississippi.— Kansas City, etc., R. Co. *v.* Fite, 67 Miss. 373, 7 So. 223; Mississippi, etc., R. Co. *v.* Gill, 66 Miss. 39, 5 So. 393; Dorrah *v.* Illinois Cent. R. Co., 65 Miss. 14, 3 So. 36, 7 Am. St. Rep. 629; Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373; Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

North Carolina.— Thomas *v.* Southern R. Co., 122 N. C. 1005, 30 S. E. 343; Hansley *v.* Jamesville, etc., R. Co., 117 N. C. 565, 23 S. E. 443, 53 Am. St. Rep. 600, 115 N. C. 602, 20 S. E. 528, 44 Am. St. Rep. 474, 32 L. R. A. 543; Holmes *v.* Carolina Cent. R. Co., 94 N. C. 318.

Texas.— Gulf, etc., R. Co. *v.* McFadden, (Tex. Civ. App. 1894) 25 S. W. 451.

Virginia.— Norfolk, etc., R. Co. *v.* Lipscomb, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817.

See 9 Cent. Dig. tit. "Carriers," § 1083.

28. *Maryland.*— Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Michigan.— Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

New York.— McPadden *v.* New York Cent.

of the safety of the goods,[29] it may be said that carriers of passengers are not insurers of the safety of passengers.[30]

b. Definitions of Degree of Care. While the carrier's liability with reference to the safety of the passenger is founded on negligence, the courts have used a variety of forms of expression, not by any means harmonious, in attempting to define what constitutes negligence, that is, in explaining what will be sufficient care on the part of the carrier as to relieve him from liability. But it is to be noticed in the first place that classification of negligence by degrees has been discouraged by very high authority.[31] In the proper use of the term "negligence" is simply the failure to use the amount of care, skill, and diligence required by the nature of the undertaking and the circumstances of the case, and speaking in this sense of the degree of care required of the carrier of passengers, who has intrusted to him the personal safety of the passenger, it is evident that the skill, care, and diligence should be proportioned to the nature and risk of the undertaking, in view of the nature of the means of conveyance employed, especially in

R. Co., 44 N. Y. 478, 4 Am. Rep. 705; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Camden, etc., R., etc., Co. *v.* Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488.

Pennsylvania.— Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581.

United States.— Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115; Boyce *v.* Anderson, 2 Pet. (U. S.) 159, 7 L. ed. 379.

England.— Readhead *v.* Midland R. Co., L. R. 2 Q. B. 412, 9 B. & S. 519, 28 L. J. Q. B. 169, 20 L. T. Rep. N. S. 628, 17 Wkly. Rep. 737; Christie *v.* Griggs, 2 Campb. 79, 11 Rev. Rep. 666; Aston *v.* Heaven, 2 Esp. 533, 5 Rev. Rep. 750. The earlier English cases on the subject are fully referred to in Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

See 9 Cent. Dig. tit. "Carriers," § 1085.

29. See *supra*, II, D, 1.

30. *California.*— Fairchild *v.* California Stage Co., 13 Cal. 599.

Georgia.—Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

Illinois.— Chicago, etc., R. Co. *v.* Byrum, 153 Ill. 131, 38 N. E. 578; Keokuk Northern Line Packet Co. *v.* True, 88 Ill. 608; Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

Indiana.— Louisville, etc., R. Co. *v.* Pedigo, 108 Ind. 481, 8 N. E. 627; Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Sherlock *v.* Alling, 44 Ind. 184.

Kentucky.— Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208.

Maryland.— Baltimore, etc., R. Co. *v.* Worthington, 21 Md. 275, 83 Am. Dec. 578.

Missouri.—Furnish *v.* Missouri Pac. R. Co., 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; Leslie *v.* Wabash, etc., R. Co., 88 Mo. 50; Gilson *v.* Jackson County Horse R. Co., 76 Mo. 282.

New Jersey.—Gardner *v.* New Jersey Traction Co., 58 N. J. L. 176, 31 Atl. 893.

New York.— McPadden *v.* New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705.

Texas.—International, etc., R. Co. *v.* Welch, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829; Gulf, etc., R. Co. *v.* Killebrew, (Tex. 1892) 20 S. W. 182; Ft. Worth, etc., R. Co. *v.* Kennedy, 12 Tex. Civ. App. 654, 35 S. W. 335; Texas Pac. R. Co. *v.* Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994.

Canada.— Canadian Pac. R. Co. *v.* Chalifoux, 22 Can. Supreme Ct. 721.

See 9 Cent. Dig. tit. "Carriers," § 1087.

By statute in Nebraska it is provided that railroad companies shall be liable for all damages to passengers while being transported, except where the injury arises from the criminal negligence of the person injured, or the violation of some express rule of the company actually brought to the passenger's notice. Chicago, etc., R. Co. *v.* Zernecke, 59 Nebr. 689, 82 N. W. 26, 55 L. R. A. 610; Chicago, etc., R. Co. *v.* Young, 58 Nebr. 678, 79 N. W. 556; Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976; Omaha, etc., R. Co. *v.* Chollette, 41 Nebr. 578, 59 N. W. 921; Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 55 N. W. 913; Chollette *v.* Omaha, etc., R. Co., 26 Nebr. 159, 41 N. W. 1106, 4 L. R. A. 135, 33 Nebr. 143, 49 N. W. 1114. But this statute has no application to street railways. Lincoln St. R. Co. *v.* McClellan, 54 Nebr. 672, 74 N. W. 1074, 69 Am. St. Rep. 736. In the federal court it has been held that even this statute does not make a common carrier an insurer of the safety of the passengers, but merely establishes a presumption that damages inflicted on the passenger are entirely attributable to the negligence of the railroad company. Clark *v.* Zarniko, 106 Fed. 607, 45 C. C. A. 494.

31. The Steamboat New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019. And see Siegrist *v.* Arnot, 10 Mo. App. 197.

Degrees of negligence.— If the degrees of negligence which have sometimes been recognized in defining the liability of a bailee were applied to carriers of passengers, then no doubt it would be proper to say that a carrier of passengers for hire would be liable for ordinary negligence only, and some courts have used language to that effect, referring to negligence as the failure to use ordinary and reasonable care. Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638, 778;

the case of railroad companies which engage in the hazardous occupation of conveying human beings in vehicles operated at a high rate of speed by means of immense power developed by the use of steam.[32] Therefore, while it might be proper in one sense to say that the care required is that which an ordinarily careful and prudent person would exercise in such business, in view of its extra-hazardous nature, yet, on the other hand, the nature of the business requires the use of a very high degree of care, prudence, and foresight, and it would be misleading to say that ordinary and reasonable care was sufficient to relieve the carrier from the charge of negligence. But it will not do to require of the carrier the exercise of every possible precaution against injury to the passenger, for that would prevent the practical performance of the duty to transport with expedition, in accordance with the usual requirements of the business.[33] Hence it is not the highest degree of care, prudence, and foresight for the safety of the passenger which is required, but such great degree of care, prudence, and foresight which a prudent man engaged in the business as usually conducted would employ, that is, such as is reasonably practicable.[34] The many different forms of expression used in stating the rule of the carrier's liability all recognize substantially the same test, the difference in statement being for the purpose of applying the rule to different states of fact. Thus it is said that the degree of care required is the high degree of care which would be used by a person of great prudence in view of the nature and risks of the business,[35] or, in general, the highest degree

Nolton *v.* Western R. Corp., 15 N. Y. 444, 69 Am. Dec. 623; Buffit *v.* Troy, etc., R. Co., 36 Barb. (N. Y.) 420. *Compare* also BAILMENTS, 5 Cyc. 157.

32. Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449; Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221.

33. *Georgia.*— East Tennessee, etc., R. Co. *v.* Miller, 95 Ga. 738, 22 S. E. 660.

Kentucky.— Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403; Brown *v.* Louisville R. Co., 21 Ky. L. Rep. 995, 53 S. W. 1041.

Maine.— Edwards *v.* Lord, 49 Me. 279.

Ohio.— Holmes *v.* Ashtabula Rapid-Transit Co., 10 Ohio Cir. Dec. 638.

Pennsylvania.—Smedley *v.* Hestonville, etc., Pass. R. Co., 184 Pa. St. 620, 39 Atl. 544.

See 9 Cent. Dig. tit. "Carriers," § 1087.

It would prevent the use of means of locomotion which, while necessary to speed and the carrying capacity of the vehicles employed, are well known to be to some extent hazardous.

Illinois.— Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138.

Iowa.— Pershing *v.* Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488.

Minnesota.— Palmer *v.* Winona R., etc., Co., 78 Minn. 138, 80 N. W. 869.

New York.—Cleveland *v.* New Jersey Steamboat Co., 7 N. Y. St. 598.

Wisconsin.— Wanzer *v.* Chippewa Valley Electric R. Co., 108 Wis. 319, 84 N. W. 423.

See 9 Cent. Dig. tit. "Carriers," § 1087.

34. *Alabama.*— Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 12 So. 439.

Indian Territory.— Gulf, etc., R. Co. *v.* Warlick, 1 Indian Terr. 10, 35 S. W. 235.

Kentucky.— Cincinnati, etc., R. Co. *v.* Vivion, 19 Ky. L. Rep. 687, 41 S. W. 580.

Maine.— Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

Massachusetts.— Gilbert *v.* West End St. R. Co., 160 Mass. 403, 36 N. E. 60.

Missouri.— Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Dougherty *v.* Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251.

South Carolina.— McClenaghan *v.* Brock, 5 Rich. (S. C.) 17.

Texas.— San Antonio, etc., R. Co. *v.* Lynch, (Tex. Civ. App. 1900) 55 S. W. 517; McCarty *v.* Houston, etc., R. Co., 21 Tex. Civ. App. 568, 54 S. W. 421; Gulf, etc., R. Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652; Gulf, etc., R. Co. *v.* Stricklin, (Tex. Civ. App. 1894) 27 S. W. 1093; Gulf, etc., R. Co. *v.* Higby, (Tex. Civ. App. 1894) 26 S. W. 737; International, etc., R. Co. *v.* Welsh, (Tex. Civ. App. 1894) 24 S. W. 854, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766.

United States.— Meyer *v.* St. Louis, etc., R. Co., 54 Fed. 116, 10 U. S. App. 677, 4 C. C. A. 221.

See 9 Cent. Dig. tit. "Carriers," § 1087.

35. *Alabama.*— Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363.

California.— Bosqui *v.* Sutro R. Co., 131 Cal. 390, 63 Pac. 682; Wheaton *v.* North Beach, etc., R. Co., 36 Cal. 590.

Connecticut.— Fuller *v.* Naugatuck R. Co., 21 Conn. 557; Derwort *v.* Loomer, 21 Conn. 245; Hall *v.* Connecticut River Steamboat Co., 13 Conn. 319.

Indiana.— Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409.

Kentucky.— Kentucky Cent. R. Co. *v.* McMurtry, 3 Ky. L. Rep. 625.

Missouri.— O'Connell *v.* St. Louis Cable, etc., R. Co., 106 Mo. 482, 17 S. W. 494; Dougherty *v.* Missouri R. Co., 81 Mo. 325, 51

of human care, prudence, and foresight.[36] In some cases it is said that extraordinary care and caution are required.[37] In other cases the requirement is to do all that human sagacity and foresight can do under the circumstances, in view of the character and mode of conveyance adopted, to prevent injury to passengers, the carrier being held liable for the slightest negligence with reference to the exercise of such care.[38]

Am. Rep. 239; Posch *v.* Southern Electric R. Co., 76 Mo. App. 601.

New Hampshire.— Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

New Jersey.— Hansen *v.* North Jersey St. R. Co., 64 N. J. L. 686, 46 Atl. 718; Scott *v.* Bergen County Traction Co., 63 N. J. L. 407, 43 Atl. 1060; Delaware, etc., R. Co. *v.* Dailey, 37 N. J. L. 526.

New York.— Maverick *v.* Eighth Ave. R. Co., 36 N. Y. 378, 2 Transcr. App. (N. Y.) 125; Bowen *v.* New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Putnam *v.* Broadway, etc., R. Co., 36 N. Y. Super. Ct. 195; Miller *v.* Ocean Steamship Co., 6 N. Y. St. 664.

Texas.— Levy *v.* Campbell, (Tex. 1892) 19 S. W. 438; St. Louis Southwestern R. Co. *v.* McCullough, 18 Tex. Civ. App. 534, 45 S. W. 324; Garry *v.* Gulf, etc., R. Co., 17 Tex. Civ. App. 129, 42 S. W. 576; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608; Texas, etc., R. Co. *v.* Orr, (Tex. Civ. App. 1895) 31 S. W. 696; Dillingham *v.* Wood, 8 Tex. Civ. App. 71, 27 S. W. 1074; Dallas Consol. Traction R. Co. *v.* Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925; Texas, etc., R. Co. *v.* Davidson, 3 Tex. Civ. App. 542, 21 S. W. 68; Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12; Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248.

United States.— Mackoy *v.* Missouri Pac. R. Co., 5 McCrary (U. S.) 538, 18 Fed. 236.

See 9 Cent. Dig. tit. "Carriers," § 1087.

36. *Alabama.*— Southern R. Co. *v.* Crowder, 130 Ala. 256, 30 So. 592.

Arkansas.— Eureka Springs R. Co. *v.* Timmons, 51 Ark. 459, 11 S. W. 690.

California.— May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

Illinois.— Chicago, etc., R. Co. *v.* George, 19 Ill. 510, 71 Am. Dec. 239; West Chicago St. R. Co. *v.* Nash, 64 Ill. App. 548; Atchison, etc., R. Co. *v.* Elder, 50 Ill. App. 276.

Indiana.— Louisville, etc., R. Co. *v.* Snyder, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434; Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125.

Iowa.— Moore *v.* Des Moines, etc., R. Co., 69 Iowa 491, 30 N. W. 51.

Kentucky.— Louisville, etc., R. Co. *v.* Ritter, 85 Ky. 368, 9 Ky. L. Rep. 22, 3 S. W. 591.

Maryland.— Baltimore, etc., R. Co. *v.* Swann, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313.

Missouri.— Muth *v.* St. Louis, etc., R. Co., 87 Mo. App. 422.

Montana.— Ryan *v.* Gilmer, 2 Mont. 517, 4 Ky. L. Rep. 151, 25 Am. Rep. 744.

New York.— Koehne *v.* New York, etc., R. Co., 32 N. Y. App. Div. 419, 52 N. Y. Suppl. 1088; Landers *v.* Staten Island R. Co., 13 Abb. Pr. N. S. (N. Y.) 338; Gonzales *v.* New York, etc., R. Co., 39 How. Pr. (N. Y.) 407.

Tennessee.— Nashville, etc., R. Co. *v.* Messino, 1 Sneed (Tenn.) 220.

Texas.— Houston, etc., R. Co. *v.* George, (Tex. Civ. App. 1901) 60 S. W. 313.

United States.— Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536.

See 9 Cent. Dig. tit. "Carriers," § 1087.

37. *Georgia.*— Central R. Co. *v.* Freeman, 75 Ga. 331; Georgia R. Co. *v.* Homer, 73 Ga. 251; Central R., etc., Co. *v.* Perry, 58 Ga. 461; Brunswick, etc., R. Co. *v.* Gale, 56 Ga. 322.

Iowa.—Raymond *v.* Burlington, etc., R. Co., 65 Iowa 152, 21 N. W. 495.

Minnesota.— McLean *v.* Burbank, 11 Minn. 277.

Missouri.— Huelsenkamp *v.* Citizens' R. Co., 37 Mo. 537, 90 Am. Dec. 399.

Nebraska.— Spellman *v.* Lincoln Rapid Transit Co., 36 Nebr. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316.

New York.— Caldwell *v.* Murphy, 1 Duer (N. Y.) 233.

Wisconsin.— Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. Rep. 935, 33 L. R. A. 654.

See 9 Cent. Dig. tit. "Carriers," § 1087.

Proof of slight neglect will, it is held, render the carrier liable in such cases. Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Crawford *v.* Georgia R. Co., 62 Ga. 566; Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; San Antonio, etc., R. Co. *v.* Long, (Tex. Civ. App. 1894) 26 S. W. 114; Seymour *v.* Chicago, etc., R. Co., 3 Biss. (U. S.) 43, 21 Fed. Cas. No. 12,685, 4 Am. L. T. Rep. (U. S. Cts.) 134.

Where carrier himself creates the danger he is bound to use adequate precautions to insure the safety of the passenger against such danger. Brockway *v.* Lascala, 1 Edm. Sel. Cas. (N. Y.) 135; Klein *v.* Jewett, 26 N. J. Eq. 474.

38. *California.*—Jamison *v.* San José, etc., R. Co., 55 Cal. 593.

Illinois.—West Chicago St. R. Co. *v.* Kromshinsky, 185 Ill. 92, 56 N. E. 1110; Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323; Pennsylvania Co. *v.* Greso, 79 Ill. App. 127.

Iowa.— Russ *v.* The Steamboat War Eagle, 14 Iowa 363; Sales *v.* Western Stage Co., 4 Iowa 547.

c. Liability as Affected by Means of Transportation — (i) *Railroads and Steam Vessels.* So large a proportion of the transportation of passengers is by means of railroads operated by steam that the general rules of liability as developed in the decided cases have reference to such carriage, and no particular discussion of the cases further than that given in the preceding paragraphs is necessary. Undoubtedly the same rules govern the liability of carriers operating steam vessels.[39] In the operation of freight trains, however, somewhat greater peril is involved to passengers riding thereon than is involved in the operation of passenger trains.[40] Nevertheless, the rule of liability, that is, the requirement as to the exercise of a high degree of care and foresight, is the same. The passenger by assuming to ride by this means of conveyance does not relieve the carrier from the obligation to exercise great care for his safety.[41] And a passenger properly

Kansas.— Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754.

Louisiana.— Black *v.* Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586.

Maine.— Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

Maryland.—Baltimore, etc., R. Co. *v.* State, 63 Md. 135.

Minnesota.— Johnson *v.* Winona, etc., R. Co., 11 Minn. 296, 88 Am. Dec. 83; McLean *v.* Burbank, 11 Minn. 277.

Missouri.— Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 799.

New York.— Hegeman *v.* Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Oliver *v.* New York, etc., R. Co., 1 Edm. Sel. Cas. (N. Y.) 589.

Virginia.—Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384.

See 9 Cent. Dig. tit. "Carriers," § 1087.

But the precautions to be taken are to be measured by those in general use. Chicago, etc., R. Co. *v.* Dunn, 61 Ill. 385; Tuller *v.* Talbot, 23 Ill. 357, 76 Am. Dec. 695; Louisville City R. Co. *v.* Weams, 80 Ky. 420, 4 Ky. L. Rep. 287; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; Dayton *v.* Pennsylvania, etc., R. Co., 1 C. Pl. Rep. (Pa.) 9.

The obligation to exercise **the highest degree of care** which human prudence and foresight can suggest only exists with respect to those results which are naturally to be apprehended from unsafe road-beds, defective machinery, imperfect cars, and other conditions endangering the success of the undertaking. In every case the degree of care to be exercised is dependent upon circumstances, and the carrier is only liable for the consequences of the negligence of the servant where the latter fails to use that skill and care which would be required of an ordinarily careful and prudent man. Stierle *v.* Union R. Co., 156 N. Y. 70, 50 N. E. 419. As to matters not directly involved in the unusual danger incident to transportation, for instance, as to the stations, premises, and the like, the strictest rule of care is not applicable. O'Reilly *v.* Long Island R. Co., 15 N. Y. App. Div. 79, 44 N. Y. Suppl. 264; Bruswitz *v.* Netherlands American Steam-Nav. Co., 64 Hun (N. Y.) 262, 19 N. Y. Suppl. 75, 46 N. Y. St. 623; Cleveland, etc., R. Co. *v.* Anderson, 21 Ohio Cir. Ct. 288, 11 Ohio Cir. Dec. 765; Houston, etc., R. Co. *v.* Richards, 20 Tex. Civ. App. 203, 49 S. W. 687.

39. See, generally, Shipping.

40. As to injury to a passenger resulting from jerks and jars of freight train see *infra*, III, F, 3, e, (vii).

41. *Alabama.*— Southern R. Co. *v.* Crowder, 130 Ala. 256, 30 So. 592.

Arkansas.— St. Louis, etc., R. Co. *v.* Sweet, 57 Ark. 287, 21 S. W. 587.

Georgia.— Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Central R., etc., Co. *v.* Smith, 80 Ga. 526, 5 S. E. 772.

Illinois.— Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210; Chicago, etc., R. Co. *v.* Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; Ohio, etc., R. Co. *v.* Muhling, 30 Ill. 9, 81 Am. Dec. 336; Illinois Cent. R. Co. *v.* Axley, 47 Ill. App. 307.

Indiana.— Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860; Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

Kentucky.— Ohio Valley R. Co. *v.* Watson, 93 Ky. 654, 14 Ky. L. Rep. 611, 21 S. W. 244, 40 Am. St. Rep. 211, 19 L. R. A. 310.

Missouri.— Fullerton *v.* St. Louis, etc., R. Co., 84 Mo. App. 498.

New York.— Edgerton *v.* New York, etc., R. Co., 39 N. Y. 227, 6 Transcr. App. (N. Y.) 248; Dillaye *v.* New York Cent. R. Co., 56 Barb. (N. Y.) 30.

Tennessee.— Southern R. Co. *v.* Vandergriff, (Tenn. 1901) 64 S. W. 481.

Texas.— Mexican Cent. R. Co. *v.* Lauricella, (Tex. Civ. App. 1894) 26 S. W. 301.

United States.— Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. ed. 898; Sprague *v.* Southern R. Co., 92 Fed. 59, 63 U. S. App. 711, 34 C. C. A. 207; Delaware, etc., R. Co. *v.* Ashley, 67 Fed. 209, 28 U. S. App. 375, 14 C. C. A. 368; Hazard *v.* Chicago, etc., R. Co., 1 Biss. (U. S.) 503, 11 Fed. Cas. No. 6,275, 2 Chic. Leg. N. 385.

See 9 Cent. Dig. tit. "Carriers," § 1098.

So drovers, or persons accompanying cattle on freight trains, being passengers, are entitled to have the same degree of care exer-

allowed to ride in a place of danger is entitled to that degree of care which corresponds to the danger to which he is exposed.[42]

(II) *Stage-Coaches.* The principles governing the liability of passenger carriers seem first to have been laid down in stage-coach cases, and it was early settled that the owner of a stage-coach is not an insurer of the safety of his passengers, and is liable only in case of negligence.[43] But the carrier by stage-coach is bound to exercise the greatest care and diligence, and is liable for the slightest negligence of himself or his servants.[44]

(III) *Street-Cars of Various Kinds.* A carrier by street-car is liable only for negligence.[45] And in some cases language has been used with reference to transportation of passengers in this manner, indicating that reasonable care and diligence is all that is necessary to relieve the carrier from liability for injuries happening to the passenger in the course of transportation;[46] but in most of the cases the general rule of liability is laid down, as in other cases discussed in the preceding paragraphs, to the effect that the highest care and diligence is required to be exercised by the carrier for the safety of the passenger.[47] And these rules

cised for their safety. Memphis, etc., Packet Co. *v.* Buckner, 22 Ky. L. Rep. 401, 57 S. W. 482; Alabama, etc., R. Co. *v.* Beardsley, 79 Miss. 417, 30 So. 660; Omaha, etc., R. Co. *v.* Crow, 54 Nebr. 747, 74 N. W. 1066, 69 Am. St. Rep. 741; Fitchburg R. Co. *v.* Nichols, 85 Fed. 945, 50 U. S. App. 297, 29 C. C. A. 500.

42. Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; International, etc., R. Co. *v.* Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. Rep. 521.

By riding in an unsafe place a passenger does not forfeit his right to care. Willmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 16 S. W. 500, 17 S. W. 490.

43. McLane *v.* Sharpe, 2 Harr. (Del.) 481; Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115; McKinney *v.* Neil, 1 McLean (U. S.) 540, 16 Fed. Cas. No. 8,865; Christie *v.* Griggs, 2 Campb. 79, 11 Rev. Rep. 666. And see other English cases referred to in Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

44. Bonce *v.* Dubuque St. R. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; Farish *v.* Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115; Maury *v.* Talmadge, 2 McLean (U. S.) 157, 16 Fed. Cas. No. 9,315; McKinney *v.* Neil, 1 McLean (U. S.) 540, 16 Fed. Cas. No. 8,865.

Thus, a carrier is bound to exercise great care in reference to the vehicle used, the horses and harness, and the skill and sobriety of the driver, and is liable if through the slightest negligence in these respects, or in the conduct of the driver, a passenger is injured. Derwort *v.* Loomer, 21 Conn. 245; Sales *v.* Western Stage Co., 4 Iowa 547; Frink *v.* Coe, 4 Greene (Iowa) 555, 61 Am. Dec. 141; Ryan *v.* Gilmer, 2 Mont. 517, 4 Ky. L. Rep. 151, 25 Am. Rep. 744; McKinney *v.* Neil, 1 McLean (U. S.) 540, 16 Fed. Cas. No. 8,865. The proprietor is answerable for any injury happening by reason of any defect in the coach which might have been discovered by the most careful and thorough examination, but not for an injury happening by reason of a hidden defect which could not upon examination have been discovered. Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

Where the accident happened by reason of the overthrowing of a stage-coach, it was held that the proprietor, to relieve himself from liability, must show not only that the driver was competent and qualified, and suitably prepared for the business, but also that at the time of the accident he acted with reasonable skill and the utmost prudence and caution. Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115. And see Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

45. Weber *v.* New Orleans, etc., R. Co., 104 La. 367, 28 So. 892; Jacquin *v.* Grand Ave. Cable Co., 57 Mo. App. 320; Armstrong *v.* Metropolitan St. R. Co., 36 N. Y. App. Div. 525, 55 N. Y. Suppl. 498 [*affirmed* in 165 N. Y. 641, 59 N. E. 1118].

46. The thought embodied in the opinions in these cases being that the carrier, employing reasonably careful and competent servants, is not responsible for accidents resulting in the operation of the cars under the control of such servants, if they use the care and caution required of reasonably prudent persons in such business. Stierle *v.* Union R. Co., 156 N. Y. 70, 684, 50 N. E. 419, 834; Regensburg *v.* Nassau Electric R. Co., 58 N. Y. App. Div. 566, 69 N. Y. Suppl. 147; Houston City St. R. Co. *v.* Ross, (Tex. Civ. App. 1894) 28 S. W. 254; Wanzer *v.* Chippewa Valley Electric R. Co., 108 Wis. 319, 84 N. W. 423.

47. *Georgia.*— Holly *v.* Atlantic St. R. Co., 61 Ga. 215, 34 Am. Rep. 97.

Illinois.— Chicago City R. Co. *v.* Young, 62 Ill. 238; North Chicago St. R. Co. *v.* Wrixon, 51 Ill. App. 307.

Iowa.— Bonce *v.* Dubuque St. R. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221.

Kentucky.— Louisville R. Co. *v.* Park, 96 Ky. 580, 29 S. W. 455.

Maryland.— Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706.

Minnesota.— Watson *v.* St. Paul City R. Co., 42 Minn. 46, 43 N. W. 904.

of liability are applicable to carriers operating horse cars,[48] cable cars,[49] and electric cars.[50]

(iv) *Ferries.* One operating a ferry for the purpose of transporting passengers is a common carrier of passengers, and must use the highest degree of vigilance and caution in protecting the passenger against danger.[51]

(v) *Passenger Elevators.* While the owner of a passenger elevator operated in a business building for carrying persons up and down may not be a carrier of passengers in the sense that he is bound to serve the public, yet his duty as to protecting the passengers in his elevator from danger is the same as that applicable to the carriage of passengers by other means, and he is bound to do all that human care, vigilance, and foresight can reasonably suggest under the circumstances and in view of the character of the mode of conveyance adopted to guard against accidents and injuries resulting therefrom, and a failure in this respect will constitute negligence rendering him liable.[52]

d. Care Required in Selection of Servants. The carrier is bound to use reasonable diligence in selecting competent and careful servants.[53] It is so held with reference to the selection of drivers for stage-coaches, hacks, and like vehicles.[54] A similar principle as to the diligence required is applicable in the

Missouri.— Bischoff *v.* People's R. Co., 121 Mo. 216, 25 S. W. 908; Parker *v.* Metropolitan St. R. Co., 69 Mo. App. 54; Powers *v.* Union R. Co., 60 Mo. App. 481.

Nebraska.— East Omaha St. R. Co. *v.* Godola, 50 Nebr. 906, 70 N. W. 491.

New Jersey.— Scott *v.* Bergen County Traction Co., 64 N. J. L. 362, 48 Atl. 1118.

New York.— Koehne *v.* New York, etc., R. Co., 165 N. Y. 603, 58 N. E. 1089; McSwyny *v.* Broadway, etc., R. Co., 4 Silv. Supreme (N. Y.) 495, 7 N. Y. Suppl. 456, 27 N. Y. St. 363.

Pennsylvania.— Philadelphia City Pass. R. Co. *v.* Hassard, 75 Pa. St. 367.

Washington.— Brown *v.* Seattle City R. Co., 16 Wash. 465, 47 Pac. 890; Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

See 9 Cent. Dig. tit. "Carriers," § 1089.

48. Louisville, etc., R. Co. *v.* Smith, 2 Duv. (Ky.) 556; Central Pass. R. Co. *v.* Bishop, 9 Ky. L. Rep. 348; Clark *v.* Eighth Ave. R. Co., 32 Barb. (N. Y.) 657.

49. Keegan *v.* Third Ave. R. Co., 34 N. Y. App. Div. 297, 54 N. Y. Suppl. 391 [*affirmed* in 165 N. Y. 622, 59 N. E. 1124].

50. Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269; Leonard *v.* Brooklyn Heights R. Co., 57 N. Y. App. Div. 125, 67 N. Y. Suppl. 985.

Negligence as to apparatus or appliances. — Where there is no negligence in the appliances used, or in the way in which the car is operated, an injury to a passenger resulting from the breaking of the trolley wire, the severed end of which comes in contact with the passenger and gives him a shock, does not render the carrier liable. Baltimore City Pass. R. Co. *v.* Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161. But where the electrical apparatus on the car was in defective condition, and the iron portions of the car became charged with electricity, which fact might, by the exercise of reasonable care, have been known to the carrier, held that the carrier was liable for injury to a passenger by reason of a shock caused by his touching the iron portions of the car. Burt *v.* Douglas County St. R. Co., 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479.

Negligence of guard. — An electric railway company is liable for any injuries resulting from negligence of a guard, whether such negligence be direct or wilful, or on the other hand the result of mere carelessness. Koetter *v.* Manhattan R. Co., 13 N. Y. Suppl. 458, 36 N. Y. St. 611.

51. McLean *v.* Burbank, 11 Minn. 277; Bartnik *v.* Erie R. Co., 36 N. Y. App. Div. 246, 55 N. Y. Suppl. 266. See also, generally, Ferries.

52. Springer *v.* Ford, 88 Ill. App. 529; Western Union Tel. Co. *v.* Woods, 88 Ill. App. 375; Marker *v.* Mitchell, 54 Fed. 637. And see *supra*, III, A, 1, b.

Those who go upon a passenger elevator without right, or contrary to reasonable regulation, cannot recover for injuries received therefrom. Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244; Billows *v.* Moors, 162 Mass. 42, 37 N. E. 750; Amerine *v.* Porteous, 105 Mich. 347, 63 N. W. 300.

Where the fall of an elevator in an apartment hotel was due to the shutting off by the city of the water supply by which the elevator was operated, and which the owner could not reasonably have anticipated or provided against, it was held that he was not liable for injuries resulting. Shattuck *v.* Rand, 142 Mass. 83, 7 N. E. 43.

53. And for any injury resulting from incompetence and inefficiency which was known, or might, by the exercise of reasonable diligence, have been known, to the carrier, the latter is liable. Dean *v.* St. Paul Union Depot Co., 41 Minn. 360, 43 N. W. 54, 16 Am. St. Rep. 703, 5 L. R. A. 442; Caveny *v.* Neely, 43 S. C. 70, 20 S. E. 806.

54. Tuller *v.* Talbot, 23 Ill. 357, 76 Am. Dec. 695; Benner Livery, etc., Co. *v.* Busson,

employment of motormen and conductors for electric cars,[55] or drivers for street-cars.[56]

e. Care as to Premises, Machinery, and Appliances. While the duty to exercise the highest care and diligence in providing safe machinery is fully recognized, and any negligence of the carrier or his servants or employees in manufacturing or providing such machinery will render the carrier liable,[57] yet, as the carrier is not necessarily a manufacturer of the machinery which he uses, if he uses the proper care in the purchase and inspection of machinery employed, buying from competent and reputable manufacturers, and carefully inspecting and testing, so far as practicable, he will not be liable for injuries resulting from hidden defects which he could not have discovered and provided against in the exercise of due care and diligence.[58]

2. Negligence or Wrongs of Servants — a. Who Are Servants. There is in general no difficulty in determining who are servants or employees of the carrier in such sense as to render him liable for their negligence or wrongful acts, the question which has usually arisen being as to whether the wrong of the servant or employee was within the scope of his authority so as to render his principal liable for injuries resulting therefrom.[59] However, the question as to whether the person whose wrong caused the injury was the servant of the carrier has arisen in determining the liability of railroad companies for the negligence or wrongful acts of porters on sleeping-cars, owned and controlled by an independent company, but used by the railroad company as a part of its train, and it has been held that inasmuch as the servants of the railroad company have entire control of the trains, and are engaged in the transportation of the passenger under contract with him, although he may be availing himself of the conveniences and additional accommodations of the sleeping-car, such porters are to be deemed servants of the railroad company so far as the passenger is concerned.[60] Postal clerks engaged in the mail service on railroads are not to be deemed employees of the railroad company so as to render the company liable for their negligence causing injury

58 Ill. App. 17; Frink *v.* Coe, 4 Greene (Iowa) 555, 61 Am. Dec. 141; Schafer *v.* Gilmer, 13 Nev. 330; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115.

55. Olsen *v.* Citizens' R. Co., 152 Mo. 426, 54 S. W. 470; Hansberger *v.* Sedalia Electric R., etc., Co., 82 Mo. App. 566.

56. Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

57. The care required as to safety of premises and in providing safe and adequate vehicles and other machinery, road-beds, tracks, and the like, to relieve against liability, will be hereafter discussed in detail. See *infra*, III, F, 3, b. d.

58. *Indiana.*— Louisville, etc., R. Co. *v.* Snyder, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434.

Massachusetts.— Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

Michigan.— Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

Pennsylvania.— Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581.

England.— Readhead *v.* Midland R. Co., L. R. 2 Q. B. 412, 9 B. & S. 519, 38 L. J. Q. B. 169, 20 L. T. Rep. N. S. 628, 17 Wkly. Rep. 737; Christie *v.* Griggs, 2 Campb. 79, 11 Rev. Rep. 666.

Contra.— Alden *v.* New York Cent. R. Co., 26 N. Y. 102, 82 Am. Dec. 401 [*criticized* and practically *overruled* in McPadden *v.* New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705].

As to latent defects see also *infra*, III, F, 3, d, (III).

59. See *infra*, III, F, 2, b; also *supra*, III, C, 4, d.

The carrier cannot so delegate his functions to an independent contractor as to escape liability for acts of the servants of such contractor. Barrow Steam Ship Co. *v.* Kane, 88 Fed. 197, 59 U. S. App. 574, 31 C. C. A. 452.

Volunteer.—While the carrier is not liable as master for negligent acts of an intermeddler or volunteer who attempts to render service without authority, yet if the servant who is charged with the carrier's business delegates some of his functions to a volunteer, even without authority to do so, the carrier becomes liable for the negligence of the volunteer as that of the servant. Leavenworth Electric R. Co. *v.* Cusick, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

60. Williams *v.* Pullman Palace Car Co., 40 La. Ann. 417, 4 So. 85, 8 Am. St. Rep. 538; Dwinelle *v.* New York Cent., etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 30 N. Y. St. 578, 17 Am. St. Rep. 611, 8 L. R. A. 224; Thorpe *v.* New York Cent., etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325; Cleveland, etc., R. Co. *v.* Walrath, 38 Ohio St. 461, 43 Am. Rep. 433; Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. ed. 141.

to a passenger.[61] With reference to the liability of a carrier who contracts for through transportation over connecting lines, it is held that the contracting carrier is liable for the negligence or wrongful acts of the servants of the connecting carrier in carrying out the transportation contracted for.[62] So where railroad companies are in the joint use and occupation of stations or tracks, a passenger of one company may recover against that company for injuries due to the negligence or fault of the employees of another company using the same station or tracks.[63]

b. Negligence or Wrongs of Servants in General; Scope of Employment. The carrier, like any other master carrying on his business by means of the employment of servants, is liable for injuries resulting from the incompetence, negligence, or wrongful acts of his servants, irrespective of whether he has used due care in the employment of such servant, or whether the act is contrary to the master's orders, even though it be wilful or malicious.[64] If the acts are outside of the scope of employment of the servant, then the carrier is not liable.[65]

c. Failure of Servants to Care For, Assist, or Protect Passengers — (i) *Care of and Assistance to Persons Under Disability.* The general rule as to the duty to care for the safety of the passenger is applicable in case of passengers

61. St. Louis, etc., R. Co. *v.* Waggoner, 90 Ill. App. 556; Carpenter *v.* Boston, etc., R. Co., 97 N. Y. 494, 49 Am. Rep. 540.

That the carrier may be liable if the conduct of the business by the postal clerk is such as to render the passenger platforms dangerous at stations see *infra*, III, F, 3, b, (v).

62. McLean *v.* Burbank, 11 Minn. 277, 12 Minn. 530; Ryland *v.* Peters, 1 Phila. (Pa.) 264, 8 Leg. Int. (Pa.) 238.

As to the liability for injuries on the line of a connecting carrier see *supra*, III, D, 2, c.

63. Murray *v.* Lehigh Valley R. Co., 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539; McElroy *v.* Nashua, etc., R. Corp., 4 Cush. (Mass.) 400, 50 Am. Dec. 794; Edgerton *v.* New York, etc., R. Co., 35 Barb. (N. Y.) 389; Illinois Cent. R. Co. *v.* Barron, 5 Wall. (U. S.) 90, 18 L. ed. 591.

Where one railroad company depends on another for motive power, negligence of the second in the operation of the train will be chargeable to the first. Keep *v.* Indianapolis, etc., R. Co., 3 McCrary (U. S.) 302, 10 Fed. 454. And this is true where a railroad company operates a road owned by the state, which furnishes the track and motive power. Peters *v.* Rylands, 20 Pa. St. 497, 59 Am. Dec. 746. But where defendant company operating a road leased from the state was sued for an injury resulting from an embankment being undermined by water, defendant was entitled to an instruction that it was not responsible for the defective condition of the road, unless it had notice thereof, or might have had notice in the exercise of due care. Littlejohn *v.* Fitchburg R. Co., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502.

64. *Georgia.*— Gasway *v.* Atlantic, etc., R. Co., 58 Ga. 216.

Indiana.— Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135; Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101.

Iowa.— McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Louisiana.— Choppin *v.* New Orleans, etc., R. Co., 17 La. Ann. 19; Carmanty *v.* Mexican Gulf R. Co., 5 La. Ann. 703.

Maryland.— Baltimore, etc., R. Co. *v.* Leapley, 65 Md. 571, 4 Atl. 891.

New York.— Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474.

Pennsylvania.— Pennsylvania R. Co. *v.* Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520.

United States.— Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468, 14 L. ed. 502; Stockton *v.* Bishop, 4 How. (U. S.) 155, 11 L. ed. 918.

See 9 Cent. Dig. tit. "Carriers," § 1121.

65. *Alabama.*— Goodloe *v.* Memphis, etc., R. Co., 107 Ala. 233, 18 So. 166, 54 Am. St. Rep. 67, 29 L. R. A. 729.

Indiana.— Cincinnati, etc., R. Co. *v.* Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144.

Massachusetts.— McGilvray *v.* West End St. R. Co., 164 Mass. 122, 41 N. E. 116.

New York.— Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; Molloy *v.* New York Cent., etc., R. Co., 10 Daly (N. Y.) 453.

North Carolina.— Owens *v.* Wilmington, etc., R. Co., 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642.

Ohio.— O'Neil *v.* Baltimore, etc., R. Co., 2 Ohio Cir. Ct. 504.

United States.— Lezinsky *v.* Metropolitan St. R. Co., 88 Fed. 437, 59 U. S. App. 588, 31 C. C. A. 573.

See also *supra*, III, C, 4, d; and 9 Cent. Dig. tit. "Carriers," § 1121.

Modification of rule.— This general rule is subject to the modification that as the carrier owes protection to his passengers he will be liable for injuries to the passenger from assaults or other wrongs committed by his servants, whose duty it is to afford such protection to the passenger, even though the wrong itself was not within the scope of the servant's employment, and was done for his own purposes and not in the discharge of any

who are suffering from some infirmity or disability.[66] And certainly this is true if the servants of the carrier have no knowledge or reason to believe that the passenger is laboring under a disability.[67] But the servants are presumed to know that persons in feeble health may be passengers, and if such persons are injured by negligence in operating the train, they are entitled to recover, even though the injury would not have happened to a person in sound health.[68] If the passenger is suffering from some sickness or disability which is known to the servants of the carrier, the care required as to him may be greater than that required as to an ordinary passenger. While a railway company is not bound to accept for transportation without an attendant one who, because of physical or mental disability, is unable to take care of himself, yet, if its servants do voluntarily accept such a person, unattended, they should render to him such special care and assistance as his condition requires in order that he may be safely transported.[69] And the same principle applies to persons who are known to be partially or entirely helpless on account of intoxication[70] or physical disability.[71] Those who are lame or otherwise infirm should be allowed a longer time, if necessary, in which to get on board or depart from the car.[72] While the duty of the carrier to all passengers is the same in degree, the amount of care may vary with the age, sex, or bodily infirmity of the passenger.[73] Where a passenger becomes ill in transit, to the knowledge of the servants of the carrier, it is their duty to furnish such care and attention as is consistent with the safe conduct of the business and the comfort of other passengers.[74]

duty owing to the master. See *infra*, III, F, 2, c, (II).

66. Spade *v.* Lynn, etc., R. Co., 172 Mass. 488, 52 N. E. 747, 70 Am. St. Rep. 298, 43 L. R. A. 832.

67. Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175.

The fact of intoxication rendering a passenger less able to care for himself will not, if unknown to the servants of the carrier, cast any additional burden upon them. St. Louis, etc., R. Co. *v.* Carr, 47 Ill. App. 353; Strand *v.* Chicago, etc., R. Co., 67 Mich. 380, 34 N. W. 712; Parker *v.* Winona, etc., R. Co., 83 Minn. 212, 86 N. W. 2; Missouri Pac. R. Co. *v.* Evans, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 476.

68. Spade *v.* Lynn, etc., R. Co., 172 Mass. 488, 52 N. E. 747, 70 Am. St. Rep. 298, 43 L. R. A. 832; East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834; Shenandoah Valley R. Co. *v.* Moose, 83 Va. 827, 3 S. E. 796.

Pregnant woman.— The carrier will be liable for injuries resulting to a pregnant woman by reason of negligence, although such injury is occasioned by her condition. Baltimore, etc., R. Co. *v.* Leapley, 65 Md. 571, 4 Atl. 891; Sawyer *v.* Dulany, 30 Tex. 479; St. Louis, etc., R. Co. *v.* Ferguson, (Tex. Civ. App. 1901) 64 S. W. 797.

69. Croom *v.* Chicago, etc., R. Co., 52 Minn. 296, 53 N. W. 1128, 38 Am. St. Rep. 557, 18 L. R. A. 602.

70. Wheeler *v.* Grand Trunk R. Co., 70 N. H. 607, 50 Atl. 103; Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758.

The fact that the passenger is intoxicated does not deprive him of the right to be transported with due care. Milliman *v.* New York Cent., etc., R. Co., 66 N. Y. 642.

71. Haug *v.* Great Northern R. Co., 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L. R. A. 664.

72. Hanks *v.* Chicago, etc., R. Co., 60 Mo. App. 274; Sheridan *v.* Brooklyn City, etc., R. Co., 36 N. Y. 39, 1 Transcr. App. (N. Y.) 49, 34 How. Pr. (N. Y.) 217, 93 Am. Dec. 490; Central Texas, etc., R. Co. *v.* Holloway, (Tex. Civ. App. 1899) 54 S. W. 419.

An injury occasioned to such person by the negligence of a servant while rendering him assistance will make the carrier liable. Western, etc., R. Co. *v.* Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; Hanks *v.* Chicago, etc., R. Co., 60 Mo. App. 274; International, etc., R. Co. *v.* Gilmer, 18 Tex. Civ. App. 680, 45 S. W. 1028.

73. St. Louis, etc., R. Co. *v.* Finley, 79 Tex. 85, 15 S. W. 266.

Care of children.— Greater care must be employed in regard to children of tender years than is necessary as to adults.

Arkansas.— Little Rock Traction, etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7; St. Louis, etc., R. Co. *v.* Rexroad, 59 Ark. 180, 26 S. W. 1037.

Kansas.— Atchison, etc., R. Co. *v.* Flinn, 24 Kan. 627.

Michigan.— East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

New York.— Ryall *v.* Kennedy, 40 N. Y. Super. Ct. 347.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Caldwell, 74 Pa. St. 421.

Wisconsin.— Hemmingway *v.* Chicago, etc., R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823.

See 9 Cent. Dig. tit. "Carriers," § 1097.

74. Conolly *v.* Crescent City R. Co., 41 La. Ann. 57, 5 So. 259, 6 So. 526, 17 Am. St. Rep. 389, 3 L. R. A. 133; Newark, etc., R. Co. *v.* McCann, 58 N. J. L. 642, 34 Atl. 1052,

(II) *Duty to Warn as to Danger.* The carrier owes to the passenger the duty of protection during transportation in order that, while on the carrier's premises and in his vehicles, they may enjoy comfort, peace, and safety. This duty of care involves warning of danger so far as such warning might enable the passenger to protect himself against an injury which might be anticipated in the exercise of a high degree of care and foresight, and the carrier will be liable for an injury which might have been avoided if due warning had been given,[75] and also for injury resulting in the reasonable efforts of the passenger to avoid supposed danger, where the warning is improperly given.[76]

(III) *Duty Not to Assault.* The duty of the carrier to protect the passenger must be discharged by means of his servants engaged in carrying out the transportation contracted for.[77] Therefore, if any servant of the carrier while thus engaged assaults a passenger, or otherwise infringes the right of protection to which he is entitled, the carrier is liable, irrespective of whether the servant in the thing done was acting for his master or for his own purposes.[78] Of course, it may be that the passenger has ceased to be passenger by the termination of his journey and his departure from the train, or the servant has ceased to be servant for the time being by reason of having no further duty to discharge to his employer in the premises, so that the assault may be said to be outside of

33 L. R. A. 127; Lake Shore, etc., R. Co. *v.* Salzman, 52 Ohio St. 558, 40 N. E. 891, 49 Am. St. Rep. 745, 31 L. R. A. 261.

Negligence of physician.— Though it may be the duty of the carrier's servants under such circumstances to call a physician to attend the passenger, the carrier is not liable for the negligence of such physician, or for his malpractice, if reasonable care in selecting a competent physician has been exercised. Galveston, etc., R. Co. *v.* Scott, 18 Tex. Civ. App. 321, 44 S. W. 589.

75. *Illinois.*— Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 293 [*affirming* 65 Ill. App. 435].

Indiana.— Terre Haute Electric R. Co. *v.* Lauer, 21 Ind. App. 466, 52 N. E. 703.

Minnesota.— Rosted *v.* Great Northern R. Co., 76 Minn. 123, 78 N. W. 971.

New Jersey.— Whalen *v.* Consolidated Traction Co., 61 N. J. L. 606, 40 Atl. 645, 68 Am. St. Rep. 723, 41 L. R. A. 836; Camden, etc., R. Co. *v.* Young, 60 N. J. L. 193, 37 Atl. 1013.

Utah.— Nelson *v.* Southern Pac. Co., 18 Utah 244, 55 Pac. 364.

76. Ephland *v.* Missouri Pac. R. Co., 137 Mo. 187, 37 S. W. 820, 38 S. W. 926, 59 Am. St. Rep. 498, 35 L. R. A. 107.

77. Schimpf *v.* Harris, 185 Pa. St. 46, 39 Atl. 820; Texas, etc., R. Co. *v.* Humphries, 20 Tex. Civ. App. 28, 48 S. W. 201.

78. The duty of the carrier to afford protection, which he is to discharge through his servants, extends to the prevention of injury to the passenger from the servant himself as well as from any other person.

Alabama.— Birmingham R., etc., Co. *v.* Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752; Southern R. Co. *v.* Wildman, 119 Ala. 565, 24 So. 764.

Illinois.— Chicago, etc., R. Co. *v.* Peacock, 48 Ill. 253; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Hanson *v.* Urbana, etc., Electric St. R. Co., 75 Ill. App. 474.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Louisville, etc., R. Co. *v.* Kelly, 92 Ind. 371, 47 Am. Rep. 149.

Kentucky.— Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

Maine.— Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Maryland.— Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220.

Missouri.— Eads *v.* Metropolitan R. Co., 43 Mo. App. 536.

New Jersey.— Haver *v.* Central R. Co., 62 N. J. L. 282, 41 Atl. 916, 72 Am. St. Rep. 647, 43 L. R. A. 84.

New York.— Dwinelle *v.* New York Cent., etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 30 N. Y. St. 578, 17 Am. St. Rep. 611, 8 L. R. A. 224; McLeod *v.* New York, etc., R. Co., 72 N. Y. App. Div. 116, 76 N. Y. Suppl. 347; Lyons *v.* Broadway, etc., R. Co., 10 N. Y. Suppl. 237, 32 N. Y. St. 232.

North Carolina.— Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879; Daniel *v.* Petersburg R. Co., 117 N. C. 592, 23 S. E. 327.

Tennessee.— Knoxville Traction Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 579.

Texas.— St. Louis, etc., R. Co. *v.* Franklin, (Tex. Civ. App. 1898) 44 S. W. 701; Houston, etc., R. Co. *v.* Washington, (Tex. Civ. App. 1895) 30 S. W. 719.

United States.—New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049; Pendleton *v.* Kinsley, 3 Cliff. (U. S.) 416, 19 Fed. Cas. No. 10,922.

See 9 Cent. Dig. tit. "Carriers," § 1123.

Contra.— Poulton *v.* London, etc., R. Co., L. R. 2 Q. B. 534, 8 B. & S. 616, 36 L. J. Q. B. 294, 16 L. T. Rep. N. S. 11, 16 Wkly. Rep. 309; Seymour *v.* Greenwood, 7 H. & N. 355, 30 L. J. Exch. 327, 4 L. T. Rep. N. S. 833, 9 Wkly. Rep. 785; Lowe *v.* Great Northern R. Co., 62 L. J. Q. B. 524, 5 Reports 535.

the scope of the servant's employment.[79] But so long as the passenger is being transported, or is on the carrier's premises legitimately in connection with such transportation,[80] and the servant is there employed about the business of the carrier in his relation to the passenger, the duty of protection exists. Therefore the carrier is liable for assault upon a passenger by the conductor in charge of the train or car in which the passenger is riding, whether the assault is in the supposed interest of and discharge of a supposed duty to the carrier, or is made as the result of personal malice or desire for revenge for an affront.[81] Likewise a brakeman upon a train, in connection with his employment, is bound to discharge the duty of protecting the passenger, and if he makes an assault upon the passenger, although not in connection with the discharge of any particular duty as brakeman, but for his own ends, the carrier will be liable.[82] The same principle extends to the conduct of other servants who have, in the discharge of their duties, any connection with the passenger, such as the porter,[83] any member of the train crew,[84] a gate-man,[85] a station agent,[86] or a guard[87] of a railroad company, the driver of a street-car,[88] or the master,[89] mate,[90] deck

79. Wise *v.* South Covington, etc., R. Co., 17 Ky. L. Rep. 1359, 34 S. W. 894; Central R. Co. *v.* Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425; Parker *v.* Erie R. Co., 5 Hun (N. Y.) 57.

Where an employee without authority starts an engine and thereby causes a collision, injuring passengers, the carrier is not liable. Mars *v.* Delaware, etc., Canal Co., 54 Hun (N. Y.) 625, 8 N. Y. Suppl. 107, 28 N. Y. St. 228.

80. Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216; Illinois Cent. R. Co. *v.* Smith, 29 Ill. App. 94; Illinois Cent. R. Co. *v.* Sheehan, 29 Ill. App. 90; Harrold *v.* Winona, etc., R. Co., 47 Minn. 17, 49 N. W. 389; Priest *v.* Hudson River R. Co., 40 How. Pr. (N. Y.) 456.

81. *Alabama.*— Birmingham R., etc., Co. *v.* Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752.

Georgia.— Georgia Cent. R. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

Illinois.— Coggins *v.* Chicago, etc., R. Co., 18 Ill. App. 620.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572.

Kentucky.— Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451; Louisville, etc., R. Co. *v.* Donaldson, 19 Ky. L. Rep. 1384, 43 S. W. 439.

Massachusetts.— Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200.

Missouri.— Spohn *v.* Missouri Pac. R. Co., 101 Mo. 417, 14 S. W. 880; Randolph *v.* Hannibal, etc., R. Co., 18 Mo. App. 609.

New York.— Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185.

Texas.—Galveston, etc., R. Co. *v.* La Prelle, (Tex. Civ. App. 1901) 65 S. W. 488.

West Virginia.— Smith *v.* Norfolk, etc., R. Co., 48 W. Va. 69, 35 S. E. 834.

United States.— Texas, etc., R. Co. *v.* Williams, 62 Fed. 440, 23 U. S. App. 379, 10 C. C. A. 463; Gallena *v.* Hot Springs R. Co., 4 McCrary (U. S.) 371, 13 Fed. 116.

See 9 Cent. Dig. tit. "Carriers," § 1123.

82. *Illinois.*— Chicago, etc., R. Co. *v.* Flexman, 103 Ill. 546, 42 Am. Rep. 33.

Indiana.— Wabash R. Co. *v.* Savage, 110 Ind. 156, 9 N. E. 85; Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19.

Iowa.— McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kansas.— Atchison, etc., R. Co. *v.* Henry, 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465.

Maine.— Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Missouri.—McPeak *v.* Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. 170.

New York.— Drew *v.* Sixth Ave. R. Co., 26 N. Y. 49.

North Carolina.— Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879.

See 9 Cent. Dig. tit. "Carriers," § 1123.

83. Galveston, etc., R. Co. *v.* McMonigal, (Tex. Civ. App. 1893) 25 S. W. 341.

84. White *v.* Norfolk, etc., R. Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489. See also Savannah, etc., R. Co. *v.* Quo, 103 Ga. 125, 29 S. E. 607, 68 Am. St. Rep. 85, 40 L. R. A. 483.

85. Indianapolis Union R. Co. *v.* Cooper, 6 Ind. App. 202, 33 N. E. 219.

86. Daniel *v.* Petersburg R. Co., 117 N. C. 592, 23 S. E. 327; Fick *v.* Chicago, etc., R. Co., 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878; McGehee *v.* McCarley, 91 Fed. 462, 63 U. S. App. 422, 33 C. C. A. 629. But the carrier will not be liable for an assault by the station agent or baggage-master not in connection with the transaction of the business of his principal. Georgia R., etc., Co. *v.* Richmond, 98 Ga. 495, 25 S. E. 565. See also Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373.

87. Texas, etc., R. Co. *v.* Bowlin, (Tex. Civ. App. 1895) 32 S. W. 918.

88. Winnegar *v.* Central Pass. R. Co., 85 Ky. 547, 9 Ky. L. Rep. 156, 4 S. W. 237; Lafitte *v.* New Orleans, etc., R. Co., 43 La. Ann. 34, 8 So. 701, 12 L. R. A. 337; Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185.

89. Trabing *v.* California Nav., etc., Co., 121 Cal. 137, 53 Pac. 644; Keene *v.* Lizardi, 5 La. 431, 25 Am. Dec. 197.

90. Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527.

hands,[91] or waiters [92] of a steamboat. The duty of the carrier toward the passenger also extends to the protection of females from insulting remarks, indecent assaults, or improper liberties.[93] But mere rudeness of language or brusqueness of behavior on the part of the servant will not be such an injury to the passenger as to entitle him to recover damages.[94] Of course, if the servant of the carrier acts only in justifiable self-defense as against an assault by the passenger, the carrier will not be liable;[95] but no provocation, consisting in mere insulting language, will excuse an assault,[96] nor will the fact that the passenger is refusing to comply with a regulation of the carrier justify the servant in using violence not proper nor necessary for the enforcement of the regulation.[97]

(iv) *Protection of Passengers Against Injuries From Fellow Passengers.* While the relation of the passenger to the carrier is not such as to render the carrier liable directly for an assault or other injury committed by the passenger upon a fellow passenger, yet it is the duty of the servants of the carrier to exercise great care and vigilance in preserving order and guarding passengers from violence or insult threatened by fellow passengers, and this duty may involve the coöperation of the servants of the carrier and the invoking of the assistance of other passengers in removing from the train a disorderly passenger.[98] Thus, where disorder is threatened by reason of race antipathy, it is the duty of the carrier's servants to remove from the train passengers whose conduct indicates danger from them to other passengers.[99] Where a passenger

91. New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049.

92. Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311.

93. *Georgia.*— Savannah, etc., R. Co. *v.* Quo, 103 Ga. 125, 29 S. E. 607, 68 Am. St. Rep. 85, 40 L. R. A. 483.

Kentucky.— Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 9 Ky. L. Rep. 7, 3 S. W. 530, 7 Am. St. Rep. 600.

Tennessee.—Knoxville Traction Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

Wisconsin.— Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

United States.— Nieto *v.* Clark, 1 Cliff. (U. S.) 145, 18 Fed. Cas. No. 10,262, 16 Leg. Int. (Pa.) 358.

94. Rose *v.* Wilmington, etc., R. Co., 106 N. C. 168, 11 S. E. 526; Daniels *v.* Florida Cent., etc., R. Co., 62 S. C. 1, 39 S. E. 762; Missouri, etc., R. Co. *v.* Kendrick, (Tex. Civ. App. 1895) 32 S. W. 42; New York, etc., R. Co. *v.* Bennett, 50 Fed. 496, 6 U. S. App. 95, 1 C. C. A. 544.

Threats used by the conductor to the passenger, imputing fraud, may be actionable. Louisville, etc., R. Co. *v.* Donaldson, 19 Ky. L. Rep. 1384, 43 S. W. 439.

95. Hayes *v.* St. Louis R. Co., 15 Mo. App. 583; Russell *v.* New York Cent., etc., R. Co., 12 N. Y. App. Div. 160, 42 N. Y. Suppl. 678; Scott *v.* Central Park, etc., R. Co., 53 Hun (N. Y.) 414, 6 N. Y. Suppl. 382, 24 N. Y. St. 754; Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781; New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. ed. 919; Harrison *v.* Fink, 42 Fed. 787.

96. *Alabama.*— Birmingham R., etc., Co. *v.* Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752.

Illinois.— Hanson *v.* Urbana, etc., Electric St. R. Co., 75 Ill. App. 474; Coggins *v.* Chicago, etc., R. Co., 18 Ill. App. 620.

Maryland.— Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220.

Nebraska.— Haman *v.* Omaha Horse R. Co., 35 Nebr. 74, 52 N. W. 830.

New York.— Weber *v.* Brooklyn, etc., R. Co., 47 N. Y. App. Div. 306, 62 N. Y. Suppl. 1.

North Carolina.— Daniel *v.* Petersburg R. Co., 117 N. C. 592, 23 S. E. 327.

A prior assault upon the conductor, the danger of which has passed, will not excuse an assault by the conductor. Galveston, etc., R. Co. *v.* La Prelle, (Tex. Civ. App. 1901) 65 S. W. 488.

Unjustifiable language and conduct of the passenger, which is exasperating to the servant and provocative of an assault, may be shown in mitigation. Georgia R., etc., Co. *v.* Hopkins, 108 Ga. 324, 33 S. E. 965, 75 Am. St. Rep. 39. And by grossly insulting conduct toward the conductor calculated to excite his passions the passenger may debar himself from recovery for an assault resulting from such provocation. City Electric R. Co. *v.* Shropshire, 101 Ga. 33, 28 S. E. 508; Peavy *v.* Georgia R., etc., Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334.

If the conductor without provocation uses opprobrious words and abusive language, tending to cause a breach of the peace or to humiliate the passenger, or subject him to mortification, the carrier is liable in damages. Cole *v.* Atlanta, etc., R. Co., 102 Ga. 474, 31 S. E. 107.

97. Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

98. New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689; Putnam *v.* Broadway, etc., R. Co., 55 N. Y. 108, 14 Am. Rep. 190.

99. Louisville, etc., R. Co. *v.* McEwan, 21 Ky. L. Rep. 487, 51 S. W. 619; Bailey *v.* Louisville, etc., R. Co., 19 Ky. L. Rep. 1617,

is insane, and by reason of that condition, although arising during transportation, injury to fellow passengers is threatened, it is the duty of the servants of the carrier to refuse to carry him further than necessary to place him in charge of an officer and use all reasonable care to prevent injury to passengers in the meantime, and this duty arises not merely from the probability, but from the reasonable possibility known to the carrier's servants that such injury will result.[1] The liability of the carrier in such cases depends on failure to use care after the danger is reasonably apparent.[2] Thus, where a passenger inadvertently threw a lighted match on the clothing of another passenger, causing the latter to be severely burnt, it was held that there was no liability on the part of the carrier, his servants having used every reasonable effort after the danger became apparent to prevent injury.[3] And there is no liability of the carrier for injuries to a passenger resulting from the ignition or explosion of inflammable material carried by a passenger, if, in the exercise of a high degree of prudence and foresight, such as would be exercised by a very cautious, prudent, and competent person under similar circumstances, the danger could not have been avoided.[4] So injury to a

44 S. W. 105; Wood *v.* Louisville, etc., R. Co., 19 Ky. L. Rep. 924, 42 S. W. 349; Britton *v.* Atlanta, etc., Air-Line R. Co., 88 N. C. 536, 43 Am. Rep. 749.

A passenger may recover for mental suffering, unaccompanied by physical pain, caused by vulgar, profane, and indecent language of other passengers which might have been prevented by the servants of the carrier. Houston, etc., R. Co. *v.* Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124.

1. Meyer *v.* St. Louis, etc., R. Co., 54 Fed. 116, 10 U. S. App. 677, 4 C. C. A. 221.

2. *Georgia.*— Holly *v.* Atlanta St. R. Co., 61 Ga. 215, 34 Am. Rep. 97.

Maryland.—Tall *v.* Baltimore Steam-Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120.

Massachusetts.— Cobb *v.* Boston El. R. Co., 179 Mass. 212, 60 N. E. 476.

Missouri.— Spohn *v.* Missouri Pac. R. Co., 87 Mo. 74.

England.— Cobb *v.* Great Western R. Co., [1894] App. Cas. 419, 58 J. P. 636, 63 L. J. Q. B. 629, 71 L. T. Rep. N. S. 161, 6 Reports 203.

Carrier liable for acts of fellow passenger. — *District of Columbia.*— Flannery *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 111.

Georgia.— Richmond, etc., R. Co. *v.* Jefferson, 89 Ga. 554, 16 S. E. 69, 32 Am. St. Rep. 87, 17 L. R. A. 571; Holly *v.* Atlanta St. R. Co., 61 Ga. 215, 34 Am. Rep. 97.

Indiana.— Evansville, etc., R. Co. *v.* Darting, 6 Ind. App. 375, 33 N. E. 636.

Kentucky.— Quinn *v.* Louisville, etc., R. Co., 98 Ky. 231, 17 Ky. L. Rep. 811, 32 S. W. 742; Louisville, etc., R. Co. *v.* Finn, 16 Ky. L. Rep. 57.

Maryland.— United R., etc., Co. *v.* State, 93 Md. 619, 49 Atl. 923, 86 Am. St. Rep. 453.

Minnesota.— Lucy *v.* Chicago Great Western R. Co., 64 Minn. 7, 65 N. W. 944, 3 L. R. A. 551.

Mississippi.—Illinois Cent. R. Co. *v.* Minor, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627; New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689.

Missouri.— Spohn *v.* Missouri Pac. R. Co., 87 Mo. 74.

New Jersey.—Partridge *v.* Woodland Steamboat Co., 66 N. J. L. 290, 49 Atl. 726.

New York.— Hendricks *v.* Sixth Ave. R. Co., 44 N. Y. Super. Ct. 8.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Pillow, 76 Pa. St. 510, 18 Am. Rep. 424; Pittsburgh, etc., R. Co. *v.* Hinds, 53 Pa. St. 512, 91 Am. Dec. 224.

Texas.— International, etc., R. Co. *v.* Miller, 9 Tex. Civ. App. 104, 28 S. W. 233.

United States.— Murphy *v.* Western, etc., R. Co., 23 Fed. 637; King *v.* Ohio, etc., R. Co., 22 Fed. 413; Flint *v.* Norwich, etc., Transp. Co., 6 Blatchf. (U. S.) 158, 9 Fed. Cas. No. 4,873, 2 Am. L. Rev. 569, 34 Conn. 554.

See 9 Cent. Dig. tit. "Carriers," § 1125.

Carrier not liable for acts of fellow passenger.— *Illinois.*— Metropolitan West Side El. R. Co. *v.* Kersey, 80 Ill. App. 301; Springfield Consol. R. Co. *v.* Flynn, 55 Ill. App. 600.

Iowa.— Felton *v.* Chicago, etc., R. Co., 69 Iowa 577, 29 N. W. 618.

Kansas.— Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

Kentucky.— Kinney *v.* Louisville, etc., R. Co., 99 Ky. 59, 17 Ky. L. Rep. 1405, 34 S. W. 1066; Louisville, etc., R. Co. *v.* McEwan, 17 Ky. L. Rep. 406, 31 S. W. 465.

Minnesota.—Mullan *v.* Wisconsin Cent. Co., 46 Minn. 474, 49 N. W. 249.

Missouri.— Sira *v.* Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386.

New York.— Thomson *v.* Manhattan R. Co., 75 Hun (N. Y.) 548, 27 N. Y. Suppl. 608, 59 N. Y. St. 621; Kiernan *v.* Manhattan R. Co., 28 Misc. (N. Y.) 516, 59 N. Y. Suppl. 626.

Pennsylvania.— Graeff *v.* Philadelphia, etc., R. Co., 161 Pa. St. 230, 28 Atl. 1107, 41 Am. St. Rep. 885, 23 L. R. A. 606.

United States.— Meyer *v.* St. Louis, etc., R. Co., 54 Fed. 116, 10 U. S. App. 677, 4 C. C. A. 221.

3. Sullivan *v.* Jefferson Ave. R. Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167.

4. Clarke *v.* Louisville, etc., R. Co., 18 Ky. L. Rep. 1082, 39 S. W. 840, 49 S. W. 1120; Gulf, etc., R. Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652.

passenger from the negligent handling of a fire-arm by a fellow passenger has been held not to impose a liability where the carrier's servants had no reason to anticipate the accident.[5]

(v) *Protection Against Wrongs of Outsiders.* The carrier owes to the passenger the duty of protecting him from injury by strangers or intruders upon his cars or premises, if the danger was, or could in the exercise of care have been, known to the servants of the carrier and prevented by them.[6] So the carrier may be liable for the robbery of a passenger by strangers, if it could have been prevented by those in charge of the conveyance,[7] and may be liable for injuries to a passenger by a mob allowed to go upon the train with the purpose of injuring passengers, the intention of the mob being reasonably apparent, and it being within the power of the conductor to prevent it by not stopping the train where the threatening mob is gathered.[8] It is not the duty of a railroad company, however, to carry on its trains a police force sufficient to quell or oppose the entrance of unexpected mobs seeking to injure persons on the train;[9] and, in general, the carrier is not liable for the acts of third persons intruding into the waiting-rooms or upon the depot grounds, or within the cars, and causing injury to passengers, where the disorderly conduct which caused the injury could not have been anticipated.[10]

3. Liability of Carrier For Injuries to Passenger by Accident — a. Inevitable Accidents. The rules developed in connection with liability of carriers of goods with reference to loss due to act of God or the public enemy[11] have no application to carriers of passengers, inasmuch as the carrier of passengers is liable only for negligence,[12] and it matters not therefore whether the injury is due to natural cause or overwhelming force, or to the wrongs or faults of third persons, unless the carrier is in some way guilty of negligence with respect thereto. And it is of course true that if the accident resulting in injuries is due to natural causes, and is inevitable, that is, could not have been avoided in the exercise of that high degree of care which the carrier is bound to exercise for the safety of the passen-

5. Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485.

Where a passenger on a steamboat was injured by a shot from a gun negligently handled by a fellow passenger, it was held that the carrier was responsible for failure to enforce with the utmost diligence such rules of orderly conduct as were necessary to the protection of passengers on a boat from such injuries. West Memphis Packet Co. *v.* White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427.

6. Exton *v.* Central R. Co., 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508.

Abusive language.— The carrier is liable for mental suffering occasioned to a female passenger by abusive language addressed to her by the wife of the station agent in his hearing and on the premises, and without interference on his part. Texas, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1897) 39 S. W. 124.

7. Wright *v.* Chicago, etc., R. Co., 4 Colo. App. 102, 35 Pac. 196; Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792; Cobb *v.* Great Western R. Co., [1894] App. Cas. 419, 58 J. P. 636, 63 L. J. Q. B. 629, 71 L. T. Rep. N. S. 161, 6 Reports 203.

8. Chicago, etc., R. Co. *v.* Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483. But see Fewings *v.* Mendenhall, 83 Minn. 237, 86 N. W. 96, 55 L. R. A. 713; Pittsburgh, etc., R. Co. *v.* Hinds, 53 Pa. St. 512, 91 Am. Dec. 224, wherein it was held that it not appearing to have been within the power of the train crew to prevent the injury inflicted by a mob the carrier was not liable. See also Pounder *v.* North Eastern R. Co., [1892] 1 Q. B. 385, 56 J. P. 247, 61 L. J. Q. B. 136, 65 L. T. Rep. N. S. 679, 40 Wkly. Rep. 189; Cobb *v.* Great Western R. Co., [1894] App. Cas. 419, 58 J. P. 636, 63 L. J. Q. B. 629, 71 L. T. Rep. N. S. 161, 6 Reports 203.

9. Pittsburgh, etc., R. Co. *v.* Hinds, 53 Pa. St. 512, 91 Am. Dec. 224.

10. *Alabama.*— Batton *v.* South, etc., Alabama R. Co., 77 Ala. 591, 54 Am. Rep. 80.

Indiana.— Lake Erie, etc., R. Co. *v.* Arnold, 26 Ind. App. 190, 59 N. E. 394.

Pennsylvania.— Fredericks *v.* Northern Cent. R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306.

Virginia.— Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792.

England.— Murphy *v.* Great Northern R. Co., [1897] 2 Ir. 301.

See 9 Cent. Dig. tit. "Carriers," § 1129.

Misplacing of switch.— The carrier is not liable for the wrongful act of a stranger in misplacing a switch, where the act of such person could not have been anticipated. Keeley *v.* Erie R. Co., 47 How. Pr. (N. Y.) 256.

11. See *supra*, II, D, 2.

12. See *supra*, III, F, 1.

ger, the carrier will not be liable.[13] But on the other hand if, in the exercise of the high degree of care and foresight required of carriers of passengers, the cause of the accident could have been foreseen and the result thereof avoided, the carrier will be liable.[14] The negligence of the carrier in such case, however, must be proximate and not remote as connected with the accident.[15]

b. Care Required as to Safety of Premises — (i) *Reasonable Care Required.* A passenger by railroad is entitled to protection against danger at the station-house or waiting-room, on the platform, and in getting upon or alighting from the train, but the peculiar hazard of railway travel, requiring high speed by the use of the dangerous agency of steam,[16] is not involved on the premises of the railroad company, or while getting on or off trains, and therefore in these respects the care required for the protection of the passenger is reasonable, rather than the highest, or extraordinary, care.[17] And the rule is stated to be that, with reference to stations, platforms, approaches, and the like, the carrier is liable for any injury to the passenger resulting from failure to maintain them in a reasonably safe condition.[18]

13. *Colorado.*— Denver, etc., R. Co. *v.* Andrews, 11 Colo. App. 204, 53 Pac. 518.

Indiana.—Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

Minnesota.— Smith *v.* St. Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

Missouri.— Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

New York.— McPadden *v.* New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705.

Tennessee.— Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202.

Virginia.— Norfolk, etc., R. Co. *v.* Marshall, 90 Va. 836, 20 S. E. 823.

See 9 Cent. Dig. tit. "Carriers," § 1137.

14. Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518; Texas, etc., R. Co. *v.* Barron, 78 Tex. 421, 14 S. W. 698; Missouri Pac. R. Co. *v.* Mitchell, 72 Tex. 171, 10 S. W. 411; Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325; Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458; Ladd *v.* Foster, 12 Sawy. (U. S.) 547, 31 Fed. 827.

15. Gillespie *v.* St. Louis, etc., R. Co., 6 Mo. App. 554; McClary *v.* Sioux City, etc., R. Co., 3 Nebr. 44, 19 Am. Rep. 631; Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202.

If the accident is due to the act of the public enemy, the carrier will not be liable if he has used such care and diligence to avoid it as a very prudent and careful person would have exercised under the circumstances. Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382.

16. See *supra*, III, F, 1, b.

17. Moreland *v.* Boston, etc., R. Co., 141 Mass. 31, 6 N. E. 225; Taylor *v.* Pennsylvania Co., 50 Fed. 755.

18. *Alabama.*— Alabama Great Southern R. Co. *v.* Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354.

California.— Falls *v.* San Francisco, etc., R. Co., 97 Cal. 114, 31 Pac. 901.

Illinois.— Chicago, etc., R. Co. *v.* Scates, 90 Ill. 586; Chicago, etc., R. Co. *v.* Stewart, 77 Ill. App. 66; Chicago, etc., R. Co. *v.* Mahara, 47 Ill. App. 208.

Indiana.— Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874.

Iowa.— Hiatt *v.* Des Moines, etc., R. Co., 96 Iowa 169, 64 N. W. 766.

Kentucky.— Louisville, etc., R. Co. *v.* Ricketts, 18 Ky. L. Rep. 687, 37 S. W. 952.

Maine.— Bacon *v.* Casco Bay Steamboat Co., 90 Me. 46, 37 Atl. 328.

Massachusetts.— Keefe *v.* Boston, etc., R. Co., 142 Mass. 251, 7 N. E. 874.

Missouri.— Robertson *v.* Wabash R. Co., 152 Mo. 382, 53 S. W. 1082.

New York.— Kelly *v.* Manhattan R. Co., 112 N. Y. 443, 20 N. E. 383, 21 N. Y. St. 507, 3 L. R. A. 74; Kirby *v.* Delaware, etc., Canal Co., 20 N. Y. App. Div. 473, 46 N. Y. Suppl. 777; Foley *v.* Manhattan El. R. Co., 89 Hun (N. Y.) 606, 34 N. Y. Suppl. 1050, 69 N. Y. St. 21.

North Carolina.— Stokes *v.* Suffolk, etc., R. Co., 107 N. C. 178, 11 S. E. 991.

Texas.— Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

See 9 Cent. Dig. tit. "Carriers," § 1142.

Degree of care.—A railroad company is bound to exercise the same degree of care in keeping sidewalks constructed for the use of its passengers in safe condition as a municipal corporation with respect to public sidewalks. Bateman *v.* New York Cent., etc., R. Co., 47 Hun (N. Y.) 429.

It is error to say that the railroad company is required to furnish safe, or absolutely safe, premises (Texas, etc., R. Co. *v.* Woods, 15 Tex. Civ. App. 612, 40 S. W. 846; Gulf, etc., R. Co. *v.* Gross, (Tex. Civ. App. 1893) 21 S. W. 186), or premises as safe as possible (Finseth *v.* Suburban R. Co., 32 Oreg. 1, 51 Pac. 84, 39 L. R. A. 517).

In some cases, however, the rule is so expressed as to require more than ordinary care in these respects. Kelly *v.* Manhattan R. Co., 8 N. Y. St. 123; Johns *v.* Charlotte, etc., R. Co., 39 S. C. 162, 17 S. E. 698, 39 Am. St. Rep. 709, 20 L. R. A. 520; Gulf, etc., R. Co.

(II) *Safe Approaches; Ingress and Egress.* In general the requirement is that the carrier shall use reasonable care in furnishing safe approaches to the vehicle for passengers going on board of or leaving the same.[19] And this liability of the carrier is applicable with reference to approaches provided by others, but in general made use of by passengers, with the express or implied approval of the carrier.[20] Carriers by street-car, taking up and discharging passengers on a public street, are not responsible for defects in the street.[21] But the passenger should be warned of any special danger involved in his alighting at such place.[22] If safe approaches are provided, the carrier is not liable if the passenger approaches or leaves in any other way, which is dangerous.[23]

(III) *Safety of Ingress and Egress at Unusual Place.* If by custom the carrier recognizes a proper place for getting on board or alighting, which is not the usual place specially provided for that purpose, the duty to provide safe approaches exists, although it may not be necessary to provide the same means for approach that would be required at the usual place.[24] Whether

v. Butcher, 83 Tex. 309, 18 S. W. 583; Missouri Pac. R. Co. *v.* Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

19. *Indiana.*— Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663, 53 N. E. 641.

Kentucky.— Louisville, etc., R. Co. *v.* Keller, 20 Ky. L. Rep. 957, 47 S. W. 1072.

Louisiana.— Peniston *v.* Chicago, etc., R. Co., 34 La. Ann. 777, 44 Am. Rep. 444.

Massachusetts.— Young *v.* New York, etc., R. Co., 171 Mass. 33, 50 N. E. 455, 41 L. R. A. 193; Bethmann *v.* Old Colony R. Co., 155 Mass. 352, 29 N. E. 587; Gaynor *v.* Old Colony, etc., R. Co., 100 Mass. 208, 97 Am. Dec. 96.

Michigan.— Poole *v.* Consolidated St. R. Co., 100 Mich. 379, 59 N. W. 390, 25 L. R. A. 744; Burnham *v.* Wabash Western R. Co., 91 Mich. 523, 52 N. W. 14.

New Jersey.— Fielders *v.* North Jersey St. R. Co., 67 N. J. L. 76, 50 Atl. 533.

New York.— Ayres *v.* Delaware, etc., R. Co., 158 N. Y. 254, 53 N. E. 22; Boyce *v.* Manhattan R. Co., 118 N. Y. 314, 23 N. E. 304, 28 N. Y. St. 692; Hoffman *v.* New York Cent., etc., R. Co., 75 N. Y. 605; Lycett *v.* Manhattan R. Co., 12 N. Y. App. Div. 326, 42 N. Y. Suppl. 431; Pitcher *v.* Lake Shore, etc., R. Co., 16 N. Y. Suppl. 62, 40 N. Y. St. 896.

Pennsylvania.— Gilmore *v.* Philadelphia, etc., R. Co., 154 Pa. St. 375, 25 Atl. 774; Neslie *v.* Second, etc., Sts. Pass. R. Co., 113 Pa. St. 300, 6 Atl. 72.

Texas.— Gulf, etc., R. Co. *v.* Roundtree, (Tex. Civ. App. 1894) 25 S. W. 989.

See 9 Cent. Dig. tit. "Carriers," § 1142.

20. *Alabama.*— East Tennessee, etc., R. Co. *v.* Watson, 94 Ala. 634, 10 So. 228; Watson *v.* Oxanna Land Co., 92 Ala. 320, 8 So. 770.

Michigan.— Collins *v.* Toledo, etc., R. Co., 80 Mich. 390, 45 N. W. 178; Cross *v.* Lake Shore, etc., R. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399.

Missouri.— Chance *v.* St. Louis, etc., R. Co., 10 Mo. App. 351.

New Jersey.— Delaware, etc., R. Co. *v.* Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435.

New York.— Wolf *v.* Brooklyn Ferry Co., 54 N. Y. App. Div. 67, 66 N. Y. Suppl. 298.

Texas.— Gulf, etc., R. Co. *v.* Glenk, 9 Tex. Civ. App. 599, 30 S. W. 278.

See 9 Cent. Dig. tit. "Carriers," § 1145.

21. Conway *v.* Lewiston, etc., Horse R. Co., 87 Me. 283, 32 Atl. 901, 90 Me. 199, 38 Atl. 110; Bigelow *v.* West End St. R. Co., 161 Mass. 393, 37 N. E. 367. But the fact that an approach to a steamboat landing is maintained in a public street will not relieve the carrier from liability for defects in such approach. Skottowe *v.* Oregon, etc., R. Co., 22 Oreg. 430, 30 Pac. 222, 16 L. R. A. 593.

22. Bass *v.* Concord St. R. Co., 70 N. H. 170, 46 Atl. 1056; Sowash *v.* Consolidated Traction Co., 188 Pa. St. 618, 41 Atl. 743; Richmond City R. Co. *v.* Scott, 86 Va. 902, 11 S. E. 404. A street-car company will be liable for injuries received by a passenger by reason of obstructions, such as rails, which it has placed on a street. Wells *v.* Steinway R. Co., 18 N. Y. App. Div. 180, 45 N. Y. Suppl. 864.

23. Walthers *v.* Chicago, etc., R. Co., 72 Ill. App. 354; Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440; Abbott *v.* Delaware, etc., R. Co., 65 N. J. L. 310, 47 Atl. 588.

But of course if a safe way is not indicated, and the passenger, without negligence on his part, takes an unsafe way, the carrier will be liable for resulting injury. Missouri Pac. R. Co. *v.* Long, 81 Tex. 253, 16 S. W. 1016, 26 Am. St. Rep. 811; Texas, etc., R. Co. *v.* Brown, 78 Tex. 397, 14 S. W. 1034; Gulf, etc., R. Co. *v.* Hodges, (Tex. Civ. App. 1893) 24 S. W. 563.

24. *Illinois.*— Chicago, etc., R. Co. *v.* Doan, 93 Ill. App. 247.

Missouri.— Waller *v.* Missouri, etc., R. Co., 59 Mo. App. 410.

Texas.— Stewart *v.* International, etc., R. Co., 53 Tex. 289, 37 Am. Rep. 753; Gulf, etc., R. Co. *v.* Williams, 21 Tex. Civ. App. 469, 51 S. W. 653.

Wisconsin.— Hartwig *v.* Chicago, etc., R. Co., 49 Wis. 358, 5 N. W. 865.

England.— Robson *v.* North Eastern R. Co., 2 Q. B. D. 85, 46 L. J. Q. B. 50, 35 L. T.

the place for getting on board or alighting is a proper place in such sense that the passenger is entitled to protection against injury will depend upon express or implied invitation, it being the duty of the carrier to look after the safety of the place at which passengers are invited to get on or off the train.[25]

(iv) *Safety of Place For Getting on Board or Alighting.* In general, therefore, with reference to the place afforded to the passenger for getting on board or alighting, it is the duty of the carrier to use reasonable care to see that it is a safe place, whether it is the usual place or not, if one at which the passenger is expressly or impliedly invited to get on or off the train.[26] Therefore

Rep. N. S. 535, 25 Wkly. Rep. 418; Siner *v.* Great Western R. Co., L. R. 4 Exch. 117, 38 L. J. Exch. 67, 20 L. T. Rep. N. S. 114, 17 Wkly. Rep. 417; Foy *v.* London, etc., R. Co., 18 C. B. N. S. 225, 11 L. T. Rep. N. S. 606, 13 Wkly. Rep. 293, 114 E. C. L. 225; Rose *v.* North Eastern R. Co., 2 Ex. D. 248, 46 L. J. Exch. 374, 35 L. T. Rep. N. S. 693, 25 Wkly. Rep. 205.

See 9 Cent. Dig. tit. "Carriers," § 1151.

But if for some proper reason the passenger is required or allowed to leave or take the train at a place not the customary stopping place, what is required of the carrier is care with respect to his doing so, and the question of approaches is not involved. Central R. Co. *v.* Thompson, 76 Ga. 770; Louisville, etc., R. Co. *v.* Stokes, 12 Ky. L. Rep. 192; Adams *v.* Missouri Pac. R. Co., 100 Mo. 555, 12 S. W. 637, 13 S. W. 509; St. Louis, etc. R. Co. *v.* Martin, (Tex. Civ. App. 1901) 63 S. W. 1089; Houston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 710.

Persons entering or leaving a train or car at a place not intended for getting on board or alighting, and without any invitation or direction to do so, cannot recover for injuries resulting from the insecurity of such place. Central R. Co. *v.* Thompson, 76 Ga. 770; McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124, 95 Am. Dec. 114; Gunderman *v.* Missouri, etc., R. Co., 58 Mo. App. 370; Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

25. *Iowa.*— Allender *v.* Chicago, etc., R. Co., 43 Iowa 276.

Mississippi.— Vicksburg, etc., R. Co. *v.* Howe, 52 Miss. 202.

Missouri.— Nurse *v.* St. Louis, etc., R. Co., 61 Mo. App. 67.

New York.— Hulbert *v.* New York Cent. R. Co., 40 N. Y. 145.

Texas.—International, etc., R. Co. *v.* Smith, (Tex. 1890) 14 S. W. 642.

United States.— Illinois Cent. R. Co. *v.* Foley, 53 Fed. 459, 10 U. S. App. 537, 3 C. C. A. 589.

England.— Cockle *v.* London, etc., R. Co., L. R. 7 C. P. 321, 41 L. J. C. P. 140, 27 L. T. Rep. N. S. 320, 20 Wkly. Rep. 754; Weller *v.* London, etc., R. Co., L. R. 9 C. P. 126, 43 L. J. C. P. 137, 29 L. T. Rep. N. S. 888, 22 Wkly. Rep. 302; Bridges *v.* North London R. Co., L. R. 7 H. L. 213, 43 L. J. Q. B. 151, 30 L. T. Rep. N. S. 844, 23 Wkly. Rep. 62.

See 9 Cent. Dig. tit. "Carriers," § 1142 *et seq.*

Mere stopping is not an invitation to alight. Lewis *v.* London, etc., R. Co., 43 L. J. Q. B. 8, 29 L. T. Rep. N. S. 397, 22 Wkly. Rep. 153.

A passenger traveling on an unfinished railroad, knowing that station facilities have not yet been provided, cannot recover for injuries resulting from want of such facilities. Chicago, etc., R. Co. *v.* Frazer, 55 Kan. 582, 40 Pac. 923.

A railroad company may be liable for want of care in securing the safety of a bridge over which it has reason to suppose that persons traveling in charge of stock will go. Texas, etc., R. Co. *v.* Hudman, 8 Tex. Civ. App. 309, 28 S. W. 388.

This rule applies also to street-cars.— *District of Columbia.*— Washington, etc., R. Co. *v.* Grant, 11 App. Cas. (D. C.) 107.

New York.— Steuer *v.* Metropolitan St. R. Co., 46 N. Y. App. Div. 500, 61 N. Y. Suppl. 1059.

Pennsylvania.—Malpass *v.* Hestonville, etc., Pass. R. Co., 189 Pa. St. 599, 42 Atl. 291.

Rhode Island.— Bullock *v.* Butler Exch. Co., 22 R. I. 105, 46 Atl. 273.

Washington.— Vasele *v.* Grant St. Electric R. Co., 16 Wash. 602, 48 Pac. 249.

26. *Georgia.*— Central R. Co. *v.* Thompson, 76 Ga. 770.

Illinois.— Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901; Chicago, etc., R. Co. *v.* Fillmore, 57 Ill. 265.

Iowa.— McDonald *v.* Illinois Cent. R. Co., 88 Iowa 345, 55 N. W. 102.

Kentucky.—Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367; Louisville, etc., R. Co. *v.* Jones, 8 Ky. L. Rep. 527.

Louisiana.— Julien *v.* Steamer Wade Hampton, 27 La. Ann. 377.

Michigan.— Mensing *v.* Michigan Cent. R. Co., 117 Mich. 606, 76 N. W. 98.

Minnesota.— Kral *v.* Burlington, etc., R. Co., 71 Minn. 422, 74 N. W. 166.

Mississippi.— Alabama, etc., R. Co. *v.* Stacy, 68 Miss. 463, 9 So. 349.

Missouri.— Talbot *v.* Chicago, etc., R. Co., 72 Mo. App. 291; Warden *v.* Missouri Pac. R. Co., 35 Mo. App. 631.

New Jersey.— Falk *v.* New York, etc., R. Co., 56 N. J. L. 380, 29 Atl. 157.

New York.— Flack *v.* Nassau Electric R. Co., 41 N. Y. App. Div. 399, 58 N. Y. Suppl. 839; Minor *v.* Lehigh Valley R. Co., 21 N. Y. App. Div. 307, 47 N. Y. Suppl. 307; Van Ostran *v.* New York Cent., etc., R. Co., 35 Hun (N. Y.) 590.

North Carolina.— Cable *v.* Southern R. Co., 122 N. C. 892, 29 S. E. 377.

a duty is imposed on a railroad or street-car company not to operate other trains or cars so as to imperil the safety of passengers who are getting on board or alighting at a proper place for the purpose.[27] And in such cases the strict rule as to looking and listening which is in general applicable to persons crossing the tracks of railroad companies does not apply, the passenger having a right to suppose that the place where he is allowed to get on board or alight from a train is a safe place.[28]

(v) *Safety of Stations, Platforms, Walks, and Landing-Places; Lighting; Obstructions; Snow and Ice, Etc.* The care required of the carrier for the protection of the passenger on his premises involves reasonable care to provide and maintain safe and adequate station-houses, platforms, walks, steps, and landings for use in waiting for, approaching, and leaving trains or other

Pennsylvania.— Neslie *v.* Second, etc., Sts. Pass. R. Co., 113 Pa. St. 300, 6 Atl. 72.

Texas.— Houston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1896) 33 S. W. 896; Ft. Worth, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 351, 23 S. W. 737.

See 9 Cent. Dig. tit. "Carriers," § 1154 *et seq.*

As to care required where a passenger is taken up or let off at a place other than the regular stopping place see *infra*, III, F, 3, c, (v).

27. *Arkansas.*— St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

California.— Franklin *v.* Southern California Motor Road Co., 85 Cal. 63, 24 Pac. 723.

Illinois.— Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713; Chicago, etc., R. Co. *v.* Ryan, 62 Ill. App. 264; Chicago, etc., R. Co. *v.* Czaja, 59 Ill. App. 21.

Kentucky.— South Covington, etc., St. R. Co. *v.* Beatty, 20 Ky. L. Rep. 1845, 50 S. W. 239; Nichols *v.* Chesapeake, etc., R. Co., 8 Ky. L. Rep. 519, 2 S. W. 181.

Massachusetts.— Gaynor *v.* Old Colony, etc., R. Co., 100 Mass. 208, 97 Am. Dec. 96.

Minnesota.— Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341.

Mississippi.— Louisville, etc., R. Co. *v.* Thompson, 64 Miss. 584, 1 So. 840.

Missouri.— McDonald *v.* Kansas City, etc., R. Co., 127 Mo. 38, 29 S. W. 848.

New Jersey.— Klein *v.* Jewett, 26 N. J. Eq. 474.

New York.— Parsons *v.* New York Cent., etc., R. Co., 113 N. Y. 355, 21 N. E. 145, 22 N. Y. St. 697, 10 Am. St. Rep. 450, 3 L. R. A. 683; Archer *v.* New York, etc., R. Co., 106 N. Y. 589, 13 N. E. 318; Terry *v.* Jewett, 78 N. Y. 338; Jewell *v.* New York, etc., R. Co., 27 N. Y. App. Div. 500, 50 N. Y. Suppl. 848; Armstrong *v.* New York Cent., etc., R. Co., 66 Barb. (N. Y.) 437; Gonzales *v.* New York, etc., R. Co., 39 How. Pr. (N. Y.) 407.

Texas.— East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834; Dallas, etc., R. Co. *v.* Reeman, (Tex. Civ. App. 1895) 32 S. W. 45; Sanchez *v.* San Antonio, etc., R. Co., 3 Tex. Civ. App. 89, 22 S. W. 242.

Washington.— Smith *v.* Union Trunk Line, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169.

United States.— Alabama Great Southern R. Co. *v.* Coggins, 88 Fed. 455, 60 U. S. App. 140, 32 C. C. A. 1; Robostelli *v.* New York, etc., R. Co., 33 Fed. 796.

See 9 Cent. Dig. tit. "Carriers," § 1155.

As to contributory negligence at such places see *infra*, III, G, 2.

Thus, where the conductor of a train allows a passenger to get off at a place which is not a usual stopping place, he will be negligent if he fails to inform the passenger of danger from a train on another track. Lewis *v.* Delaware, etc., Canal Co., 145 N. Y. 508, 40 N. E. 248, 65 N. Y. St. 374.

But it is not the duty of a street-car company to stop its car, or slow up, or give a signal, on every occasion of meeting another car. West Chicago St. R. Co. *v.* Coit, 50 Ill. App. 640.

Passengers have the right to assume that all trains will comply with the law by way of giving warning, displaying lights, etc. Chicago, etc., R. Co. *v.* Doan, 93 Ill. App. 247.

Servants operating the train of one railroad are bound to use reasonable precautions as to passengers who have alighted from a train of another railroad. Chicago, etc., R. Co. *v.* Ryan, 62 Ill. App. 264.

Statutory provisions as to signals at public crossings do not control the duty of the carrier to operate its trains with reference to the safety of passengers going upon or alighting from other trains. Gulf, etc., R. Co. *v.* Morgan, (Tex. Civ. App. 1901) 64 S. W. 688.

The duty of servants operating other trains to look out for passengers who have alighted from a train does not involve absolute liability under all circumstances. Van Natta *v.* People's St. R., etc., Co., 133 Mo. 13, 34 S. W. 505; Goldberg *v.* New York Cent., etc., R. Co., 133 N. Y. 561, 30 N. E. 597, 44 N. Y. St. 71. Nor does it apply after the passenger has left the place of alighting. Com. *v.* Boston, etc., R. Co., 129 Mass. 500, 37 Am. Rep. 382.

28. Burbridge *v.* Kansas City Cable R. Co., 36 Mo. App. 669; Hirsch *v.* New York, etc., R. Co., 6 N. Y. Suppl. 162, 25 N. Y. St. 156; Shutt *v.* Cumberland Valley R. Co., 149 Pa. St. 266, 24 Atl. 305; Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 18 S. Ct. 68, 42 L. ed. 491. And see *infra*, III, G, 2.

means of conveyance in which the transportation is to be or has been furnished.[29] Thus, it may be necessary for a railroad company at the usual stopping places to furnish platforms suitable and adequate for the purpose, and to stop the train at such platform.[30] Station-houses, as well as platforms, walks, and other approaches, should at night be reasonably lighted for a sufficient time before and after the arrival and departure of trains to enable passengers to avoid danger.[31] The carrier must use reasonable care in avoiding or controlling crowds of persons at its stations imperiling the safety of passengers.[32] The carrier will be liable if a pas-

29. *California.*—Jamison *v.* San Jose, etc., R. Co., 55 Cal. 593.

Georgia.—Central R., etc., Co. *v.* Smith, 80 Ga. 526, 5 S. E. 772.

Illinois.—Chicago, etc., R. Co. *v.* Wilson, 63 Ill. 167.

Indiana.—Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687; Louisville, etc., R. Co. *v.* Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193.

Kentucky.—Louisville, etc., R. Co. *v.* Smith, 9 Ky. L. Rep. 404.

Massachusetts.—Jordan *v.* New York, etc., R. Co., 165 Mass. 346, 43 N. E. 111, 52 Am. St. Rep. 522, 32 L. R. A. 161; Keefe *v.* Boston, etc., R. Co., 142 Mass. 251, 7 N. E. 874.

Missouri.—Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778; Fullerton *v.* Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516, 144 Mo. 519, 44 S. W. 1053; Waller *v.* Missouri, etc., R. Co., 59 Mo. App. 410.

New Jersey.—Exton *v.* Central R. Co., 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508.

New York.—Fox *v.* New York, 5 N. Y. App. Div. 349, 39 N. Y. Suppl. 309; Redner *v.* Lehigh, etc., R. Co., 73 Hun (N. Y.) 562, 26 N. Y. Suppl. 1050, 56 N. Y. St. 230; Clussman *v.* Long Island R. Co., 9 Hun (N. Y.) 618; Liscomb *v.* New Jersey R., etc., Co., 6 Lans. (N. Y.) 75; Kiernan *v.* Manhattan R. Co., 27 Misc. (N. Y.) 841, 58 N. Y. Suppl. 394.

Texas.—Texas, etc., R. Co. *v.* Brown, 78 Tex. 397, 14 S. W. 1034.

United States.—Green *v.* Pennsylvania R. Co., 36 Fed. 66; Seymour *v.* Chicago, etc., R. Co., 3 Biss. (U. S.) 43, 21 Fed. Cas. No. 12,685, 4 Am. L. T. Rep. (U. S. Cts.) 134; Harkey *v.* Texas, etc., R. Co., 11 Fed. Cas. No. 6,065, 1 Tex. L. J. 116.

See 9 Cent. Dig. tit. "Carriers," § 1142.

30. *Illinois.*—Illinois Cent. R. Co. *v.* Hobbs, 58 Ill. App. 130.

Louisiana.—Turner *v.* Vicksburg, etc., R. Co., 37 La. Ann. 648, 55 Am. Rep. 514.

Maryland.—Baltimore, etc., R. Co. *v.* Leapley, 65 Md. 571, 4 Atl. 891.

Mississippi.—Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.—Eichorn *v.* Missouri, etc., R. Co., 130 Mo. 575, 32 S. W. 993.

Pennsylvania.—Pennsylvania R. Co. *v.* Zebe, 33 Pa. St. 318, 37 Pa. St. 420.

Wisconsin.—Delmatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578.

See 9 Cent. Dig. tit. "Carriers," § 1154.

The platform should be so constructed as to not render it dangerous for the passenger to step from the steps of the car to the platform. Ryan *v.* Manhattan R. Co., 121 N. Y. 126, 23 N. E. 1131, 30 N. Y. St. 624; Boyce *v.* Manhattan R. Co., 118 N. Y. 314, 23 N. E. 304, 28 N. Y. St. 692; Gabriel *v.* Long Island R. Co., 54 N. Y. App. Div. 41, 66 N. Y. Suppl. 301; Fox *v.* New York, 70 Hun (N. Y.) 181, 24 N. Y. Suppl. 43, 53 N. Y. St. 902.

31. *Alabama.*—Alabama Great Southern R. Co. *v.* Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354.

Arkansas.—St. Louis, etc., R. Co. *v.* Battle, 69 Ark. 369, 63 S. W. 805; Fordyce *v.* Merrill, 49 Ark. 277, 5 S. W. 329.

Delaware.—Wallace *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 529, 18 Atl. 818.

Indiana.—Louisville, etc., R. Co. *v.* Treadway, 142 Ind. 475, 40 N. E. 807, 41 N. E. 794.

Iowa.—Hiatt *v.* Des Moines, etc., R. Co., 96 Iowa 169, 64 N. W. 766.

Kentucky.—Louisville, etc., R. Co. *v.* Ricketts, 21 Ky. L. Rep. 662, 52 S. W. 939, 18 Ky. L. Rep. 687, 37 S. W. 952.

Louisiana.—Moses *v.* Louisville, etc., R. Co., 39 La. Ann. 649, 2 So. 567, 4 Am. St. Rep. 231; Reynolds *v.* Texas, etc., R. Co., 37 La. Ann. 694; Peniston *v.* Chicago, etc., R. Co., 34 La. Ann. 777, 44 Am. Rep. 444.

Minnesota.—Buenemann *v.* St. Paul, etc., R. Co., 32 Minn. 390, 20 N. W. 379.

New York.—Miller *v.* Ft. Lee Park, etc., Co., 73 Hun (N. Y.) 150, 25 N. Y. Suppl. 924, 56 N. Y. St. 94; Fox *v.* New York, 5 N. Y. App. Div. 349, 39 N. Y. Suppl. 309; Osborn *v.* Union Ferry Co., 53 Barb. (N. Y.) 629.

Texas.—Texas, etc., R. Co. *v.* Brown, 78 Tex. 397, 14 S. W. 1034; Texas, etc., R. Co. *v.* Lee, 21 Tex. Civ. App. 174, 51 S. W. 351, 57 S. W. 573; Texas, etc., R. Co. *v.* Reich, (Tex. Civ. App. 1895) 32 S. W. 817.

Virginia.—Alexandria, etc., R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289.

United States.—Scanlan *v.* Tenney, 72 Fed. 225; Grimes *v.* Pennsylvania Co., 36 Fed. 72; Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 276, 5 Fed. 523.

See 9 Cent. Dig. tit. "Carriers," § 1148.

Where a passenger attempted to get upon a train half an hour before the time for departure, held that he could not recover for injuries received by reason of failure to have the approach to the train lighted. Hodges *v.* New Hanover Transit Co., 107 N. C. 576, 12 S. E. 597.

32. Illinois Cent. R. Co. *v.* Treat, 75 Ill. App. 327; Dawson *v.* Trustees New York, etc.,

senger is injured by reason of the throwing of mail-pouches from postal cars in such a way as to involve danger to passengers, if it has permitted postal clerks carried on its trains to adopt an unsafe method of delivering such pouches.[33] Station-houses should be kept reasonably comfortable and decent, and a passenger suffering injury by reason of being unable to sit therein when he desires and it is proper for him to do so may have damages for injury suffered.[34]

(VI) *To Whom Carrier Liable For Unsafe Premises.* Liability for injuries resulting from unsafe station-houses, platforms, and the like, is not limited, however, to those who are entitled to be considered passengers. Any one having business with the carrier, and coming upon the premises, does so with an implied invitation, imposing upon the carrier the same duty as that of any person conducting a place of business where others are invited to come, that is, the duty of using reasonable care to make the premises safe, and the corresponding liability for injuries resulting from negligence in doing so.[35] Moreover, the usual method of conducting the business of carriage of passengers involves the presence of persons on the premises who are not, and do not intend to become, passengers, but are there for the purpose of accompanying passengers to the trains or other conveyances, or meeting them when they arrive.[36] One leaving the station in the usual way and in a reasonable manner is entitled to the protection of a passenger until he has left the premises,[37] but after voluntarily leaving a passenger train at an unusual place,[38] or reaching the street on alighting from a street-car,[39] the lia-

Bridge, 31 N. Y. App. Div. 537, 52 N. Y. Suppl. 133; McGearty *v.* Manhattan R. Co., 15 N. Y. App. Div. 2, 43 N. Y. Suppl. 1086; Taylor *v.* Pennsylvania Co., 50 Fed. 755.

33. Snow *v.* Fitchburg R. Co., 136 Mass. 552, 49 Am. Rep. 40; Hughes *v.* Chicago, etc., R. Co., 127 Mo. 447, 30 S. W. 127; Sargent *v.* St. Louis, etc., R. Co., 114 Mo. 348, 21 S. W. 843, 19 L. R. A. 460; Carpenter *v.* Boston, etc., R. Co., 97 N. Y. 494, 49 Am. Rep. 540; Ayres *v.* Delaware, etc., R. Co., 77 Hun (N. Y.) 414, 28 N. Y. Suppl. 789, 60 N. Y. St. 13; Southern R. Co. *v.* Rhodes, 86 Fed. 422, 58 U. S. App. 349, 30 C. C. A. 157.

Snow and ice.— The carrier must use reasonable care in preventing accumulations of snow and ice on its platforms and approaches, rendering them dangerous to passengers. Waterbury *v.* Chicago, etc., R. Co., 104 Iowa 32, 73 N. W. 341; Louisville, etc., R. Co. *v.* Cockerel, 17 Ky. L. Rep. 1037, 33 S. W. 407; Kelly *v.* Manhattan R. Co., 112 N. Y. 443, 20 N. E. 383, 21 N. Y. St. 507, 3 L. R. A. 74; Weston *v.* New York El. R. Co., 73 N. Y. 595; Timpson *v.* Manhattan R. Co., 52 Hun (N. Y.) 489, 5 N. Y. Suppl. 685, 24 N. Y. St. 629; Ainley *v.* Manhattan R. Co., 47 Hun (N. Y.) 206; Rusk *v.* Manhattan R. Co., 46 N. Y. App. Div. 100, 61 N. Y. Suppl. 384; Weston *v.* New York El. R. Co., 42 N. Y. Super. Ct. 156.

The act of a servant of the company in negligently forcing a drunken man against a passenger at a railway station may render the company liable. Gray *v.* Boston, etc., R. Co., 168 Mass. 20, 46 N. E. 397.

Vicious dog.—A railroad company may be liable for injury to a passenger by a vicious dog fastened at the station, the servants of the company having had notice of its vicious character. Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

34. McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124, 95 Am. Dec. 114, 29 Iowa 176; Pickens *v.* South Carolina, etc., R. Co., 54 S. C. 498, 32 S. E. 567; Texas, etc., R. Co. *v.* Cornelius, 10 Tex. Civ. App. 125, 30 S. W. 720; Texas, etc., R. Co. *v.* Mayes, (Tex. App. 1890) 15 S. W. 43.

35. Georgia R., etc., Co. *v.* Richmond, 98 Ga. 495, 25 S. E. 565; Union Pac. R. Co. *v.* Evans, 52 Nebr. 50, 71 N. W. 1062; Hauk *v.* New York, etc., R. Co., 34 N. Y. App. Div. 434, 54 N. Y. Suppl. 248; Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 53 U. S. App. 22, 25 C. C. A. 413. See also *infra*, III, F, 3, c, (VI).

36. *Colorado.*—Denver, etc., R. Co. *v.* Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121.

Indiana.— New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954.

Michigan.— McKone *v.* Michigan Cent. R. Co., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596.

South Carolina.— Izlar *v.* Manchester, etc., R. Co., 57 S. C. 332, 35 S. E. 583.

Tennessee.— Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1, 31 S. W. 737.

Texas.— Hamilton *v.* Texas, etc., R. Co., 64 Tex. 251, 53 Am. Rep. 756.

Wisconsin.— Dowd *v.* Chicago, etc., R. Co., 84 Wis. 105, 54 N. W. 24, 36 Am. St. Rep. 917, 20 L. R. A. 527.

See 9 Cent. Dig. tit. "Carriers," § 1110 *et seq.*

37. Texas, etc., R. Co. *v.* Orr, 46 Ark. 182; Keefe *v.* Boston, etc., R. Co., 142 Mass. 251, 7 N. E. 874; Hartzig *v.* Lehigh Valley R. Co., 154 Pa. St. 364, 26 Atl. 310.

38. Buckley *v.* Old Colony R. Co., 161 Mass. 26, 36 N. E. 583; International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632.

39. Platt *v.* Forty-Second St., etc., Ferry R. Co., 2 Hun (N. Y.) 124, 4 Thomps. & C. (N. Y.) 406.

bility of the carrier as such ceases, and the care which he is required to exercise with reference to the person who has thus ceased to be a passenger is that owed to any other member of the general public.[40]

c. Care Required in Connection With Getting on Board Of, or Alighting From, Car or Other Conveyance — (1) *Degree of Care; Assistance.* The carrier is bound to exercise care in securing the safety of the passenger while boarding and alighting from its cars or other conveyances,[41] and the degree of care required in the discharge of this duty is the highest care, or the care which a very prudent person would have used under the circumstances,[42] that is, that high degree of care which is required with reference to the transportation of passengers.[43] But in general there is no duty to instruct or warn passengers, it being the duty of the passenger to comply with the usual reasonable and known regulations of the carrier with reference to safe entrance and exit.[44] Nor in general is there any duty to assist a passenger in entering or alighting from the train or other conveyance,[45] unless there is some unusual danger or difficulty arising from the place or means afforded for alighting,[46] or the passenger is, to the knowledge of the servants of the carrier, infirm or under some disability.[47] But if assistance is rendered, even where it is not necessary, the carrier will be liable for any negligence of its servants connected with the rendering of such assistance[48] or

40. Fisher *v.* Paxson, 182 Pa. St. 457, 38 Atl. 407; Imhoff *v.* Chicago, etc., R. Co., 22 Wis. 681.

41. Applehy *v.* South Carolina, etc., R. Co., 60 S. C. 48, 38 S. E. 237.

42. *Georgia.*— Central R. Co. *v.* Thompson, 76 Ga. 770.

Illinois.— Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713; Cleveland, etc., R. Co. *v.* Reese, 93 Ill. App. 657.

Kentucky.— Lutz *v.* Louisville R. Co., 20 Ky. L. Rep. 1163, 48 S. W. 1080; Louisville, etc., R. Co. *v.* Smith, 13 Ky. L. Rep. 974.

Massachusetts.— Nichols *v.* Lynn, etc., R. Co., 168 Mass. 528, 47 N. E. 427.

Texas.— Missouri Pac. R. Co. *v.* Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368; Texas Midland R. *v.* Brown, (Tex. Civ. App. 1900) 58 S. W. 44; Ft. Worth, etc., R. Co. *v.* Kennedy, 12 Tex. Civ. App. 654, 35 S. W. 335.

43. See *supra*, III, F, 1, b.

44. *District of Columbia.*— Holohan *v.* Washington, etc., R. Co., 19 D. C. 316.

Georgia.— Central R. Co. *v.* Thompson, 76 Ga. 770.

Kansas.— Warren *v.* Southern Kansas R. Co., 37 Kan. 408, 15 Pac. 601.

Massachusetts.— Goddard *v.* Boston, etc., R. Co., 179 Mass. 52, 60 N. E. 486.

New York.— Lafflin *v.* Buffalo, etc., R. Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433.

Wisconsin.— Detroit, etc., R. Co. *v.* Curtis, 23 Wis. 152, 99 Am. Dec. 141.

See 9 Cent. Dig. tit. "Carriers," § 1156.

45. Western, etc., R. Co. *v.* Earwood, 104 Ga. 127, 29 S. E. 913; Raben *v.* Central Iowa R. Co., 74 Iowa 732, 34 N. W. 621; Raben *v.* Central Iowa R. Co., 73 Iowa 579, 35 N. W. 645, 5 Am. St. Rep. 708; Yarnell *v.* Kansas City, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; Hurt *v.* St. Louis, etc., R. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; Deming *v.* Chicago, etc., R. Co., 80 Mo. App. 152.

It is not negligence to have the vestibules of cars locked at a station so far as such cars are supposed to contain passengers not desiring to alight at the station, a reasonable exit being provided from other cars. Cleveland, etc., R. Co. *v.* Wade, 18 Ind. App. 346, 48 N. E. 12.

46. *Indiana.*— New York, etc., R. Co. *v.* Doane, 115 Ind. 435, 17 N. E. 913, 7 Am. St. Rep. 451.

Mississippi.— Carson *v.* Leathers, 57 Miss. 650; Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

New York.— Maverick *v.* Eighth Ave. R. Co., 36 N. Y. 378, 2 Transcr. App. (N. Y.) 125.

South Carolina.— Brodie *v.* Carolina Midland R. Co., 46 S. C. 203, 24 S. E. 180; Madden *v.* Port Royal, etc., R. Co., 41 S. C. 440, 19 S. E. 951, 20 S. E. 65; Simms *v.* South Carolina R. Co., 27 S. C. 268, 3 S. E. 301.

Tennessee.— Southern R. Co. *v.* Mitchell, 98 Tenn. 77, 40 S. W. 72.

Texas.— Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; Martin *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1900) 56 S. W. 1011; Missouri, etc., R. Co. *v.* White, 22 Tex. Civ. App. 424, 55 S. W. 593; Campbell *v.* Alston, (Tex. Civ. App. 1893) 23 S. W. 33.

Virginia.— Alexandria, etc., R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289.

See 9 Cent. Dig. tit. "Carriers," § 1232.

47. Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37; Croom *v.* Chicago, etc., R. Co., 52 Minn. 296, 53 N. W. 1128, 38 Am. St. Rep. 557, 18 L. R. A. 602.

48. *Indiana.*— Citizens' St. R. Co. *v.* Shepherd, (Ind. App. 1901) 62 N. E. 300.

Missouri.— Mackin *v.* People's St. R., etc., Co., 45 Mo. App. 82.

Texas.— International, etc., R. Co. *v.* Anderson, 15 Tex. Civ. App. 180, 53 S. W. 606.

Wisconsin.— Werner *v.* Chicago, etc., R. Co., 105 Wis. 300, 81 N. W. 416.

providing appliances, such as a box or stool, to facilitate the alighting of the passenger.[49]

(II) *Opportunity and Time For Getting on Board.* The passenger is entitled to a reasonable time in which to get on board a train after he is given an opportunity to do so,[50] and if, without allowing such reasonable time, the train is started and the passenger is injured, the railroad company is liable.[51]

(III) *Reasonable Time For Alighting.* With reference to the safety of the passenger in alighting at his destination, it is the duty of the railroad company to stop its train at the passenger's destination a sufficient length of time to enable him to alight with safety before the train is again moved, and failure in this respect will render the carrier liable for any injury resulting to the passenger.[52] It is not necessary that the train be held without moving until the passenger has had time to leave the platform. It is enough if he has had a reasonable opportunity to get beyond danger from the movement of the cars.[53]

United States.— Pennsylvania R. Co. *v.* Reed, 60 Fed. 694, 20 U. S. App. 400, 9 C. C. A. 219.

Fault of third person.— There is of course no liability to the passenger incurred in alighting by reason of the fault of a third person, without negligence on the part of the servants of the carrier. Furgason *v.* Citizens' St. R. Co., 16 Ind. App. 171, 44 N. E. 936; Ellinger *v.* Philadelphia, etc., R. Co., 153 Pa. St. 213, 25 Atl. 1132, 34 Am. St. Rep. 697.

49. Missouri Pac. R. Co. *v.* Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368; Texas Midland R. Co. *v.* Frey, (Tex. Civ. App. 1901) 61 S. W. 442; Gulf, etc., R. Co. *v.* Southwick, (Tex. Civ. App. 1895) 30 S. W. 592.

50. Flint, etc., R. Co. *v.* Stark, 38 Mich. 714; Paulitsch *v.* New York Cent., etc., R. Co., 102 N. Y. 280, 6 N. E. 577.

As to passenger's right to be taken up see *supra*, III, E, 1, b.

51. Poole *v.* Georgia R., etc., Co., 89 Ga. 320, 15 S. E. 321; Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976; Keating *v.* New York Cent., etc., R. Co., 49 N. Y. 673; Lee *v.* Manhattan R. Co., 53 N. Y. Super. Ct. 260; Cook *v.* Long Island R. Co., 19 N. Y. Suppl. 648, 47 N. Y. St. 200; Hickinbottom *v.* Delaware, etc., R. Co., 15 N. Y. St. 11; Myers *v.* Long Island R. Co., 10 N. Y. St. 430; Texas, etc., R. Co. *v.* Mayfield, 23 Tex. Civ. App. 415, 56 S. W. 942.

So it is negligence to start an elevator while the door is still open and the passenger is entering. Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

52. *Illinois.*— Illinois Cent. R. Co. *v.* Souders, 79 Ill. App. 41; Baltimore, etc., R. Co. *v.* Slanker, 77 Ill. App. 567.

Indiana.— Toledo, etc., R. Co. *v.* Wingate, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477; Jeffersonville, etc., R. Co. *v.* Parmalee, 51 Ind. 42; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228.

Kentucky.— Louisville, etc., R. Co. *v.* Constantine, 14 Ky. L. Rep. 432; Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367; Louisville, etc., R. Co. *v.* Abell, 14 Ky. L. Rep. 239.

Louisiana.— Kennon *v.* Vicksburg, etc., R. Co., 51 La. Ann. 1599, 26 So. 466; Boikens *v.* New Orleans, etc., R. Co., 48 La. Ann. 831, 19 So. 737.

Mississippi.— Hooks *v.* Alabama, etc., R. Co., 73 Miss. 145, 18 So. 925.

Missouri.— Straus *v.* Kansas City, etc., R. Co., 86 Mo. 421; Cullar *v.* Missouri, etc., R. Co., 84 Mo. App. 340; Deming *v.* Chicago, etc., R. Co., 80 Mo. App. 152; Culberson *v.* Chicago, etc., R. Co., 50 Mo. App. 556.

Nebraska.— Omaha, etc., R. Co. *v.* Chollette, 33 Nebr. 143, 49 N. W. 1114.

New Hampshire.— Emery *v.* Boston, etc., R. Co., 67 N. H. 434, 36 Atl. 367.

New York.— Baker *v.* Manhattan R. Co., 118 N. Y. 533, 23 N. E. 885, 29 N. Y. St. 936; McDonald *v.* Long Island R. Co., 116 N. Y. 546, 22 N. E. 1068, 27 N. Y. St. 481, 15 Am. St. Rep. 437; Milliman *v.* New York Cent., etc., R. Co., 66 N. Y. 642; Onderdonk *v.* New York, etc., R. Co., 74 Hun (N. Y.) 42, 26 N. Y. Suppl. 310, 56 N. Y. St. 190; Vredenburgh *v.* New York Cent., etc., R. Co., 12 N. Y. Suppl. 18, 34 N. Y. St. 953; Murphy *v.* Rome, etc., R. Co., 10 N. Y. Suppl. 354, 32 N. Y. St. 381.

Pennsylvania.— Leggett *v.* Western New York, etc., R. Co., 143 Pa. St. 39, 21 Atl. 996; Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701; Fairmont, etc., Pass. R. Co. *v.* Stutler, 54 Pa. St. 375, 93 Am. Dec. 714; Pennsylvania R. Co. *v.* Kilgore, 32 Pa. St. 292, 72 Am. Dec. 787.

South Carolina.— Appleby *v.* South Carolina, etc., R. Co., 60 S. C. 48, 38 S. E. 237.

Texas.— Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; Texas, etc., R. Co. *v.* Goldman, (Tex. Civ. App. 1899) 51 S. W. 275; Texas, etc., R. Co. *v.* Bryant, 8 Tex. Civ. App. 134, 27 S. W. 825.

Virginia.— Norfolk, etc., R. Co. *v.* Prinnell, (Va. 1887) 3 S. E. 95.

United States.— Texas, etc., R. Co. *v.* Nunn, 98 Fed. 963, 39 C. C. A. 364; McSloop *v.* Richmond, etc., R. Co., 59 Fed. 431.

See 9 Cent. Dig. tit. "Carriers," § 1228.

As to right of the passenger to be let off see *supra*, III, E, 5, b.

53. Louisville, etc., R. Co. *v.* Ricketts, 18 Ky. L. Rep. 687, 37 S. W. 952, 21 Ky. L. Rep. 662, 52 S. W. 939.

Where a passenger alighting from a stage-

(iv) *Special Circumstances.* The time to be allowed a passenger for getting on board a train, or for alighting therefrom, may depend on the special circumstances of the passenger as to his physical ability, his encumbrance with luggage, the existence of a crowd on the car or platform, and the like. It is the duty of the carrier to give a reasonable time under the circumstances as they exist and are known to, or should be known to, the servants in charge of the train.[54] After a time which is reasonable under the circumstances the car or train may be moved without notice or warning,[55] unless within the reasonable knowledge of the servants in charge such movement will endanger the safety of someone who is getting on or off.[56] The train may be started after a passenger has got on board the car, and before he has reached a seat,[57] unless there is some reason to apprehend danger in so doing, or the movement is in a negligent manner.[58] No signal or warning as to the starting of the train is necessary after a sufficient stop,[59] unless a passenger has been misled as to the time when the train will start, or there are other special circumstances rendering a signal or warning reasonably necessary.[60]

(v) *Care at Places Other Than Regular Stopping Places.* The rules stated in the preceding paragraphs as to reasonable time for alighting and signal

coach was injured by the horses starting up, causing the passenger to be thrown to the ground, held that the happening of the accident showed *prima facie* liability, either in having unsuitable horses or an incompetent or negligent driver. Roberts *v.* Johnson, 58 N. Y. 613.

54. *Illinois.*— Pierce *v.* Gray, 63 Ill. App. 158.

Kansas.— Luse *v.* Union Pac. R. Co., 57 Kan. 361, 46 Pac. 768.

Minnesota.— Keller *v.* Sioux City, etc., R. Co., 27 Minn. 178, 6 N. W. 486.

Texas.— Texas, etc., R. Co. *v.* Mayfield, 23 Tex. Civ. App. 415, 56 S. W. 942; Texas, etc., R. Co. *v.* Born, 20 Tex. Civ. App. 351, 50 S. W. 613; Texas, etc., R. Co. *v.* Gott, 20 Tex. Civ. App. 335, 50 S. W. 193.

Wisconsin.— Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344.

See 9 Cent. Dig. tit. "Carriers," § 1228.

Thus in case of children a longer time may be necessary. Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

55. *Arkansas.*— Little Rock, etc., R. Co. *v.* Tankersley, 54 Ark. 25, 14 S. W. 1099.

Indiana.— Louisville, etc., R. Co. *v.* Castello, 9 Ind. App. 462, 36 N. E. 299.

Iowa.— Raben *v.* Central Iowa R. Co., 73 Iowa 579, 35 N. W. 645, 5 Am. St. Rep. 708.

Missouri.— Clotworthy *v.* Hannibal, etc., R. Co., 80 Mo. 220.

Nebraska.— Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976.

Wisconsin.—Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344.

See 9 Cent. Dig. tit. "Carriers," § 1228.

Where a car has been standing at the station some time previous to the hour of departure there is no requirement that it shall remain without movement until the hour of departure, the only requirement being that for a reasonable time before departure it remain standing for passengers to get on board. Flint, etc., R. Co. *v.* Stark, 38 Mich. 714.

56. *Georgia.*— Florida Cent., etc., R. Co. *v.* Cain, 100 Ga. 472, 28 S. E. 381.

Kentucky.— Louisville, etc., R. Co. *v.* Harmon, 23 Ky. L. Rep. 871, 64 S. W. 640.

New York.— Philips *v.* Northern R. Co., 62 Hun (N. Y.) 233, 16 N. Y. Suppl. 909, 41 N. Y. St. 780.

Texas.— St. Louis, etc., R. Co. *v.* Finley, 79 Tex. 85, 15 S. W. 266; Missouri Pac. R. Co. *v.* Foreman, (Tex. Civ. App. 1898) 46 S. W. 834.

Virginia.— Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

Washington.— Irish *v.* Northern Pac. R. Co., 4 Wash. 48, 29 Pac. 845, 31 Am. St. Rep. 899.

57. Louisville, etc., R. Co. *v.* Hale, 102 Ky. 600, 19 Ky. L. Rep. 1651, 44 S. W. 213; Middleborough R. Co. *v.* Webster, 21 Ky. L. Rep. 3, 50 S. W. 843; Yarnell *v.* Kansas City, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

58. Sheffer *v.* Louisville, etc., R. Co., 22 Ky. L. Rep. 1305, 60 S. W. 403; Gulf, etc., R. Co. *v.* Powers, 4 Tex. Civ. App. 228, 23 S. W. 325; International, etc., R. Co. *v.* Copeland, 60 Tex. 325.

59. Atlanta, etc., R. Co. *v.* Dickerson, 89 Ga. 455, 15 S. E. 534; Malcom *v.* Richmond, etc., R. Co., 106 N. C. 63, 11 S. E. 187; New York, etc., R. Co. *v.* Woods, 9 Ohio Cir. Ct. 322; Gulf, etc., R. Co. *v.* Williams, 70 Tex. 159, 8 S. W. 78.

60. *California.*— Carr *v.* Eel River, etc., R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354.

Georgia.—Mitchell *v.* Western, etc., R. Co., 30 Ga. 22.

Michigan.— Flint, etc., R. Co. *v.* Stark, 38 Mich. 714.

New York.— Keating *v.* New York Cent., etc., R. Co., 49 N. Y. 673; Daly *v.* Central R. Co., 26 N. Y. App. Div. 200, 49 N. Y. Suppl. 901; McQuade *v.* Manhattan R. Co., 53 N. Y. Super. Ct. 91.

for the starting of the train are applicable where the train is stopped for taking on or discharging passengers at other than its regular stopping place.[61] If the train is stopped, not for the purpose of allowing passengers to get on board or alight, care must be taken to avoid injury to passengers who may be misled as to the place of stoppage being the proper one for those purposes.[62] With reference to this matter it is important to know whether there has been an express or implied invitation to the passenger to get on board or alight at such place, and if such invitation has been given, the duty is involved of using care with reference to passengers who attempt to comply with the invitation.[63] Where the passenger is attempting to get on board or alight in pursuance of an express or implied invitation, it is the duty of the carrier to bring the train to a full stop in order to enable him to do so in safety,[64] and if, by increasing the speed of the train before it has come to a full stop, the passenger is injured, he may recover for the injury caused thereby.[65] It is in general negligent on the part of the servants in charge of a train to induce passengers to get off while it is in motion.[66]

Wisconsin.— Imhoff *v.* Chicago, etc., R. Co., 22 Wis. 681.

See 9 Cent. Dig. tit. "Carriers," § 1228.

61. Alabama Great Southern R. Co. *v.* Siniard, 123 Ala. 557, 26 So. 689; Ward *v.* Chicago, etc., R. Co., 165 Ill. 462, 46 N. E. 365.

62. *Alabama.*— Richmond, etc., R. Co. *v.* Smith, 92 Ala. 237, 9 So. 223.

Arkansas.—Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598.

California.— Raub *v.* Los Angeles Terminal R. Co., 103 Cal. 473, 37 Pac. 374.

Georgia.— Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406; Montgomery, etc., R. Co. *v.* Boring, 51 Ga. 582; Mitchell *v.* Western, etc., R. Co., 30 Ga. 22.

Illinois.— Chicago., etc., R. Co. *v.* Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631; Ohio, etc., R. Co. *v.* Schiebe, 44 Ill. 460.

Indiana.— Columbus, etc., R. Co. *v.* Farrell, 31 Ind. 408; Louisville, etc., R. Co. *v.* Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

Kansas.—Southern Kansas R. Co. *v.* Pavey, 48 Kan. 452, 29 Pac. 593.

Michigan.— Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773.

Missouri.— McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706.

New York.— Taber *v.* Delaware, etc., R. Co., 71 N. Y. 489; Sauter *v.* New York Cent., etc., R. Co., 6 Hun (N. Y.) 446.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Edelstein, 23 Wkly. Notes Cas. (Pa.) 342, 16 Atl. 847.

See 9 Cent. Dig. tit. "Carriers," § 1228.

63. *Michigan.*— Nichols *v.* Chicago, etc., R. Co., 90 Mich. 203, 51 N. W. 364; Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

Minnesota.— Kral *v.* Burlington, etc., R. Co., 71 Minn. 422, 74 N. W. 166.

New York.— Jones *v.* New York Cent., etc., R. Co., 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490; Phillips *v.* Rensselaer, etc., R. Co., 57 Barb. (N. Y.) 644.

Pennsylvania.— Case *v.* Delaware, etc., R. Co., 191 Pa. St. 450, 457, 43 Atl. 319, 1100.

Texas.— Texas Midland R. Co. *v.* Brown, (Tex. Civ. App. 1900) 58 S. W. 44; Houston, etc., R. Co. *v.* Dotson, 15 Tex. Civ. App. 73, 38 S. W. 642.

As to invitation see also *supra*, III, F, 3, b, (IV).

Warning not to get off.— There is, however, it seems, no duty imposed on a railroad company of warning passengers not to get off when the train is stopped for other purposes, there having been no indication that passengers are to get off at such stopping place. Minock *v.* Detroit, etc., R. Co., 97 Mich. 425, 56 N. W. 780; Mitchell *v.* Chicago, etc., R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; Central R. Co. *v.* Van Horn, 38 N. J. L. 133; Davis *v.* Lehigh Valley R. Co., 64 Hun (N. Y.) 492, 19 N. Y. Suppl. 516, 46 N. Y. St. 735.

64. St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Bucher *v.* New York Cent., etc., R. Co., 98 N. Y. 128; Zimmerman *v.* Long Island R. Co., 14 N. Y. App. Div. 562, 43 N. Y. Suppl. 883; Crissey *v.* Hestonville, etc., Pass. R. Co., 75 Pa. St. 83.

65. Montgomery, etc., R. Co. *v.* Stewart, 91 Ala. 421, 8 So. 708; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Brashear *v.* Houston Cent., etc., R. Co., 47 La. Ann. 735, 17 So. 260, 49 Am. St. Rep. 382, 28 L. R. A. 811; Nance *v.* Carolina Cent. R. Co., 94 N. C. 619.

Failure of a railroad company to stop its train at a crossing, in accordance with a police regulation, will not render the company liable for injuries to a passenger by reason of his attempting to alight at such crossing, where the company has no notice of his attempt. Louisville, etc., R. Co. *v.* Johnson, 44 Ill. App. 56.

The fact that the train is not brought to a stop will not justify a hazardous attempt to alight so as to render the carrier liable for injury resulting therefrom. Little Rock, etc., R. Co. *v.* Tankersley, 54 Ark. 25, 14 S. W. 1099. And see as to contributory negligence in such cases *infra*, III, G, 3.

66. *Georgia.*— Southwestern R. Co. *v.* Singleton, 67 Ga. 306.

Kansas.— Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, 40 Pac. 919.

(VI) *CARE REQUIRED AS TO PERSONS NOT PASSENGERS.* A carrier owes a duty to persons who come upon a train accompanying passengers, with the intention of getting off before the train starts, or for the purpose of meeting passengers who are about to alight.[67] And especially is there such a duty where a passenger requires assistance which the servants of the carrier do not undertake to render.[68] But if the servants of the carrier have no notice or knowledge of the intention of one thus coming on board to get off before the starting of the train, they owe him no additional duty as to affording him an opportunity to safely alight.[69]

(VII) *STREET-CAR CASES.* While the general rules applicable to taking up and setting down passengers, which have already been considered mainly with reference to steam-cars, are applicable to street-cars, yet some difference in the methods of operating street-cars may necessitate variations in their application, and it will be proper to restate some of these rules in the light of street-car

Kentucky.—Louisville, etc., R. Co. *v.* Richerson, 14 Ky. L. Rep. 925; Louisville, etc., R. Co. *v.* Sharp, 6 Ky. L. Rep. 367.

Louisiana.— Jones *v.* Texas, etc., R. Co., 47 La. Ann. 383, 16 So. 937.

Minnesota.— Jones *v.* Chicago, etc., R. Co., 42 Minn. 183, 43 N. W. 1114.

Missouri.— Fortune *v.* Missouri R. Co., 10 Mo. App. 252.

New York.— Geiler *v.* Manhattan R. Co., 11 Misc. (N. Y.) 413, 32 N. Y. Suppl. 254, 65 N. Y. St. 437.

Pennsylvania.— Hestonville Pass. R. Co. *v.* Grey, 1 Walk. (Pa.) 513.

Texas.— Texas, etc., R. Co. *v.* Elliott, (Tex. Civ. App. 1901) 61 S. W. 726.

See 9 Cent. Dig. tit. "Carriers," § 1226.

It is not, however, under all circumstances negligence per se to suggest to a passenger that he leave the train while it is slowly moving. Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373; Wilburn *v.* St. Louis, etc., R. Co., 48 Mo. App. 224; Rothstein *v.* Pennsylvania R. Co., 171 Pa. St. 620, 33 Atl. 379.

67. *Indiana.*— Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443.

Iowa.— Galloway *v.* Chicago, etc., R. Co., 87 Iowa 458, 54 N. W. 447.

Missouri.— Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371.

New York.— Rott *v.* Forty-Second St., etc., Ferry R. Co., 56 N. Y. Super. Ct. 151, 1 N. Y. Suppl. 518.

South Carolina.— Johnson *v.* Southern R. Co., 53 S. C. 203, 31 S. E. 212, 69 Am. St. Rep. 849.

Texas.— Gulf, etc., R. Co. *v.* Williams, 21 Tex. Civ. App. 469, 51 S. W. 653.

See 9 Cent. Dig. tit. "Carriers," § 1110 *et seq.*

As to duty to persons not passengers at stations see *supra*, III, F, 3, b, (VI).

Persons may be properly on or about trains other than as passengers, or after their relations to the carrier as passengers have ceased, as, for instance, drovers accompanying stock after the train has reached its destination, and the carrier is bound in such cases to exercise care in avoiding injury to such persons. Orcutt *v.* Northern Pac. R. Co., 45 Minn. 368, 47 N. W. 1068.

68. Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 18 S. W. 543, 29 Am. St. Rep. 48, 15 L. R. A. 434; Macon, etc., R. Co. *v.* Moore, 108 Ga. 84, 33 S. E. 889.

Carrier's duty.—Perhaps the degree of care required in protecting such persons against injury is only ordinary care, and not that highest degree of care which is required as to passengers. Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371. But in Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443, it is said that the carrier owes the same duty to such persons as to passengers. At any rate, such person is not entitled to have the train held for the full length of time usually required for passengers to get off, but only long enough to enable him to get off upon notice to the trainmen of his desire to do so. Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 18 S. W. 543, 29 Am. St. Rep. 48, 15 L. R. A. 434.

Presumption as to intention.— There is no presumption that a person who goes on board a steamboat intends to remain as a passenger, and if he does not he must be provided with reasonable means and opportunity of leaving the boat before starting. Keokuk Packet Co. *v.* Henry, 50 Ill. 264.

69. *Georgia.*— Coleman *v.* Georgia R., etc., Co., 84 Ga. 1, 10 S. E. 498.

Indiana.—Louisville, etc., R. Co. *v.* Espenschild, 17 Ind. App. 558, 47 N. E. 186.

Kentucky.—Berry *v.* Louisville, etc., R. Co., 22 Ky. L. Rep. 1410, 60 S. W. 699.

Missouri.— Yarnell *v.* Kansas City, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

Texas.— International, etc., R. Co. *v.* Satterwhite, 15 Tex. Civ. App. 102, 38 S. W. 401; Dillingham *v.* Pierce, (Tex. Civ. App. 1895) 31 S. W. 203.

Wisconsin.— Griswold *v.* Chicago, etc., R. Co., 64 Wis. 652, 26 N. W. 101.

See 9 Cent. Dig. tit. "Carriers," § 1242.

If the carrier's servants have notice or knowledge that such person has come upon the train with the intention of alighting before the train starts, they are bound to give him reasonable opportunity to do so. Houston *v.* Gate City R. Co., 89 Ga. 272, 15 S. E. 323; International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41; Missouri, etc., R. Co. *v.* Miller, 15 Tex. Civ. App. 428, 39 S. W. 583.

cases. It is the duty of the carrier by street-car to stop the car for the purpose of taking on or letting off passengers,[70] and if the car is started up again before it has fully stopped, the carrier will be liable for injury to the passenger resulting therefrom, if the passenger has reason to think that the slowing up was for the purpose of enabling him to get on board or to alight.[71] The time of stoppage must be such as to enable the passenger attempting to get on or off to reach a place of safety, either on the street or in the car, before it is started.[72] Before starting the car after a stop for the purpose of letting a passenger on or off, the servants in charge of the car should see that all passengers attempting to get on or off have reached a place of safety.[73] In general a carrier will be liable for injuries to any passenger attempting to get on or off by reason of the car being started after a stoppage for receiving or discharging passengers without allowing a reasonable time for the purpose.[74] Perhaps it may be true as a general propo-

70. Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555; Crissey *v.* Hestonville, etc., Pass. R. Co., 75 Pa. St. 83.

71. *Illinois.*— Springfield Consol. R. Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. 884; Chicago West Div. R. Co. *v.* Mills, 91 Ill. 39.

Indiana.— Conner *v.* Citizens' St. R. Co., 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177; Dresslar *v.* Citizens' St. R. Co., 19 Ind. App. 383, 47 N. E. 651.

Massachusetts.— Nichols *v.* Middlesex R. Co., 106 Mass. 463.

Missouri.— Cobb *v.* Lindell R. Co., 149 Mo. 135, 50 S. W. 310.

New Jersey.— Herbich *v.* North Jersey St. R. Co., 65 N. J. L. 381, 47 Atl. 427.

New York.— Morrison *v.* Broadway, etc., R. Co., 130 N. Y. 166, 29 N. E. 105, 41 N. Y. St. 248; Butler *v.* Glens Falls, etc., St. R. Co., 121 N. Y. 112, 24 N. E. 187, 30 N. Y. St. 678; Sexton *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 26, 57 N. Y. Suppl. 577; Bachrach *v.* Nassau Electric R. Co., 35 N. Y. App. Div. 633, 54 N. Y. Suppl. 958; Dean *v.* Third Ave. R. Co., 34 N. Y. App. Div. 220, 54 N. Y. Suppl. 490; Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465, 24 N. Y. Suppl. 490, 54 N. Y. St. 342; Moylan *v.* Second Ave. R. Co., 13 N. Y. Suppl. 494, 35 N. Y. St. 644.

Pennsylvania.— Walters *v.* Philadelphia Traction Co., 161 Pa. St. 36, 28 Atl. 941; Picard *v.* Ridge Ave. Pass. R. Co., 147 Pa. St. 195, 23 Atl. 566.

See 9 Cent. Dig. tit. "Carriers," § 1228½.

The fact that the car is started up suddenly, or with a jerk, may show want of proper care. Chicago City R. Co. *v.* Dinsmore, 162 Ill. 658, 44 N. E. 887; Bourque *v.* New Orleans City, etc., R. Co., (La. 1898) 24 So. 622; Eppendorf *v.* Brooklyn City, etc., R. Co., 69 N. Y. 195, 25 Am. Rep. 171.

72. *District of Columbia.*—Anacostia, etc., R. Co. *v.* Klein, 8 App. Cas. (D. C.) 75.

Minnesota.— Miller *v.* St. Paul City R. Co., 66 Minn. 192, 68 N. W. 862.

Missouri.— Dougherty *v.* Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239 [*affirming* 9 Mo. App. 478].

New York.— Dochtermann *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 13, 52 N. Y. Suppl. 1051.

Pennsylvania.— Holmes *v.* Allegheny Traction Co., 153 Pa. St. 152, 25 Atl. 640.

73. *Alabama.*— Birmingham Union R. Co. *v.* Smith, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761; Highland Ave., etc., R. Co. *v.* Burt, 92 Ala. 291, 9 So. 410, 13 L. R. A. 95.

Illinois.— Chicago West Div. R. Co. *v.* Mills, 105 Ill. 63; Chicago City R. Co. *v.* Mumford, 97 Ill. 560.

Indiana.—Anderson *v.* Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. 1109.

Louisiana.— Conway *v.* New Orleans, etc., R. Co., 46 La. Ann. 1429, 16 So. 362; Wardle *v.* New Orleans City R. Co., 35 La. Ann. 202.

Michigan.— Finn *v.* Valley City St., etc., R. Co., 86 Mich. 74, 48 N. W. 696.

New York.— Poulin *v.* Broadway, etc., R. Co., 61 N. Y. 621; Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370; Munroe *v.* Third Ave. R. Co., 50 N. Y. Super. Ct. 114.

See 9 Cent. Dig. tit. "Carriers," § 1228½.

If the car does not stop the passenger should not attempt to get on or off, and the failure to stop will not be the proximate cause of an injury resulting from his attempting to do so. White *v.* West End St. R. Co., 165 Mass. 522, 43 N. E. 298. And as to contributory negligence in such cases see *infra*, III, G, 3.

74. *Illinois.*— North Chicago St. R. Co. *v.* Brown, 178 Ill. 187, 52 N. E. 864; West Chicago St. R. Co. *v.* James, 69 Ill. App. 609.

Kansas.— Leavenworth Electric R. Co. *v.* Cusick, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

Kentucky.— Paducah St. R. Co. *v.* Walsh, 22 Ky. L. Rep. 532, 58 S. W. 431; Louisville R. Co. *v.* Rammaker, 21 Ky. L. Rep. 250, 51 S. W. 175.

Maryland.— Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706.

Minnesota.— Steeg *v.* St. Paul City R. Co., 50 Minn. 149, 52 N. W. 393, 16 L. R. A. 379.

Missouri.— Barth *v.* Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778.

New York.— Maher *v.* Central Park, etc., R. Co., 67 N. Y. 52; De Rozas *v.* Metropolitan St. R. Co., 13 N. Y. App. Div. 296, 43 N. Y. Suppl. 27; McSwyny *v.* Broadway, etc., R. Co., 4 Silv. Supreme (N. Y.) 495, 7 N. Y. Suppl. 456, 27 N. Y. St. 363; Lamline *v.* Houston, etc., R. Co., 14 Daly (N. Y.) 144, 6 N. Y. St. 248; Goldwasser *v.* Metropolitan St. R. Co., 32 Misc. (N. Y.) 682, 66 N. Y. Suppl. 505; Flanagan *v.* Metropolitan St. R.

sition that where the car is stopped to allow one passenger to get off in response to notice of his desire to do so, the servants of the carrier are not bound to look out for other passengers intending, or attempting, to get off at the same time, but who have given no notice of their intention.[75] But in many cases it is held that the duty rests upon such servants to know when a car is stopped for the purpose of letting one passenger on or off that others may attempt to get on or alight at the same time, and to see that the car is not started so as to imperil their safety.[76]

d. Machinery, Track, and Appliances — (i) *Care as to Sufficiency and Maintenance in General.* The rule requiring the highest degree of practicable care and skill which the carrier is required to use in performance of the transportation is applicable in its full extent with reference to the road-bed, bridges, track, and machinery of a railroad company engaged in the carriage of passengers.[77] If injuries result to a passenger from defects which could have been

Co., 31 Misc. (N. Y.) 820, 64 N. Y. Suppl. 379; Weiss *v.* Metropolitan St. R. Co., 29 Misc. (N. Y.) 332, 60 N. Y. Suppl. 473; Friedman *v.* Consolidated Traction Co., 24 Misc (N. Y.) 764, 53 N. Y. Suppl. 410; Schalscha *v.* Third Ave. R. Co., 19 Misc. (N. Y.) 141, 43 N. Y. Suppl. 251.

United States.—Washington, etc,. R. Co. *v.* Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284; Van de Venter *v.* Chicago City R. Co., 26 Fed. 32.

See 9 Cent. Dig. tit. "Carriers," § 1228.

Even though the signal for starting is improperly given by an unauthorized person, nevertheless, if the conductor might have controlled the movement of the car in the use of due care and diligence, the carrier will be liable for injury resulting from his failure to do so. North Chicago St. R. Co. *v.* Cook, 145 Ill. 551, 33 N. E. 958.

The passenger should give notice of his desire to alight, in order to charge the carrier with the duty of giving him a proper opportunity. McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

75. *Georgia.*—Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406.

Illinois.— Chicago West Div. R. Co. *v.* Mills, 91 Ill. 39.

Indiana.— Conner *v.* Citizens' St. R. Co., 146 Ind. 430, 45 N. E. 662.

Massachusetts.— Gilbert *v.* West End St. R. Co., 160 Mass. 403, 36 N. E. 60; Nichols *v.* Middlesex R. Co., 106 Mass. 463.

New York.— Losee *v.* Watervliet Turnpike, etc., Co., 63 Hun (N. Y.) 404, 18 N. Y. Suppl. 297, 44 N. Y. St. 343; Ganiard *v.* Rochester City, etc., R. Co., 50 Hun (N. Y.) 22, 2 N. Y. Suppl. 470, 18 N. Y. St. 692.

Pennsylvania.— Pitcher *v.* People's St. R. Co., 174 Pa. St. 402, 34 Atl. 567; Pitcher *v.* People's St. R. Co., 154 Pa. St. 560, 26 Atl. 559.

Rhode Island.— Rathbone *v.* Union R. Co., 13 R. I. 709.

See 9 Cent. Dig. tit. "Carriers," § 1228½.

76. *Alabama.*—Birmingham R., etc., Co. *v.* Wildman, 119 Ala. 547, 24 So. 548.

Connecticut.— Post *v.* Hartford St. R. Co., 72 Conn. 362, 44 Atl. 547.

District of Columbia.—Washington, etc., R. Co. *v.* Grant, 11 App. Cas. (D. C.) 107.

Illinois.— Joliet St. R. Co. *v.* Duggan, 45 Ill. App. 450.

Kansas.— Leavenworth Electric R. Co. *v.* Cusick, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

Kentucky.—Louisville R. Co. *v.* Rammaker, 21 Ky. L. Rep. 250, 51 S. W. 175.

Massachusetts.— Davey *v.* Greenfield, etc., St. R. Co., 177 Mass. 106, 58 N. E. 172.

New York.— Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465, 24 N. Y. Suppl. 490, 54 N. Y. St. 342.

Pennsylvania.— Bensing *v.* Peoples Electric St. R. Co., 9 Pa. Super. Ct. 142.

United States.— Dudley *v.* Front St. Cable R. Co., 73 Fed. 128; Cohen *v.* West Chicago St. R. Co., 60 Fed. 698, 18 U. S. App. 593, 9 C. C. A. 223.

See 9 Cent. Dig. tit. "Carriers," § 1228.

Even when the car is stopped for some other purpose than that of allowing passengers to get on or off, it has been held that those in charge of the car must see to it before again starting the car that passengers are not attempting at that place to get on or off. West Chicago St. R. Co. *v.* Manning, 170 Ill. 417, 48 N. E. 958; West Chicago St. R. Co. *v.* Luka, 72 Ill. App. 60; North Chicago St. R. Co. *v.* Cook, 43 Ill. App. 634; Patterson *v.* Omaha, etc., B. Co., 90 Iowa 247, 57 N. W. 880; Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

77. Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; McElroy *v.* Nashua, etc., R. Corp., 4 Cush. (Mass.) 400, 50 Am. Dec. 794; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. (Va.) 394; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; Anthony *v.* Louisville, etc., R. Co., 27 Fed. 724.

But in the construction of the road-bed and track the company is not bound absolutely to provide against extraordinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which cannot be reasonably anticipated by that degree of engineering skill and experience required in the prudent construction of a railroad. Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812. Fur-

avoided in the exercise of the extreme degree of care required for the protection of the passenger the carrier is liable.[78]

(II) *Inspection.* The care required as to road-bed, track, machinery, and appliances is not fully exercised by an originally safe construction, but involves such constant inspection for the purpose of discovering defects or dangers which may be developed in the operation of the road, and remedying the same, as the highest care and foresight would suggest, so far as practicable, consistently with the carrying on of the company's business.[79] Under circumstances involving peculiar peril, such as a freshet, endangering the safety of the track, special inspection to discover whether danger has been developed is necessary.[80]

ther as to inevitable accidents see *supra*, III, F, 3, a.

Independent contractor.— The exercise of this care on the part of the carrier himself cannot be avoided by turning over the construction or maintenance of road-bed or track to an independent contractor. Virginia Cent. R. Co. *v.* Sanger, 15 Gratt. (Va.) 230; Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

78. *Iowa.*— Sherman *v.* Western Stage Co., 24 Iowa 515.

Kentucky.— Chesapeake, etc., R. Co. *v.* Brown, 12 Ky. L. Rep. 468.

Minnesota.—Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 50 N. W. 927.

New York.—Weber *v.* Metropolitan St. R. Co., 22 N. Y. App. Div. 628, 47 N. Y. Suppl. 812.

Pennsylvania.—Willis *v.* Second Ave. Traction Co., 189 Pa. St. 430, 42 Atl. 1.

South Carolina.— Caveny *v.* Neely, 43 S. C. 70, 20 S. E. 806.

Virginia.— Farish *v.* Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

See 9 Cent. Dig. tit. "Carriers," § 1168.

But the carrier is not liable for accidents not due to negligence, that is, to the failure to use the degree of care, prudence, and forethought required under the circumstances. Posten *v.* Denver Consol. Tramway Co., 11 Colo. App. 187, 53 Pac. 391; Harbison *v.* Metropolitan R. Co., 9 App. Cas. (D. C.) 60; Wabash, etc., R. Co. *v.* Koenigsam, 13 Ill. App. 505; Leyh *v.* Newburgh Electric R. Co., 41 N. Y. App. Div. 218, 58 N. Y. Suppl. 479 [*affirmed* in 168 N. Y. 667, 61 N. E. 1131]; Nelson *v.* Lehigh Valley R. Co., 25 N. Y. App. Div. 535, 50 N. Y. Suppl. 63; Atwood *v.* Metropolitan St. R. Co., 25 Misc. (N. Y.) 758, 54 N. Y. Suppl. 138.

Placing in a vestibuled train a car without vestibule does not constitute negligence. Sansom *v.* Southern R. Co., 111 Fed. 887, 50 C. C. A. 53.

Where snow-sheds were constructed over a railroad track, but not high enough to enable a person to walk over the highest cars of a freight train with safety, and a person in charge of stock properly passing along the top of the train was injured by a collision with such snow-sheds, held that he might recover. Nelson *v.* Southern Pac. Co., 18 Utah 244, 55 Pac. 364; Saunders *v.* Southern Pac. Co., 13 Utah 275, 44 Pac. 932.

79. *Arkansas.*—Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550; St. Louis, etc., R. Co. *v.* Mitchell, 57 Ark. 418, 21 S. W. 883.

Illinois.— Chicago, etc., R. Co. *v.* Lewis, 145 Ill. 67, 33 N. E. 960.

Louisiana.— Frelsen *v.* Southern Pac. Co., 42 La. Ann. 673, 7 So. 800.

Maine.— Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

Minnesota.— Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673.

New York.—Wynn *v.* Central Park, etc., R. Co., 133 N. Y. 575, 30 N. E. 721, 44 N. Y. St. 673; Palmer *v.* Delaware, etc., Canal Co., 120 N. Y. 170, 24 N. E. 302, 30 N. Y. St. 817, 17 Am. St. Rep. 629; Poulsen *v.* Nassau Electric R. Co., 30 N. Y. App. Div. 246, 51 N. Y. Suppl. 933.

Texas.— Texas, etc., R. Co. *v.* Hamilton, 66 Tex. 92, 17 S. W. 406; International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744; Houston, etc., R. Co. *v.* Norris, (Tex. Civ. App. 1897) 41 S. W. 708.

England.— Richardson *v.* Great Eastern R. Co., 1 C. P. D. 342, 35 L. T. Rep. N. S. 351, 24 Wkly. Rep. 907.

See 9 Cent. Dig. tit. "Carriers," § 1168 *et seq.*

This duty involves reinspection from time to time. Houston, etc., R. Co. *v.* Summers, (Tex. Civ. App. 1899) 49 S. W. 1106. Inspection at regular places provided for the purpose does not relieve the carrier from the duty to watch and inspect the cars for defects occurring between stations, so far as they might be anticipated and discovered. Texas, etc., R. Co. *v.* Suggs, 62 Tex. 323. However, a railroad company is not required to keep up a continuous inspection, or to know at each moment the condition of every part of the train. Proud *v.* Philadelphia, etc., R. Co., 64 N. J. L. 702, 46 Atl. 710, 50 L. R. A. 468.

Electric cars.—Where a passenger was injured by the metal portions of an electric car becoming charged with a current, which fact might have been readily ascertained by inspection, held that the street-car company was liable for injury to a passenger therefrom. Burt *v.* Douglas County St. R. Co., 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479.

80. Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Cobb *v.* St. Louis, etc., R. Co., 149 Mo. 609, 50 S. W. 894; Hardy *v.* Carolina Cent. R. Co., 74 N. C. 734, 76 N. C. 5.

(III) *Latent Defects.* The duty of the carrier as to furnishing machinery and appliances originally safe, suitable, and adequate, is discharged by a purchase thereof from a reputable manufacturer and inspection to detect defects discoverable by any tests which the highest care and prudence can suggest. The carrier does not warrant the safety and perfection of his machinery and appliances, but undertakes to exercise the highest care with reference to their safety.[81]

(IV) *Well-Known and Approved Machinery and Appliances.* The exercise of the highest degree of care does not, however, require that machinery and appliances which are absolutely the safest shall be used, without regard to the practical nature and exigencies of the business. The duty is to make use of well-known and approved appliances for the safety of passengers so far as is reasonably consistent with the carrying on of the business and the discharge of the duty which the carrier owes to the public.[82]

(V) *Care as to Track.* Specifically as to the track it is the duty of a railroad company to construct and maintain in a safe and adequate condition so far as the highest degree of care and foresight can accomplish that result.[83] Thus, if

81. *Alabama.*—Western R. Co. *v.* Walker, 113 Ala. 267, 22 So. 182.

California.—Siemsen *v.* Oakland, etc., Electric R. Co., 134 Cal. 494, 66 Pac. 672.

Illinois.— Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613; St. Louis Coal R. Co. *v.* Moore, 14 Ill. App. 510.

Indiana.— Grand Rapids, etc., R. Co. *v.* Boyd, 65 Ind. 526.

Maine.— Stevens *v.* European, etc., R. Co., 66 Me. 74.

Maryland.— Baltimore City Pass. R. Co. *v.* Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

Massachusetts.— Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

Michigan.— Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

New York.—Birmingham *v.* Rochester City, etc., R. Co., 137 N. Y. 13, 32 N. E. 995, 49 N. Y. St. 888, 18 L. R. A. 764; Alden *v.* New York Cent. R. Co., 26 N. Y. 102, 82 Am. Dec. 401; Hegeman *v.* Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Griffen *v.* Manice, 36 Misc. (N. Y.) 364, 73 N. Y. Suppl. 559.

Pennsylvania.— Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581.

Texas.— Texas, etc., R. Co. *v.* Buckalew, (Tex. Civ. App. 1896) 34 S. W. 165.

United States.— Carter *v.* Kansas City Cable R. Co., 42 Fed. 37; Anthony *v.* Louisville, etc., R. Co., 27 Fed. 724; Robinson *v.* New York Cent., etc., R. Co., 20 Blatchf. (U. S.) 338, 9 Fed. 877.

England.— Redhead *v.* Midland R. Co., L. R. 4 Q. B. 379, 9 B. & S. 519, 38 L. J. Q. B. 169, 20 L. T. Rep. N. S. 628, 17 Wkly. Rep. 737.

See 9 Cent. Dig. tit. "Carriers," § 1177; and *supra*, III, F, 1, c.

82. North Chicago St. R. Co. *v.* Wrixon, 51 Ill. App. 307; Witsell *v.* West Asheville, etc., R. Co., 120 N. C. 557, 27 S. E. 125; Texas Midland R. Co. *v.* Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797.

Such machinery or appliances as have been in general use, and have been found to be safe and sufficient, may be employed (Holt *v.* Southwest Missouri Electric R. Co., 84 Mo. App. 443; Frobisher *v.* Fifth Ave. Transp. Co., 151 N. Y. 431, 45 N. E. 839; Smith *v.* Kingston City R. Co., 55 N. Y. App. Div. 143, 67 N. Y. Suppl. 185; Hegeman *v.* Western R. Corp., 16 Barb. (N. Y.) 353); but the mere fact that those used are such as are in common use, irrespective of their safety and sufficiency, is not enough (Illinois Cent. R. Co. *v.* O'Connell, 160 Ill. 636, 43 N. E. 704; Union Pac. R. Co. *v.* Hand, 7 Kan. 380; Dougherty *v.* Kansas City, etc., Rapid Transit R. Co., 128 Mo. 33, 30 S. W. 317, 49 Am. St. Rep. 536; Lee *v.* Knapp, 55 Mo. App. 390).

The nature of the business must be taken into account in determining the safety and sufficiency of the machinery and appliances (Baltimore, etc., R. Co. *v.* Worthington, 21 Md. 275, 83 Am. Dec. 578); and therefore a railroad company operating freight trains on which passengers are allowed to ride is not required to equip them with safety devices such as are usual only to passenger trains and are not practicable in connection with freight trains (Olds *v.* New York, etc., R. Co., 172 Mass. 73, 51 N. E. 450; Heyward *v.* Boston, etc., R. Co., 169 Mass. 466, 48 N. E. 773).

The obligation to provide the safest pattern of rails does not depend on whether such rails could be provided without additional expense. Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138.

What degree of care required.— It is not error to charge that a railroad company in the selection of its plans and materials for roadways and bridges must use the degree of care exercised by the most skilfully and carefully managed railroads under like circumstances. Pershing *v.* Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488.

83. *Georgia.*— Macon Consol. St. R. Co. *v.* Barnes, 113 Ga. 212, 38 S. E. 756.

Illinois.— Toledo, etc., R. Co. *v.* Apperson, 49 Ill. 480; West Chicago St. R. Co. *v.* Stephens, 66 Ill. App. 303.

Indiana.— Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Citizens' St. R. Co. *v.* Twiname, 111 Ind. 587, 13 N. E. 55.

the track is so constructed as to subject trains passing thereon to danger from landslides, which might have been provided against, the company will be liable for injuries resulting from such dangerous condition.[84]

(VI) *Obstructions on, or Near, Track; Dangers From Animals.* The duty to maintain a safe track is not performed if permanent obstructions are allowed to remain on or near to it so as to imperil the safety of persons on passing cars.[85] So the carrier will be liable for injuries resulting from temporary obstructions on or near the track which are there by the negligence of the carrier.[86] The duty to provide against obstructions involves care to keep animals off the track.[87]

Maine.— Libby *v.* Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

Massachusetts.—Valentine *v.* Middlesex R. Co., 137 Mass. 28.

New Hampshire.— Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

New York.— Daub *v.* Yonkers R. Co., 69 Hun (N. Y.) 138, 23 N. Y. Suppl. 268, 52 N. Y. St. 527; Lynch *v.* New York Cent., etc., R. Co., 8 N. Y. App. Div. 458, 40 N. Y. Suppl. 775, 75 N. Y. St. 148; Reed *v.* New York Cent. R. Co., 56 Barb. (N. Y.) 493.

Pennsylvania.—McCafferty *v.* Pennsylvania R. Co., 193 Pa. St. 339, 44 Atl. 435, 74 Am. St. Rep. 690.

Tennessee.— Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202.

Virginia.—Virginia Cent. R. Co. *v.* Sanger, 15 Gratt. (Va.) 230.

See 9 Cent. Dig. tit. "Carriers," § 1170.

But a railroad company is not liable for injuries resulting from an accident which could not have been provided against in the exercise of the degree of care required, or which is not the result of any defective condition. Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Where a street railway is constructed across a bridge maintained by the state and constituting a part of the highway, the street-car company is not liable for an injury caused by defects in such bridge. Birmingham *v.* Rochester City, etc., R. Co., 137 N. Y. 13, 32 N. E. 995, 49 N. Y. St. 888, 17 L. R. A. 764.

84. Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94; Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. ed. 458.

85. *Illinois.*— North Chicago St. R. Co. *v.* Williams, 140 Ill. 275, 29 N. E. 672.

Louisiana.— Kird *v.* New Orleans, etc., R. Co., 105 La. 226, 29 So. 729.

Maryland.—Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 59 Am. Rep. 156, 5 Atl. 346.

Massachusetts.— Tyrrell *v.* Eastern R. Co., 111 Mass. 546.

Michigan.— Dickinson *v.* Port Huron, etc., R. Co., 53 Mich. 43, 18 N. W. 553.

Missouri.— Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739.

New York.— Francis *v.* New York Steam Co., 114 N. Y. 380, 21 N. E. 988, 23 N. Y. St. 543.

See 9 Cent. Dig. tit. "Carriers," § 1175; and also *infra*, III, F, 3, e, (VIII).

As to contributory negligence see *infra*, III, G, 4, a, (III).

What does not show negligence.—The mere fact that a passenger is injured by coming in contact with an obstruction does not show negligence of the carrier where he is not riding in such place or in such manner as passengers are reasonably expected to ride in. Weaver *v.* Baltimore, etc., R. Co., 3 App. Cas. (D. C.) 436; Murphy *v.* Ninth Ave. R. Co., 6 Misc. (N. Y.) 298, 26 N. Y. Suppl. 783, 58 N. Y. St. 140.

86. *New York.*— Herdt *v.* Rochester City, etc., R. Co., 20 N. Y. Suppl. 346 [*affirmed* in 142 N. Y. 626, 37 N. E. 565, 60 N. Y. St. 866]; Gray *v.* Rochester City, etc., R. Co., 61 Hun (N. Y.) 212, 15 N. Y. Suppl. 927, 40 N. Y. St. 715.

North Carolina.— Grant *v.* Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209.

Tennessee.— Mexican Cent. R. Co. *v.* Lauricella, 87 Tenn. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

Virginia.—Virginia Cent. R. Co. *v.* Sanger, 15 Gratt. (Va.) 230.

United States.— Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003; Farlow *v.* Kelly, 108 U. S. 288, 2 S. Ct. 555, 27 L. ed. 726.

See 9 Cent. Dig. tit. "Carriers," § 1172.

As to the operation of street-cars in view of temporary obstructions in the street on, or near, the track see *infra*, III, F, 3, e, (VIII).

87. Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597; Chicago, etc., R. Co. *v.* McAra, 52 Ill. 296; Louisville, etc., R. Co. *v.* Ritter, 2 Ky. L. Rep. 385; Eames *v.* Texas, etc., R. Co., 63 Tex. 660. As to the duty to so operate the train as to avoid collisions with animals see *infra*, III, F, 3, e, (VIII).

Duty to fence.— If a railroad company is required by law to fence its track, the failure to do so will render it liable for injuries resulting from collisions with animals on the track which are there by reason of failure to fence. Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597; Atchison, etc., R. Co. *v.* Elder, 149 Ill. 173, 36 N. E. 565; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486. Even where the company is not required to fence, it may be negligent in not properly guarding against animals being on the track. Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

(VII) *FURNISHING SAFE CARS OR OTHER VEHICLES.* The duty of the carrier involves the exercise of the highest care in furnishing cars which are safe and provided with proper appliances, and to keeping them in repair.[88] The carrier will be liable for injuries resulting from transporting a passenger in a baggage-car which is not as safe a place of conveyance as a passenger-car.[89] A railroad company must also provide for the comfort of its passengers by furnishing reasonable means for heating its cars.[90] And it must make provision for safety on the train by providing bell-ropes, where that is practicable in view of the nature of the business.[91] Owners of passenger elevators, although not strictly

88. *California.* — Finkeldey *v.* Omnibus Cable Co., 114 Cal. 28, 45 Pac. 996.

District of Columbia.—Metropolitan R. Co. *v.* Falvey, 5 App. Cas. (D. C.) 176.

Illinois.— Frink *v.* Potter, 17 Ill. 406.

Kentucky.— Louisville R. Co. *v.* Park, 96 Ky. 580, 29 S. W. 455.

Massachusetts.— Le Barron *v.* East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. Dec. 717.

Missouri.— Sharp *v.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93; Chartrand *v.* Southern R. Co., 57 Mo. App. 425.

New York.— Pendergast *v.* Union R. Co., 10 N. Y. App. Div. 207, 41 N. Y. Suppl. 927, 75 N. Y. St. 1297.

Pennsylvania. — People's Pass. R. Co. *v.* Weiller, (Pa. 1886) 2 Atl. 510.

But it is not negligence to fail to so construct the car windows that passengers cannot put their arms out (Pittsburg, etc., R. Co. *v.* McClurg, 56 Pa. St. 294); nor to fail to construct the upper parts of car doors so that passengers approaching can see those approaching from the other side (Graeff *v.* Philadelphia, etc., R. Co., 161 Pa. St. 230, 28 Atl. 1107, 41 Am. St. Rep. 885, 23 L. R. A. 606), or to provide a street-car with open steps instead of steps so closed at the back as to prevent the possibility of the passenger's foot being caught (Werbowlsky *v.* Ft. Wayne, etc., R. Co., 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120; Boehncke *v.* Brooklyn City R. Co., 3 Misc. (N. Y.) 49, 22 N. Y. Suppl. 712, 51 N. Y. St. 434; Keller *v.* Hestonville, etc., Pass. R. Co., 149 Pa. St. 65, 24 Atl. 159). But as to steps of stage-coaches see Frobisher *v.* Fifth Ave. Transp. Co., 151 N. Y. 431, 45 N. E. 839. Nor is it negligence to omit to stretch a chain between the railings on the rear platform of the train. Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373; Newton *v.* Central Vermont R. Co., 80 Hun (N. Y.) 491, 30 N. Y. Suppl. 488, 62 N. Y. St. 387.

Accumulations of snow and ice on car platforms, which cannot be prevented in the prosecution of the carrier's business, will not be imputed to him as negligence. Ohio, etc., R. Co. *v.* Allender, 59 Ill. App. 620; Pittsburgh, etc., R. Co. *v.* Aldridge, 27 Ind. App. 498, 61 N. E. 741; Palmer *v.* Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859, 19 N. Y. St. 493, 2 L. R. A. 252.

Safe seats.— The carrier must exercise as high a degree of care in providing safe seats as in providing for the general safety of the car. International, etc., R. Co. *v.* Anthony, 24 Tex. Civ. App. 9, 57 S. W. 897. But it is not negligent to run a street-car with seats extending entirely across, with an elevation in the floor which may catch the foot of the passenger, but which is plainly apparent and proper in the reasonable construction of the car. Farley *v.* Philadelphia Traction Co., 132 Pa. St. 58, 18 Atl. 1090.

An electric railway company is not required to exercise the highest degree of care in the construction of its cars as to improvements not involving the safety of the passengers. Leyh *v.* Newburgh Electric R. Co., 41 N. Y. App. Div. 218, 58 N. Y. Suppl. 479 [*affirmed* in 168 N. Y. 667, 61 N. E. 1131].

As to the duty of owners of steamboats, ferries, and vessels in general to provide boats or vessels which are seaworthy and adequately equipped to avoid danger to passengers, it is sufficient, without further specification, to refer to the cases.

Louisiana.— Lobdell *v.* Bullitt, 13 La. 348, 33 Am. Dec. 567.

Massachusetts. — Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Simmons *v.* New Bedford, etc., Steamboat Co., 100 Mass. 34.

Missouri. — Yerkes *v.* Keokuk Northern Line Packet Co., 7 Mo. App. 265.

New York. — Crocheron *v.* North Shore Staten Island Ferry Co., 56 N. Y. 656; Dougan *v.* Champlain Transp. Co., 56 N. Y. 1; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282; Garoni *v.* Compagnie Nationale de Navigation, 14 N. Y. Suppl. 797, 39 N. Y. St. 630.

Pennsylvania.—American Steamship Co. *v.* Landreth, 102 Pa. St. 131, 108 Pa. St. 264, 48 Am. Rep. 196; Richter *v.* The Netherland, 14 Phila. (Pa.) 601, 38 Leg. Int. (Pa.) 242.

United States.— The Pilot Boy, 23 Fed. 103; The Nederland, 7 Fed. 926.

See 9 Cent. Dig. tit. "Carriers," § 1186; and also, generally, FERRIES; SHIPPING.

The owner of a steamboat was held to be affected with notice of the insecure condition of the gangway by complaint made to deck hands, who were servants of the boat. Parker *v.* Boston, etc., Steamboat Co., 109 Mass. 449.

89. Baltimore, etc., R. Co. *v.* Swann, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313.

90. International, etc., R. Co. *v.* Davis, 17 Tex. Civ. App. 340, 43 S. W. 540; Henderson *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1896) 38 S. W. 1136; Ft. Worth, etc., R. Co. *v.* Hyatt, 12 Tex. Civ. App. 435, 34 S. W. 677.

91. Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15; Oviatt *v.* Dakota Cent. R. Co., 43 Minn. 300, 45 N. W. 436.

common carriers of passengers, owe the same duty to those who by invitation, express or implied, are transported in the cars of such elevators, to exercise the highest care, in view of the character of the mode of conveyance adopted, as to the safety of the car and appliances.[92]

e. Care in Management and Operation — (I) *In General.* The same high degree of care, diligence, and foresight which is required as to providing machinery and appliances is also required as to the operation of the machinery by which the transportation is carried out.[93] And this degree of care is usually required as to the operation of passenger elevators.[94]

(II) *Providing For Safety and Comfort of Passengers on Trains.* Proper appliances for the protection of the passenger, such as gates on platforms and the like, must be so used as that they shall afford the protection intended.[95] Passengers should not be encouraged or required, by reason of failure to furnish them other accommodations, to ride in dangerous places, such as on the platforms or steps of railway or street-cars.[96] And if fare is collected from a passenger riding in such position, it is the duty of the carrier to exercise the proper degree of care for him with reference to his dangerous position,[97] and as to persons of immature years, it is negligence to permit them to ride in such positions.[98] The servants in charge of the train or car should notify passengers of any danger which may be apprehended or foreseen with reference to the place of riding, or any other peril to which they are subjected.[99] But it may be negligence to

92. *California.*— Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

Illinois.— Hodges *v.* Percival, 132 Ill. 53, 23 N. E. 423; Field *v.* French, 80 Ill. App. 78; Hartford Deposit Co. *v.* Pederson, 67 Ill. App. 142.

Massachusetts. — Bourgo *v.* White, 159 Mass. 216, 34 N. E. 191.

Minnesota.— Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673.

Missouri.— Lee *v.* Knapp, 155 Mo. 610, 56 S. W. 458.

New York.— Griffen *v.* Manice, 47 N. Y. App. Div. 70, 62 N. Y. Suppl. 364; McGrell *v.* Buffalo Office-Bldg. Co., 90 Hun (N. Y.) 30, 35 N. Y. Suppl. 599, 70 N. Y. St. 372.

See 9 Cent. Dig. tit. "Carriers," § 1188.

Riding on freight elevator.— But one who accepts an express or implied invitation to ride in a freight elevator is only entitled to such appliances as are proper for such use. Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150; McGrell *v.* Buffalo Office Bldg. Co., 153 N. Y. 265, 47 N. E. 305.

93. Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848; Kentucky Hotel Co. *v.* Camp, 97 Ky. 424, 17 Ky. L. Rep. 279, 30 S. W. 1010; Fisher *v.* Tryon, 15 Ohio Cir. Ct. 541.

It is not negligence to run a train during a severe snow-storm, although an accident results therefrom, such an accident not having before occurred in the same connection. Denver, etc., R. Co. *v.* Pilgrim, 9 Colo. App. 86, 47 Pac. 657.

94. *Illinois.*— Haymarket Theater Co. *v.* Rosenberg, 77 Ill. App. 183.

Rhode Island.— Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

Tennessee.— Southern Bldg., etc., Assoc. *v.* Lawson, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804.

Virginia.— Farish *v.* Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

Wisconsin.—Oberndorfer *v.* Pabst, 100 Wis. 505, 76 N. W. 338.

United States.— Mitchell *v.* Marker, 62 Fed. 139, 22 U. S. App. 325, 10 C. C. A. 306.

See 9 Cent. Dig. tit. "Carriers," § 1194.

Compare Griffen *v.* Manice, 36 Misc. (N. Y.) 364, 73 N. Y. Suppl. 559; Hubener *v.* Heide, 62 N. Y. App. Div. 368, 70 N. Y. Suppl. 1115, wherein it is said that the rule requiring the highest degree of care in the operation of the machinery and appliances of a common carrier of passengers does not apply to a passenger elevator.

95. Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406; Byron *v.* Lynn, etc., R. Co., 177 Mass. 303, 58 N. E. 1015.

Closing gangway to ferry-boat.— It is not negligent to start a ferry-boat from the pier before closing the gangway opening, no danger to the passengers being involved in so doing. Cleveland *v.* New Jersey Steamboat Co., 68 N. Y. 306, 125 N. Y. 299, 34 N. Y. St. 938, 26 N. E. 327.

96. Union R., etc., Co. *v.* Shacklett, 19 Ill. App. 145; Grieve *v.* North Jersey St. R. Co., 65 N. J. L. 409, 47 Atl. 427; International, etc., R. Co. *v.* Williams, 20 Tex. Civ. App. 587, 50 S. W. 732.

97. Lucas *v.* Metropolitan St. R. Co., 56 N. Y. App. Div. 405, 67 N. Y. Suppl. 833; Schaefer *v.* Union R. Co., 29 N. Y. App. Div. 261, 51 N. Y. Suppl. 431; Dillon *v.* Forty-second St., etc., R. Co., 28 N. Y. App. Div. 404, 51 N. Y. Suppl. 145.

98. Jackson *v.* St. Paul City R. Co., 74 Minn. 48, 76 N. W. 856; Pittsburg, etc., R. Co. *v.* Caldwell, 74 Pa. St. 421.

99. *Alabama.*— Thompson *v.* Duncan, 76 Ala. 334.

unduly alarm a passenger by unnecessary signals or warnings as to danger, whereby he is induced to act in such a way as to be injured.[1] Passengers should be protected against dangers from obstructions in the aisles of the car,[2] and from disorder,[3] and they should be furnished the usual comfort in the way of heat and conveniences.[4]

(III) *Overcrowding.* For injuries received by the passenger by reason of the overcrowding of the conveyance, increasing the danger to the passenger by his being compelled to stand or ride in an unsafe place, or put in peril while getting on or off the conveyance, the carrier is liable.[5] But the carrier's duty in this respect is to use the highest degree of care, and his liability is not absolute.[6]

(IV) *Duty to Have Proper Person in Charge of Conveyance.* The carrier will be liable for failure to have a driver, conductor, or other person in charge of the conveyance, be it coach, train, or car.[7]

Kentucky.— Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 21 Ky. L. Rep. 114, 42 Am. Rep. 208.

Minnesota.— McLean *v.* Burbank, 11 Minn. 277.

New York.—Craighead *v.* Brooklyn City R. Co., 123 N. Y. 391, 25 N. E. 387, 33 N. Y. St. 620.

Ohio.— Lake Shore, etc., R. Co. *v.* Salzman, 52 Ohio St. 558, 40 N. E. 891, 49 Am. St. Rep. 745, 31 L. R. A. 261.

Washington.— Washington *v.* Spokane St. R. Co., 13 Wash. 9, 42 Pac. 628.

United States.— Behrens *v.* The Furnessia, 35 Fed. 798.

See 9 Cent. Dig. tit. "Carriers," § 1196.

It is not necessary to warn a passenger of danger involved in sitting with his arm outside of the window. Kentucky Cent. R. Co. *v.* Jacoby, 14 Ky. L. Rep. 763; Miller *v.* St. Louis R. Co., 5 Mo. App. 471.

Statutory signals required where a train approaches a station have no reference to the safety of the passenger in connection with the operation of the train. Alahama Great Southern R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403; Louisville, etc., R. Co. *v.* McKenna, 7 Lea (Tenn.) 313.

1. Chicago, etc., R. Co. *v.* Felton, 24 Ill. App. 376; Kreuzen *v.* Forty-Second St., etc., R. Co., 13 N. Y. Suppl. 588, 38 N. Y. St. 461.

The usual signals or warnings required in the operation of the train or car with reference to those not passengers will not render the carrier liable, however, for injury resulting to a passenger who is alarmed thereby. Chicago, etc., R. Co. *v.* Felton, 125 Ill. 458, 17 N. E. 765; Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613.

2. Chicago, etc., R. Co. *v.* Buckmaster, 74 Ill. App. 575; Van Winkle *v.* Brooklyn City R. Co., 46 Hun (N. Y.) 564.

3. Texas, etc., R. Co. *v.* Hughes, (Tex. Civ. App. 1897) 41 S. W. 821.

4. Schilling *v.* Winona, etc., R. Co., 66 Minn. 252, 68 N. W. 1083; Taylor *v.* Wabash R. Co., (Mo. 1896) 38 S. W. 304, 42 L. R. A. 410.

5. *California.*— Lynn *v.* Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710.

Connecticut.—Derwort *v.* Loomer, 21 Conn. 245.

Illinois.— Chicago, etc., R. Co. *v.* Dumser, 161 Ill. 190, 43 N. E. 698.

Minnesota.— Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638, 778; Brusch *v.* St. Paul City R. Co., 52 Minn. 512, 55 N. W. 57.

Missouri.—Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739.

Nebraska.— Pray *v.* Omaha St. R. Co., 44 Nebr. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

New Jersey.— Hansen *v.* North Jersey St. R. Co., 64 N. J. L. 686, 46 Atl. 718.

New York.— Graham *v.* Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917; Lehr *v.* Steinway, etc., R. Co., 8 N. Y. St. 813.

Pennsylvania.— Dennis *v.* Pittsburg, etc., R. Co., 165 Pa. St. 624, 36 Wkly. Notes Cas. (Pa.) 81, 31 Atl. 52.

Washington.—Graham *v.* McNeill, 20 Wash. 466, 55 Pac. 631, 72 Am. St. Rep. 121, 43 L. R. A. 300.

Wisconsin.— Ward *v.* Chicago, etc., R. Co., 102 Wis. 215, 78 N. W. 442.

United States.— Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536.

See 9 Cent. Dig. tit. "Carriers," § 1202.

6. Chicago, etc., R. Co. *v.* Carroll, 5 Ill. App. 201; Olivier *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431; Randall *v.* Frankford, etc., R. Co., 139 Pa. St. 464, 22 Atl. 639; Camden, etc., R. Co. *v.* Hoosey, 99 Pa. St. 492, 44 Am. Rep. 120.

Overcrowding does not render the carrier absolutely liable for robbery (Cobb *v.* Great Western R. Co., [1894] App. Cas. 419, 58 J. P. 636, 63 L. J. Q. B. 629, 71 L. T. Rep. N. S. 161, 6 Reports 203), nor for assault from a fellow passenger (Pounder *v.* North Eastern R. Co., [1892] 1 Q. B. 385, 56 J. P. 247, 61 L. J. Q. B. 136, 65 L. T. Rep. N. S. 679, 40 Wkly. Rep. 189).

7. *California.*— Redfield *v.* Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822.

Georgia.—Metropolitan St. R. Co. *v.* Moore, 83 Ga. 453, 10 S. E. 730.

Michigan.— Youmans *v.* Padden, 1 Mich. N. P. 127.

North Carolina.— Means *v.* Carolina Cent. R. Co., 122 N. C. 990, 29 S. E. 939, 124 N. C. 574, 32 S. E. 960, 45 L. R. A. 164.

Texas.— Gallagher *v.* Bowie, 66 Tex. 265, 17 S. W. 407.

(v) *Liability For Collisions.* Collisions between trains or cars, or between cars and passing vehicles on a street, being one of the most common forms of danger to which passengers are subjected in transportation, the carrier must exercise the highest degree of care and foresight in avoiding them.[8] This duty is especially imperative when a train or a car is approaching a railroad or a street-car crossing.[9] The fact that those operating the train or car on the crossing track are negligent will not relieve the carrier of the passenger from liability for injury to him if his servants might, in the exercise of the highest degree of care and precaution, have avoided the collision.[10]

(vi) *Dangerous Speed.* The rate of speed at which a train or car is run may be dangerous in view of the circumstances or conditions under which it is operated, or because the particular place is such as to require precautions in that respect.[11]

(vii) *Jerks and Jars.* It may constitute negligence that the train or car is so operated as that, by jerking or jarring, passengers are imperiled who are properly conducting themselves with reference to their transportation, even though they may be standing or moving for the purpose of getting off the conveyance.

8. *Illinois.*— West Chicago St. R. Co. *v.* Tuerk, 90 Ill. App. 105; Chicago City R. Co. *v.* Rood, 62 Ill. App. 550.

Iowa.— Quackenbush *v.* Chicago, etc., R. Co., 73 Iowa 458, 35 N. W. 523.

Kentucky.—Louisville, etc., R. Co. *v.* Long, 94 Ky. 410, 15 Ky. L. Rep. 199, 22 S. W. 747; Louisville, etc., R. Co. *v.* Page, 12 Ky. L. Rep. 988; Chesapeake, etc., R. Co. *v.* Harlan, 12 Ky. L. Rep. 506.

Massachusetts.— Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481.

Missouri.— Olsen *v.* Citizens' R. Co., 152 Mo. 426, 54 S. W. 470; Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

New York.— Fox *v.* Brooklyn City R. Co., 7 Misc. (N. Y.) 285, 27 N. Y. Suppl. 895, 58 N. Y. St. 540.

North Carolina.— Tillett *v.* Norfolk, etc., R. Co., 118 N. C. 1031, 24 S. E. 111.

South Carolina.— Steele *v.* Southern R. Co., 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756.

Texas.— Ft. Worth, etc., R. Co. *v.* Enos, (Tex. Civ. App. 1898) 50 S. W. 595.

Wisconsin.— Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

See 9 Cent. Dig. tit. "Carriers," § 1211.

9. West Chicago St. R. Co. *v.* Martin, 47 Ill. App. 610; Kellow *v.* Central Iowa R. Co., 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858; Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013; Kuttner *v.* Lindell R. Co., 29 Mo. App. 502; Connelly *v.* Manhattan R. Co., 142 N. Y. 377, 37 N. E. 462, 59 N. Y. St. 775; Schneider *v.* Second Ave. R. Co., 113 N. Y. 583, 30 N. E. 752, 44 N. Y. St. 680; Coddington *v.* Brooklyn Crosstown R. Co., 102 N. Y. 66, 5 N. E. 797; Zimmer *v.* Third Ave. R. Co., 36 N. Y. App. Div. 265, 55 N. Y. Suppl. 308.

10. *Missouri.*— Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013.

New York.— Zimmer *v.* Third Ave. R. Co., 36 N. Y. App. Div. 265, 55 N. Y. Suppl. 308; O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84, 36 N. Y. St. 934; Devlin *v.* Atlantic Ave. R. Co., 10 N. Y. Suppl. 848, 32 N. Y. St. 958.

Pennsylvania.— Goorin *v.* Allegheny Traction Co., 179 Pa. St. 327, 36 Atl. 207.

Texas.— Missouri, etc., R. Co. *v.* Vance, (Tex. Civ. App. 1897) 41 S. W. 167.

Washington.— Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

See 9 Cent. Dig. tit. "Carriers," § 1211.

The driver or conductor of a street-car approaching a railroad crossing should go forward to see that there is no danger in running his car over the crossing. Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 9 Ky. L. Rep. 725, 6 S. W. 441, 9 Am. St. Rep. 309; Cincinnati St. R. Co. *v.* Murray, 9 Ohio Cir. Ct. 291, 3 Ohio Dec. 72, 6 Ohio Cir. Dec. 413.

11. *Illinois.*— Indianapolis, etc., R. Co. *v.* Hall, 106 Ill. 371; Elgin City R. Co. *v.* Wilson, 56 Ill. App. 364.

Indiana.— Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

New York.— Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Daub *v.* Yonkers R. Co., 69 Hun (N. Y.) 138, 23 N. Y. Suppl. 268, 52 N. Y. St. 527; Schmidt *v.* Coney Island, etc., R. Co., 26 N. Y. App. Div. 391, 49 N. Y. Suppl. 777; Seeling *v.* Metropolitan St. R. Co., 18 Misc. (N. Y.) 383, 41 N. Y. Suppl. 656; Murray *v.* Brooklyn City R. Co., 7 N. Y. Suppl. 900, 27 N. Y. St. 280.

Pennsylvania.— Reber *v.* Pittsburg, etc., Traction Co., 179 Pa. St. 339, 36 Atl. 245, 57 Am. St. Rep. 599.

Virginia.— Danville St. Car Co. *v.* Payne, (Va. 1896) 24 S. E. 904.

See 9 Cent. Dig. tit. "Carriers," § 1204.

The mere fact that the train or car is operated at a high, or even unusually high, rate of speed will not in itself constitute negligence, unless under the circumstances it is dangerous, that is, improper in view of the practical exigencies of the transportation. Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; Hite *v.* Metro-

In this respect the conveyance must be operated with regard to the situation of the passengers as known to, or as it should be known to, the servants in charge.[12] But such jerks and jars as are necessarily incident to the use of the conveyance, and not the result of negligence, will not render the carrier liable for resulting injuries.[13] Passengers on freight trains assume the risk of such additional jerking and jarring as is incident to the operation of freight trains, as distinguished from passenger trains.[14]

(VIII) *AVOIDANCE OF COLLISIONS WITH ANIMALS, VEHICLES, OR OTHER OBSTACLES ON, OR NEAR, TRACK.* The highest degree of care is required in avoiding collision with obstacles on or near the track from which danger might be anticipated,[15] and this is the rule as to animals on, or which may be about to come upon, the track in front of a railway train.[16] In the operation of street-cars this

politan St. R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; Gidionsen *v.* Union Depot R. Co., 129 Mo. 392, 31 S. W. 800; Francisco *v.* Troy, etc., R. Co., 78 Hun (N. Y.) 13, 29 N. Y. Suppl. 247, 60 N. Y. St. 798; Chesapeake, etc., R. Co. *v.* Clowes, 93 Va. 189, 24 S. E. 833; Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

12. *Illinois.*—Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210; North Chicago St. R. Co. *v.* Schwartz, 82 Ill. App. 493; West Chicago St. R. Co. *v.* Craig, 57 Ill. App. 411.

Indiana.—Evansville St. R. Co. *v.* Meadows, 13 Ind. App. 155, 41 N. E. 398.

Massachusetts.— Pomeroy *v.* Boston, etc., R. Co., 172 Mass. 92, 51 N. E. 523.

Missouri.— Smith *v.* Chicago, etc., R. Co., 108 Mo. 243, 18 S. W. 971; Choate *v.* Missouri Pac. R. Co., 67 Mo. App. 105; Jones *v.* Missouri Pac. R. Co., 31 Mo. App. 614.

New Jersey.— Scott *v.* Bergen County Traction Co., 64 N. J. L. 362, 48 Atl. 1118; Consolidated Traction Co. *v.* Thalheimer, 59 N. J. L. 474, 37 Atl. 132.

New York.— Dochtermann *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 13, 52 N. Y. Suppl. 1051 [*affirmed* in 164 N. Y. 586, 58 N. E. 1087]; Bartholomew *v.* New York Cent., etc., R. Co., 102 N. Y. 716, 7 N. E. 623; Bradley *v.* Second Ave. R. Co., 34 N. Y. App. Div. 284, 54 N. Y. Suppl. 256; Hassen *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 71, 53 N. Y. Suppl. 1069.

Pennsylvania.— Dixey *v.* Philadelphia Traction Co., 180 Pa. St. 401, 36 Atl. 924.

Texas.— Claiborne *v.* Missouri, etc., R. Co., 21 Tex. Civ. App. 648, 53 S. W. 827, 57 S. W. 336.

See 9 Cent. Dig. tit. "Carriers," § 1205.

That it is not necessarily negligent for a passenger to stand or move from one part of the car to another while the car is in motion see *infra*, III, G, 4, a, (II).

13. *California.*— Yaeger *v.* Southern California R. Co., (Cal. 1897) 51 Pac. 190.

Massachusetts.— Byron *v.* Lynn, etc., R. Co., 177 Mass. 303, 58 N. E. 1015.

Missouri.— Bartley *v.* Metropolitan St. R. Co., 148 Mo. 124, 49 S. W. 840.

New Jersey.— North Hudson County R. Co. *v.* Rochat, (N. J. 1887) 10 Atl. 710; May *v.* North Hudson County R. Co., 49 N. J. L. 445, 9 Atl. 688.

Pennsylvania.— Barry *v.* Union Traction Co., 194 Pa. St. 576, 45 Atl. 321.

See 9 Cent. Dig. tit. "Carriers," § 1205.

It is not negligent to start a car while a passenger is standing up, unless the start is with an extraordinary jerk due to some defect in the track or machinery, or want of skill in the person operating the car or train. Pryor *v.* Metropolitan St. R. Co., 85 Mo. App. 367.

Notice of starting.— There is no necessity, in an ordinary case, for giving notice to the passengers that the car is about to be started, whether they are standing up or not. Haile *v.* Clayton, etc., Co., 61 N. J. L. 197, 38 Atl. 805; Armstrong *v.* Metropolitan St. R. Co., 36 N. Y. App. Div. 525, 55 N. Y. Suppl. 498; International, etc., R. Co. *v.* Copeland, 60 Tex. 325.

14. Georgia Cent. R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Crine *v.* East Tennessee, etc., R. Co., 84 Ga. 651, 11 S. E. 555; Moore *v.* Saginaw, etc., R. Co., 115 Mich. 103, 72 N. W. 1112; Wait *v.* Omaha, etc., R. Co., 165 Mo. 612, 65 S. W. 1028.

As to care required with reference to passengers on freight trains see *supra*, III, F, 1, c, (I).

Even in the operation of freight trains, the highest degree of care and skill should be exercised to avoid unnecessary and dangerous jerking and jarring. Macon, etc., R. Co. *v.* Moore, 108 Ga. 84, 33 S. E. 889; Missouri Pac. R. Co. *v.* Holcomb, 44 Kan. 332, 24 Pac. 467; Moore *v.* Saginaw, etc., R. Co., 115 Mich. 103, 72 N. W. 1112; Ft. Worth, etc., R. Co. *v.* Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61.

15. Highland Ave., etc., R. Co. *v.* Swope, 115 Ala. 287, 22 So. 174; Kird *v.* New Orleans, etc., R. Co., 105 La. 226, 29 So. 729. See also *supra*, III, F, 3, d, (VI).

16. St. Louis, etc., R. Co. *v.* Stewart, 68 Ark. 606, 61 S. W. 169, 82 Am. St. Rep. 311; Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597; Louisville, etc., R. Co. *v.* Ritter, 2 Ky. L. Rep. 385; Brown *v.* New York Cent. R. Co., 34 N. Y. 404; Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; Trinity Valley R. Co. *v.* Stewart, (Tex. Civ. App. 1901) 62 S. W. 1085.

A reasonable increase of danger to passengers is not justified, although for the purpose

high degree of care is required in avoidance of collision with vehicles, or other cars or temporary obstructions, on the track or so near to it that danger may be apprehended therefrom.[17]

4. Actions For Personal Injuries — a. Form of Action. While the action against a carrier for wrong resulting in personal injury is usually brought in tort the action may be in assumpsit for breach of the common-law duty to carry safely.[18]

b. Pleading — (I) *Allegations Showing Relation of Carrier and Passenger.* It is essential in the petition or complaint in an action founded on breach of duty by defendant as carrier of passengers that it be made to appear by proper averment that the relation of carrier and passenger existed at the time the injury was received,[19] and therefore there should be such allegation as to indicate that defendant was a carrier of passengers.[20] But if defendant is a railroad company, the fact that it is a carrier of passengers will be presumed.[21] It must also be alleged in some form that plaintiff was a passenger,[22] and it is usual to charge that the undertaking to carry plaintiff was for hire.[23] It is not necessary to allege that plaintiff had paid for his transportation, as the obligation to pay is inferred.[24]

(II) *Allegations of Negligence or Wrong.* While it is not sufficient to charge negligence of defendant in general terms as a conclusion of law, and it

of avoiding injury to stock. Sandham *v.* Chicago, etc., R. Co., 38 Iowa 88.

17. *Illinois.*— West Chicago St. R. Co. *v.* Marks, 82 Ill. App. 185.

Kansas.— Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754.

Minnesota.— Dahlberg *v.* Minneapolis St. R. Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585.

Missouri.—Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739.

New York.— O'Malley *v.* Metropolitan St. R. Co., 158 N. Y. 674, 52 N. E. 1125; Craighead *v.* Brooklyn City R. Co., 123 N. Y. 391, 25 N. E. 387, 33 N. Y. St. 620; Henderson *v.* Nassau Electric R. Co., 46 N. Y. App. Div. 280, 61 N. Y. Suppl. 690; Keegan *v.* Third Ave. R. Co., 34 N. Y. App. Div. 297, 54 N. Y. Suppl. 391; Wood *v.* Brooklyn City R. Co., 5 N. Y. App. Div. 492, 38 N. Y. Suppl. 1077.

Pennsylvania.— Bumbear *v.* United Traction Co., 198 Pa. St. 198, 47 Atl. 961.

United States.— New York, etc., R. Co. *v.* Baker, 98 Fed. 694, 39 C. C. A. 237; Potts *v.* Chicago City R. Co., 33 Fed. 610.

See 9 Cent. Dig. tit. "Carriers," § 1207.

That it is negligence with reference to the safety of the track to allow permanent obstructions so near to it as to imperil passengers see *supra*, III, F, 3, d, (VI).

As to contributory negligence of passenger in such cases see *infra*, III, G, 4, a, (III).

18. Kansas City Pac. R. Co. *v.* Kunkel, 17 Kan. 145; Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 619, 48 Am. Rep. 134; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115.

As to abatement of action for injuries to passenger see Abatement and Revival, III, A, 3, l, [1 Cyc. 59].

19. *Alabama.*— North Birmingham R. Co. *v.* Liddicoat, 99 Ala. 545, 13 So. 18.

Illinois.— Chicago, etc., R. Co. *v.* Jennings, 190 Ill. 478, 60 N. E. 818.

Mississippi.— Powell *v.* East Tennessee, etc., R. Co., (Miss. 1891) 8 So. 738.

New Jersey.— Breese *v.* Trenton Horse R. Co., 52 N. J. L. 250, 19 Atl. 204.

Washington.— Boyle *v.* Great Northern R. Co., 13 Wash. 383, 43 Pac. 344.

See 9 Cent. Dig. tit. "Carriers," § 1275.

20. Fuller *v.* Naugatuck R. Co., 21 Conn. 557; Chicago, etc., R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680.

21. Fuller *v.* Naugatuck R. Co., 21 Conn. 557; Atlantic, etc., R. Co. *v.* Laird, 58 Fed. 760, 15 U. S. App. 248, 7 C. C. A. 489. Even though the allegation is that plaintiff was a passenger on a freight train, it is not necessary to allege that defendant was a carrier of passengers by freight trains. Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

The duties incident to carriage of passengers will be inferred without being specially pleaded. Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322.

22. Barger *v.* North Chicago St. R. Co., 54 Ill. App. 284; Evansville, etc., R. Co. *v.* Darting, 6 Ind. App. 375, 33 N. E. 636; Louisville, etc., R. Co. *v.* Smith, 9 Ky. L. Rep. 404.

An averment that plaintiff boarded the car of defendant with the intention of becoming a passenger is not sufficient, since the law does not concern itself with mere intention, not accompanied by an outward act. Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268.

23. Roberts *v.* Johnson, 58 N. Y. 613.

24. Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 799.

The fact that plaintiff had not paid his fare at the time of the injury will not affect his right to recover, it not appearing that the fare had been demanded. Chicago, etc., R. Co. *v.* Lee, 92 Fed. 318, 34 C. C. A. 365. See also *supra*, III, B, 1, a, (II).

must be stated in what the negligence complained of consisted,[25] yet, on the other hand, the particular facts need not be averred, and in most states it is sufficient to say in a general way that defendant was negligent as to the machinery or appliances used, or in failing to construct or maintain the track in a safe condition, or in the operation of the train, conveyance, or the like.[26] An allegation of negligence of a servant is sufficient to charge the carrier with negligence, and it is not necessary to specifically charge that the acts of the servant were within the scope of his employment, if that fact appears in a general way from the allegation that the servant was acting for the carrier in the matter as to which negligence is alleged.[27] In actions for injuries received by a passenger by reason of assaults, or other wrongful acts on the part of an employee or fellow passenger, which the servants of the carrier should have prevented, the allegation may properly be of negligence and misconduct on the part of the carrier with respect thereto.[28] In any case it must be made to appear that the injury complained of was in some way the proximate result of the negligence or wrongful act on the part of the carrier or his servants.[29]

(III) *Negativing Contributory Negligence.* In some states it is neces-

25. Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874; South Chicago City R. Co. *v.* Moltrum, 26 Ind. App. 550, 60 N. E. 361; Conley *v.* Richmond, etc., R. Co., 109 N. C. 692, 14 S. E. 303; Devino *v.* Central Vermont R. Co., 63 Vt. 98, 20 Atl. 953.

Setting out special contract.— If the right of the passenger which is disregarded is one arising from special contract, the contract should be set out. International, etc., R. Co. *v.* Downing, 16 Tex. Civ. App. 643, 41 S. W. 190.

26. *Alabama.*— Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349; Highland Ave., etc., R. Co. *v.* Swope, 115 Ala. 287, 22 So. 174; Alabama Great Southern R. Co. *v.* Collier, 112 Ala. 681, 14 So. 327.

Delaware.—King *v.* Wilmington, etc., Electric R. Co., 1 Pennew. (Del.) 452, 41 Atl. 975.

Georgia.—Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

Illinois.— Lavis *v.* Wisconsin Cent. R. Co., 54 Ill. App. 636.

Indiana.— Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443; Cincinnati, etc., R. Co. *v.* Chester, 57 Ind. 297; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322; Cleveland, etc., R. Co. *v.* Stewart, 24 Ind. App. 374, 56 N. E. 917.

Kentucky.— Kentucky Cent. R. Co. *v.* McMurty, 3 Ky. L. Rep. 625.

Massachusetts.— Ware *v.* Gay, 11 Pick. (Mass.) 106.

Missouri.— Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Coudy *v.* St. Louis, etc., R. Co., 85 Mo. 79.

Nebraska.— Chicago, etc., R. Co. *v.* Young, 58 Nebr. 678, 79 N. W. 556.

New Jersey.— Breese *v.* Trenton Horse R. Co., 52 N. J. L. 250, 19 Atl. 204.

South Carolina.— Madden *v.* Port Royal, etc., R. Co., 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855.

Texas.— Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104.

Virginia.— Birckhead *v.* Chesapeake, etc., R. Co., 95 Va. 648, 29 S. E. 678.

West Virginia.— Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248.

United States.— Clark *v.* Chicago, etc., R. Co., 4 McCrary (U. S.) 360, 15 Fed. 588.

See 9 Cent. Dig. tit. "Carriers," § 1275½.

If particular acts of negligence are alleged, a general allegation of negligence is thereby superseded. Houston, etc., R. Co. *v.* Summers, (Tex. Civ. App. 1899) 49 S. W. 1106.

27. Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Evansville, etc., Steam Packet Co. *v.* Wildman, 63 Ind. 370; Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37; Wilburn *v.* St. Louis, etc., R. Co., 36 Mo. App. 203.

Where the negligent act charged to the servant is one not apparently within the scope of his employment, some allegation of authority is necessary. Savannah, etc., R. Co. *v.* Wall, 96 Ga. 328, 23 S. E. 197.

28. *Alabama.*—Lampkin *v.* Louisville, etc., R. Co., 106 Ala. 287, 17 So. 448.

Georgia.— Holly *v.* Atlanta St. R. Co., 61 Ga. 215, 34 Am. Rep. 97; Peeples *v.* Brunswick, etc., R. Co., 60 Ga. 281.

Indiana.— Smith *v.* Louisville, etc., R. Co., 124 Ind. 394, 24 N. E. 753.

Tennessee.—Knoxville Traction Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

Texas.— International, etc., R. Co. *v.* Williams, 20 Tex. Civ. App. 587, 50 S. W. 732.

Wisconsin.— Mace *v.* Reed, 89 Wis. 440, 62 N. W. 186.

See 9 Cent. Dig. tit. "Carriers," § 1273.

29. Reibel *v.* Cincinnati, etc., R. Co., 114 Ind. 476, 17 N. E. 107; Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Jarrell *v.* Charleston, etc., R. Co., 58 S. C. 491, 36 S. E. 910; International, etc., R. Co. *v.* Downing, 16 Tex. Civ. App. 643, 41 S. W. 190.

sary in the petition or complaint to expressly negative any fault or contributory negligence on the part of plaintiff.[30] But in most of the states it is held sufficient to so allege the facts as to indicate that the injury was the result of the fault or negligence of defendant, without expressly averring plaintiff's freedom from contribution thereto.[31]

c. Evidence — (i) *In General.* Plaintiff must prove the essential elements of his cause of action, such as that the relation of carrier and passenger existed, that there was a wrong on the part of the carrier or his servants in the discharge of the duties growing out of this relation, and that injury to plaintiff resulted therefrom which was proximate to the wrong done. For instance, plaintiff must prove that he was a passenger, and as such rightfully being transported at the time of the accident.[32]

(ii) *Happening of Accident as Presumptive Evidence of Negligence* — (a) *Statement of Rule.* The maxim, *res ipsa loquitur*, which is recognized to some extent in the proof of negligence in general, is of peculiar application in actions against carriers of passengers, and it is sometimes said that the happening of an accident to the passenger, at least where it appears to have occurred without fault on his part, gives rise to the presumption of negligence on the part of the carrier, so that the passenger makes out a *prima facie* right to recover for personal injuries received during transportation by proof that he was at the time of receiving the injury a passenger, that an accident occurred, and that his injury resulted therefrom.[33] But this is too broad a statement. The carrier is

30. Indiana, etc., R. Co. *v.* Burdge, 94 Ind. 46; Cincinnati, etc., R. Co. *v.* Peters, 80 Ind. 168; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Lake Erie, etc., R. Co. *v.* Arnold, 26 Ind. App. 190, 59 N. E. 394; Citizens' St. R. Co. *v.* Wagner, 24 Ind. App. 556, 57 N. E. 49; Wahl *v.* Shoulder, 14 Ind. App. 665, 43 N. E. 458; Evansville, etc., R. Co. *v.* Weikle, 6 Ind. App. 340, 33 N. E. 639; Baker *v.* Chicago, etc., R. Co., 95 Iowa 163, 63 N. W. 667; and, generally, NEGLIGENCE.

31. Illinois Cent. R. Co. *v.* Simmons, 38 Ill. 242; Cincinnati St. R. Co. *v.* Fullhright, 8 Ohio Dec. (Reprint) 361, 7 Cinc. L. Bul. 187; Potter *v.* Chicago, etc., R. Co., 20 Wis. 561, 91 Am. Dec. 444.

As to burden of proof with reference to contributory negligence see *infra*, III, G, 5.

Even where freedom from contributory negligence must be averred, it is not necessary to charge that the injury was without plaintiff's fault, if the allegations show that it was occasioned solely by the carelessness of defendant, or was without any negligence on the part of plaintiff. Michigan Southern, etc., R. Co. *v.* Lantz, 29 Ind. 528; Citizens' St. R. Co. *v.* Huffer, 26 Ind. App. 575, 60 N. E. 316.

32. Chicago, etc., R. Co. *v.* Huston, 95 Ill. App. 350; Louisville, etc., R. Co. *v.* Harmon, 23 Ky. L. Rep. 871, 64 S. W. 640; Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118; San Antonio, etc., R. Co. *v.* Lynch, (Tex. Civ. App. 1900) 55 S. W. 517.

A person on a train used for the transportation of passengers is, in the absence of any circumstances indicating a contrary relation, presumed to be a passenger. Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Buffett *v.* Troy, etc., R. Co., 40 N. Y. 168; Creed *v.* Pennsylvania R. Co., 86 Pa. St.. 139, 27 Am. Rep. 693; Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229. And this presumption is entertained with reference to passengers on freight trains carrying passengers, as well as with reference to regular passenger trains. Georgia Pac. R. Co. *v.* Love, 91 Ala. 432, 8 So. 714, 24 Am. St. Rep. 927; Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642; Southern R. Co. *v.* Dawson, 98 Va. 577, 36 S. E. 996.

33. *California.*— Bosqui *v.* Sutro R. Co., 131 Cal. 390, 63 Pac. 682.

Georgia.— Killian *v.* Georgia R., etc., Co., 97 Ga. 727, 25 S. E. 384; Central R. Co. *v.* Freeman, 75 Ga. 331.

Illinois.—New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809; Galena, etc., R. Co. *v.* Yarwood, 17 Ill. 509, 65 Am. Dec. 682; Calumet Electric St. R. Co. *v.* Jennings, 83 Ill. App. 612; Cramblet *v.* Chicago, etc., R. Co., 82 Ill. App. 542; Illinois Cent. R. Co. *v.* Beebe, 69 Ill. App. 363; Atchison, etc., R. Co. *v.* Elder, 50 Ill. App. 276.

Indiana.—Louisville, etc., R. Co. *v.* Snyder, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434; Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

Kentucky.— Louisville, etc., R. Co. *v.* Ritter, 85 Ky. 368, 9 Ky. L. Rep. 22, 3 S. W. 591.

Maryland.— Baltimore, etc., R. Co. *v.* Swann, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313; Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346, 59 Am. Rep. 156.

Nebraska.— Chicago, etc., R. Co. *v.* Wolfe, 61 Nebr. 502, 86 N. W. 441; Chicago, etc., R. Co. *v.* Zernecke, 59 Nebr. 689, 82 N. W. 26,

not an insurer against injuries to the passenger,[34] and there is no implied contract that the passenger shall be transported safely. His right of action for injuries is based on negligence, and the burden of proof of negligence is on plaintiff. Therefore the mere proof of an injury to the passenger in course of transportation, which, so far as it is shown, might have occurred by reason of other cause than the carrier's negligence, such as the act of the passenger himself, or without fault of any one, will not make out a *prima facie* case.[35] So also if it appears that the accident might have been the result of the wrongful acts or negligence of third persons,[36] or of causes not due to human agency,[37] a *prima facie* case is not made out. It is very generally said, however, that proof of the happening

55 L. R. A. 610; Lincoln St. R. Co. *v.* McClellan, 54 Nebr. 672, 74 N. W. 1074, 69 Am. St. Rep. 736.

New York.— Loudoun *v.* Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988; Hegeman *v.* Western R. Corp., 16 Barb. (N. Y.) 353; Holbrook *v.* Utica, etc., R. Co., 16 Barb. (N. Y.) 113.

North Carolina.— Lambeth *v.* North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508.

Pennsylvania.— Dampman *v.* Pennsylvania R. Co., 166 Pa. St. 520, 31 Atl. 244; Pittsburg, etc., R. Co. *v.* Pillow, 76 Pa. St. 510, 18 Am. Rep. 424; Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533.

South Carolina.— Cooper *v.* Georgia, etc., R. Co., 61 S. C. 345, 39 S. E. 543; Zemp *v.* Wilmington, etc., R. Co., 9 Rich. (S. C.) 84, 64 Am. Dec. 763.

United States.— New Jersey R., etc., Co. *v.* Pollard, 22 Wall. (U. S.) 341, 22 L. ed. 877; Whitney *v.* New York, etc., R. Co., 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615; Sprague *v.* Southern R. Co., 92 Fed. 59, 63 U. S. App. 711, 34 C. C. A. 207; Southern R. Co. *v.* Myers, 87 Fed. 149, 58 U. S. App. 131, 32 C. C. A. 19; Carter *v.* Kansas City Cable R. Co., 42 Fed. 37.

See 9 Cent. Dig. tit. "Carriers," § 1283.

34. See *supra*, III, F, 1, a.

35. *Connecticut.*—Donovan *v.* Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297.

District of Columbia.— Harbison *v.* Metropolitan R. Co., 9 App. Cas. (D. C.) 60.

Florida.— Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175.

Georgia.— Savannah, etc., R. Co. *v.* Flaherty, 110 Ga. 335, 35 S. E. 677; Murphy *v.* Atlanta, etc., R. Co., 89 Ga. 832, 15 S. E. 774; Mitchell *v.* Western, etc., R. Co., 30 Ga. 22.

Illinois.— Chicago City R. Co. *v.* Catlin, 70 Ill. App. 97.

Indiana.— Dresslar *v.* Citizens' St. R. Co., 19 Ind. App. 383, 47 N. E. 651.

Kentucky.— Kentucky Cent. R. Co. *v.* Gerreiss, 14 Ky. L. Rep. 397.

Minnesota.— Palmer *v.* Winona R., etc., Co., 78 Minn. 138, 80 N. W. 869.

Mississippi.— Chicago, etc., R. Co. *v.* Trotter, 60 Miss. 442.

Missouri.— Schaefer *v.* St. Louis, etc., R. Co., 128 Mo. 64, 30 S. W. 331; Yarnell *v.* Kansas City, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

Nebraska.— Chicago, etc., R. Co. *v.* Landauer, 39 Nebr. 803, 58 N. W. 434.

New York.— Wilder *v.* Metropolitan St. R. Co., 10 N. Y. App. Div. 364, 41 N. Y. Suppl. 931 [*affirmed* in 161 N. Y. 665, 57 N. E. 1128]; Deyo *v.* New York Cent. R. Co., 34 N. Y. 9, 88 Am. Dec. 418; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Holbrook *v.* Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Hoffman *v.* Third Ave. R. Co., 45 N. Y. App. Div. 586, 61 N. Y. Suppl. 590; Jonas *v.* Long Island R. Co., 21 Misc. (N. Y.) 306, 47 N. Y. Suppl. 149.

Pennsylvania.—Bernhardt *v.* Western Pennsylvania R. Co., 159 Pa. St. 360, 28 Atl. 140; Seddon *v.* Bickley, 153 Pa. St. 271, 25 Atl. 1104; Hayman *v.* Pennsylvania R. Co., 118 Pa. St. 508, 11 Atl. 815; Delaware, etc., R. Co. *v.* Napheys, 90 Pa. St. 135.

South Carolina.— Jarrell *v.* Charleston, etc., R. Co., 58 S. C. 491, 36 S. E. 910.

Tennessee.— East Tennessee, etc., R. Co. *v.* Mitchell, 11 Heisk. (Tenn.) 400.

Texas.— Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142; Southerland *v.* Texas, etc., R. Co., (Tex. Civ. App. 1897) 40 S. W. 193; Texas Pac. R. Co. *v.* Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994.

Washington.— Hawkins *v.* Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L. R. A. 808.

United States.— The Nederland, 14 Fed. 63.

See 9 Cent. Dig. tit. "Carriers," § 1283.

36. Chicago City R. Co. *v.* Rood, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478; Falke *v.* Third Ave. R. Co., 38 N. Y. App. Div. 49, 55 N. Y. Suppl. 984; Dennis *v.* Pittsburg, etc., R. Co., 165 Pa. St. 624, 36 Wkly. Notes Cas. (Pa.) 81, 31 Atl. 52; Fleming *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 130, 27 Atl. 858, 38 Am. St. Rep. 835, 22 L. R. A. 351; Pennsylvania R. Co. *v.* MacKinney, 124 Pa. St. 462, 17 Atl. 14, 10 Am. St. Rep. 601, 2 L. R. A. 820; Federal St., etc., R. Co. *v.* Gibson, 96 Pa. St. 83.

Where several agencies united have caused injury, all of them not being within the control of the carrier, the burden of proof is on plaintiff to show that negligence of defendant caused the injury. Elwood *v.* Chicago City R. Co., 90 Ill. App. 397.

37. St. Louis, etc., R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439; Rusk *v.* Manhattan R. Co., 46 N. Y. App. Div. 100, 61 N. Y. Suppl. 384; Spencer *v.* Chicago, etc., R. Co., 105 Wis. 311, 81 N. W. 407. See also Kay *v.* Metro-

of an accident which appears to have been due to defective road-bed, track, machinery, or appliances, or fault in the operation of the conveyance, makes out a *prima facie* case in an action by the passenger to recover for injuries resulting therefrom, and throws on the carrier the burden of proof to show his freedom from negligence, that is, from any want of the exercise of the high degree of care, skill, and foresight required of carriers of passengers in the prosecution of their business with respect to the defect or fault which caused the accident.[38] And this rule is particularly applicable where some defect in the track, machinery, or appliances is shown.[39]

(B) *Application of Rule.* In the application of this general rule it is held that the overturning of a stage-coach is *prima facie* evidence of the carrier's negligence.[40] Also that proof of the derailment of a train is *prima facie* evi-

politan St. R. Co., 163 N. Y. 447, 57 N. E. 751.

38. *Illinois.*— Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245.

Indiana.— Terre Haute, etc., R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434; Memphis, etc., Packet Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71; Kentucky, etc., Bridge Co. *v.* Quinkert, 2 Ind. App. 244, 28 N. E. 338.

Louisiana.— Patton *v.* Pickles, 50 La. Ann. 857, 24 So. 290; Kird *v.* New Orleans, etc., R. Co., 105 La. 226, 29 So. 729.

Maryland.— North Baltimore Pass. R. Co. *v.* Kaskell, 78 Md. 517, 28 Atl. 410; Baltimore, etc., R. Co. *v.* State, 63 Md. 135.

Minnesota.— McLean *v.* Burbank, 11 Minn. 277.

Mississippi.— Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.— Och *v.* Missouri, etc., R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666.

Nebraska.—Fremont, etc., R. Co. *v.* French, 48 Nebr. 638, 67 N. W. 472; Chicago, etc., R. Co. *v.* Hague, 48 Nebr. 97, 66 N. W. 1000.

New York.—Breen *v.* New York Cent., etc., R. Co., 109 N. Y. 297, 16 N. E. 60, 14 N. Y. St. 835, 4 Am. St. Rep. 450; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Holbrook *v.* Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Allen *v.* United Traction Co., 67 N. Y. App. Div. 363, 73 N. Y. Suppl. 737; Bartnik *v.* Erie R. Co., 36 N. Y. App. Div. 246, 55 N. Y. Suppl. 266; Walker *v.* Erie R. Co., 63 Barb. (N. Y.) 260; Wilkie *v.* Bolster, 3 E. D. Smith (N. Y.) 327; Hitchcock *v.* Brooklyn City R. Co., 8 N. Y. St. 848.

Oregon.— Budd *v.* United Carriage Co., 25 Oreg. 314, 35 Pac. 660, 27 L. R. A. 279.

Pennsylvania.— Clow *v.* Pittsburgh Traction Co., 158 Pa. St. 410, 27 Atl. 1004; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581.

Virginia.— Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. (Va.) 394; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384.

Washington.— Hawkins *v.* Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L. R. A. 808.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

United States.— Root *v.* Catskill Mountain R. Co., 33 Fed. 858.

England.— Carpue *v.* London, etc., R. Co., 5 Q. B. 747, D. & M. 608, 8 Jur. 464, 13 L. J. Q. B. 138, 3 R. & Can. Cas. 692, 48 E. C. L. 747; Great Western R. Co. *v.* Braid, 1 Moore P. C. N. S. 101, 15 Eng. Reprint 640.

See 9 Cent. Dig. tit. "Carriers," § 1283.

Where the evidence showed the happening of an accident which, according to the ordinary course of things, would not happen if proper care was exercised, the burden is on the carrier to relieve himself from that presumption. Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282. So where a passenger is injured by the falling of something in the car in which the passenger is being carried, the burden is on the railroad company to show that it was not responsible for the danger. Stoody *v.* Detroit, etc., R. Co., 124 Mich. 420, 83 N. W. 26.

39. *Arkansas.*— Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550.

Colorado.— Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Illinois.— Wabash Western R. Co. *v.* Friedman, 41 Ill. App. 270.

Indiana.—Cleveland, etc., R. Co. *v.* Newell, 75 Ind. 542.

Maryland.— Philadelphia, etc., R. Co. *v.* Anderson, 72 Md. 519, 20 Atl. 2, 20 Am. St. Rep. 483, 8 L. R. A. 673.

Pennsylvania.— Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229.

Where a passenger is injured by a defect in a foot-walk about the depot grounds, the burden is on plaintiff to show that the walk where the injury was received was under the control of the carrier. Quimby *v.* Boston, etc., R. Co., 69 Me. 340.

40. *California.*— Bush *v.* Barnett, 96 Cal. 202, 31 Pac. 2; Lawrence *v.* Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428; Boyce *v.* California Stage Co., 25 Cal. 460; Fairchild *v.* California Stage Co., 13 Cal. 599.

Colorado.— Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; Wall *v.* Livezay, 6 Colo. 465.

Indiana.— Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125.

Maryland.—Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Massachusetts.— Ware *v.* Gay, 11 Pick. (Mass.) 106.

dence of defect in track or machinery, or fault in the operation of the train.[41] Also, if the accident is the result of breaking of machinery or appliances, a *prima facie* case of negligence is made out.[42] The happening of a collision between a train or car and another train or car of the same carrier is *prima facie* proof of negligence.[43] As to injuries resulting from sudden movement of

Missouri.— Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 799.

Montana.— Ryan *v.* Gilmer, 2 Mont. 517, 4 Ky. L. Rep. 151, 25 Am. Rep. 744.

Virginia.—Farish *v.* Reigle, 11 Gratt. (Va.) 697, 62 Am. Rep. 666.

United States.— Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115; McKinney *v.* Neil, 1 McLean (U. S.) 540, 16 Fed. Cas. No. 8,865.

See 9 Cent. Dig. tit. "Carriers," § 1294.

41. *Alabama.*—Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363.

Arkansas.—St. Louis, etc., R. Co. *v.* Mitchell, 57 Ark. 418, 21 S. W. 883; Eureka Springs R. Co. *v.* Timmons, 51 Ark. 459, 11 S. W. 690; George *v.* St. Louis, etc., R. Co., 34 Ark. 613.

California.— Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

Colorado.— Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1; Rio Grande Western R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

Georgia.—Central R. Co. *v.* Sanders, 73 Ga. 513; Yonge *v.* Kinney, 28 Ga. 111.

Illinois.— Peoria, etc., R. Co. *v.* Reynolds, 88 Ill. 418; Heazle *v.* Indianapolis, etc., R. Co., 76 Ill. 501; Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138.

Indiana.— Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Pittsburgh, etc., R. Co. *v.* Williams, 74 Ind. 462; Chicago, etc., R. Co. *v.* Grimm, 25 Ind. App. 494, 57 N. E. 640.

Iowa.— Pershing *v.* Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488.

Kansas.— Meador *v.* Missouri Pac. R. Co., (Kan. 1900) 61 Pac. 442; Atchison, etc., R. Co. *v.* Elder, 57 Kan. 312, 46 Pac. 310; Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45; Union Pac. R. Co. *v.* Hand, 7 Kan. 380.

Kentucky.—Louisville, etc., R. Co. *v.* Smith, 2 Duv. (Ky.) 556; Felton *v.* Holbrook, 21 Ky. L. Rep. 1824, 56 S. W. 506; Louisville, etc., R. Co. *v.* Ritter, 2 Ky. L. Rep. 385.

Maine.— Stevens *v.* European, etc., R. Co., 66 Me. 74.

Maryland.— Baltimore, etc., R. Co. *v.* Worthington, 21 Md. 275, 83 Am. Dec. 578.

Missouri.—Furnish *v.* Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; Furnish *v.* Missouri Pac. R. Co., 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; Hipsley *v.* Kansas City, etc., R. Co., 88 Mo. 348; Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654.

Nebraska.— Spellman *v.* Lincoln Rapid Transit Co., 36 Nebr. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316.

New Jersey.— Bergen County Traction Co. *v.* Demarest, 62 N. J. L. 755, 42 Atl. 729, 72 Am. St. Rep. 683.

New York.— Webster *v.* Elmira, etc., R. Co., 85 Hun (N. Y.) 167, 32 N. Y. Suppl. 590, 65 N. Y. St. 628; Murphy *v.* Coney Island, etc., R. Co., 36 Hun (N. Y.) 199; Hegeman *v.* Western R. Corp., 16 Barb. (N. Y.) 353; Brignoli *v.* Chicago, etc., R. Co., 4 Daly (N. Y.) 182.

Ohio.— Cincinnati St. R. Co. *v.* Kelsey, 9 Ohio Cir. Ct. 170.

Pennsylvania.— Reading City Pass. R. Co. *v.* Eckert, (Pa. 1886) 4 Atl. 530.

Tennessee.— Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202.

Texas.— Texas, etc., R. Co. *v.* Suggs, 62 Tex. 323; Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

England.— Flannery *v.* Waterford, etc., R. Co., Ir. R. 11 C. L. 30.

See 9 Cent. Dig. tit. "Carriers," § 1288.

Derailment of street-car.— Negligence is not to be imputed to a street-car company from the mere fact that the car left the track. Hastings *v.* Central Crosstown R. Co., 7 N. Y. App. Div. 312, 40 N. Y. Suppl. 93.

42. Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613; Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410; Sharp *v.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93; Yerkee *v.* Keokuk Northern Line Packet Co., 7 Mo. App. 265; Gilmore *v.* Brooklyn Heights R. Co., 6 N. Y. App. Div. 117, 39 N. Y. Suppl. 417; Wynn *v.* Central Park, etc., R. Co., 14 N. Y. Suppl. 172, 38 N. Y. St. 181; Miller *v.* Ocean Steamship Co., 6 N. Y. St. 664.

The explosion of a boiler in a steamboat is *prima facie* evidence of negligence. Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282.

Injury from cinder.— Where a passenger on a railroad train is injured by a red hot cinder from the engine, the burden of proof is on the railroad company to show that the engine was properly equipped. Texas Midland R. Co. *v.* Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797.

43. *California.*— Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747.

Illinois.— North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899.

Indiana.— Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869.

Kentucky.—Baltimore, etc., R. Co. *v.* Hausman, 21 Ky. L. Rep. 1264, 54 S. W. 841.

Minnesota.— Smith *v.* St Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

Mississippi.— New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

the train or car, resulting in a jerk or jar, it has been said that the fact itself is *prima facie* evidence of negligence, where it is extraordinary in its nature.[44] But on the other hand it is said that where there is no injury to the car, and there is no evidence that it was the result of defect in the machinery, no presumption of negligence from evidence of a jar or jerk arises.[45] An accident caused by the washing away of an embankment, the breaking down of a bridge, or other casualty connected with the maintaining of the roadway is *prima facie* evidence of negligence.[46]

(III) *Carrier's Freedom From Negligence.* Where plaintiff, by proof of the happening of an accident, presumptively due to the negligence of the carrier, has made out a case against him, the carrier may show, as a sufficient defense, that in all matters which, under the evidence might have been connected with the accident, he has exercised that high degree of care, skill, and foresight which is required of him by the nature of the business.[47]

5. Damages — a. In General. As in other cases of actionable negligence, the wrongful act or omission constituting negligence must have been the direct and

Montana.— Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

New York.— Kay *v.* Metropolitan St. R. Co., 29 N. Y. App. Div. 466, 51 N. Y. Suppl. 724.

Ohio.— Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 38 Am. Rep. 597.

Pennsylvania.— Madara *v.* Shamokin, etc., Electric R. Co., 192 Pa. St. 542, 43 Atl. 995.

United States.— Goble *v.* Delaware, etc., R. Co., 10 Fed. Cas. No. 5,488*a*, 3 N. J. L. J. 176.

England.— Ayles *v.* South Eastern R. Co., L. R. 3 Exch. 146, 37 L. J. Exch. 104, 18 L. T. Rep. N. S. 332, 16 Wkly. Rep. 709; Skinner *v.* London, etc., R. Co., 5 Exch. 299, 15 Jur. 299; Birkett *v.* Whitehaven Junction R. Co., 4 H. & M. 730, 28 L. J. Exch. 348.

See 9 Cent. Dig. tit. "Carriers," § 1287.

Collision between street-car and bridge.— The rule applies to a collision between a street-car and a bridge. Wilkerson *v.* Corrigan Consol. St. R. Co., 26 Mo. App. 144.

Collision at crossing.— The rule has also been applied in case of collision between a train or car of one line, and that of another line at a crossing. West Chicago St. R. Co. *v.* Martin, 47 Ill. App. 610; Chicago City R. Co. *v.* Engel, 35 Ill. App. 490; Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 9 Ky. L. Rep. 725, 6 S. W. 441, 9 Am. St. Rep. 309; Central Pass. R. Co. *v.* Bishop, 9 Ky. L. Rep. 348; Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013.

Collision between street-car and vehicle.— It is not error to refuse to apply the rule to a collision between a street-car and a wagon in the street. Smith *v.* St. Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Shay *v.* Camden, etc., R. Co., 66 N. J. L. 334, 49 Atl. 547.

Proof of a collision between a train and an animal on the railroad track raises a presumption of negligence on the part of the company. Louisville, etc., R. Co. *v.* Hendricks, 128 Ind. 462, 28 N. E. 58; Sullivan *v.* Philadelphia, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254; Patchell *v.* Irish North Western R. Co., Ir. R. 6 C. L. 117.

44. *Alabama.*— Birmingham Union R. Co. *v.* Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748.

Illinois.— Lavis *v.* Wisconsin Cent. R. Co., 54 Ill. App. 636.

Missouri.— Coudy *v.* St. Louis, etc., R. Co., 85 Mo. 79; Dougherty *v.* Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239.

New Jersey.— Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845.

New York.— Martin *v.* Second Ave. R. Co., 3 N. Y. App. Div. 448, 38 N. Y. Suppl. 220, 73 N. Y. St. 714.

See 9 Cent. Dig. tit. "Carriers," § 1286.

45. Chicago, etc., R. Co. *v.* Bingenheimer, 14 Ill. App. 125; Tuley *v.* Chicago, etc., R. Co., 41 Mo. App. 432; Herstine *v.* Lehigh Valley R. Co., 151 Pa. St. 244, 25 Atl. 104; Stager *v.* Ridge Ave. Pass. R. Co., 119 Pa. St. 70, 12 Atl. 821; Saunders *v.* Chicago, etc., R. Co., 6 S. D. 40, 60 N. W. 148.

46. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442; Bedford, etc., R. Co. *v.* Rainbolt, 99 Ind. 551; Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256; McCafferty *v.* Pennsylvania R. Co., 193 Pa. St. 339, 44 Atl. 435, 74 Am. St. Rep. 690; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787.

47. *Alabama.*— Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363.

Indiana.—Louisville, etc., R. Co. *v.* Pedigo, 108 Ind. 481, 8 N. E. 627; Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Pittsburgh, etc., R. Co. *v.* Williams, 74 Ind. 462.

Kansas.— Atchison, etc., R. Co. *v.* Elder, 57 Kan. 312, 46 Pac. 310.

Missouri.— Sharp *v.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93.

Nebraska.— Spellman *v.* Lincoln Rapid Transit Co., 36 Nebr. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316.

Pennsylvania.—O'Connor *v.* Scranton Traction Co., 180 Pa. St. 444, 36 Atl. 866.

Texas.—Mexican Cent. R. Co. *v.* Lauricella,

proximate cause of the injury,[48] and if there were other possible causes, the question is whether the negligent construction, maintenance or operation of the premises, road-bed, machinery, or appliances was the efficient and dominant cause producing the injury.[49] If the carrier or his servants were negligent in any of these respects, and the injury resulted mediately or immediately from such negligence, then the carrier is liable, although there may have been an intervening accidental cause not chargeable to the carrier's fault, the question being one for the jury.[50] But if, on the other hand, though the carrier is negligent, there is an intervening independent cause for the injury, not the result of the carrier's negligence, the carrier is not liable.[51] Thus, where the passenger is not given reasonable opportunity to alight, but is carried past his destination or the proper place for alighting, the carrier will not be liable for injury suffered by the passenger after alighting without injury, if the subsequent injury is not such as could have been anticipated as the result of being carried beyond the place for alighting, and is not in itself due to any fault of the carrier.[52] It is not necessary, however, that

87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

As to what constitutes due care see *supra*, III, F, 1.

To sustain his defense the carrier is not required to furnish a satisfactory explanation of the cause of the accident. It is sufficient for him to show that in no respect was there any negligence in connection therewith. Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Tuttle *v.* Chicago, etc., R. Co., 48 Iowa 236; Hammack *v.* White, 11 C. B. N. S. 588, 8 Jur. N. S. 796, 31 L. J. C. P. 129, 5 L. T. Rep. N. S. 676, 10 Wkly. Rep. 230, 103 E. C. L. 588.

48. Doolittle *v.* Southern R. Co., 62 S. C. 130, 40 S. E. 133.

49. Union Pac. R. Co. *v.* Evans, 52 Nebr. 50, 71 N. W. 1062.

50. *Alabama.*— Alabama Great Southern R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337.

California.— Johnsen *v.* Oakland, etc., R. Co., 127 Cal. 608, 60 Pac. 170.

Colorado.— Denver, etc., R. Co. *v.* Bedell, 11 Colo. App. 139, 54 Pac. 280.

Delaware.— Flinn *v.* Philadelphia, etc., R. Co., 1 Houst. (Del.) 469.

New Hampshire.—Boothby *v.* Grand Trunk R. Co., 66 N. H. 342, 34 Atl. 157.

New Jersey.— Newark, etc., R. Co. *v.* McCann, 58 N. J. L. 642, 34 Atl. 1052, 33 L. R. A. 127.

New York.— Smith *v.* British, etc., Royal Mail Steam Packet Co., 86 N. Y. 408; Macer *v.* Third Ave. R. Co., 47 N. Y. Super. Ct. 461.

If there is negligence in failing to exercise proper care to enable the passenger to alight safely, and he receives an injury in connection with alighting, the carrier will be liable, although the danger in doing so is increased by some physical infirmity or disability under which the passenger was laboring. Kral *v.* Burlington, etc., R. Co., 71 Minn. 422, 74 N. W. 166.

If the accident and consequent injury are such as might have been anticipated in the exercise of the high degree of care and foresight required of the carrier, as a consequence of negligence, the carrier is liable therefor. Chicago, etc., R. Co. *v.* Grimm, 25 Ind. App. 494, 57 N. E. 640; Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. Rep. 935, 33 L. R. A. 654.

51. *Colorado.*— Denver, etc., R. Co. *v.* Pilgrim, 9 Colo. App. 86, 47 Pac. 657.

Louisiana.—Cronan *v.* Crescent City R. Co., 49 La. Ann. 65, 21 So. 163; De Mahy *v.* Morgan's Louisiana, etc., R., etc., Co., 45 La. Ann. 1329, 14 So. 61.

Michigan.— Vandercook *v.* Detroit, etc., R. Co., 125 Mich. 459, 84 N. W. 616.

Mississippi.— Royston *v.* Illinois Cent. R. Co., 67 Miss. 376, 7 So. 320.

Pennsylvania.— Kurfess *v.* Harris, 195 Pa. St. 385, 46 Atl. 2.

Texas.— St. Louis, etc., R. Co. *v.* Caseday, (Tex. Civ. App. 1897) 40 S. W. 198; Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493.

Wisconsin.—Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. Rep. 935, 33 L. R. A. 654.

52. *California.*—Benson *v.* Central Pac. R. Co., 98 Cal. 45, 32 Pac. 809, 33 Pac. 206.

Georgia.— Savannah, etc., R. Co. *v.* Wall, 96 Ga. 328, 23 S. E. 197.

Indiana.—Louisville, etc., R. Co. *v.* Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

Kansas.— Chicago, etc., R. Co. *v.* Bell, 1 Kan. App. 71, 41 Pac. 209.

Maine.— Conway *v.* Lewiston, etc., Horse R. Co., 90 Me. 199, 38 Atl. 110.

Massachusetts.— White *v.* West End St. R. Co., 165 Mass. 522, 43 N. E. 298.

Michigan.— Lewis *v.* Flint, etc., R. Co., 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790.

Missouri.— Sira *v.* Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386; Henry *v.* St. Louis, etc., R. Co., 76 Mo. 288, 43 Am. Rep. 762.

New York.—Minor *v.* Lehigh Valley R. Co., 21 N. Y. App. Div. 307, 47 N. Y. Suppl. 307.

Pennsylvania.— South Side Pass. R. Co. *v.* Trich, 117 Pa. St. 390, 11 Atl. 627, 2 Am. St. Rep. 672.

Texas.— International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632; Texas, etc., R. Co. *v.* Beckworth, 11 Tex. Civ. App. 153, 32 S. W. 347; Texas, etc.,

the negligence of the carrier be the sole cause of the resulting injury. Even though there is an accompanying cause not chargeable to the carrier, yet if the carrier's negligence contributes to the injury he is liable therefor.[53] Therefore it is immaterial that in connection with the accident causing injury to the passenger there is negligence or wrongful act of a third person, such as the negligence of those managing a train, car, or vehicle with which the train or car in which the passenger is riding collides, or the like. It is enough that the negligence of the carrier contributes in some way or concurs with the negligence of third persons in causing the accident complained of.[54] In such cases the carrier and the third person whose negligence has concurred with that of the carrier in causing the injury may be sued jointly or separately therefor.[55] Where physical or mental suffering follows as a natural consequence on the injury received by the passenger from the carrier's negligence, recovery therefor may be had in an action against the carrier.[56]

b. Exemplary Damages. While it has been sometimes said that a corporation, even though charged with the responsibility of a carrier of passengers, is not liable in exemplary damages for the wilful, malicious, or grossly negligent acts of its servants, not ratified by it,[57] or that it is liable in such damages only

R. Co. *v.* Woods, 8 Tex. Civ. App. 462, 28 S. W. 416.

Virginia.— Jammison *v.* Chesapeake, etc., R. Co., 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813.

England.— Hobbs *v.* London, etc., R. Co., L. R. 10 Q. B. 111, 44 L. J. Q. B. 49, 32 L. T. Rep. N. S. 352, 23 Wkly. Rep. 520.

If the place or circumstances are not proper for the alighting of the passenger, the carrier will be liable for injuries naturally resulting from his getting off. Griffith *v.* Missouri Pac. R. Co., 98 Mo. 168, 11 S. W. 559; Evans *v.* St. Louis, etc., R. Co., 11 Mo. App. 463.

53. Ephland *v.* Missouri Pac. R. Co., 57 Mo. App. 147; Sheridan *v.* Brooklyn City, etc., R. Co., 36 N. Y. 39, 1 Transcr. App. (N. Y.) 49, 34 How. Pr. (N. Y.) 217, 93 Am. Dec. 490; McCabe *v.* Manhattan R. Co., 3 Silv. Supreme (N. Y.) 324, 6 N. Y. Suppl. 418, 25 N. Y. St. 631; Bonner *v.* Wingate, 78 Tex. 333, 14 S. W. 790.

54. *Illinois.*— Chicago, etc., R. Co. *v.* McDonnell, 91 Ill. App. 488.

Indiana.— Louisville, etc., R. Co. *v.* Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193.

Kansas.— Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6.

Massachusetts.— Eaton *v.* Boston, etc., R. Co., 11 Allen (Mass.) 500, 87 Am. Dec. 730.

Nebraska.— St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887.

New York.— Spooner *v.* Brooklyn City R. Co., 54 N. Y. 230, 13 Am. Rep. 570; Card *v.* New York, etc., R. Co., 50 Barb. (N. Y.) 39.

Washington.—Croft *v.* Northwestern Steamship Co., 20 Wash. 175, 55 Pac. 42; Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

United States.—Washington, etc., R. Co. *v.* Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. ed. 1101.

If the negligence of the carrier does not contribute to the accident, though he has been in some sense negligent, the third person alone will be responsible. Lockhart *v.* Lichtenthaler, 46 Pa. St. 151.

55. *California.*— Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165.

District of Columbia.— Washington, etc., R. Co. *v.* Hickey, 12 App. Cas. (D. C.) 269.

Illinois.— West Chicago St. R. Co. *v.* Piper, 165 Ill. 325, 46 N. E. 186; Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791.

Indiana.— Lucas *v.* Pennsylvania Co., 120 Ind. 205, 21 N. E. 972, 16 Am. St. Rep. 323.

Kentucky.— Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. (Ky.) 119.

Louisiana.— McDonald *v.* Louisville, etc., R. Co., 47 La. Ann. 1440, 17 So. 873.

Massachusetts.— White *v.* Fitchburg R. Co., 136 Mass. 321.

Michigan.— Cuddy *v.* Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178.

Minnesota.— Flaherty *v.* Minneapolis R. Co., 39 Minn. 328, 40 N. W. 160, 12 Am. St. Rep. 654, 1 L. R. A. 680.

Imputing negligence.— The negligence of the passenger carrier will not be imputed to him so as to defeat his action against the other wrong-doer. Louisville, etc., R. Co. *v.* Case, 9 Bush (Ky.) 728. And see Little *v.* Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. ed. 652.

56. Rosted *v.* Great Northern R. Co., 76 Minn. 123, 78 N. W. 971; Keegan *v.* Minneapolis, etc., R. Co., 76 Minn. 90, 78 N. W. 965; Purcell *v.* St. Paul City R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Bishop *v.* St. Paul City R. Co., 48 Minn. 26, 50 N. W. 927; Buckbee *v.* Third Ave. R. Co., 64 N. Y. App. Div. 360, 72 N. Y. Suppl. 217; Anderson *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 266, 52 N. Y. Suppl. 984; Texas, etc., R. Co. *v.* Gott, 20 Tex. Civ. App. 335, 50 S. W. 193; Haile *v.* Texas, etc., R. Co., 60 Fed. 557, 23 U. S. App. 80, 9 C. C. A. 134, 23 L. R. A. 774.

57. Wardrobe *v.* California Stage Co., 7 Cal. 118, 68 Am. Dec. 231; Ackerson *v.* Erie

where there is wilful misconduct or reckless indifference on the part of the servants affecting the safety of the traveling public in general, and not merely the safety of a particular passenger,[58] yet, by the great weight of authority, the carrier, even though a corporation, is liable for injury to a passenger due to gross neglect of duty on the part of its servants,[59] or for the consequences of their wanton and reckless conduct.[60] Thus, the carrier may be liable in exemplary damages for wanton misconduct or gross negligence of his servants in assaulting a passenger, or failing to protect him from assault by fellow passengers or others.[61]

G. Passenger's Contributory Negligence — 1. Will Defeat Recovery — a. General Rule; Ordinary Care. The rule already stated[62] that the carrier will be liable for injuries to which his negligence contributes, although it is not the sole cause, has an exception in the well-established rule applicable in other branches of the law of negligence, that the injured person cannot recover if his own negligence has in any way contributed to his injury, even though there has also been negligence on the part of the carrier. Therefore, in an action by a passenger against the carrier for personal injuries, contributory negligence of the passenger in respect to the injury, and proximately connected with it, will defeat recovery.[63] In a few states the doctrine of comparative negligence as between

R. Co., 32 N. J. L. 254; Mace *v.* Reed, 89 Wis. 440, 62 N. W. 186; Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 13 S. Ct. 261, 37 L. ed. 97. And see *supra*, III, C, 5, d, (v).

58. Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. ed. 374; Stockton *v.* Bishop, 4 How. (U. S.) 155, 11 L. ed. 918.

59. *Alabama.*— Kansas City, etc., R. Co. *v.* Phillips, 98 Ala. 159, 13 So. 65; Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442; Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15.

Colorado.— Wall *v.* Cameron, 6 Colo. 275.

District of Columbia.— Flannery *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 111.

Kentucky.—Louisville, etc., R. Co. *v.* Kingman, 18 Ky. L. Rep. 82, 35 S. W. 264.

Maine.— Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

New Hampshire.—Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287.

Texas.— Texas Trunk R. Co. *v.* Johnson, 75 Tex. 158, 12 S. W. 482; Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165, 10 S. W. 408; Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325.

See 9 Cent. Dig. tit. "Carriers," § 1341.

If a stage-coach proprietor employs as driver one known to be careless, or a drunkard, he will be liable in exemplary damages for injuries to a passenger resulting from the negligence or misconduct of such driver. Frink *v.* Coe, 4 Greene (Iowa) 555, 61 Am. Dec. 141; Sawyer *v.* Sauer, 10 Kan. 466.

60. *Alabama.*— Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

Kentucky.— Kentucky Cent. R. Co. *v.* Dills, 4 Bush (Ky.) 593; Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367; Louisville, etc., R. Co. *v.* Ferrell, 7 Ky. L. Rep. 607.

Mississippi.— Memphis, etc., R. Co. *v.* Green, 52 Miss. 779.

Missouri.— Dorsey *v.* Atchison, etc., R. Co., 83 Mo. App. 528.

South Carolina.— Appleby *v.* South Carolina, etc., R. Co., 60 S. C. 48, 38 S. E. 237.

West Virginia.— Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

See 9 Cent. Dig. tit. "Carriers," § 1341.

61. *Georgia.*— East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778; Savannah St., etc., R. Co. *v.* Bryan, 86 Ga. 312, 12 S. E. 307, 22 Am. St. Rep. 464.

Iowa.— McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kentucky.— Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 9 Ky. L. Rep. 7, 3 S. W. 530, 7 Am. St. Rep. 600; Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451; Lexington R. Co. *v.* Cozine, 23 Ky. L. Rep. 1137, 64 S. W. 848.

Maine.— Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Maryland.— Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220.

Mississippi.— New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689.

Missouri.— Randolph *v.* Hannibal, etc., R. Co., 18 Mo. App. 609.

Tennessee.— R. R. Springer Transp. Co. *v.* Smith, 16 Lea (Tenn.) 498, 1 S. W. 280.

Texas.— Galveston, etc., R. Co. *v.* McMonigal, (Tex. Civ. App. 1893) 25 S. W. 341.

See 9 Cent. Dig. tit. "Carriers," § 1342.

Mitigation of damages.—Evidence of plaintiff's conduct which reasonably tended to provoke the assault may be shown in mitigation. Galveston, etc., R. Co. *v.* La Prelle, (Tex. Civ. App. 1901) 65 S. W. 488. And see *supra*, III, F, 2, c, (II).

Assault by master of vessel.— In McGuire *v.* The Golden Gate, 1 McAll. (U. S.) 104, 16 Fed. Cas. No. 8,815, it was held that a ship was liable only for actual damages for an assault upon a passenger by the master.

62. See *supra*, III, F, 5, a.

63. *Alabama.*— South, etc., Alabama R. Co. *v.* Schaufler, 75 Ala. 136.

plaintiff and defendant is recognized, and it is said that negligence of the passenger which is only slight as compared with that of the carrier will not defeat recovery.[64] But these cases are exceptional, and the inquiry is usually directed not to any comparison between the negligence of the passenger and that of the carrier with respect to the injury, but solely to the question whether the passenger has exercised ordinary care. If it appears that there has been a want of such care on the passenger's part, contributing to the injury suffered, he cannot recover.[65]

b. Persons Under Disability — (1) *In General.* What will constitute failure to exercise ordinary care on the part of the passenger may depend, however, on the mental and physical capacity of the passenger himself, and acts which might be negligent in a normal person may not be contributory negligence in view of the passenger's disability, such as will defeat his recovery for injury where the carrier has been negligent.[66]

Florida.— Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175.

Illinois.— Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323; Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373.

Kentucky.—Kentucky Cent. R. Co. *v.* Dills, 4 Bush (Ky.) 593.

Louisiana.— Woods *v.* Jones, 34 La. Ann. 1086.

Maryland.— Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706.

Mississippi.— Illinois Cent. R. Co. *v.* Trail, (Miss. 1899) 25 So. 863.

New Jersey.— Harper *v.* Erie R. Co., 32 N. J. L. 88.

Pennsylvania.— Pennsylvania R. Co. *v.* Zebe, 33 Pa. St. 318; Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323.

South Carolina.— Renneker *v.* South Carolina R. Co., 20 S. C. 219.

Texas.— Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573.

Washington.—Graham *v.* McNeill, 20 Wash. 466, 55 Pac. 631, 72 Am. St. Rep. 121, 43 L. R. A. 300.

West Virginia.— Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

United States.— Seymour *v.* Chicago, etc., R. Co., 3 Biss. (U. S.) 43, 21 Fed. Cas. No. 12,685, 4 Am. L. T. Rep. (U. S. Cts.) 134.

See 9 Cent. Dig. tit. "Carriers," § 1346.

64. Augusta, etc., R. Co. *v.* McElmurry, 24 Ga. 75; Chicago City R. Co. *v.* Dinsmore, 162 Ill. 658, 44 N. E. 887; Chicago, etc., R. Co. *v.* Bonifield, 104 Ill. 223; Chicago, etc., R. Co *v.* Pondrom, 51 Ill. 333, 2 Am. Rep. 306; Sawyer *v.* Sauer, 10 Kan. 466.

Conflict of laws.— The law of the state where the injury was received will govern in the state where the action is brought. Louisville, etc., R. Co. *v.* Harmon, 23 Ky. L Rep. 871, 64 S. W. 640.

65. *Georgia.*— Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

Illinois.— Keokuk Northern Line Packet Co. *v.* True, 88 Ill. 608; Chicago, etc., R. Co. *v.* Weir, 91 Ill. App. 420.

Indiana.— Citizens' St. R. Co. *v.* Merl, 26 Ind. App. 575, 59 N. E. 491.

Iowa.— Waterbury *v.* Chicago. etc., R. Co., 104 Iowa 32, 73 N. W. 341.

Kentucky.— Bailey *v.* Cincinnati, etc., R. Co., 14 Ky. L. Rep. 226, 20 S. W. 198.

Minnesota.— Smith *v.* St. Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

Missouri.— Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268; Talbot *v.* Chicago, etc., R. Co., 72 Mo. App. 291.

Pennsylvania.— Coburn *v.* Philadelphia, etc., R. Co., 198 Pa. St. 436, 48 Atl. 265.

South Carolina.— Doolittle *v.* Southern R. Co., 62 S. C. 130, 40 S. E. 133.

Texas.— Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905.

Wisconsin.—Conroy *v.* Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419.

See 9 Cent. Dig. tit. "Carriers," § 1348.

The negligence that will defeat the passenger's recovery need not amount to rashness. Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

Freight trains.— The dangers incident to transportation on freight trains call for a correspondingly high degree of care on the part of the passenger. Harris *v.* Hannibal, etc., R. Co., 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111.

Assumption of risk.— A passenger on a freight train does not assume the risk. See *supra*, III, F, 1, c, (1). Nor does the passenger assume the risk of failure in any respect of the carrier to exercise the required care. Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125.

66. *Arkansas.*— Little Rock Traction, etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7; St. Louis, etc., R. Co. *v.* Maddry, 57 Ark. 306, 21 S. W. 472.

Illinois.— Schneider *v.* Chicago St. R. Co., 80 Ill. App. 306.

New Hampshire.— See Foss *v.* Boston, etc., R. Co., 66 N. H. 256, 21 Atl. 222, 49 Am. St. Rep. 607, 11 L. R. A. 367.

New York.— Sheridan *v.* Brooklyn City, etc., R. Co., 36 N. Y. 39, 1 Transcr. App. (N. Y.) 49, 34 How. Pr. (N. Y.) 217, 93 Am. Dec. 490.

Texas.— St. Louis, etc., R. Co. *v.* Ferguson, (Tex. Civ. App. 1901) 64 S. W. 797.

See 9 Cent. Dig. tit. "Carriers," § 1349.

Intoxication is not contributory negligence

(11) *Children.* The same care, discretion, and foresight cannot be required of a child of immature years as of an ordinary adult, and all that can be required is such care and judgment as may reasonably be expected of a child of the same age and mental development as the one in question.[67]

c. Acts in Case of Emergency. In determining whether the passenger has exercised ordinary care to avoid the injury which he has received as a result of the carrier's negligence, it sometimes becomes a question whether he has been negligent in doing an act which would in itself have been presumptively negligent, but under circumstances which it is claimed justified it in the attempt to escape a threatened injury, such as a collision, and the rule is well established that if the passenger acts as a reasonably prudent person would have done in view of the danger as it appeared to him, he is not guilty of contributory negligence so as to bar his right of recovery against the carrier, although, if he had not acted thus in the attempt to avoid injury, he would have been safe.[68] The same rule is

per se, and will defeat recovery only where it has contributed to the injury.

Michigan.— Strand *v.* Chicago, etc., R. Co., 67 Mich. 380, 34 N. W. 712.

New Hampshire.— See Wheeler *v.* Grand Trunk R. Co., 70 N. H. 607, 50 Atl. 103.

New York.— Milliman *v.* New York Cent., etc., R. Co., 66 N. Y. 642; Newton *v.* Central Vermont R. Co., 80 Hun (N. Y.) 491, 30 N. Y. Suppl. 488, 62 N. Y. St. 387.

Texas.— Texas, etc., R. Co. *v.* Edmond, (Tex. Civ. App. 1895) 29 S. W. 518.

West Virginia.— Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758, 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69.

United States.— Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 276, 5 Fed. 523.

See 9 Cent. Dig. tit. "Carriers," § 1350.

67. East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503; Sly *v.* Union Depot R. Co., 134 Mo. 681, 36 S. W. 235; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Wyatt *v.* Citizens' R. Co., 55 Mo. 485; Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555; Philadelphia City Pass. R. Co. *v.* Hassard, 75 Pa. St. 367.

Negligence of parent.— While the negligence of the parent will not, in general, be imputed to the child so as to defeat recovery by the child for an injury received (Wymore *v.* Mahaska County, 78 Iowa 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545; Ploof *v.* Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108), yet, if the child is in charge of the parent, the carrier may be relieved by that fact from any extra caution with reference to the child on account of its immature years, and the negligence of the parent or person in charge of the child may therefore tend to rebut negligence of the carrier (Morrison *v.* Erie R. Co., 56 N. Y. 302; Waite *v.* North Eastern R. Co., E. B. & E. 719, 5 Jur. N. S. 936, 28 L. J. Q. B. 258, 7 Wkly. Rep. 311, 96 E. C. L. 719).

68. *Arkansas.*— St. Louis, etc., R. Co. *v.* Maddry, 57 Ark. 306, 21 S. W. 472.

California.— Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; Lawrence *v.* Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428.

District of Columbia.— Washington, etc., R. Co. *v.* Hickey, 5 App. Cas. (D. C.) 436.

Georgia.— South Western R. Co. *v.* Paulk, 24 Ga. 356.

Illinois.— Galena, etc., R. Co. *v.* Yarwood, 17 Ill. 509, 65 Am. Dec. 682; Frink *v.* Potter, 17 Ill. 406; Benner Livery, etc., Co. *v.* Busson, 58 Ill. App. 17; Mobile, etc., R. Co. *v.* Klein, 43 Ill. App. 63; North Chicago St. R. Co. *v.* Louis, 35 Ill. App. 477.

Indiana.— Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114.

Iowa.— Kellow *v.* Central Iowa R. Co., 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858.

Kentucky.— South Covington, etc., St. R. Co. *v.* Ware, 84 Ky. 267, 8 Ky. L. Rep. 241, 1 S. W. 493; Louisville, etc., R. Co. *v.* Cecil, 9 Ky. L. Rep. 402.

Louisiana.— Holzab *v.* New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177.

Massachusetts.— Cody *v.* New York, etc., R. Co., 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843; Caswell *v.* Boston, etc., R. Corp., 98 Mass. 194, 93 Am. Dec. 151; Ingalls *v.* Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

Michigan.— Ashton *v.* Detroit City R. Co., 78 Mich. 587, 44 N. W. 141.

Minnesota.— Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410.

Missouri.— Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868; McPeak *v.* Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. 170; Bischoff *v.* People's R. Co., 121 Mo. 216, 25 S. W. 908; Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; Ephland *v.* Missouri Pac. R. Co., 57 Mo. App. 147.

Nebraska.— St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887.

New York.— Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Brown *v.* New York Cent. R. Co., 32 N. Y. 597, 88 Am. Dec. 353; Buel *v.* New York Cent., etc., R. Co., 31 N. Y. 314, 88 Am. Dec. 271; Cuyler *v.* Decker, 20 Hun (N. Y.) 173.

applicable to the failure of the passenger to attempt to escape threatened injury.[69]

d. Violation of Regulations or Directions; Reliance on Persons in Charge. It will in general constitute negligence on the part of the passenger to violate the regulations made by the carrier with reference to the safety of passengers, and for an injury resulting from such violation he cannot recover.[70] But the passenger may properly rely upon the directions of the persons in charge of the conveyance as to what will be safe conduct.[71] Thus, while it is usually in violation of rule to ride on the platform of a railway train or street-car, yet if this is by the express or implied direction or consent of the persons in charge of the

Ohio.— Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 38 Am. Rep. 597.

Pennsylvania.— Willis *v.* Second Ave. Traction Co., 189 Pa. St. 430, 42 Atl. 1; Johnson *v.* West Chester, etc., R. Co., 70 Pa. St. 357.

South Carolina.— Wade *v.* Columbia Electric, etc., Co., 51 S. C. 296, 29 S. E. 233, 64 Am. St. Rep. 676.

Texas.— Houston, etc., R. Co. *v.* Norris, (Tex. Civ. App. 1897) 41 S. W. 708; Gulf, etc., R. Co. *v.* Downman, (Tex. Civ. App. 1895) 28 S. W. 922; Dallas Consol. Traction R. Co. *v.* Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925; Texarkana St. R. Co. *v.* Hart, (Tex. Civ. App. 1894) 26 S. W. 435; La Prelle *v.* Fordyce, 4 Tex. Civ. App. 391, 23 S. W. 453.

Virginia.— Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71.

Washington.— Pederson *v.* Seattle Consol. St. R. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665.

West Virginia.— Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

Wisconsin.— Wanzer *v.* Chippewa Valley Electric R. Co., 108 Wis. 319, 84 N. W. 423.

United States.— Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115; Shankenberry *v.* Metropolitan St. R. Co., 46 Fed. 177; Ladd *v.* Foster, 12 Sawy. (U. S.) 547, 31 Fed. 827.

See 9 Cent. Dig. tit. "Carriers," § 1352.

69. Union Pac. R. Co. *v.* Kelley, 4 Colo. App. 325, 35 Pac. 923.

In determining the nature of the danger as apparent to the passenger, the direction of those in charge of the conveyance as to what the passenger shall do may be taken into account. St. Louis, etc., R. Co. *v.* Murray, 55 Ark. 248, 18 S. W. 50, 29 Am. St. Rep. 32, 16 L. R. A. 787; Budd *v.* United Carriage Co., 25 Oreg. 314, 35 Pac. 660, 27 L. R. A. 279.

70. *Alabama.*— McCauley *v.* Tennessee Coal, etc., Co., 93 Ala. 356, 9 So. 611; Alabama Great Southern R. Co. *v.* Hawks, 72 Ala. 112, 47 Am. Rep. 403.

Illinois.— Lake Shore, etc., R. Co. *v.* Kelsey, 180 Ill. 530, 54 N. E. 608.

Maryland.— Baltimore, etc., Turnpike Road *v.* Cason, 72 Md. 377, 20 Atl. 113.

Massachusetts.— Sweetland *v.* Lynn, etc., R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783.

Missouri.— Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

North Carolina.— Malcom *v.* Richmond, etc., R. Co., 106 N. C. 63, 11 S. E. 187.

Texas.— Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

West Virginia.— Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

See 9 Cent. Dig. tit. "Carriers," § 1355.

The injury must be the proximate result of the violation. Keith *v.* Pinkham, 43 Me. 501, 69 Am. Dec. 80; Platt *v.* Forty-Second St., etc., Ferry R. Co., 2 Hun (N. Y.) 124, 4 Thomps. & C. (N. Y.) 406; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526; Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 14 S. Ct. 281, 38 L. ed. 131. And see *infra*, III, G, 1, e.

Notice of regulation.— The passenger must be in some way affected with notice of the regulation to hold him guilty of negligence in violating it. Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349; Western Maryland R. Co. *v.* Herold, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75; Colegrove *v.* New York, etc., R. Co., 6 Duer (N. Y.) 382.

Waiver of regulation.—A regulation may be waived by permitting its habitual violation. Chicago, etc., R. Co. *v.* Dickson, 143 Ill. 368, 32 N. E. 380; Jones *v.* Chicago, etc., R. Co., 43 Minn. 279, 45 N. W. 444; Heumphreus *v.* Fremont, etc., R. Co., 8 S. D. 103, 65 N. W. 466; San Antonio, etc., R. Co. *v.* Lynch, (Tex. Civ. App. 1900) 55 S. W. 517; Houston, etc., R. Co. *v.* Norris, (Tex. Civ. App. 1897) 41 S. W. 708. But an act of the carrier's employees in violation of a regulation cannot be relied on as a waiver thereof. Whitehead *v.* St. Louis, etc., R. Co., 22 Mo. App. 60.

71. *Arkansas.*— St. Louis, etc., R. Co. *v.* Baker, 67 Ark. 531, 55 S. W. 941.

Illinois.— Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901; Chicago, etc., R. Co. *v.* Rayburn, 153 Ill. 290, 38 N. E. 558.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Kansas.— Walker *v.* Green, 60 Kan. 289, 56 Pac. 477.

Kentucky.— Louisville, etc., R. Co. *v.* Smith, 13 Ky. L. Rep. 974.

Michigan.— Clinton *v.* Root, 58 Mich. 182, 24 N. W. 667, 55 Am. Rep. 671.

Minnesota.— Olson *v.* St. Paul, etc., R. Co., 45 Minn. 536, 48 N. W. 445, 22 Am. St. Rep. 749.

New York.— Carroll *v.* New York, etc., R. Co., 1 Duer (N. Y.) 571.

Pennsylvania.—O'Donnell *v.* Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336;

train or car it will not be imputed to the passenger as negligence.[72] But if the act is manifestly negligent, and in violation of rule, the consent of the persons in charge will be no excuse,[73] and it is so held as to riding on the engine.[74] On the other hand, the passenger should be guided by the directions of the persons in charge with reference to his own safety, and may be guilty of contributory negligence in failing to observe warnings or cautions thus given.[75] Another illustration of the same principle is furnished by cases with reference to injuries received by a passenger who attempts to get on board of or alight from a train while moving. Such an act is generally regarded as contrary to reasonable prudence,[76] but if it is done in response to the invitation or direction of the person in charge of the train the passenger is said to be thereby exonerated from fault.[77]

Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526; Hanover Junction, etc., R. Co. *v.* Anthony, 3 Walk. (Pa.) 210.

South Carolina.— Cooper *v.* Georgia, etc., R. Co., 56 S. C. 91, 34 S. E. 16.

Texas.— International, etc., R. Co. *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

Washington.— Irish *v.* Northern Pac. R. Co., 4 Wash. 48, 29 Pac. 845, 31 Am. St. Rep. 899.

Wisconsin.— Chamberlain *v.* Milwaukee, etc., R. Co., 11 Wis. 238.

United States.— New Orleans, etc., R. Co. *v.* Thomas, 60 Fed. 379, 23 U. S. App. 37, 9 C. C. A. 29.

See 9 Cent. Dig. tit. "Carriers," § 1357.

72. *Indiana.*— Kentucky, etc., Bridge Co. *v.* Quinkert, 2 Ind. App. 244, 28 N. E. 338.

Louisiana.— Olivier *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431.

Missouri.— Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739; Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555.

New York.— Ginna *v.* Second Ave. R. Co., 67 N. Y. 596; Maher *v.* Central Park, etc., R. Co., 67 N. Y. 52; Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 1 Transcr. App. (N. Y.) 105, 34 How. Pr. (N. Y.) 315, 93 Am. Dec. 492; Francisco *v.* Troy, etc., R. Co., 88 Hun (N. Y.) 464, 34 N. Y. Suppl. 859, 68 N. Y. St. 792.

Pennsylvania.— Bumbear *v.* United Traction Co., 198 Pa. St. 198, 47 Atl. 961; West Philadelphia Pass. R. Co. *v.* Gallagher, 108 Pa. St. 524.

United States.— Baltimore, etc., R. Co. *v.* Meyers, 62 Fed. 367, 18 U. S. App. 569, 10 C. C. A. 485.

See 9 Cent. Dig. tit. "Carriers," § 1359.

73. *Arkansas.*— Little Rock, etc., R. Co. *v.* Miles, 40 Ark. 298, 48 Am. Rep. 10.

Georgia.— Hicks *v.* Georgia Southern, etc., R. Co., 108 Ga. 304, 32 S. E. 880.

Maryland.— Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224.

Massachusetts.— Roberts *v.* New York, etc., R. Co., 175 Mass. 296, 56 N. E. 559.

Michigan.— Downey *v.* Hendrie, 46 Mich. 498, 9 N. W. 828, 41 Am. Rep. 177.

Missouri.— Aufdenberg *v.* St. Louis, etc., R. Co., 132 Mo. 565, 34 S. W. 485.

New York.— Ward *v.* Central Park, etc., R. Co., 33 N. Y. Super. Ct. 392.

Pennsylvania.— Pennsylvania R. Co. *v.* Langdon, 92 Pa. St. 21, 37 Am. Rep. 651.

Texas.— Ebert *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1899) 49 S. W. 1105; Central Texas, etc., R. Co. *v.* Hoard, (Tex. Civ. App. 1898) 49 S. W. 142.

74. Chicago, etc., R. Co. *v.* Michie, 83 Ill. 427; Files *v.* Boston, etc., R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411; Robertson *v.* New York, etc., R. Co., 22 Barb. (N. Y.) 91; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

75. *Illinois.*— Ohio, etc., R. Co. *v.* Schiebe, 44 Ill. 460.

Indiana.— Louisville, etc., R. Co. *v.* Bisch, 120 Ind. 549, 22 N. E. 662.

Missouri.— Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818.

North Carolina.— Tillett *v.* Lynchburg, etc., R. Co., 115 N. C. 662, 20 S. E. 480.

Oregon.— Davis *v.* Oregon, etc., R. Co., 8 Oreg. 172.

Washington.— White *v.* Peninsular R. Co., 20 Wash. 132, 54 Pac. 999.

See 9 Cent. Dig. tit. "Carriers," § 1356.

Conditions precedent.—To charge him with negligence in disobedience of directions given to him, the passenger must have reason to know that they are intended for his safety. West Chicago St. R. Co. *v.* Johnson, 180 Ill. 285, 54 N. E. 334; Detroit, etc., R. Co. *v.* Curtis, 23 Wis. 152, 99 Am. Dec. 141. Nor is the passenger chargeable with warnings which do not reasonably come to his notice. Lynn *v.* Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; Walter *v.* Chicago, etc., R. Co., 39 Iowa 33; Elliott *v.* Newport St. R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208. And the warning must be timely. Louisville, etc., R. Co. *v.* Bean, 9 Ind. App. 240, 36 N. E. 443. To make a warning effectual, however, it is not essential that those in charge enforce compliance with it. Aufdenberg *v.* St. Louis, etc., R. Co., 132 Mo. 565, 34 S. W. 485; Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

A passenger has the right to occupy a car other than that to which he has been assigned, or in which he has taken a berth, and he is not guilty of contributory negligence in so doing. Illinois Cent. R. Co. *v.* Sandusky, 14 Ky. L. Rep. 767.

76. See *infra*, III, G, 3, a, (II); III, G, 3, h, (IV).

77. *Alabama.*— Montgomery, etc., R. Co. *v.* Stewart, 91 Ala. 421, 8 So. 708.

But this is not true if the act is manifestly, to the judgment of a reasonable person, imprudent, or contrary to the authority of the servant who gives the direction.[78] The mere advice or counsel of those in charge of the train as to getting on or off while the train is in motion will not be enough to excuse the passenger in doing a negligent or wrongful act.[79] Misdirection of persons in charge of a train as to the proper place for passengers to get off will render the carrier liable to one who, acting in reasonable reliance on the direction given, is injured.[80]

e. Proximate Cause. The negligence of the passenger must have some proximate connection with the injury suffered, or it will not defeat his recovery. Thus,

Arkansas.— St. Louis, etc., R. Co. *v.* Person, 49 Ark. 182, 4 S. W. 755; St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105.

District of Columbia.— Jones *v.* Baltimore, etc., R. Co., 21 D. C. 346.

Georgia.— Southwestern R. Co. *v.* Singleton, 66 Ga. 252, 67 Ga. 306.

Michigan.— McCaslin *v.* Lake Shore, etc., R. Co., 93 Mich. 553, 53 N. W. 724.

Mississippi.— Davis *v.* Louisville, etc., R. Co., 69 Miss. 136, 10 So. 450.

Missouri.—Owens *v.* Wabash R. Co., 84 Mo. App. 143; Murphy *v.* St. Louis, etc., R. Co., 43 Mo. App. 342.

New York.— Bucher *v.* New York Cent., etc., R. Co., 98 N. Y. 128; Filer *v.* New York Cent. R. Co., 68 N. Y. 124; Geiler *v.* Manhattan R. Co., 11 Misc. (N. Y.) 413, 32 N. Y. Suppl. 254, 65 N. Y. St. 437; Schurr *v.* Houston, 10 N. Y. St. 262.

North Carolina.—Watkins *v.* Raleigh, etc., Air Line R. Co., 116 N. C. 961, 21 S. E. 409; Lambeth *v.* North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508.

Pennsylvania.—Delaware, etc., Canal Co. *v.* Webster, (Pa. 1886) 6 Atl. 841.

Texas.— International, etc., R. Co. *v.* Smith, (Tex. 1890) 14 S. W. 642; Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711; Texas, etc., R. Co. *v.* Elliott, (Tex. Civ. App. 1901) 61 S. W. 726; Missouri, etc., R. Co. *v.* Meyers, (Tex. Civ. App. 1896) 35 S. W. 421; Ft. Worth, etc., R. Co. *v.* Viney, (Tex. Civ. App. 1895) 30 S. W. 252; Gulf, etc., R. Co. *v.* Brown, 4 Tex. Civ. App. 435, 23 S. W. 618; Texas, etc., R. Co. *v.* Bingham, 2 Tex. Civ. App. 278, 21 S. W. 569.

United States.— Eddy *v.* Wallace, 49 Fed. 801, 4 U. S. App. 264, 1 C. C. A. 435.

See 9 Cent. Dig. tit. "Carriers," § 1361½.

78. *Alabama.*— South, etc., Alabama R. Co. *v.* Schaufler, 75 Ala. 136.

Arkansas.— St. Louis, etc., R. Co. *v.* Rosenberry, 45 Ark. 256.

Georgia.— East Tennessee, etc., R. Co. *v.* Hughes, 92 Ga. 388, 17 S E. 949.

Indiana.— Jeffersonville R. Co. *v.* Swift, 26 Ind. 459.

Kentucky.— Chesapeake, etc., R. Co. *v.* Gregston, 12 Ky. L. Rep. 604; Louisville, etc., R. Co. *v.* Coppage, 7 Ky. L. Rep. 530.

Maryland.— Dietrich *v.* Baltimore, etc., R. Co., 58 Md. 347.

Mississippi.— Davis *v.* Louisville, etc., R. Co., 69 Miss. 136, 10 So. 450.

New York.— Hunter *v.* Cooperstown, etc., R. Co., 112 N. Y. 371, 19 N. E. 820, 21 N. Y. St. 1, 8 Am. St. Rep. 752, 2 L. R. A. 832, 126 N. Y. 18, 26 N. E. 958, 36 N. Y. St. 367, 12 L. R. A. 429; Myers *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 619, 34 N. Y. Suppl. 807, 68 N. Y. St. 818; Ginnon *v.* New York, etc., R. Co., 3 Rob. (N. Y.) 25.

United States.— Whitlock *v.* Comer, 57 Fed. 565.

See 9 Cent. Dig. tit. "Carriers," § 1361½.

The direction of a person not a servant of the carrier furnishes no excuse to the passenger. Filer *v.* New York Cent. R. Co., 59 N. Y. 351.

A statute making it a misdemeanor to get off a moving train without the consent of the person in charge does not render such act negligent when done by the consent of a brakeman. Galloway *v.* Chicago, etc., R. Co., 87 Iowa 458, 54 N. W. 447.

79. Vimont *v.* Chicago, etc., R. Co., 71 Iowa 58, 32 N. W. 100; Lindsey *v.* Chicago, etc., R. Co., 64 Iowa 407, 20 N. W. 737; McDonald *v.* Boston, etc., R. Co., 87 Me. 466, 32 Atl. 1010; Bardwell *v.* Mobile, etc., R. Co., 63 Miss. 574, 56 Am. Rep. 842.

Failure of a brakeman to warn a passenger not to get off while the train is in motion will not constitute consent or authority to do so. England *v.* Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1.

Passing from one car to another.—What has been said as to getting on or off a train in motion is applicable also to passing from one car to another while the train is in motion. Stewart *v.* Boston, etc., R. Co., 146 Mass. 605, 16 N. E. 466; Dickinson *v.* Port Huron, etc., R. Co., 53 Mich. 43, 18 N. W. 553; McIntyre *v.* New York Cent. R. Co., 37 N. Y. 287, 4 Transcr. App. (N. Y.) 1, 35 How. Pr. (N. Y.) 36; Cleveland, etc., R. Co. *v.* Manson, 30 Ohio St. 451.

80. *Indiana.*— Cincinnati, etc., R. Co. *v.* Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; Louisville, etc., R. Co. *v.* Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

Kentucky.— Louisville, etc., R. Co. *v.* Smith, 13 Ky. L. Rep. 974.

Missouri.— Griffith *v.* Missouri Pac. R. Co., 98 Mo. 168, 11 S. W. 559.

North Carolina.— Hinshaw *v.* Raleigh, etc., R. Co., 118 N. C. 1047, 24 S. E. 426.

Tennessee.— East Tennessee, etc., R. Co. *v.* Conner, 15 Lea (Tenn.) 254.

his riding in an unsafe place, or violating some rule or direction of the carrier intended to secure his safety will not defeat his recovery if the injury suffered is not the result of his fault in so riding, that is, if it is such injury as would have been as likely to happen had he been in a proper place.[81]

f. Carrier's Duty to Protect Passenger Against His Own Negligence. The doctrine of the preceding section that contributory negligence to defeat recovery must be the proximate cause of the injury leads to a well-recognized rule that if the negligence of the passenger is known to the servants of the carrier, or in the exercise of proper care might have been known to them, and by the exercise of the degree of care required of carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of his servants in not avoiding such injury, such fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause.[82]

Washington.— Henry *v.* Grant St. Electric R. Co., 24 Wash. 246, 64 Pac. 137.

See 9 Cent. Dig. tit. "Carriers," § 1362.

81. *Alabama.*—Birmingham R., etc., Co. *v.* James, 121 Ala. 120, 25 So. 847; Watkins *v.* Birmingham R., etc., Co., 120 Ala. 147, 24 So. 392, 43 L. R. A. 297; Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 12 So. 439.

Colorado.— Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

Indiana.— Lafayette, etc., R. Co. *v.* Sims, 27 Ind. 59; Lawrenceburgh, etc., R. Co. *v.* Montgomery, 7 Ind. 474; Pittsburgh, etc., R. Co. *v.* Gray, (Ind. App. 1901) 59 N. E. 1000.

Kansas.— Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, 40 Pac. 919.

Kentucky.— Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208.

Massachusetts.— Dewire *v.* Boston, etc., R. Co., 148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166.

Michigan.— Noble *v.* St. Joseph, etc., R. Co., 98 Mich. 249, 57 N. W. 126; Wood *v.* Lake Shore, etc., R. Co., 49 Mich. 370, 13 N. W. 779.

Minnesota.— Jones *v.* Chicago, etc., R. Co., 43 Minn. 279, 45 N. W. 444; Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360.

Missouri.—Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521; Nissen *v.* Missouri R. Co., 19 Mo. App. 662.

Nebraska.— Fremont, etc., R. Co. *v.* Root, 49 Nebr. 900, 69 N. W. 397; Omaha, etc., R. Co. *v.* Chollette, 41 Nebr. 578, 59 N. W. 921.

New Jersey.— Central R. Co. *v.* Van Horn, 38 N. J. L. 133.

New York.— Distler *v.* Long Island R. Co., 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; Jewell *v.* New York Cent., etc., R. Co., 27 N. Y. App. Div. 500, 50 N. Y. Suppl. 848.

Oregon.— Davis *v.* Oregon, etc., R. Co., 8 Oreg. 172.

Pennsylvania.— Sharrer *v.* Paxson, 171 Pa. St. 26, 33 Atl. 120; Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

South Carolina.— Cooper *v.* Georgia, etc., R. Co., 61 S. C. 345, 39 S. E. 543; Martin *v.* Southern R. Co., 51 S. C. 150, 28 S. E. 303.

Utah.— Woods *v.* Southern Pac. Co., 9 Utah 146, 33 Pac. 628.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

United States.— Texas, etc., R. Co. *v.* Reeder, 170 U. S. 530, 18 S. Ct. 705, 42 L. ed. 1134; Butts *v.* Cleveland, etc., R. Co., 110 Fed. 329, 49 C. C. A. 69; Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536; Kansas, etc., R. Co. *v.* White, 67 Fed. 481, 32 U. S. App. 192, 14 C. C. A. 483; Pennsylvania R. Co. *v.* Reed, 60 Fed. 694, 20 U. S. App. 400, 9 C. C. A. 219 [*affirming* 56 Fed. 184].

See 9 Cent. Dig. tit. "Carriers," § 1353.

Riding in an unsafe place does not forfeit the passenger's right to care. Willmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 16 S. W. 500, 17 S. W. 490.

82. *Colorado.*— Denver, etc., Rapid Transit Co. *v.* Dwyer, 3 Colo. App. 408, 33 Pac. 815.

District of Columbia.— Holohan *v.* Washington, etc., R. Co., 19 D. C. 316; Metropolitan R. Co. *v.* Snashall, 3 App. Cas. (D. C.) 435.

Georgia.— Central R. Co. *v.* Smith, 69 Ga. 268.

Kentucky.— Kentucky Cent. R. Co. *v.* Dills, 4 Bush (Ky.) 593; Central Pass. R. Co. *v.* Rose, 15 Ky. L. Rep. 209, 22 S. W. 745.

Maryland.— Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706; People's Pass. R. Co. *v.* Green, 56 Md. 84; Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69.

Missouri.— Morrissey *v.* Wiggins' Ferry Co., 43 Mo. 380, 97 Am. Dec. 402; McKeon *v.* Citizens' R. Co., 42 Mo. 79.

New York.— Gonzales *v.* New York, etc., R. Co., 39 How. Pr. (N. Y.) 407.

North Carolina.— Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703.

Ohio.— Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674.

Texas.— Gulf, etc., R. Co. *v.* Fox, (Tex. 1887) 6 S. W. 569; Christie *v.* Galveston City R. Co., (Tex. Civ. App. 1897) 39 S. W. 638; Missouri, etc., R. Co. *v.* Cook, 12 Tex. Civ. App. 203, 33 S. W. 669.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E.

2. While on Premises or Approaches; Going Upon Track. One who goes about the station and premises, and passes along the approaches to railroad trains in connection with going on board of or alighting from such train must take reasonable care for his own safety.[83] Some care is required of the passenger going upon or crossing a railroad track for the purpose of reaching or leaving his train.[84] But one who is in the act of going to or leaving the train at a place

12; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

Wisconsin.— Woodard *v.* West Side St. R. Co., 71 Wis. 625, 38 N. W. 347.

England.— Radley *v.* London, etc., R. Co., 1 App. Cas. 754, 46 L. J. Exch. 573, 35 L. T. Rep. N. S. 637, 25 Wkly. Rep. 147.

See 9 Cent. Dig. tit. "Carriers," § 1354.

A carrier is not liable for failure to take steps to avert injury threatening one who has placed himself in danger where he has not omitted the discharge of any duty toward such person. Carroll *v.* Inter-State Rapid Transit Co., 107 Mo. 653, 17 S. W. 889.

Where a passenger was in an express car, without the knowledge or consent of the conductor, he cannot excuse himself from contributory negligence on the ground that the conductor should have discovered him and compelled him to go to a safe place. Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208.

83. *Alabama.*— Wood *v.* Richmond, etc., R. Co., 100 Ala. 660, 13 So. 552.

California.— Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161, 31 Pac. 834.

Illinois.— Chicago, etc., R. Co. *v.* Mahara, 47 Ill. App. 208; Chicago, etc., R. Co. *v.* Woolridge, 32 Ill. App. 237.

Indiana.— New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954.

Indian Territory.— Gulf, etc., R. Co. *v.* Bolton, 2 Indian Terr. 463, 51 S. W. 1085; Missouri, etc., R. Co. *v.* Turley, 1 Indian Terr. 275, 37 S. W. 52.

Kansas.— Missouri Pac. R. Co. *v.* Neiswanger, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304.

Massachusetts.— Sonier *v.* Boston, etc., R. Co., 141 Mass. 10, 6 N. E. 84.

Minnesota.—Emery *v.* Chicago, etc., R. Co., 77 Minn. 465, 80 N. W. 627.

Missouri.— Gunderman *v.* Missouri, etc., R. Co., 58 Mo. App. 370.

Nebraska.— Omaha, etc., R. Co. *v.* Crow, 54 Nebr. 747, 74 N. W. 1066, 69 Am. St. Rep. 741.

New Jersey.— Exton *v.* Central R. Co., 62 N. J. L. 7, 42 Atl. 486.

New York.— Dobiecki *v.* Sharp, 88 N. Y. 203; Weston *v.* New York El. R. Co., 73 N. Y. 595; Keating *v.* New York Cent., etc., R. Co., 49 N. Y. 673; Lycett *v.* Manhattan R. Co., 12 N. Y. App. Div. 326, 42 N. Y. Suppl. 431; Maclennan *v.* Long Island R. Co., 52 N. Y. Super. Ct. 22; Gordon *v.* Grand St., etc., R. Co., 40 Barb. (N. Y.) 546.

Pennsylvania.— Rathgebe *v.* Pennsylvania R. Co., 179 Pa. St. 31, 36 Atl. 160; McGeehan *v.* Lehigh Valley R. Co., 149 Pa. St. 188, 24 Atl. 205; Matthews *v.* Pennsylvania R. Co., 148 Pa. St. 491, 24 Atl. 67; Pennsylvania R. Co. *v.* Bell, 122 Pa. St. 58, 15 Atl. 561; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315.

Texas.— St. Louis, etc., R. Co. *v.* Casseday, (Tex. Civ. App. 1898) 48 S. W. 6; Missouri, etc., R. Co. *v.* Martin, (Tex. Civ. App. 1898) 44 S. W. 703.

United States.— Missouri, etc., R. Co. *v.* Turley, 85 Fed. 369, 56 U. S. App. 1, 29 C. C. A. 196.

See 9 Cent. Dig. tit. "Carriers," § 1363.

84. *Alabama.*— East Tennessee, etc., R. Co. *v.* Kornegay, 92 Ala. 228, 9 So. 557.

Georgia.— Central R., etc., Co. *v.* Perry, 58 Ga. 461.

Iowa.— Smith *v.* Chicago, etc., R. Co., 55 Iowa 33, 7 N. W. 398.

Louisiana.— Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. Rep. 560; Moses *v.* Louisville, etc., R. Co., 39 La. Ann. 649, 2 So. 567, 4 Am. St. Rep. 231.

Maryland.—Baltimore, etc., R. Co. *v.* State, 63 Md. 135.

Massachusetts.— Winslow *v.* Boston, etc., R. Co., 165 Mass. 264, 42 N. E. 1133; Debbins *v.* Old Colony R. Co., 154 Mass. 402, 28 N. E. 274.

Michigan.— French *v.* Detroit, etc., R. Co., 89 Mich. 537, 50 N. W. 914.

Minnesota.— De Kay *v.* Chicago, etc., R. Co., 41 Minn. 178, 43 N. W. 182, 16 Am. St. Rep. 687, 4 L. R. A. 632.

Missouri.— Kreis *v.* Missouri Pac. R. Co., 131 Mo. 533, 33 S. W. 64, 1150.

Nebraska.— Union Pac. R. Co. *v.* Sue, 25 Nebr. 772, 41 N. W. 801.

New Hampshire.— Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

New York.— Lewis *v.* Delaware, etc., Canal Co., 145 N. Y. 508, 40 N. E. 248, 65 N. Y. St. 374; Davenport *v.* Brooklyn City R. Co., 100 N. Y. 632, 3 N. E. 305; Gonzales *v.* New York, etc., R. Co., 38 N. Y. 440, 98 Am. Dec. 58; Albrecht *v.* New York Cent., etc., R. Co., 54 N. Y. App. Div. 636, 66 N. Y. Suppl. 605; Hempenstall *v.* New York Cent., etc., R. Co., 82 Hun (N. Y.) 285, 31 N. Y. Suppl. 479, 64 N. Y. St. 76; Dale *v.* Brooklyn City, etc., R. Co., 1 Hun (N. Y.) 146, 3 Thomps. & C. (N. Y.) 686; Halpin *v.* Third Ave. R. Co., 40 N. Y. Super. Ct. 175.

Pennsylvania.— Kohler *v.* Pennsylvania R. Co., 135 Pa. St. 346, 19 Atl. 1049; Buzby *v.* Philadelphia Traction Co., 126 Pa. St. 559, 17 Atl. 895, 12 Am. St. Rep. 919.

Rhode Island.— Chaffee *v.* Old Colony R. Co., 17 R. I. 658, 24 Atl. 141.

Washington.— Cameron *v.* Union Trunk Line, 10 Wash. 507, 39 Pac. 128.

Wisconsin.— Hartwig *v.* Chicago, etc., R. Co., 49 Wis. 358, 5 N. W. 865.

United States.— St. Louis, etc., R. Co. *v.*

where there is an express or implied invitation for him to do so may assume that the railroad company will so operate its other trains as not to put him in peril,[85] and he is not under the same obligation to look out for his own safety by looking and listening as is incumbent in general on one who approaches a railroad track with intent to cross it.[86]

3. While Getting On and Off Trains or Cars — a. Getting On Train or Car — (I) *In General.* The question as to the negligence of the passenger in getting on board a train or car is generally one of fact for the jury, to be determined under the circumstances of the particular case.[87]

(II) *Moving Train or Car.* It has been said in some cases that it is negli-

Whittle, 74 Fed. 296, 40 U. S. App. 23, 20 C. C. A. 196; MacLeod *v.* Graven, 73 Fed. 627, 43 U. S. App. 129, 19 C. C. A. 616.

See 9 Cent. Dig. tit. "Carriers," § 1365.

85. *Arkansas.*— St. Louis, etc., R. Co. *v.* Johnson, 59 Ark. 122, 26 S. W. 593.

Georgia.— Atlanta Consol. St. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41.

Illinois.— Chicago, etc., R. Co. *v.* Wilson, 63 Ill. 167; Pennsylvania Co. *v.* Keane, 41 Ill. App. 317.

Indiana.— Stowers *v.* Citizens' St. R. Co., 21 Ind. App. 434, 52 N. E. 710.

Maryland.— Baltimore Traction Co. *v.* Helms, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215.

Massachusetts.— Connolly *v.* New York, etc., R. Co., 158 Mass. 8, 32 N. E. 937; Mayo *v.* Boston, etc., R. Co., 104 Mass. 137; Chaffee *v.* Boston, etc., R. Co., 104 Mass. 108; Gaynor *v.* Old Colony, etc., R. Co., 100 Mass. 208, 97 Am. Dec. 96; Warren *v.* Fitchburg R. Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700.

Minnesota.— Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341.

Missouri.— Lenix *v.* Missouri Pac. R. Co., 76 Mo. 86.

New Jersey.— Klein *v.* Jewett, 26 N. J. Eq. 474.

New York.— Beecher *v.* Long Island R. Co., 161 N. Y. 222, 55 N. E. 899; Distler *v.* Long Island R. Co., 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; Terry *v.* Jewett, 78 N. Y. 338; Jewell *v.* New York Cent., etc., R. Co., 27 N. Y. App. Div. 500, 50 N. Y. Suppl. 848; Landrigan *v.* Brooklyn Heights R. Co., 23 N. Y. App. Div. 43, 48 N. Y. Suppl. 454.

Pennsylvania.— Girton *v.* Lehigh Valley R. Co., 199 Pa. St. 147, 48 Atl. 970; Flanagan *v.* Philadelphia, etc., R. Co., 181 Pa. St. 237, 37 Atl. 341.

Rhode Island.— Chaffee *v.* Old Colony R. Co., 17 R. I. 658, 24 Atl. 141.

Washington.— Smith *v.* Union Trunk Line, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169.

United States.— Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 18 S. Ct. 68, 42 L. ed. 491; Richmond, etc., R. Co. *v.* Powers, 149 U. S. 43, 13 S. Ct. 748, 37 L. ed. 642; Chesapeake, etc., R. Co. *v.* King, 99 Fed. 251, 40 C. C. A. 432.

See 9 Cent. Dig. tit. "Carriers," § 1365.

86. *Colorado.*— Atchison, etc., R. Co. *v.* Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729.

Illinois.— Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713; Chicago City R. Co. *v.* Robinson, 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L. R. A. 126.

Louisiana.— Conway *v.* New Orleans City, etc., R. Co., 51 La. Ann. 146, 24 So. 780; Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. Rep. 560.

Maryland.—Baltimore, etc., R. Co. *v.* State, 81 Md. 371, 32 Atl. 201; Philadelphia, etc., R. Co. *v.* Anderson, 72 Md. 519, 20 Atl. 2, 20 Am. St. Rep. 483, 8 L. R. A. 673; Baltimore, etc., R. Co. *v.* State, 60 Md. 449.

Missouri.— McDonald *v.* Kansas City, etc., R. Co., 127 Mo. 38, 29 S. W. 848.

New Jersey.— Atlantic City R. Co. *v.* Goodin, 62 N. J. L. 394, 42 Atl. 333, 72 Am. St. Rep. 652, 45 L. R. A. 671; Jewett *v.* Klein, 27 N. J. Eq. 550.

New York.— Parsons *v.* New York Cent., etc., R. Co., 113 N. Y. 355, 21 N. E. 145, 22 N. Y. St. 697, 10 Am. St. Rep. 450, 3 L. R. A. 683; Brassell *v.* New York Cent., etc., R. Co., 84 N. Y. 241; Warfield *v.* New York, etc., R. Co., 8 N. Y. App. Div. 479, 40 N. Y. Suppl. 783, 75 N. Y. St. 158.

Ohio.— Cincinnati St. R. Co. *v.* Snell, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276.

Pennsylvania.— Betts *v.* Lehigh Valley R. Co., 191 Pa. St. 575, 43 Atl. 362, 45 L. R. A. 261; Pennsylvania R. Co. *v.* White, 88 Pa. St. 327.

Texas.— Gulf, etc., R. Co. *v.* Morgan, (Tex. Civ. App. 1901) 64 S. W. 688.

United States.— Graven *v.* MacLeod, 92 Fed. 846, 35 C. C. A. 47.

And see *supra*, III, F, 3, b, (IV).

87. *Alabama.*— Alabama Great Southern R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337.

California.— Wardlaw *v.* California R. Co., (Cal. 1895) 42 Pac. 1075.

Georgia.— Savannah, etc., R. Co. *v.* Flaherty, 110 Ga. 335, 35 S. E. 677; Macon, etc., R. Co. *v.* Moore, 108 Ga. 84, 33 S. E. 889.

Illinois.— Cleveland, etc., R. Co. *v.* McHenry, 47 Ill. App. 301.

Louisiana.— Byrd *v.* New Orleans City, etc., R. Co., 43 La. Ann. 822, 9 So. 565.

Maryland.— Western Maryland R. Co. *v.* Herold, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75.

Michigan.— Moore *v.* Saginaw, etc., R. Co., 119 Mich. 613, 78 N. W. 666.

Missouri.— Eichhorn *v.* Missouri, etc., R. Co., 130 Mo. 575, 32 S. W. 993.

gence *per se* to attempt to get on board a train while moving;[88] while in other cases it is denied that such an attempt is under all circumstances in itself negligence.[89] Usually it is said that the question as to whether under the circumstances of the case the passenger was negligent in attempting to get on board a moving train is one of fact, and therefore to be determined by the jury, unless the facts are so unequivocal in their character as to make it proper for the court to determine the question.[90] Even though the carrier fails to stop the train in order for passengers to get on at the proper place, or does not stop it for a reasonable length of time, this will not in itself excuse the passenger in negligently attempting to get on the train while moving.[91] As to street-cars, the general doctrine that it indicates negligence to attempt to get on board while moving is not so strictly applied,[92] and it has been announced in a great majority of cases in which the subject has been passed on that it is not negligence *per se* to do so.[93]

Nebraska.— Union Pac. R. Co. *v.* Sue, 25 Nebr. 772, 41 N. W. 801.

New Hampshire.—Call *v.* Portsmouth, etc., St. R. Co., 69 N. H. 562, 45 Atl. 405.

New York.—Black *v.* Brooklyn City R. Co., 108 N. Y. 640, 15 N. E. 389; Mowrey *v.* Central City R. Co., 51 N. Y. 666; Jones *v.* New York Cent., etc., R. Co., 46 N. Y. App. Div. 470, 61 N. Y. Suppl. 721; Pitcher *v.* Lake Shore, etc., R. Co., 61 Hun (N. Y.) 623, 16 N. Y. Suppl. 62, 40 N. Y. St. 896; Hanrahan *v.* Manhattan R. Co., 53 Hun (N. Y.) 420, 6 N. Y. Suppl. 395, 24 N. Y. St. 790; Ganiard *v.* Rochester City, etc., R. Co., 50 Hun (N. Y.) 22, 2 N. Y. Suppl. 470, 18 N. Y. St. 692; Dale *v.* Brooklyn City, etc., R. Co., 1 Hun (N. Y.) 146, 3 Thomps. & C. (N. Y.) 686; Schestanber *v.* Manhattan R. Co., 9 N. Y. St. 215.

North Carolina.— Hodges *v.* New Hanover Transit Co., 107 N. C. 576, 12 S. E. 597.

Oregon.— Skottowe *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 430, 30 Pac. 222, 16 L. R. A. 593.

Texas.— Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631, 10 S. W. 731.

Wisconsin.— Lucas *v.* Milwaukee, etc., R. Co., 33 Wis. 41, 14 Am. Rep. 735.

United States.— Root *v.* Catskill Mountain R. Co., 33 Fed. 858.

See 9 Cent. Dig. tit. "Carriers," § 1367.

88. *Colorado.*— Denver, etc., R. Co. *v.* Pickard, 8 Colo. 163, 6 Pac. 149.

Louisiana.— Knight *v.* Pontchartrain R. Co., 23 La. Ann. 462.

Massachusetts.— Harvey *v.* Eastern R. Co., 116 Mass. 269.

Missouri.— Schaefer *v.* St. Louis, etc., R. Co., 128 Mo. 64, 30 S. W. 331.

Pennsylvania.— Rothstein *v.* Pennsylvania R. Co., 171 Pa. St. 620, 33 Atl. 379; Bacon *v.* Delaware, etc., R. Co., 143 Pa. St. 14, 21 Atl. 1002.

Texas.— Missouri, etc., R. Co. *v.* Wylie, (Tex. Civ. App. 1894) 26 S. W. 85.

See 9 Cent. Dig. tit. "Carriers," § 1369.

89. Baltimore, etc., R. Co. *v.* Kane, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 387; Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818; Swigert *v.* Hannibal, etc., R. Co., 75 Mo. 475; Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497.

It is not negligent as matter of law to attempt to board a train after a signal is given to start, but before the train is actually started. Dawson *v.* Boston, etc., R. Co., 156 Mass. 127, 30 N. E. 466.

90. *Alabama.*— McLaren *v.* Alabama Midland R. Co., 100 Ala. 506, 14 So. 405.

Illinois.— Chicago, etc., R. Co. *v.* Scates, 90 Ill. 586; Chicago, etc., R. Co. *v.* Stewart, 77 Ill. App. 66; Walthers *v.* Chicago, etc., R. Co., 72 Ill. App. 354; Chicago, etc., R. Co. *v.* Koehler, 47 Ill. App. 147; Spannagle *v.* Chicago, etc., R. Co., 31 Ill. App. 460.

Iowa.— McCorkle *v.* Chicago, etc., R. Co., 61 Iowa 555, 16 N. W. 714.

Maryland.— Baltimore Traction Co. *v.* State, 78 Md. 409, 28 Atl. 397.

Mississippi.— McMurtry *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401.

Missouri.— Heaton *v.* Kansas City, etc., R. Co., 65 Mo. App. 479; Hays *v.* Wabash R. Co., 51 Mo. App. 438.

New York.— Phillips *v.* Rensselaer, etc., R. Co., 49 N. Y. 177; Myers *v.* New York Cent., etc., R. Co., 82 Hun (N. Y.) 36, 31 N. Y. Suppl. 153, 63 N. Y. St. 475.

Rhode Island.—Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

Virginia.—Richmond, etc., R. Co. *v.* Pickleseimer, 85 Va. 798, 10 S. E. 44, 89 Va. 389, 16 S. E. 245.

See 9 Cent. Dig. tit. "Carriers," § 1369.

Elevated railroads.— The text is true also as to elevated railroads. Card *v.* Manhattan R. Co., 103 N. Y. 670, 9 N. E. 433; Solomon *v.* Manhattan R. Co., 103 N. Y. 437, 9 N. E. 430, 57 Am. Rep. 760; Robinson *v.* Manhattan R. Co., 5 Misc. (N. Y.) 209, 25 N. Y. Suppl. 91.

91. McMurtry *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401; Browne *v.* Raleigh, etc., R. Co., 108 N. C. 34, 12 S. E. 958; Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189.

92. Citizens' St. R. Co. *v.* Spahr, 7 Ind. App. 23, 33 N. E. 446.

93. *Alabama.*— Birmingham Electric R. Co. *v.* Clay, 108 Ala. 233, 19 So. 309.

District of Columbia.— Brown *v.* Washington, etc., R. Co., 11 App. Cas. (D. C.) 37.

Georgia.— White *v.* Atlanta Consol. St. R. Co., 92 Ga. 494, 17 S. E. 672.

Illinois.— North Chicago St. R. Co. *v.* Wiswell, 168 Ill. 613, 48 N. E. 407; Cicero, etc., St. R. Co. *v.* Meixner, 160 Ill. 320, 43 N. E.

More particularly it has been held not to be negligence in itself to attempt to board a street-car after it has been slowed up in response to the signal of one desiring to get on board, although it has not come to a full stop.[94] But in general the question is one of fact for the jury, to be determined under the circumstances of the case.[95] As to street-cars it has also been held that it is not negligence in itself to attempt to get on the front platform, although the rear platform is the usual place for mounting.[96] With reference both to steam and street-cars it has also been said that it is not negligence *per se* to attempt to get on board at a place other than a regular stopping place, the question being one of fact under the circumstances.[97]

b. Getting Off Train or Car — (i) *In General.* It is not necessarily negligent for the passenger to leave his seat before the conveyance comes to a stop; whether it is or not is dependent on the circumstances.[98] Even to go on the car platform before the car stops is not necessarily negligent, the passenger having a right to

823, 31 L. R. A. 331; West Chicago St. R. Co. *v.* Dudzik, 67 Ill. App. 681.

Kentucky.— Central Pass. R. Co. *v.* Rose, 15 Ky. L. Rep. 209, 22 S. W. 745.

Massachusetts.—Briggs *v.* Union St. R. Co., 148 Mass. 72, 19 N. E. 19, 12 Am. St. Rep. 518; McDonough *v.* Metropolitan R. Co., 137 Mass. 210.

Minnesota.— Sahlgaard *v.* St. Paul City R. Co., 48 Minn. 232, 51 N. W. 111; Schacherl *v.* St. Paul City R. Co., 42 Minn. 42, 43 N. W. 837.

Missouri.— Wyatt *v.* Citizens' R. Co., 55 Mo. 485. *Compare* Schepers *v.* Union Depot R. Co., 126 Mo. 665, 29 S. W. 712.

Nebraska.— Omaha St. R. Co. *v.* Martin, 48 Nebr. 65, 66 N. W. 1007.

New York.— Morrison *v.* Broadway, etc., R. Co., 130 N. Y. 166, 29 N. E. 105, 41 N. Y. St. 248; Sexton *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 26, 57 N. Y. Suppl. 577; Anderson *v.* Third Ave. R. Co., 36 N. Y. App. Div. 309, 55 N. Y. Suppl. 290; Wallace *v.* Third Ave. R. Co., 36 N. Y. App. Div. 57, 55 N. Y. Suppl. 132; Valentine *v.* Broadway, etc., R. Co., 14 Daly (N. Y.) 540, 4 N. Y. Suppl. 481, 16 N. Y. St. 602; Reidy *v.* Metropolitan St. R. Co., 27 Misc. (N. Y.) 527, 58 N. Y. Suppl. 326.

Pennsylvania.— Stager *v.* Ridge Ave. Pass. R. Co., 119 Pa. St. 70, 12 Atl. 821.

See 9 Cent. Dig. tit. "Carriers," § 1369.

94. Corlin *v.* West-End St. R. Co., 154 Mass. 197, 27 N. E. 1000; Briggs *v.* Union St. R. Co., 148 Mass. 72, 19 N. E. 19, 12 Am. St. Rep. 518; Sahlgaard *v.* St. Paul City R. Co., 48 Minn. 232, 51 N. W. 111; Eppendorf *v.* Brooklyn City, etc., R. Co., 69 N. Y. 195, 25 Am. Rep. 171; Frobisher *v.* Fifth Ave. Transp. Co., 81 Hun (N. Y.) 544, 30 N. Y. Suppl. 1099, 63 N. Y. St. 287.

95. *Illinois.*— North Chicago St. R. Co. *v.* Williams, 140 Ill. 275, 29 N. E. 672; West Chicago St. R. Co. *v.* Binder, 51 Ill. App. 420; North Chicago St. R. Co. *v.* Wrixon, 51 Ill. App. 307.

Indiana.— Citizens' St. R. Co. *v.* Spahr, 7 Ind. App. 23, 33 N. E. 446.

New Jersey.— Schmidt *v.* North Jersey St. R. Co., 66 N. J. L. 424, 49 Atl. 438.

New York.— Butler *v.* Glens Falls, etc., St. R. Co., 121 N. Y. 112, 24 N. E. 187, 30 N. St. 678; McSwyny *v.* Broadway, etc., R. Co., 54 Hun (N. Y.) 637, 4 Silv. Supreme (N. Y.) 504, 7 N. Y. Suppl. 456, 27 N. Y. St. 363; Mettlestadt *v.* Ninth Ave. R. Co., 4 Rob. (N. Y.) 377, 32 How. Pr. (N. Y.) 428; Ebling *v.* Second Ave. R. Co., 69 N. Y. Suppl. 1102.

Pennsylvania.— Linch *v.* Pittsburgh Traction Co., 153 Pa. St. 102, 25 Atl. 621; Reddington *v.* Philadelphia Traction Co., 132 Pa. St. 154, 19 Atl. 28.

Washington.— Woo Dan *v.* Seattle Electric R., etc., Co., 5 Wash. 466, 32 Pac. 103.

See 9 Cent. Dig. tit. "Carriers," § 1369.

96. Finkeldey *v.* Omnibus Cable Co., 114 Cal. 28, 45 Pac. 996; Dixon *v.* Brooklyn City, etc., R. Co., 100 N. Y. 170, 3 N. E. 65; Maher *v.* Central Park, etc., R. Co., 67 N. Y. 52; Townsend *v.* Binghamton R. Co., 57 N. Y. App. Div. 234, 68 N. Y. Suppl. 121; De Rozas *v.* Metropolitan St. R. Co., 13 N. Y. App. Div. 296, 43 N. Y. Suppl. 27; Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465, 24 N. Y. Suppl. 490, 54 N. Y. St. 342; Holmes *v.* Allegheny Traction Co., 153 Pa. St. 152, 25 Atl. 640.

97. *Indiana.*— Stoner *v.* Pennsylvania Co., 98 Ind. 384, 49 Am. Rep. 764.

Kentucky.— Louisville, etc., R. Co. *v.* Long, 94 Ky. 410, 15 Ky. L. Rep. 199, 22 S. W. 747.

Maryland.— Baltimore, etc., R. Co. *v.* Kane, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 387.

Michigan.— Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

Oregon.— Haase *v.* Oregon R., etc., Co., 19 Oreg. 354, 24 Pac. 238.

Texas.— Missouri Pac. R. Co. *v.* Callahan, (Tex. 1889) 12 S. W. 833.

See 9 Cent. Dig. tit. "Carriers," § 1368.

98. *California.*— Babcock *v.* Los Angeles Traction Co., 128 Cal. 173, 60 Pac. 780.

Illinois.— Chicago, etc., R. Co. *v.* Means, 48 Ill. App. 396.

Maryland.— Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346, 59 Am. Rep. 156.

Massachusetts.— Barden *v.* Boston, etc., R. Co., 121 Mass. 426.

New Jersey.— Consolidated Traction Co. *v.* Thalheimer, 59 N. J. L. 474, 37 Atl. 132.

assume care on the part of the carrier's servants in stopping.[99] In alighting from the platform the passenger should exercise reasonable care in taking hold of railings or other supports, and in stepping off in the proper direction and manner, and failure to use reasonable precautions in these respects may constitute contributory negligence.[1]

(II) *Dangers on Station Platform; Safe Exit.* The passenger must exercise reasonable care to avoid danger on or about the platform or other place for alighting, but he has the right to assume that a place which is safe from hidden dangers is provided, and will not be guilty of contributory negligence in acting on that assumption.[2] He is justified in the same assumption with reference to the usual exit from the train or station, but may be negligent in taking a way which is not the usual one, or one indicated by the carrier in some way as proper.[3]

(III) *Improper Place.* The passenger should obey the reasonable rules of the carrier as to the place for alighting, and if one place rather than another is indicated he should alight at that place. Thus, it may be negligent to get off at the wrong side of the car where there are conveniences offered for the alighting

New York.— Wylde *v.* Northern R. Co., 53 N. Y. 156, 14 Abb. Pr. N. S. (N. Y.) 213; Newton *v.* Central Vermont R. Co., 80 Hun (N. Y.) 491, 30 N. Y. Suppl. 488, 62 N. Y. St. 387; Colwell *v.* Manhattan R. Co., 57 Hun (N. Y.) 452, 10 N. Y. Suppl. 636, 32 N. Y. St. 991; Demann *v.* Eighth Ave. R. Co., 10 Misc. (N. Y.) 191, 30 N. Y. Suppl. 926, 62 N. Y. St. 476.

Virginia.— Norfolk, etc., R. Co. *v.* Prinnell, (Va. 1887) 3 S. E. 95.

United States.— New Jersey R., etc., Co. *v.* Pollard, 22 Wall. (U. S.) 341, 22 L. ed. 877.

See 9 Cent. Dig. tit. "Carriers," § 1386.

99. *District of Columbia.*— Harmon *v.* Washington, etc., R. Co., 7 Mackey (D. C.) 255.

Indiana.— Cincinnati, etc., R. Co. *v.* McLain, 148 Ind. 188, 44 N. E. 306.

Massachusetts.—Fleck *v.* Union R. Co., 134 Mass. 480.

Minnesota.— Scheiber *v.* Chicago, etc., R. Co., 61 Minn. 499, 63 N. W. 1034.

New Jersey.— Scott *v.* Bergen County Traction Co., 64 N. J. L. 362, 48 Atl. 1118.

New York.— Nichols *v.* Sixth Ave. R. Co., 38 N. Y. 131, 97 Am. Dec. 780.

See 9 Cent. Dig. tit. "Carriers," § 1386.

To pass on to the platform of a railroad car for the purpose of alighting when the train stops is not to ride on the platform in violation of a rule on the subject. Central R., etc., Co. *v.* Miles, 88 Ala. 256, 6 So. 696.

Where a passenger in going upon the platform for the purpose of alighting receives injuries in connection with car doors, such as the door giving way when leaned against, fingers being pinched by the closing of the door, and the like, the question is one of fact as to the exercise of reasonable care by the passenger. Romine *v.* Evansville, etc., R. Co., 24 Ind. App. 230, 56 N. E. 245; Kentucky, etc., Bridge Co. *v.* Quinkert, 2 Ind. App. 244, 28 N. E. 338; Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666; Baker *v.* Manhattan R. Co., 118 N. Y. 533, 23 N. E. 885, 29 N. Y. St. 836; Guthman *v.* Manhattan R. Co., 53 N. Y. Suppl. 139; Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142.

1. Watkins *v.* Birmingham R., etc., Co., 120 Ala. 147, 24 So. 392, 43 L. R. A. 297; Rouser *v.* Washington, etc., R. Co., 13 App. Cas. (D. C.) 320; Lafflin *v.* Buffalo, etc., R. Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; Schaefer *v.* Central Crosstown R. Co., 30 Misc. (N. Y.) 114, 61 N. Y. Suppl. 806.

2. *Arkansas.*— St. Louis, etc., R. Co. *v.* Battle, 69 Ark. 369, 63 S. W. 805.

California.— Jamison *v.* San Jose, etc., R. Co., 55 Cal. 593.

Indiana.— Ohio, etc., R. Co. *v.* Stansberry, 132 Ind. 533, 32 N. E. 218; Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687.

Kansas.—Southern Kansas R. Co. *v.* Pavey, 48 Kan. 452, 29 Pac. 593.

Michigan.— Bradley *v.* Grand Trunk R. Co., 107 Mich. 243, 65 N. W. 102.

New York.— Boyce *v.* Manhattan R. Co., 118 N. Y. 314, 23 N. E. 304, 28 N. Y. St. 692; Fox *v.* New York, 5 N. Y. App. Div. 349, 39 N. Y. Suppl. 309.

Pennsylvania.— Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293.

Texas.— Gulf, etc., R. Co. *v.* Hodges, (Tex. Civ. App. 1893) 24 S. W. 563.

Virginia.— Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587.

See 9 Cent. Dig. tit. "Carriers," § 1394.

3. *Alabama.*— Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

Arkansas.— St. Louis, etc., R. Co. *v.* Cox, 60 Ark. 106, 29 S. W. 38.

Connecticut.— Bennett *v.* New York, etc., R. Co., 57 Conn. 422, 18 Atl. 668.

Massachusetts.— Cazneau *v.* Fitchburg R. Co., 161 Mass. 355, 37 N. E. 311; Keefe *v.* Boston, etc., R. Co., 142 Mass. 251, 7 N. E. 874; Forsyth *v.* Boston, etc., R. Co., 103 Mass. 510.

Michigan.— Sturgis *v.* Detroit, etc., R. Co., 72 Mich. 619, 40 N. W. 914.

New York.— Van Schaick *v.* Hudson River

of the passenger at one side of the car and not at the other, and if this is contrary to the regulation or plain intent of the carrier, or manifestly dangerous, it will constitute contributory negligence.[4] But in general, unless there is some indication that only one side is a safe place to alight, the passenger may alight at either.[5] So also there may be regulations requiring passengers to get off at the rear platform, so as to render it negligent to get off at the front platform, defeating recovery for any injury resulting therefrom.[6] It is not, however, as a rule negligence *per se* to get off at the front platform, either in case of railroad cars[7] or street-cars.[8] Whether it constitutes negligence on the part of the passenger to get off the train at any other place than the usual and recognized place for passengers to alight will depend largely on whether there has been an invitation, express or implied, to alight at the unusual place, for the carrier will be expected to provide for the safety of the passenger in alighting at a place where it is intended he shall alight, and not elsewhere.[9] To alight, therefore, at a place which is in fact dangerous, and without express or implied invitation, may be contributory negligence,[10] while, although the place may be dangerous, if it is indicated by the carrier in any way as a proper place for alighting, then the question of whether the passenger used proper precautions is one of fact.[11]

R. Co., 43 N. Y. 527; Parsons *v.* New York Cent., etc., R. Co., 85 Hun (N. Y.) 23, 32 N. Y. Suppl. 598, 66 N. Y. St. 166.

Vermont.— Sullivan *v.* Delaware, etc., Canal Co., 72 Vt. 353, 47 Atl. 1084.

United States.— Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 14 S. Ct. 281, 38 L. ed. 131.

See 9 Cent. Dig. tit. "Carriers," § 1395.

4. Louisville, etc., R. Co. *v.* Ricketts, 93 Ky. 116, 14 Ky. L. Rep. 19, 19 S. W. 182, 96 Ky. 44, 16 Ky. L. Rep. 281, 27 S. W. 860; Gonzales *v.* New York, etc., R. Co., 38 N. Y. 440, 98 Am. Dec. 58; Plopper *v.* New York Cent., etc., R. Co., 13 Hun (N. Y.) 625; Deselms *v.* Baltimore, etc., R. Co., 149 Pa. St. 432, 24 Atl. 283; Drake *v.* Pennsylvania R. Co., 137 Pa. St. 352, 20 Atl. 994, 21 Am. St. Rep. 883; Pennsylvania R. Co. *v.* Zebe, 37 Pa. St. 420, 33 Pa. St. 318; Morgan *v.* Camden, etc., R. Co., 23 Wkly. Notes Cas. (Pa.) 189, 16 Atl. 353.

5. *California.*— McQuilken *v.* Central Pac. R. Co., 64 Cal. 463, 2 Pac. 46.

Illinois.— Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713; West Chicago St. R. Co. *v.* Manning, 170 Ill. 417, 48 N. E. 958; North Chicago St. R. Co. *v.* Eldridge, 151 Ill. 542, 38 N. E. 246; Chicago West Div. R. Co. *v.* Bolton, 37 Ill. App. 143.

Massachusetts.— McKimble *v.* Boston, etc., R. Co., 141 Mass. 463, 5 N. E. 804.

Michigan.— Poole *v.* Consolidated St. R. Co., 100 Mich. 379, 59 N. W. 390, 25 L. R. A. 744.

New Jersey.— Atlantic City R. Co. *v.* Goodin, 62 N. J. L. 394, 42 Atl. 333, 72 Am. St. Rep. 652, 45 L. R. A. 671.

Rhode Island.— Boss *v.* Providence, etc., R. Co., 15 R. I. 149, 1 Atl. 9.

Texas.— Gulf, etc., R. Co. *v.* Vinson, (Tex. Civ. App. 1893) 24 S. W. 956.

United States.— Graven *v.* MacLeod, 92 Fed. 846, 35 C. C. A. 47; Robostelli *v.* New York, etc., R. Co., 33 Fed. 796.

See 9 Cent. Dig. tit. "Carriers," § 1390.

6. Pittsburgh, etc., R. Co. *v.* Aldridge, 27 Ind. App. 498, 61 N. E. 741; Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224.

7. McDonald *v.* Illinois Cent. R. Co., 88 Iowa 345, 55 N. W. 102; Cartwright *v.* Chicago, etc., R. Co., 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274.

8. Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370; Platt *v.* Forty-Second St., etc., Ferry R. Co., 2 Hun (N. Y.) 124, 4 Thomps. & C. (N. Y.) 406.

9. See *supra*, III, F, 3, b, (IV); III, F, 3, c, (V).

As to relying on person in charge of the conveyance as to what will be safe conduct see *supra*, III, G, 1, d.

10. *Alabama.*— Smith *v.* Georgia Pac. R. Co., 88 Ala. 538, 7 So. 119, 16 Am. St. Rep. 63, 7 L. R. A. 323.

Georgia.— Georgia Southern, etc., R. Co. *v.* Murray, 113 Ga. 1021, 39 S. E. 427.

Illinois.— Illinois Cent. R. Co. *v.* Green, 81 Ill. 19, 25 Am. Rep. 255.

Kentucky.—Louisville, etc., R. Co. *v.* Keith, 22 Ky. L. Rep. 593, 56 S. W. 468.

Missouri.— Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

Nebraska.— Chicago, etc., R. Co. *v.* Hague, 48 Nebr. 97, 66 N. W. 1000.

Oklahoma.— Blevins *v.* Atchison, etc., R. Co., 3 Okla. 512, 41 Pac. 92.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Edelstein, 23 Wkly. Notes Cas. (Pa.) 342, 16 Atl. 847.

Texas.— International, etc., R. Co. *v.* Eckford, 71 Tex. 274, 8 S. W. 679; Gulf, etc., R. Co. *v.* Jordan, (Tex. Civ. App. 1895) 33 S. W. 690; Texas, etc., R. Co. *v.* McLane, (Tex. Civ. App. 1895) 32 S. W. 776.

See 9 Cent. Dig. tit. "Carriers," § 1388.

11. *Alabama.*— East Tennessee, etc., R. Co. *v.* Holmes, 97 Ala. 332, 12 So. 286; Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 12 So. 439; North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105.

Indiana.—Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168.

(IV) *MOVING TRAIN OR CAR.* In many railroad cases it has been said that an attempt to alight from a moving train is negligence *per se*.[12] But there are other cases to the contrary,[13] and in general the question of negligence in such cases is left to be determined as one of fact.[14] As to street-cars, it has been said

Iowa.— Eckerd *v.* Chicago, etc., R. Co., 70 Iowa 353, 30 N. W. 615.

Michigan.— Poole *v.* Consolidated St. R. Co., 100 Mich. 379, 59 N. W. 390, 25 L. R. A. 744.

New Hampshire.— Foss *v.* Boston, etc., R. Co., 66 N. H. 256, 21 Atl. 222, 49 Am. St. Rep. 607, 11 L. R. A. 367.

New York.— Keating *v.* New York Cent., etc., R. Co., 49 N. Y. 673.

Texas.— Texas, etc., R. Co. *v.* Garcia, 62 Tex. 285.

See 9 Cent. Dig. tit. "Carriers," § 1388.

As to looking out for moving trains at place of alighting see *supra*, III, G, 2.

12. *Alabama.*— McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

Georgia.—Whelan *v.* Georgia Midland, etc., R. Co., 84 Ga. 506, 10 S. E. 1091.

Illinois.— Ohio, etc., R. Co. *v.* Stratton, 78 Ill. 88; Illinois Cent. R. Co. *v.* Slatton, 54 Ill. 133, 5 Am. Rep. 109; Louisville, etc., R. Co. *v.* Johnson, 44 Ill. App. 56; Cincinnati, etc., R. Co. *v.* Dufrain, 36 Ill. App. 352.

Kentucky.— Louisville, etc., R. Co. *v.* Constantine, 14 Ky. L. Rep. 432.

Massachusetts.— Gavett *v.* Manchester, etc., R. Co., 16 Gray (Mass.) 501, 77 Am. Dec. 422.

Missouri.— Straus *v.* Kansas City, etc., R. Co., 75 Mo. 185.

North Carolina.— Lambeth *v.* North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508.

Pennsylvania.— Brown *v.* Barnes, 151 Pa. St. 562, 25 Atl. 144; Kilpatrick *v.* Pennsylvania R. Co., 140 Pa. St. 502, 21 Atl. 408; New York, etc., R. Co. *v.* Enches, 127 Pa. St. 316, 17 Atl. 991, 14 Am. St. Rep. 848, 4 L. R. A. 432; McClintock *v.* Pennsylvania R. Co., 21 Wkly. Notes Cas. (Pa.) 133.

Tennessee.— East Tennessee, etc., R. Co. *v.* Massengill, 15 Lea (Tenn.) 328.

See 9 Cent. Dig. tit. "Carriers," § 1391.

13. Carr *v.* Eel River, etc., R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354; Pittsburgh, etc., R. Co. *v.* Gray, (Ind. App. 1901) 59 N. E. 1000; Price *v.* St. Louis, etc., R. Co., 72 Mo. 414; Owens *v.* Wabash R. Co., 84 Mo. App. 143; Bartholomew *v.* New York Cent., etc., R. Co., 102 N. Y. 716, 7 N. E. 623; Morrison *v.* Erie R. Co., 56 N. Y. 302; Willis *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 332, 71 N. Y. Suppl. 554; Van Ostran *v.* New York Cent., etc., R. Co., 35 Hun (N. Y.) 590.

14. *Alabama.*— Birmingham R., etc., Co. *v.* James, 121 Ala. 120, 25 So. 847; Watkins *v.* Birmingham R., etc., Co., 120 Ala. 147, 24 So. 392, 43 L. R. A. 297; South, etc., Alabama R. Co. *v.* Schaufler, 75 Ala. 136.

Arkansas.— St. Louis, etc., R. Co. *v.* Rosenberry, (Ark. 1889) 11 S. W. 212; St. Louis, etc., R. Co. *v.* White, 48 Ark. 495.

Colorado.—Posten *v.* Denver Consol. Tramway Co., 11 Colo. App. 187, 53 Pac. 391.

Georgia.— Sanders *v.* Southern R. Co., 107 Ga. 132, 32 S. E. 840; Jones *v.* Georgia, etc., R. Co., 103 Ga. 570, 29 S. E. 927; Paterson *v.* Central R., etc., Co., 85 Ga. 653, 11 S. E. 872; McLarin *v.* Atlanta, etc., R. Co., 85 Ga. 504, 11 S. E. 840; Coleman *v.* Georgia R., etc., Co., 84 Ga. 1, 10 S. E. 498; Savannah, etc., R. Co. *v.* Watts, 82 Ga. 229, 9 S. E. 129; Blodgett *v.* Bartlett, 50 Ga. 353.

Illinois.— Chicago, etc., R. Co. *v.* Storment, 190 Ill. 42, 60 N. E. 104; Chicago, etc., R. Co. *v.* Byrum, 153 Ill. 131, 38 N. E. 578; Hoehn *v.* Chicago, etc., R. Co., 152 Ill. 223, 38 N. E. 549; Chicago, etc., R. Co. *v.* Bonifield, 104 Ill. 223; Chicago City R. Co. *v.* Mumford, 97 Ill. 560.

Indiana.— Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687; Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443; Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322; Louisville, etc., R. Co. *v.* Bean, 9 Ind. App. 240, 36 N. E. 443.

Iowa.— Root *v.* Des Moines City R. Co., 113 Iowa 675, 83 N. W. 904; Rahen *v.* Central Iowa R. Co., 74 Iowa 732, 34 N. W. 621; Nichols *v.* Dubuque, etc., R. Co., 68 Iowa 732, 28 N. W. 44.

Kansas.— Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, 40 Pac. 919.

Kentucky.— Louisville, etc., R. Co. *v.* Depp, 17 Ky. L. Rep. 1049, 33 S. W. 417; Hughlett *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 178, 22 S. W. 551; Chesapeake, etc., R. Co. *v.* Reeves, 11 Ky. L. Rep. 14, 11 S. W. 464.

Maryland.— Cumberland Valley R. Co. *v.* Maugans, 61 Md. 53, 48 Am. Rep. 88.

Massachusetts.— Merritt *v.* New York, etc., R. Co., 162 Mass. 326, 38 N. E. 447; England *v.* Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1; Brooks *v.* Boston, etc., R. Co., 135 Mass. 21; Lucas *v.* New Bedford, etc., R. Co., 6 Gray (Mass.) 64, 66 Am. Dec. 406.

Michigan.— Strand *v.* Chicago, etc., R. Co., 64 Mich. 216, 31 N. W. 184, 67 Mich. 380, 34 N. W. 712.

Minnesota.— Jones *v.* Chicago, etc., R. Co., 42 Minn. 183, 43 N. W. 1114.

Missouri.— Leslie *v.* Wabash, etc., R. Co., 88 Mo. 50; Waller *v.* Hannibal, etc., R. Co., 83 Mo. 608; Sanderson *v.* Missouri Pac. R. Co., 64 Mo. App. 655; Richmond *v.* Quincy, etc., R. Co., 49 Mo. App. 104; Duncan *v.* Wyatt Park R. Co., 48 Mo. App. 659; Jackson *v.* St. Louis, etc., R. Co., 29 Mo. App. 495; Taylor *v.* Missouri Pac. R. Co., 26 Mo. App. 336.

Nebraska.— Chicago, etc., R. Co. *v.* Hyatt, 48 Nebr. 161, 67 N. W. 8; Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976,

that to attempt to get off while the car is in motion, without any effort to cause a stoppage or slowing up of the car, is negligence *per se*;[15] but whether it is negligence to attempt to alight before the car has come to a full stop will depend on the circumstances, and no general rule can be laid down.[16] If the car has failed to stop or slow up on the signal of the passenger indicating his desire to alight, he is not justified in attempting to get off while it is in rapid motion.[17] But if the speed of the car is reduced in apparent response to the passenger's signal, it is not necessarily negligent to attempt to alight before it has come to a full stop.[18] In general with reference to either steam or street-cars it may be said that the fact that the train or car is not stopped at the proper place, or not stopped long enough to enable the passenger to alight, will be no excuse for his incurring danger in attempting to get off,[19] while on the other hand, if the speed has been checked so as to indicate an intention that he shall alight, or so as to render it

39 Nebr. 803, 58 N. W. 434; Union Pac. R. Co. *v.* Porter, 38 Nebr. 226, 56 N. W. 808.

New York.— Mearns *v.* New Jersey Cent. R. Co., 163 N. Y. 108, 57 N. E. 292; Lewis *v.* Delaware, etc., Canal Co., 145 N. Y. 508, 40 N. E. 248, 65 N. Y. St. 374; Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; McAlan *v.* Trustees New York, etc., Bridge, 43 N. Y. App. Div. 374, 60 N. Y. Suppl. 176; Munroe *v.* Third Ave. R. Co., 50 N. Y. Super. Ct. 114; Herdman *v.* New York, etc., R. Co., 17 N. Y. Suppl. 198, 42 N. Y. St. 293.

North Carolina.— Rickert *v.* Southern R. Co., 123 N. C. 255, 31 S. E. 497; Hodges *v.* Southern R. Co., 122 N. C. 992, 29 S. E. 939.

Ohio.— Pittsburgh, etc., R. Co. *v.* Krouse, 30 Ohio St. 222.

Rhode Island.— Bullock *v.* Butler Exch. Co., 22 R. I. 105, 46 Atl. 273.

Texas.— Galveston, etc., R. Co. *v.* Smith, 59 Tex. 406; Gulf, etc., R. Co. *v.* Cleveland, (Tex. Civ. App. 1901) 61 S. W. 951; High *v.* International, etc., R. Co., (Tex. Civ. App. 1900) 55 S. W. 526; International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41; Dillingham *v.* Pierce, (Tex. Civ. App. 1895) 31 S. W. 203.

Virginia.— Richmond, etc., R. Co. *v.* Morris, 31 Gratt. (Va.) 200.

Wisconsin.— Schiffler *v.* Chicago, etc., R. Co., 96 Wis. 141, 71 N. W. 97, 65 Am. St. Rep. 35; Brown *v.* Chicago, etc., R. Co., 80 Wis. 162, 49 N. W. 807.

See 9 Cent. Dig. tit. "Carriers," § 1391.

15. *Maryland.*— State *v.* Lake Roland El. R. Co., 84 Md. 163, 34 Atl. 1130.

Massachusetts.— White *v.* West End St. R. Co., 165 Mass. 522, 43 N. E. 298.

Missouri.— Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 18 Am. St. Rep. 541, 7 L. R. A. 819.

New York.— Dickson *v.* Broadway, etc., R. Co., 41 How. Pr. (N. Y.) 151.

Pennsylvania.— Purtell *v.* Ridge Ave. Pass. R. Co., 3 Pa. Co. Ct. 273.

See 9 Cent. Dig. tit. "Carriers," § 1391.

16. *Alabama.*— Calderwood *v.* North Birmingham St. R. Co., 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105, 96 Ala. 318, 11 So. 66; Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353.

California.— Campbell *v.* Los Angeles R. Co., 135 Cal. 137, 67 Pac. 50.

Georgia.— Masterson *v.* Macon City, etc., R. Co., 88 Ga. 436, 14 S. E. 591.

Michigan.— Britton *v.* Grand Rapids St. R. Co., 90 Mich. 159, 51 N. W. 276.

Nebraska.— Omaha St. R. Co. *v.* Craig, 39 Nebr. 601, 58 N. W. 209.

New Jersey.— New Jersey Traction Co. *v.* Gardner, 60 N. J. L. 571, 38 Atl. 669.

New York.— Conley *v.* Forty-second St., etc., R. Co., 56 N. Y. Super. Ct. 607, 2 N. Y. Suppl. 229; Taylor *v.* Dry Dock, etc., R. Co., 9 N. Y. St. 498.

Pennsylvania.— Sweeney *v.* Union Traction Co., 199 Pa. St. 293, 49 Atl. 66; Crissey *v.* Hestonville, etc., Pass. R. Co., 75 Pa. St. 83.

Washington.— Brown *v.* Seattle City R. Co., 16 Wash. 465, 47 Pac. 890.

See 9 Cent. Dig. tit. "Carriers," § 1391.

Where the facts are not in controversy the question is for the court. Jagger *v.* People's St. R. Co., 180 Pa. St. 436, 36 Atl. 867, 38 L. R. A. 786.

17. *District of Columbia.*— Harmon *v.* Washington, etc., R. Co., 6 Mackey (D. C.) 57.

Georgia.— Outen *v.* North, etc., R. Co., 94 Ga. 662, 21 S. E. 710.

Indiana.— Dresslar *v.* Citizens' St. R. Co., 19 Ind. App. 383, 47 N. E. 651.

Massachusetts.— Cram *v.* Metropolitan R. Co., 112 Mass. 38.

Pennsylvania.—Hagan *v.* Philadelphia, etc., Ferry R. Co., 15 Phila. (Pa.) 278, 38 Leg. Int. (Pa.) 252.

See 9 Cent. Dig. tit. "Carriers," § 1392.

18. Walters *v.* Collins Park, etc., R. Co., 95 Ga. 519, 20 S. E. 497; Solomon *v.* Central Park, etc., R. Co., 1 Sweeny (N. Y.) 298; Mettlestadt *v.* Ninth Ave. R. Co., 4 Rob. (N. Y.) 377, 32 How. Pr. (N. Y.) 428; Crissey *v.* Hestonville, etc., Pass. R. Co., 75 Pa. St. 83.

19. *Alabama.*— Louisville, etc., R. Co. *v.* Lee, 97 Ala. 325, 12 So. 48.

Arkansas.— Kansas City, etc., R. Co. *v.* Mayes, 58 Ark. 397, 24 S. W. 1076.

Georgia.— Atlanta, etc., R. Co. *v.* Dickerson, 89 Ga. 455, 15 S. E. 534; Barnett *v.* East Tennessee, etc., R. Co., 87 Ga. 766, 13 S. E. 904; Watson *v.* Georgia Pac. R. Co., 81 Ga. 476, 7 S. E. 854.

not hazardous to do so, the act of alighting before the train or car has come to a full stop will not necessarily be negligent.[20]

4. While in Transit — a. Incidental Dangers — (I) *In General.* The duty of the carrier to look out for the safety of the passenger justifies the passenger in assuming safety, and he is not bound to take precautions against dangers which are not apparent or brought to his knowledge.[21]

(II) *Standing or Moving From Place to Place.* The passenger is not, however, justified in incurring the risk incident to standing in a car, and thus subjecting himself to injury from jerks and jars which would not imperil his safety if he were properly seated.[22] Inasmuch, however, as it is not generally

Illinois.— Dongherty *v.* Chicago, etc., R. Co., 86 Ill. 467; Illinois Cent. R. Co. *v.* Lutz, 84 Ill. 598; Illinois Cent. R. Co. *v.* Chambers, 71 Ill. 519; Illinois Cent. R. Co. *v.* Able, 59 Ill. 131.

Indiana.— Toledo, etc., R. Co. *v.* Wingate, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477; Reibel *v.* Cincinnati, etc., R. Co., 114 Ind. 476, 17 N. E. 107; Jeffersonville R. Co. *v.* Swift, 26 Ind. 459; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Pennsylvania Co. *v.* Hixon, 10 Ind. App. 520, 38 N. E. 56.

Louisiana.— Walker *v.* Vicksburg, etc., R. Co., 41 La. Ann. 795, 6 So. 916, 17 Am. St. Rep. 417, 7 L. R. A. 111; Damont *v.* New Orleans, etc., R. Co., 9 La. Ann. 441, 61 Am. Dec. 214.

Massachusetts.— La Pointe *v.* Boston, etc., R. Co., 179 Mass. 535, 61 N. E. 142.

Michigan.— Jacob *v.* Flint, etc., R. Co., 105 Mich. 450, 63 N. W. 502; Porter *v.* Chicago, etc., R. Co., 80 Mich. 156, 44 N. W. 1054, 20 Am. St. Rep. 511; Lake Shore, etc., R. Co. *v.* Bangs, 47 Mich. 470, 11 N. W. 276.

Minnesota.—Butler *v.* St. Paul, etc., R. Co., 59 Minn. 135, 60 N. W. 1090.

Missouri.— Kelly *v.* Hannibal, etc., R. Co., 70 Mo. 604; Nelson *v.* Atlantic, etc., R. Co., 68 Mo. 593.

Nebraska.— Chicago, etc., R. Co. *v.* Landauer, 36 Nebr. 642, 54 N. W. 976.

New York.— Burrows *v.* Erie R. Co., 63 N. Y. 556; Morrison *v.* Erie R. Co., 56 N. Y. 302; Scully *v.* New York, etc., R. Co., 80 Hun (N. Y.) 197, 30 N. Y. Suppl. 61, 61 N. Y. St. 804.

North Carolina.—Burgin *v.* Richmond, etc., R. Co., 115 N. C. 673, 20 S. E. 473.

Pennsylvania.— Rothstein *v.* Pennsylvania R. Co., 171 Pa. St. 620, 33 Atl. 379; Victor *v.* Pennsylvania R. Co., 164 Pa. St. 195, 30 Atl. 381; Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323.

Texas.— Fordyce *v.* Allen, (Tex. Civ. App. 1894) 26 S. W. 437.

Wisconsin.— Jewell *v.* Chicago, etc., R. Co., 54 Wis. 610, 12 N. W. 83, 41 Am. Rep. 63.

See 9 Cent. Dig. tit. "Carriers," § 1392.

20. *Alabama.*— Central R., etc., Co. *v.* Miles, 88 Ala. 256, 6 So. 696.

Georgia.— Covington *v.* Western, etc., R. Co., 81 Ga. 273, 6 S. E. 593.

Illinois.— Illinois Cent. R. Co. *v.* Able, 59 Ill. 131.

Louisiana.— Lehman *v.* Louisiana Western R. Co., 37 La. Ann. 705.

Michigan.— Cousins *v.* Lake Shore, etc., R. Co., 96 Mich. 386, 56 N. W. 14.

Missouri.— Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509.

Pennsylvania.— Leggett *v.* Western New York, etc., R. Co., 143 Pa. St. 39, 21 Atl. 996; Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701.

Wisconsin.—Alford *v.* Chicago, etc., R. Co., 86 Wis. 235, 56 N. W. 743; Hemmingway *v.* Chicago, etc., R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823; Delamatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578.

United States.—McSloop *v.* Richmond, etc., R. Co., 59 Fed. 431.

See 9 Cent. Dig. tit. "Carriers," § 1392.

21. *California.*— Babcock *v.* Los Angeles Traction Co., 128 Cal. 173, 60 Pac. 780.

Illinois.— West Chicago St. R. Co. *v.* Johnson, 77 Ill. App. 142.

Indiana.— Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135; Citizens' St. R. Co. *v.* Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.

Iowa.— Quackenbush *v.* Chicago, etc., R. Co., 73 Iowa 458, 35 N. W. 523.

Missouri.— Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; Taylor *v.* Wabash R. Co., (Mo. 1896) 38 S. W. 304, 42 L. R. A. 410.

New Jersey.— Sparks *v.* Citizens' Coach Co., 6 N. J. L. 365.

New York.— Hill *v.* Starin, 65 N. Y. App. Div. 361, 73 N. Y. Suppl. 91; Caldwell *v.* Murphy, 1 Duer (N. Y.) 233.

Ohio.— Hollingsworth *v.* Cincinnati St. R. Co., 21 Ohio Cir. Ct. 536.

Pennsylvania.— O'Toole *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 99, 27 Atl. 737, 38 Am. St. Rep. 830, 22 L. R. A. 606.

Texas.— Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

Washington.— Washington *v.* Spokane St. R. Co., 13 Wash. 9, 42 Pac. 628.

United States.— Goble *v.* Delaware, etc., R. Co., 10 Fed. Cas. No. 5,488*a*, 3 N. J. L. J. 176.

See 9 Cent. Dig. tit. "Carriers," § 1370.

22. East Tennessee, etc., R. Co. *v.* Green, 95 Ga. 736, 22 S. E. 658; De Soucey *v.* Manhattan R. Co., 15 N. Y. Suppl. 108, 39 N. Y. St. 79; Wallace *v.* Western North Carolina R. Co., 98 N. C. 494, 4 S. E. 503, 2 Am. St. Rep. 346; Whipple *v.* West Philadelphia Pass. R. Co., 11 Phila. (Pa.) 345, 33 Leg. Int. (Pa.) 140.

practicable nor usual in the course of the business to require passengers to remain in a seat without moving from the beginning to the end of the transit, it is properly a question of fact whether under the circumstances the passenger was negligent in standing in the car while in motion.[23] At any rate when the car is crowded so that passengers cannot all be accommodated with seats it is not negligent for a passenger to stand, taking proper precautions in doing so.[24] The same principle applies to moving from one part of the car to another while in motion.[25] It is suggested in some cases that it is negligent for a passenger to go from one car to another while in transit, thus subjecting himself to danger not incident to continuing in the car which he first entered.[26] But even this may be justified under some circumstances, and the question is for the jury as one of fact.[27]

(III) *Projection of Body or Member Beyond Side of Car.* It is generally said that it is negligence for a passenger in a steam car to protrude his arm or head through a window so as to come in contact with objects or obstacles near the track.[28] It is not negligence for the passenger to sit with his elbow on the window sill, the window being open, although by reason of some sudden jolt

23. Farnon *v.* Boston, etc., R. Co., 180 Mass. 212, 62 N. E. 254; Griffith *v.* Utica, etc., R. Co., 17 N. Y. Suppl. 692, 43 N. Y. St. 835; Tillett *v.* Norfolk, etc., R. Co., 118 N. C. 1031, 24 S. E. 111; Harden *v.* Chicago, etc., R. Co., 102 Wis. 213, 78 N. W. 424.

24. Grötsch *v.* Steinway R. Co., 19 N. Y. App. Div. 130, 45 N. Y. Suppl. 1075; Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536.

25. *Alabama.*— Birmingham R., etc., Co. *v.* James, 121 Ala. 120, 25 So. 847.

District of Columbia.— McAfee *v.* Huidekoper, 9 App. Cas. (D. C.) 36, 34 L. R. A. 720.

Illinois.—North Chicago St. R. Co. *v.* Baur, 79 Ill. App. 121; Lavis *v.* Wisconsin Cent. R. Co., 54 Ill. App. 636.

Indiana.— Indiana, etc., R. Co. *v.* Masterson, 16 Ind. App. 323, 44 N. E. 1004.

Maryland.— Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346, 59 Am. Rep. 156.

Minnesota.— Blondel *v.* St. Paul City R. Co., 66 Minn. 284, 68 N. W. 1079.

New Jersey.— Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845.

New York.— Piper *v.* New York Cent., etc., R. Co., 89 Hun (N. Y.) 75, 34 N. Y. Suppl. 1072, 68 N. Y. St. 835; Farrell *v.* Houston, etc., R. Co., 4 N. Y. Suppl. 597, 21 N. Y. St. 84.

Texas.—San Antonio, etc., R. Co. *v.* Choate, 22 Tex. Civ. App. 618, 56 S. W. 214; Sturdivant *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1894) 27 S. W. 170.

See 9 Cent. Dig. tit. "Carriers," § 1383.

It is for the jury to determine whether risk was involved in moving about in the car, which the passenger should have avoided. Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845; Felton *v.* Horner, 97 Tenn. 579, 37 S. W. 696; Chicago, etc., R. Co. *v.* Myers, 80 Fed. 361, 49 U. S. App. 279, 25 C. C. A. 486; Bronson *v.* Oakes, 76 Fed. 734, 40 U. S. App. 413, 22 C. C. A. 520.

26. *Alabama.*— Hill *v.* Birmingham Union R. Co., 100 Ala. 447, 14 So. 201; McDaniel *v.* Highland Ave., etc., R. Co., 90 Ala. 64, 8 So. 41.

Illinois.— Galena, etc., R. Co. *v.* Yarwood, 15 Ill. 468; Louisville, etc., R. Co. *v.* Stout, 66 Ill. App. 298.

Louisiana.— Bemiss *v.* New Orleans, etc., R. Co., 47 La. Ann. 1671, 18 So. 711.

New York.— Piper *v.* New York Cent., etc., R. Co., 156 N. Y. 224, 50 N. E. 851, 66 Am. St. Rep. 559, 41 L. R. A. 724; Downs *v.* New York Cent. R. Co., 47 N. Y. 83.

Texas.—Choate *v.* San Antonio, etc., R. Co., 90 Tex. 82, 36 S. W. 247, 37 S. W. 319.

See 9 Cent. Dig. tit. "Carriers," § 1384.

27. *Georgia.*— Cotchett *v.* Savannah, etc., R. Co., 84 Ga. 687, 11 S. E. 553.

Illinois.— Hannibal, etc., R. Co. *v.* Martin, 111 Ill. 219.

Kentucky.—Louisville, etc., R. Co. *v.* Berg, 17 Ky. L. Rep. 1105, 32 S. W. 616.

Massachusetts.— Snowden *v.* Boston, etc., R. Co., 151 Mass. 220, 20 N. E. 40.

Texas.— Galveston, etc., R. Co. *v.* Morris, (Tex. Civ. App. 1901) 60 S. W. 813.

Virginia.— Chesapeake, etc., R. Co. *v.* Clowes, 93 Va. 189, 24 S. E. 833.

Wisconsin.—Burt *v.* Douglas County St. R. Co., 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479.

See 9 Cent. Dig. tit. "Carriers," § 1384.

28. *Alabama.*— Georgia Pac. R. Co. *v.* Underwood, 90 Ala. 49, 8 So. 116, 24 Am. St. Rep. 756.

Indiana.— Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

Indian Territory.— Chicago, etc., R. Co. *v.* Hoover, (Indian Terr. 1901) 64 S. W. 579.

Kentucky.— Clarke *v.* Louisville, etc., R. Co., 101 Ky. 34, 18 Ky. L. Rep. 1082, 39 S. W. 840, 36 L. R. A. 123; Favre *v.* Louisville, etc., R. Co., 91 Ky. 541, 13 Ky. L. Rep. 116, 16 S. W. 370; Louisville, etc., R. Co. *v.* Sickings, 5 Bush (Ky.) 1, 96 Am. Dec. 320; Shelton *v.* Louisville, etc., R. Co., 19 Ky. L. Rep. 215, 39 S. W. 842; Kentucky Cent. R. Co. *v.* Jacoby, 14 Ky. L. Rep. 763.

Maryland.— Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568.

or jar his arm is thrown outside and he is injured.[29] As to street-cars there is less strictness in the rule with reference to the elbow or arm projecting, or holding on to the posts of an open car, or the like.[30] But it may be negligent for a passenger in either a railway or street-car to stand on the side of the car or on the platform and swing his body out so as to come in contact with obstacles.[31]

b. Riding in Dangerous or Improper Place — (i) *In Cars Not For Passengers.* A passenger who rides in a place not intended for passengers, and which is more dangerous than the places where passengers are permitted to ride, is thereby chargeable with contributory negligence, and cannot recover for injuries resulting to him by reason of his assuming such extra hazard, although the question is one of fact as to whether the hazard was increased and the injury resulted by reason thereof.[32] But for some purposes it is necessary for one who

Massachusetts.— Todd *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49, 7 Allen (Mass.) 207, 83 Am. Dec. 679.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* McClurg, 56 Pa. St. 294.

Virginia.— Richmond, etc., R. Co. *v.* Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; Dun *v.* Seaboard, etc., R. Co., 78 Va. 645, 49 Am. Rep. 388.

See 9 Cent. Dig. tit. "Carriers," § 1380.

But in some cases such act is said to be not negligence per se, and the question of contributory negligence is to be determined as one of fact.

Louisiana.— Kird *v.* New Orleans, etc., R. Co., 105 La. 226, 29 So. 729.

Missouri.— Barton *v.* St. Louis, etc., R. Co., 52 Mo. 253, 14 Am. Rep. 418.

South Carolina.— Quinn *v.* South Carolina R. Co., 29 S. C. 381, 7 S. E. 614, 1 L. R. A. 682.

Texas.— Gulf, etc., R. Co. *v.* Danshank, 6 Tex. Civ. App. 385, 25 S. W. 295.

Wisconsin.— Spencer *v.* Milwaukee, etc., R. Co., 17 Wis. 487, 84 Am. Dec. 758.

See 9 Cent. Dig. tit. "Carriers," § 1380.

As to negligence of the carrier with reference to obstacles on, or near, the track see *supra*, III, F, 3, d, (VI); III, F, 3, e, (VIII).

29. *Missouri.*— Winters *v.* Hannibal, etc., R. Co., 39 Mo. 468.

Oregon.— Moakler *v.* Willamette Valley R. Co., 18 Oreg. 189, 22 Pac. 948, 17 Am. St. Rep. 717, 6 L. R. A. 656.

Pennsylvania.— People's Pass. R. Co. *v.* Lauderbach, (Pa. 1886) 3 Atl. 672.

Texas.— Gulf, etc., R. Co. *v.* Killebrew, (Tex. 1892) 20 S. W. 182.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

United States.— Farlow *v.* Kelly, 108 U. S. 288, 2 S. Ct. 555, 27 L. ed. 726; Schneider *v.* New Orleans, etc., R., 54 Fed. 466.

See 9 Cent. Dig. tit. "Carriers," § 1380.

30. *California.*— Seigel *v.* Eisen, 41 Cal. 109.

Illinois.— Chicago City R. Co. *v.* Rood, 62 Ill. App. 550.

Kentucky.— South Covington, etc., R. Co. *v.* McCleave, 18 Ky. L. Rep. 1036, 38 S. W. 1055.

Louisiana.— Summers *v.* Crescent City R. Co., 34 La. Ann. 139, 44 Am. Rep. 419.

Maryland.— North Baltimore Pass. R. Co. *v.* Kaskell, 78 Md. 517, 28 Atl. 410.

Minnesota.— Dahlberg *v.* Minneapolis St. R. Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585.

Missouri.— Miller *v.* St. Louis R. Co., 5 Mo. App. 471.

New York.— Francis *v.* New York Steam Co., 114 N. Y. 380, 21 N. E. 988, 23 N. Y. St. 543; Tucker *v.* Buffalo R. Co., 53 N. Y. App. Div. 571, 65 N. Y. Suppl. 989.

Pennsylvania.— Germantown Pass. R. Co. *v.* Brophy, 105 Pa. St. 38.

See 9 Cent. Dig. tit. "Carriers," § 1380.

31. *Illinois.*— Lake Shore, etc., R. Co. *v.* Kelsey, 180 Ill. 530, 54 N. E. 608.

Louisiana.— Moore *v.* Edison Electric Illuminating Co., 43 La. Ann. 792, 9 So. 433.

Massachusetts.— Cummings *v.* Worcester, etc., St. R. Co., 166 Mass. 220, 44 N. E. 126.

New Jersey.— Flynn *v.* Consolidated Traction Co., 64 N. J. L. 375, 45 Atl. 799.

New York.— Sias *v.* Rochester R. Co., 92 Hun (N. Y.) 140, 36 N. Y. Suppl. 378, 71 N. Y. St. 148.

Pennsylvania.— Butler *v.* Pittsburgh, etc., Pass. R. Co., 139 Pa. St. 195, 21 Atl. 500.

Texas.— Houston, etc., R. Co. *v.* Hampton, 64 Tex. 427.

See 9 Cent. Dig. tit. "Carriers," § 1380.

32. *Georgia.*— Higgins *v.* Cherokee R. Co., 73 Ga. 149.

Illinois.— Moss *v.* Johnson, 22 Ill. 633; Ohio, etc., R. Co. *v.* Allender, 47 Ill. App. 484.

Indiana.— Udell *v.* Citizens St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336.

Massachusetts.— Worthen *v.* Grand Trunk R. Co., 125 Mass. 99.

Michigan.— Nieboer *v.* Detroit Electric R. Co., (Mich. 1901) 87 N. W. 626.

Missouri.— Carroll *v.* Inter-State Rapid Transit Co., 107 Mo. 653, 17 S. W. 889.

North Carolina.—Asbury *v.* Charlotte Electric R., etc., Co., 125 N. C. 568, 34 S. E. 654; Smith *v.* Richmond, etc., R. Co., 99 N. C. 241, 5 S. E. 896.

Pennsylvania.—Bard *v.* Pennsylvania Traction Co., 176 Pa. St. 97, 34 Atl. 953, 53 Am. St. Rep. 672.

Tennessee.— Mobile, etc., R. Co. *v.* Bogle, 101 Tenn. 40, 46 S. W. 760.

Virginia.— Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

is being transported as a passenger, such as a drover on a freight train accompanying cattle, to ride in a more hazardous place than that provided for the transportation of passengers, and the assumption of any necessary hazard of this kind will not be contributory negligence.[33] To ride in a car not intended for passengers, such as a baggage, mail, or express car, and without the consent of the carrier's servants, is usually considered negligence *per se* so far as to absolutely defeat recovery for injuries which would not have been sustained had the passenger been in a proper place.[34] It is usually for the jury to say whether the injury is the proximate result of riding in such car.[35]

(II) *Riding on Car Platform or Steps.* To ride on the platform of a railroad car while the train is in rapid motion is usually treated as negligence *per se*, such as to defeat recovery for injuries received by reason of riding in such position;[36] but there are cases in which such an act is said not to be negligence

Washington.— Hawkins *v.* Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L. R. A. 808.

See 9 Cent. Dig. tit. "Carriers," § 1375.

33. *Florida.*— Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714.

Illinois.— Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210 [*affirming* 69 Ill. App. 363].

Iowa.— Player *v.* Burlington, etc., R. Co., 62 Iowa 723, 16 N. W. 347.

Wisconsin.— Lawson *v.* Chicago, etc., R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

United States.—Chicago, etc., R. Co. *v.* Lee, 92 Fed. 318, 34 C. C. A. 365; Chicago, etc., R. Co. *v.* Carpenter, 56 Fed. 451, 12 U. S. App. 392, 5 C. C. A. 551.

See 9 Cent. Dig. tit. "Carriers," § 1374.

A drover may, however, be negligent in assuming unnecessary hazards so as to defeat his right to recover for injuries resulting therefrom. Beyer *v.* Louisville, etc., R. Co., 114 Ala. 424, 21 So. 952; Illinois Cent. R. Co. *v.* Brown, 77 Miss. 338, 28 So. 949; Neville *v.* St. Louis Merchants Bridge Terminal R. Co., 158 Mo. 293, 59 S. W. 123; Kimball *v.* Palmer, 80 Fed. 240, 42 U. S. App. 399, 25 C. C. A. 394.

As to the care required for the protection of persons who are properly riding in a manner more dangerous than usual see *supra*, III, F, 1, c, (I); III, F, 3, e, (VII).

34. *Florida.*— Florida Southern R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631.

Illinois.— Peoria, etc., R. Co. *v.* Lane, 83 Ill. 448.

Kentucky.— Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208.

Missouri.— Tuley *v.* Chicago, etc., R. Co., 41 Mo. App. 432.

Oklahoma.— Atchison, etc., R. Co. *v.* Johnson, 3 Okla. 41, 41 Pac. 641.

Texas.— Houston, etc., R. Co. *v.* Clemmons, 55 Tex. 88, 40 Am. Rep. 799.

See 9 Cent. Dig. tit. "Carriers," § 1381.

35. *Iowa.*— Blake *v.* Burlington, etc., R. Co., 89 Iowa 8, 56 N. W. 405, 21 L. R. A. 559.

Maryland.—Baltimore, etc., R. Co. *v.* State, 72 Md. 36, 18 Atl. 1107, 20 Am. St. Rep. 454, 6 L. R. A. 706.

Massachusetts.— Cody *v.* New York, etc., R. Co., 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843.

Missouri.— Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

New Jersey.— New York, etc., R. Co. *v.* Ball, 53 N. J. L. 283, 21 Atl. 1052.

New York.— Webster *v.* Rome, etc., R. Co., 40 Hun (N. Y.) 161.

Pennsylvania.— Creed *v.* Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693.

Tennessee.— Washburn *v.* Nashville, etc., R. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784.

Texas.— International, etc., R. Co. *v.* Ormond, 64 Tex. 485.

See 9 Cent. Dig. tit. "Carriers," § 1381.

Riding on engine.— The same rule is applicable as to injuries received while riding on the engine. Doggett *v.* Illinois Cent. R. Co., 34 Iowa 284; Hanson *v.* Mansfield R., etc., Co., 38 La. Ann. 111, 58 Am. Rep. 162; Texas, etc., R. Co. *v.* Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

36. *Indiana.*— Cleveland, etc., R. Co. *v.* Moneyhun, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141.

Kentucky.— Louisville, etc., R. Co. *v.* Morris, 23 Ky. L. Rep. 448, 62 S. W. 1012.

Maine.— Goodwin *v.* Boston, etc., R., 84 Me. 203, 24 Atl. 816.

Massachusetts.— Hickey *v.* Boston, etc., R. Co., 14 Allen (Mass.) 429.

Missouri.— Smotherman *v.* St. Louis, etc., R. Co., 29 Mo. App. 265; Gerstle *v.* Union Pac. R. Co., 23 Mo. App. 361; Ashbrook *v.* Frederick Ave. R. Co., 18 Mo. App. 290.

Oklahoma.— Sanders *v.* Chicago, etc., R. Co., 10 Okla. 325, 61 Pac. 1075.

Pennsylvania.— Aikin *v.* Frankford, etc., R. Co., 142 Pa. St. 47, 21 Atl. 781.

Vermont.— Worthington *v.* Central Vermont R. Co., 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326.

See 9 Cent. Dig. tit. "Carriers," § 1376.

By statute in some states passengers are prohibited from riding on the platform if suitable accommodations are available inside the car, and of course a violation of the statute constitutes contributory negligence.

per se, even where there is no particular excuse for it.[37] And where the car is so crowded that there is no reasonable accommodation inside, the act of riding on the platform is treated as not negligent.[38] As therefore the question of the propriety of riding on the platform depends on circumstances, it is properly for the jury.[39] As to street-cars, the rule as to riding on the platform is more liberal, and it is generally said not to be negligence *per se* to do so.[40] And it is said not to be negligence *per se* in such cases, even though the passenger fails to hold on to railings or other convenient supports.[41] But under the circumstances failure to hold on may constitute such negligence as to defeat recovery for resulting injury.[42] In many cases, however, it is said to be negligent to ride on the plat-

Choate *v.* Missouri Pac. R. Co., 67 Mo. App. 105; Willis *v.* Long Island R. Co., 34 N. Y. 670. But one who goes upon the platform while the speed of the car is being checked for the purpose of stopping is not riding upon the platform in violation of the statute. Schultze *v.* Missouri Pac. R. Co., 32 Mo. App. 438; Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271.

37. *Alabama.*— Highland Ave., etc., R. Co. *v.* Donovan, 94 Ala. 299, 10 So. 139.

Georgia.— Augusta, etc., R. Co. *v.* Renz, 55 Ga. 126.

Iowa.— Sutherland *v.* Standard L., etc., Ins. Co., 87 Iowa 505, 54 N. W. 453.

Massachusetts.— Beal *v.* Lowell, etc., St. R. Co., 157 Mass. 444, 32 N. E. 653; Maguire *v.* Middlesex R. Co., 115 Mass. 239; Meesel *v.* Lynn, etc., R. Co., 8 Allen (Mass.) 234.

Michigan.— Upham *v.* Detroit City R. Co., 85 Mich. 12, 48 N. W. 199, 12 L. R. A. 129.

Minnesota.— Matz *v.* St. Paul City R. Co., 52 Minn. 159, 53 N. W. 1071.

Missouri.— Choate *v.* Missouri Pac. R. Co., 67 Mo. App. 105.

South Carolina.— Doolittle *v.* Southern R. Co., 62 S. C. 130, 40 S. E. 133.

Texas.— Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572; Gaunce *v.* Gulf, etc., R. Co., 20 Tex. Civ. App. 33, 48 S. W. 524; International, etc., R. Co. *v.* Welsh, (Tex. Civ. App. 1894) 24 S. W. 854.

Washington.— Muldoon *v.* Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794.

See 9 Cent. Dig. tit. "Carriers," § 1376.

38. *Illinois.*— Chicago, etc., R. Co. *v.* Dumser, 161 Ill. 190, 43 N. E. 698; Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406.

Kentucky.— Chesapeake, etc., R. Co. *v.* Lang, 100 Ky. 221, 19 Ky. L. Rep. 65, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271.

New York.— Werle *v.* Long Island R. Co., 98 N. Y. 650; Merwin *v.* Manhattan R. Co., 48 Hun (N. Y.) 608, 1 N. Y. Suppl. 267, 16 N. Y. St. 20.

Texas.— International, etc., R. Co. *v.* Williams, 20 Tex. Civ. App. 587, 50 S. W. 732.

Washington.— Graham *v.* McNeill, 20 Wash. 466, 55 Pac. 631, 72 Am. St. Rep. 121, 43 L. R. A. 300.

United States.— Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536.

See 9 Cent. Dig. tit. "Carriers," § 1377.

39. *Alabama.*— McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

Arkansas.— Memphis, etc., R. Co. *v.* Salinger, 46 Ark. 528.

Illinois.— Lake Shore, etc., R. Co. *v.* Kelsey, 180 Ill. 530, 54 N. E. 608; Illinois Cent. R. Co. *v.* O'Keefe, 154 Ill. 508, 39 N. E. 606; Chicago, etc., R. Co. *v.* Rielly, 40 Ill. App. 416.

Massachusetts.— Torrey *v.* Boston, etc., R. Co., 147 Mass. 412, 18 N. E. 213.

Minnesota.— Saiko *v.* St. Paul City R. Co., 67 Minn. 8, 69 N. W. 473.

New York.— Goodrich *v.* Pennsylvania, etc., Canal, etc., Co., 29 Hun (N. Y.) 50.

See 9 Cent. Dig. tit. "Carriers," § 1376.

40. *District of Columbia.*— Adams *v.* Washington, etc., R. Co., 9 App. Cas. (D. C.) 26.

Illinois.— North Chicago St. R. Co. *v.* Baur, 179 Ill. 126, 53 N. E. 568, 45 L. R. A. 108.

Maine.— Watson *v.* Portland, etc., R. Co., 91 Me. 584, 40 Atl. 699, 64 Am. St. Rep. 268, 44 L. R. A. 157.

Massachusetts.— Cummings *v.* Worcester, etc., St. R. Co., 166 Mass. 220, 44 N. E. 126.

Missouri.— Burns *v.* Bellefontaine R. Co., 50 Mo. 139.

New Jersey.—Scott *v.* Bergen County Traction Co., 63 N. J. L. 407, 43 Atl. 1060 [*affirmed* in 64 N. J. L. 362, 48 Atl. 1118].

New York.— Nolan *v.* Brooklyn City, etc., R. Co., 87 N. Y. 63, 41 Am. Rep. 345; Bradley *v.* Second Ave. R. Co., 34 N. Y. App. Div. 284, 54 N. Y. Suppl. 256; Dillon *v.* Forty-second St., etc., R. Co., 28 N. Y. App. Div. 404, 51 N. Y. Suppl. 145; Hastings *v.* Central Crosstown R. Co., 7 N. Y. App. Div. 312, 40 N. Y. Suppl. 93; Morris *v.* Eighth Ave. R. Co., 68 Hun (N. Y.) 39, 22 N. Y. Suppl. 666, 52 N. Y. St. 61; Seelig *v.* Metropolitan St. R. Co., 18 Misc. (N. Y.) 383, 41 N. Y. Suppl. 656.

See 9 Cent. Dig. tit "Carriers," § 1376.

41. North Chicago St. R. Co. *v.* Baur, 79 Ill. App. 121; Kean *v.* West Chicago St. R. Co., 75 Ill. App. 38; Ginna *v.* Second Ave. R. Co., 67 N. Y. 596.

42. *Colorado.*— Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331.

Illinois.— Quinn *v.* Illinois Cent. R. Co., 51 Ill. 495.

Massachusetts.— Holland *v.* West End St. R. Co., 155 Mass. 387, 29 N. E. 622; Wills *v.* Lynn, etc., R. Co., 129 Mass. 351.

Minnesota.— Matz *v.* St. Paul City R. Co., 52 Minn. 159, 53 N. W. 1071.

form or steps of a street-car in rapid motion, unless the crowded condition of the car makes it necessary.[43] In general the question of negligence in riding on the platform of a street-car is one of fact.[44] The rule applicable to platforms and steps of ordinary street-cars is also applicable to the running-board or step at the side of an open car, and it is said in some cases to be negligence *per se* to ride in such position without the excuse that there is no room in the car,[45] while, if the car is crowded, it is not negligence *per se* to ride on the running-board.[46] This question, also, is usually left to the jury.[47]

New York.— Ward *v.* Central Park, etc., R. Co., 33 N. Y. Super. Ct. 392.

See 9 Cent. Dig. tit. "Carriers," § 1376.

43. *Alabama.*— Highland Ave., etc., R. Co. *v.* Donovan, 94 Ala. 299, 10 So. 139.

District of Columbia.— Brightwood R. Co. *v.* Carter, 12 App. Cas. (D. C.) 155; Metropolitan R. Co. *v.* Snashall, 3 App. Cas. (D. C.) 420, 435; Andrews *v.* Capitol, etc., R. Co., 2 Mackey (D. C.) 137, 47 Am. Rep. 266.

Indiana.— Marion St. R. Co. *v.* Shaffer, 9 Ind. App. 486, 36 N. E. 861.

Michigan.— Archer *v.* Ft. Wayne, etc., R. Co., 87 Mich. 101, 49 N. W. 488; Upham *v.* Detroit City R. Co., 85 Mich. 12, 48 N. W. 199, 12 L. R. A. 129.

Nebraska.— West Omaha St. R. Co. *v.* Godola, 50 Nebr. 906, 70 N. W. 491; Pray *v.* Omaha St. R. Co., 44 Nebr. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

New York.— Lehr *v.* Steinway, etc., R. Co., 118 N. Y. 556, 23 N. E. 889, 30 N. Y. St. 1; Ginna *v.* Second Ave. R. Co., 67 N. Y. 596; Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 1 Transcr. App. (N. Y.) 105, 34 How. Pr. (N. Y.) 315, 93 Am. Dec. 495; Willis *v.* Long Island R. Co., 34 N. Y. 670; Pendergast *v.* Union R. Co., 10 N. Y. App. Div. 207, 41 N. Y. Suppl. 927, 75 N. Y. St. 1297; Bradley *v.* Second Ave. R. Co., 90 Hun (N. Y.) 419, 35 N. Y. Suppl. 918, 70 N. Y. St. 622; McGrath *v.* Brooklyn, etc., R. Co., 87 Hun (N. Y.) 310, 34 N. Y. Suppl. 365, 68 N. Y. St. 444; Hadencamp *v.* Second Ave. R. Co., 1 Sweeny (N. Y.) 490; Hourney *v.* Brooklyn City R. Co., 7 N. Y. Suppl. 602, 27 N. Y. St. 49.

Ohio.— Shrum *v.* Cincinnati, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 244, 8 Ohio N. P. 26.

Pennsylvania.— Thane *v.* Scranton Traction Co., 191 Pa. St. 249, 43 Atl. 136, 71 Am. St. Rep. 767; Reber *v.* Pittsburg, etc., Traction Co., 179 Pa. St. 339, 36 Atl. 245, 57 Am. St. Rep. 599; Thirteenth, etc., St. Pass. R. Co. *v.* Boudrou, 92 Pa. St. 475, 37 Am. Rep. 707.

See 9 Cent. Dig. tit. "Carriers," § 1377.

In case of a crowd on the platform it may be negligent to subject one's self to the danger of riding in such position. Graham *v.* Manhattan R. Co., 8 Misc. (N. Y.) 305, 28 N. Y. Suppl. 739, 59 N. Y. St. 279; Tregear *v.* Dry Dock, etc., R. Co., 14 Abb. Pr. N. S. (N. Y.) 49. It is also said that a passenger riding upon the platform of a car assumes the increased risk resulting therefrom. Harbison *v.* Metropolitan R. Co., 9 App. Cas. (D. C.) 60; Watson *v.* Portland, etc., R. Co., 91 Me. 584, 40 Atl. 699, 64 Am. St. Rep. 268, 44 L. R. A. 157.

44. Adams *v.* Washington, etc., R. Co., 9 App. Cas. (D. C.) 26; Chicago West Div. R. Co. *v.* Klauber, 9 Ill. App. 613; Still *v.* Nassau Electric R. Co., 32 N. Y. App. Div. 276, 52 N. Y. Suppl. 975; Schaefer *v.* Union R. Co., 29 N. Y. App. Div. 261, 51 N. Y. Suppl. 431; Solomon *v.* Central Park, etc., R. Co., 1 Sweeny (N. Y.) 298; Bailey *v.* Tacoma Traction Co., 16 Wash. 48, 47 Pac. 241.

45. Caspers *v.* Dry Dock, etc., R. Co., 22 N. Y. App. Div. 156, 47 N. Y. Suppl. 961; Francisco *v.* Troy, etc., R. Co., 78 Hun (N. Y.) 13, 29 N. Y. Suppl. 247, 60 N. Y. St. 798; Vroman *v.* Houston, etc., R. Co., 7 Misc. (N. Y.) 234, 27 N. Y. Suppl. 257, 58 N. Y. St. 23; Schoenfeld *v.* Milwaukee City R. Co., 74 Wis. 433, 43 N. W. 162.

46. *California.*— Babcock *v.* Los Angeles Traction Co., 128 Cal. 173, 60 Pac. 780.

Illinois.—West Chicago St. R. Co. *v.* Marks, 82 Ill. App. 185.

Kansas.— Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754.

Massachusetts.—Wilde *v.* Lynn, etc., R. Co., 163 Mass. 533, 40 N. E. 851.

Michigan.— Pomaski *v.* Grant, 119 Mich. 675, 78 N. W. 891.

Missouri.— Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682.

New York.— Henderson *v.* Nassau Electric R. Co., 46 N. Y. App. Div. 280, 61 N. Y. Suppl. 690; Faris *v.* Brooklyn City, etc., R. Co., 46 N. Y. App. Div. 231 61 N. Y. Suppl. 670; Brainard *v.* Nassau Electric R. Co., 44 N. Y. App. Div. 613, 61 N. Y. Suppl. 74; Hassen *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 71, 53 N. Y. Suppl. 1069; Wood *v.* Brooklyn City R. Co., 5 N. Y. App. Div. 492, 38 N. Y. Suppl. 1077; Coleman *v.* Second Ave. R. Co., 41 Hun (N. Y.) 380; Bruno *v.* Brooklyn City R. Co., 5 Misc. (N. Y.) 327, 25 N. Y. Suppl. 507, 55 N. Y. St. 215.

Washington.— Cogswell *v.* West St., etc., Electric R. Co., 5 Wash. 46, 31 Pac. 411.

Wisconsin.— Geitz *v.* Milwaukee City R. Co., 72 Wis. 307, 39 N. W. 866.

See 9 Cent. Dig. tit. "Carriers," § 1379.

47. *Colorado.* — Denver Tramway Co. *v.* Reid, 22 Colo. 349, 45 Pac. 378.

New Jersey.— City R. Co. *v.* Lee, 50 N. J. L. 435, 14 Atl. 183, 7 Am. St. Rep. 798.

New York.— Spooner *v.* Brooklyn City R. Co., 54 N. Y. 230, 13 Am. Rep. 570; Cassio *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 617, 69 N. Y. Suppl. 208; Solomon *v.* Central Park, etc., R. Co., 1 Sweeny (N. Y.) 298;

5. Pleading and Proof. As already stated,[48] the rule in some states is that plaintiff must aver freedom from contributory negligence, while in others such negligence is to be pleaded by defendant to defeat plaintiff's recovery. There is a corresponding difference as to the burden of proof, in some states the rule being that the burden of showing freedom from fault or negligence on his part is upon plaintiff,[49] while in others the burden of showing such fact as a defense is upon defendant.[50] Where contributory negligence is treated as a defense it should be specially averred,[51] but if the burden with reference thereto is regarded as resting upon plaintiff, then defendant may introduce evidence of contributory negligence under a general denial.[52]

H. Transportation in Sleeping or Palace Cars — 1. Public Duty.[53] While the companies operating palace or sleeping-cars attached to railway trains, but under a separate management, perform only an auxiliary function in the transportation of passengers, they are nevertheless engaged in a public calling by virtue of which they are under obligation to accommodate without discrimination all persons desiring their accommodations,[54] and refusal, without good excuse, to furnish accommodations to an unobjectionable person on the usual and reasonable terms is a breach of legal duty.[55]

2. Contract Duty.[56] One who has secured a berth by purchasing a ticket, or otherwise paying therefor, is entitled to the accommodation for which he has contracted, and may recover damages if they are not furnished.[57]

Craighead *v.* Brooklyn City R. Co., 5 N. Y. Suppl. 431.

Ohio.— Hollingsworth *v.* Cincinnati St. R. Co., 21 Ohio Cir. Ct. 536.

Pennsylvania.—Mann *v.* Philadelphia Traction Co., 175 Pa. St. 122, 34 Atl. 572.

Rhode Island.— Elliott *v.* Newport St. R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208.

United States.— Third Ave. R. Co. *v.* Barton, 107 Fed. 215, 46 C. C. A. 241, 52 L. R. A. 471.

See 9 Cent. Dig. tit. "Carriers," § 1379.

A passenger who gets upon the car of an elevated railway outside the gate at the entrance to the car and rides in that position is guilty of contributory negligence. Carroll *v.* Inter-State Rapid Transit Co., 107 Mo. 653, 17 S. W. 889.

Where it appears that the passenger was riding in a place of danger his negligence is *prima facie* shown, and the onus is on him to rebut the presumption. Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 1 Transcr. App. (N. Y.) 105, 34 How. Pr. (N. Y.) 315, 93 Am. Dec. 495.

48. See *supra*, III, F, 4, b, (III).

49. Raymond *v.* Burlington, etc., R. Co., 65 Iowa 152, 21 N. W. 495; Bonce *v.* Dubuque St. R. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; Fuller *v.* Boston, etc., R. Co., 133 Mass. 491; Lucas *v.* New Bedford, etc., R. Co., 6 Gray (Mass.) 64, 66 Am. Dec. 406; Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21; Deyo *v.* New York Cent. R. Co., 34 N. Y. 9, 88 Am. Dec. 418.

50. *California.*— May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

Colorado.—Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

Nebraska.— St. Joseph, etc., R. Co. *v.* Hedge, 44 Nebr. 448, 62 N. W. 887.

Texas.— Gulf, etc., R. Co. *v.* Williams, 70 Tex. 159, 7 S. W. 88, 8 S. W. 78; Texas Pac. R. Co. *v.* Davidson, 68 Tex. 370, 4 S. W. 636; Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297; Pares *v.* St. Louis, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. 301.

Washington.— Northern Pass. R. Co. *v.* Hess, 2 Wash. 383, 26 Pac. 866.

United States.— Holmes *v.* Oregon, etc., R. Co., 6 Sawy. (U. S.) 276, 5 Fed. 523.

See 9 Cent. Dig. tit. "Carriers," § 1399.

51. Louisville, etc., R. Co. *v.* Wolfe, 80 Ky. 82, 3 Ky. L. Rep. 576; Vail *v.* Broadway R. Co., 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626.

52. Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

53. As to public duty of passenger carriers generally see *supra*, III, A.

54. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53.

55. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688.

A husband who has paid for a berth has a right to have his wife admitted into the same berth. Pullman Palace Car Co. *v.* Bales, 80 Tex. 211, 15 S. W. 785.

The company may sell a whole section in its car to one person and refuse to allow another to occupy the upper berth, although the purchaser of the section occupies the lower berth only. Searles *v.* Mann Boudoir-Car Co., 45 Fed. 330.

56. As to contract duty of passenger carriers generally see *supra*, III, D.

57. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Pullman Palace Car Co. *v.* Taylor, 65 Ind. 153, 32 Am. Rep. 57; Pullman Palace Car Co. *v.* Cain, 15 Tex. Civ. App. 503, 40 S. W. 220; Pullman's Palace-Car Co. *v.* King, 99 Fed. 380, 39 C. C. A. 573.

Berth in possession of another.—Where a

3. Regulations.[58] It is proper to require extra compensation for the special accommodations furnished in a sleeping-car, even though it is owned and operated by the railroad company,[59] and also proper to require the purchase and presentation of a sleeping-car ticket, showing what accommodations the passenger is entitled to,[60] and if the ticket is lost the passenger may be refused the accommodations for which he has paid.[61] Further, it may be required by the rules of the railway company that passengers shall not be allowed to have accommodations in the sleeping-car, unless they have a first-class railway ticket.[62]

4. Safety and Comfort of Passengers[63]**— a. Care for Passenger's Safety.** The same high degree of care for the personal safety of the passenger is required of sleeping-car companies as of railway companies.[64] But contributory negligence of the passenger will defeat recovery for injuries received, where such contributory negligence, rather than the fault of the company, occasions the injury.[65]

b. Care For Passenger's Comfort. As the sleeping-car company undertakes to furnish accommodations for the comfort of the passenger, it is under obligation to give him reasonably safe means for getting into and out of a berth, and to respond to his reasonable calls for attention.[66] The fact that the sleeping-car company assumes to furnish accommodations for the passenger while asleep involves the duty, which is not imposed on a railroad company with reference to ordinary passengers,[67] to awaken the occupant of a berth at night in reasonable time to enable him to get off at his destination.[68]

c. Liability For Wrongs of Servants—(i) *In General.* For the wrongful ejection of the passenger by the conductor the sleeping-car company is liable in tort for the injury resulting therefrom.[69] It is also liable, like any other carrier

ticket for a berth has been sold, but the purchaser is refused the right to occupy it because it is already in possession of someone else he may recover damages suffered, and is not limited to recovering back the money paid. Braun *v.* Webb, 32 Misc. (N. Y.) 243, 65 N. Y. Suppl. 668.

Where by mistake a berth is sold which cannot be delivered, and another one is tendered which is equally good, the passenger cannot refuse to accept the one offered and recover damages. Mann Boudoir Car Co. *v.* Dupre, 54 Fed. 646, 13 U. S. App. 183, 4 C. C. A. 540, 21 L. R. A. 289.

Where the railroad company fails to take the train through to its destination, and a passenger having accommodations in the sleeper is thereby deprived of the benefit of his journey, he has no right of action against the sleeping-car company. Duval *v.* Pullman Palace-Car Co., 62 Fed. 265, 23 U. S. App. 527, 10 C. C. A. 331; Sims *v.* Pullman South Car Co., 22 Fed. Cas. No. 12,869*a*.

58. As to rules and regulations of passenger carriers generally see *supra*, III, C.

59. St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, 17 S. W. 711.

60. Pullman Palace Car Co. *v.* Reed, 75 Ill. 125, 20 Am. Rep. 232.

61. Buck *v.* Webb, 58 Hun (N. Y.) 185, 11 N. Y. Suppl. 617, 33 N. Y. St. 824.

62. Pullman Palace Car Co. *v.* Lee, 49 Ill. App. 75; Lemon *v.* Pullman Palace Car Co., 52 Fed. 262.

63. As to safety and comfort of passengers generally see *supra*, III, F.

64. See *supra*, III, F, 1.

Illustrations.— Thus the happening of an accident, such as the falling of a berth, or the like, which is in its nature attributable to some defect in the car or appliances, will make out a *prima facie* case of liability. Jenkins *v.* Louisville, etc., R. Co., 104 Ky. 673, 20 Ky. L. Rep. 865, 47 S. W. 761; Cleveland, etc., R. Co. *v.* Walrath, 38 Ohio St. 461, 43 Am. Rep. 433. And where a passenger was thrown from his berth by a sudden jerk or lurch of the car, it was held that the accident was *prima facie* evidence of negligence of the railroad company in operating the train. Smith *v.* Canada Pac. R. Co., 34 Nova Scotia 22. So the sleeping-car company will also be liable for injuries to a passenger by reason of obstructions in the aisle, where the passenger is himself not negligent. Levien *v.* Webb, 30 Misc. (N. Y.) 196, 61 N. Y. Suppl. 1113.

65. So held where a passenger opening the wrong door fell out of the car. Piper *v.* New York, etc., R. Co., 76 Hun (N. Y.) 44, 27 N. Y. Suppl. 593, 59 N. Y. St. 629, 89 Hun (N. Y.) 75, 34 N. Y. Suppl. 1072, 68 N. Y. St. 835. See also *supra*, III, G.

66. Pullman's Palace Car Co. *v.* Fielding, 62 Ill. App. 577.

But passenger cannot complain of inconvenience or discomfort which is incident to the operation of the car. Edmunson *v.* Pullman Palace-Car Co., 92 Fed. 824, 34 C. C. A. 382.

67. See *supra*, III, E, 5, c.

68. Airey *v.* Pullman Palace Car Co., 50 La. Ann. 648, 23 So. 512; McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 909, 35 L. R. A. 252.

69. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Pullman Palace

of passengers, for wrongful assaults upon a passenger by a servant in charge of the car, such as the porter.[70]

(II) *Respective Liability of Sleeping-Car and Railroad Company For Wrongs of Servants of the Other.* The railroad company is liable to a passenger for wrongful acts or negligence of the servants in charge of a sleeping-car, at least in the absence of any knowledge on the part of the passenger that the sleeping-car is under separate management.[71] On the other hand the sleeping-car company, not having undertaken the general duty of transporting the passenger, is not liable for the wrongful acts or negligence of the servants of the railroad company.[72]

d. Limitation of Liability. Contracts of a sleeping-car company, like those of any other carrier of passengers, for limitation of liability in case of negligence are invalid.[73]

5. Actions For Breach of Duty as to Passenger — a. Form of Action. Although the passenger may have a right of action on contract for breach of the express or implied undertaking of the sleeping-car company to furnish accommodations, the refusal of the company, without valid excuse, to permit a proper person to avail himself of the accommodations of the sleeping-car will support an action in tort.[74]

b. Damages.[75] For the wrong of the sleeping-car company through its servants in denying accommodations to a passenger, or failing reasonably to provide for his comfort, the company is liable to the extent of the injury resulting which could have been anticipated as the natural and probable result of such breach of duty.[76] And the company may also be liable in punitive damages if the injury is malicious or wilful.[77] But for damages which could not reasonably have been

Car Co. *v.* Reed, 75 Ill. 125, 20 Am. Rep. 232; Pullman Palace-Car Co. *v.* Booth, (Tex. Civ. App. 1894) 28 S. W. 719.

Acts of the conductor and porter of a sleeping-car with reference to the safety of the passenger are within the scope of their authority, and the company will be liable for their negligence or misconduct. Pullman Palace-Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215; Campbell *v.* Pullman Palace-Car Co., 42 Fed. 484.

70. Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. 53; Campbell *v.* Pullman Palace-Car Co., 42 Fed. 484. But for an assault by the porter upon a passenger not entitled to accommodation in a sleeping-car the sleeping-car company is not liable. Cassedy *v.* Pullman Palace-Car Co., (Miss. 1895) 17 So. 373.

For failure to protect the passenger against insult or injury from improper persons permitted to come into the sleeping-car, both the sleeping-car company and the railway company are liable. Houston, etc., R. Co. *v.* Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124.

Theft by fellow passenger.— The sleeping-car company is not liable to a passenger for theft of his property by a fellow passenger, if reasonable care to protect the passenger against such a wrong has been taken. Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

71. Cleveland R. Co. *v.* Walrath, 38 Ohio St. 461, 43 Am. Rep. 433.

The railroad company is primarily responsible for the safety of the passenger in transit, and the conductor and porter of the sleeping-car may be properly regarded as its servants in this respect. Louisville, etc., R. Co. *v.* Ray, 101 Tenn. 1, 46 S. W. 554.

The servants of the railroad company are acting within the scope of their authority in determining who shall have accommodations in the sleeping-car. Lemon *v.* Pullman Palace Car Co., 52 Fed. 262.

72. Pullman Palace Car Co. *v.* Lee, 49 Ill. App. 75; Lawrence *v.* Pullman's Palace Car Co., 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58; Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231.

The railroad company cannot recover over against the sleeping-car company for injuries to a passenger on the sleeper for which it has been compelled to pay on account of failure of its own servants in connection with those of the sleeping-car company as to the protection of the passenger from the acts of improper persons permitted to enter and remain in the sleeper. Houston, etc., R. Co. *v.* Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124.

73. Stevenson *v.* Pullman Palace-Car Co., (Tex. Civ. App. 1895) 32 S. W. 335. See also *supra*, III, D, 3, f.

74. Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Pullman Palace-Car Co. *v.* Booth, (Tex. Civ. App. 1894) 28 S. W. 719.

75. See also, generally, Damages.

76. Pullman Palace Car Co. *v.* Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624; Pullman's Palace-Car Co. *v.* King, 99 Fed. 380, 39 C. C. A. 573; Hughes *v.* Pullman's Palace-Car Co., 74 Fed. 499.

77. Lemon *v.* Pullman Palace Car Co., 52 Fed. 262.

anticipated as a probable consequence of the wrong the passenger cannot recover.[78]

6. Liability as to Passenger's Luggage or Effects — a. For Negligence Only. A sleeping-car company does not accept the luggage and effects of its passengers as a bailee, nor does it undertake to maintain a place where accommodation is furnished for the safety of its patrons' property like an innkeeper, and therefore it does not assume the exceptional liability for goods which the law imposes upon common carriers of goods or innkeepers by reason of engaging in those public callings.[79] Its liability with reference to the luggage and effects of its patrons is analogous to that of a railway company carrying passengers in regard to the safety of the personal belongings and baggage which the passenger is allowed to take with him into the sleeping-car.[80] Therefore, while a sleeping-car company owes a duty to its passenger to protect his property, luggage, and effects[81] from loss or injury, it is not an insurer of the safety thereof, and is liable only for negligence.[82] Mere proof of loss of luggage which is taken by the passenger into a sleeping-car does not therefore make out either an absolute or *prima facie* case of liability against the company.[83] But the company does owe to the passenger the duty of protecting his luggage and effects by all reasonable means from loss or injury while in the sleeping-car.[84] This duty involves provisions for the safety

78. Pullman Palace Car Co. *v.* Barker, 4 Colo. 344, 34 Am. Rep. 89; Pullman Palace Car Co. *v.* Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268; Missouri Pac. R. Co. *v.* Groesbeck, (Tex. Civ. App. 1894) 24 S. W. 702; Pullman Palace Car Co. *v.* McDonald, 2 Tex. Civ. App. 322, 21 S. W. 945; Norfolk, etc., R. Co. *v.* Lipscomb, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817.

79. *Alabama.*— Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

Georgia. — Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765, 32 S. E. 923, 71 Am. St. Rep. 293, 44 L. R. A. 790.

Illinois.—Pullman Palace Car Co. *v.* Smith, 73 Ill. 360, 24 Am. Rep. 258.

Indiana.—Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 43 Am. Rep. 102.

Kentucky. — Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

Massachusetts.— Dawley *v.* Wagner Palace Car Co., 169 Mass. 315, 47 N. E. 1024; Lewis *v.* New York Cent. Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 56 Am. Rep. 852 note.

Missouri.— Root *v.* New York Sleeping-Car Co., 28 Mo. App. 199; Scaling *v.* Pullman's Palace Car Co., 24 Mo. App. 29.

New York.—Welch *v.* Pullman Palace Car Co., Sheld. (N. Y.) 457; Williams *v.* Webb, 27 Misc. (N. Y.) 508, 58 N. Y. Suppl. 300; Carpenter *v.* New York, etc., R. Co., 10 N. Y. St. 712.

Texas.— Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31.

United States.— Blum *v.* Southern Pullman Palace Car Co., 1 Flipp. (U. S.) 500, 3 Fed. Cas. No. 1,574, 3 Centr. L. J. 591, 22 Int. Rev. Rec. 305.

See 9 Cent. Dig. tit. "Carriers," § 1583 *et seq.*

To the contrary it is said in Pullman Palace Car Co. *v.* Lowe, 28 Nebr. 239, 44 N. W. 226, 26 Am. St. Rep. 325, 6 L. R. A. 809, that a sleeping-car company, so far as it renders services similar in kind to those usually rendered by an innkeeper, is subject to the same liabilities.

80. See *infra*, III, I, 1.

81. See *infra*, III, H, 6, d.

82. That is, for failure of itself or servants to exercise the high degree of care and foresight which are required in the prosecution of the business of carrier of passengers. Whicher *v.* Boston, etc., R. Co., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314; Efron *v.* Wagner Palace-Car Co., 59 Mo. App. 641; Welding *v.* Wagner, 1 N. Y. City Ct. 66; Belden *v.* Pullman Palace-Car Co., (Tex. Civ. App. 1897) 43 S. W. 22.

83. *Illinois.*— McMurray *v.* Pullman's Palace-Car Co., 86 Ill. App. 619.

New York.— Carpenter *v.* New York, etc., R. Co., 10 N. Y. St. 712; Tracy *v.* Pullman Palace Car Co., 67 How. Pr. (N. Y.) 154.

Ohio.— Falls River, etc., Co. *v.* Pullman Palace Car Co., 6 Ohio S. & C. Pl. Dec. 85, 4 Ohio N. P. 26.

Texas.—Dargan *v.* Pullman Palace Car Co., 2 Tex. App. Civ. Cas. § 691.

United States.—Blum *v.* Southern Pullman Palace-Car Co., 1 Flipp. (U. S.) 500, 3 Fed. Cas. No. 1,574, 3 Centr. L. J. 591, 22 Int. Rev. Rec. 305.

See 9 Cent. Dig. tit. "Carriers," § 1583.

Although there are cases in which it seems to be assumed that the mere loss of luggage gives rise to a presumption of negligence on the part of the company. Pullman Palace Car Co. *v.* Freudenstein, 3 Colo. App. 540, 34 Pac. 578; Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186; Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873; Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31.

84. *Alabama.*— Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A.

of luggage by maintaining a strict and vigilant watch by a competent person, such as the porter, over the safety of the passenger's belongings while in the car,[85] and if there is a failure to discharge this duty by not providing a competent and efficient person[86] or by imposing on him duties which make it impracticable for him to furnish adequate protection, the sleeping-car company is liable for any loss which may reasonably be attributable to negligence in this respect.[87] For negligence of the servant in caring for property, the control of which is directly assumed by him for the time being, the sleeping-car company is liable.[88] Contributory negligence of the passenger will defeat his recovery.[89]

b. Limitation of Liability. As the liability of the sleeping-car company is for negligence only, such liability cannot be restricted by notice or special contract.[90]

c. Liability of the Railroad Company. As the luggage and effects of a passenger in a sleeping-car are under the control of the servants of the sleeping-car company, the railroad company is not liable for loss thereof.[91]

d. Personal Baggage Only. The rule as to what luggage and effects the sleeping-car company may become liable for by reason of their being taken into its car by a passenger is the same as that with reference to liability of carriers in general for baggage of the passenger.[92]

690; Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

Indiana.— Voss *v.* Wagner Palace-Car Co., 16 Ind. App. 271, 44 N. E. 1010.

Massachusetts.— Lewis *v.* New York Sleeping-Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 56 Am. Rep. 852, note.

Pennsylvania.— Pullman Car Co. *v.* Gardner, 3 Pennyp. (Pa.) 78.

Texas.— Pullman Palace Car. Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31; Stevenson *v.* Pullman Palace-Car Co., (Tex. Civ. App. 1894) 26 S. W. 112, (Tex. Civ. App. 1895) 32 S. W. 335.

See 9 Cent. Dig. tit. "Carriers," § 1585.

Where the railroad company switched off the sleeping-car while passengers were absent therefrom and without their having reason to anticipate a change of cars and removed their luggage into another car, held that it rendered itself liable to a passenger for luggage lost during the transfer. Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200.

85. *Alabama.*— Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

Georgia.— Pullman Palace Car Co. *v.* Martin, 92 Ga. 161, 18 S. E. 364.

Indiana.— Woodruff Sleeping, etc., Coach Co. *v.* Diehl, 84 Ind. 474, 43 Am. Rep. 102.

Massachusetts.— Dawley *v.* Wagner Palace Car Co., 169 Mass. 315, 47 N. E. 1024.

New York.— Williams *v.* Webb, 27 Misc. (N. Y.) 508, 58 N. Y. Suppl. 300; Carpenter *v.* New York, etc., R. Co., 13 N. Y. St. 718.

See 9 Cent. Dig. tit. "Carriers," § 1584.

86. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

87. Pullman Palace Car Co. *v.* Hunter, 21 Ky. L. Rep. 1248, 54 S. W. 845, 47 L. R. A. 286; Lewis *v.* New York Sleeping-Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 56 Am. Rep. 852 note; Carpenter *v.* New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 34 N. Y. St. 854, 21 Am. St. Rep. 644, 11 L. R. A. 759.

88. Voss *v.* Cleveland, etc., R. Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010; Root *v.* New York Cent. Sleeping-Car Co., 28 Mo. App. 199; Pullman Palace-Car Co. *v.* Gavin, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298.

89. Dawley *v.* Wagner Palace Car Co., 169 Mass. 315, 47 N. E. 1024; Whitney *v.* Pullman's Palace Car Co., 143 Mass. 243, 9 N. E. 619; Chamberlain *v.* Pullman Palace Car Co., 55 Mo. App. 474; Wilson *v.* Baltimore, etc., R. Co., 32 Mo. App. 682; Root *v.* New York Cent. Sleeping-Car Co., 28 Mo. App. 199.

Depositing his clothing in a vacant berth above his own will not constitute contributory negligence on the part of the passenger. Florida *v.* Pullman Palace Car Co., 37 Mo. App. 598. *Contra*, Welch *v.* Pullman Palace-Car Co., 16 Abb. Pr. N. S. (N. Y.) 352.

The negligence of one's companion in a sleeping-car berth will not preclude recovery. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

90. Lewis *v.* New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, 56 Am. Rep. 852, note; Louisville, etc., R. Co. *v.* Katzenberger, 16 Lea (Tenn.) 380, 1 S. W. 44, 57 Am. Rep. 232; Stevenson *v.* Pullman Palace-Car Co., (Tex. Civ. App. 1894) 26 S. W. 112.

91. Hillis *v.* Chicago, etc., R. Co., 72 Iowa 228, 33 N. W. 643; Sessions *v.* New York, etc., R. Co., 78 Hun (N. Y.) 541, 29 N. Y. Suppl. 628, 61 N. Y. St. 170. But where the railroad company, without notice to the passenger and while he is absent from the car, removes the passenger's effects to a passenger-car and takes away the sleeping-car, the railroad company will be liable for any loss. Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200.

92. See *infra*, III, I, 2, c. See also the following cases:

Alabama.— Cooney *v.* Pullman Palace Car

I. Liability For Baggage or Effects — 1. Luggage or Effects Retained in Passenger's Possession. As will appear hereafter,[93] a carrier of passengers may become the bailee of the baggage of the passenger so as to have, with reference to such baggage, the liability of a common carrier of goods, but the passenger has the right to retain in his possession and under his control, and to have carried as a part of the transaction, a reasonable quantity of personal baggage appropriate to the journey.[94] Even without delivery of the goods into the exclusive possession of the carrier there is a duty to furnish reasonable protection to the passenger against loss or injury of such property, such as the clothing which he wears, the valise and personal belongings contained therein, and the like. This right, however, to take personal belongings and other articles with him into the cars or other vehicles of conveyance is subject to reasonable regulation, not only as to what may be thus taken,[95] but also as to how far the carrier will be liable for articles retained by the passenger under his control.[96] The carrier's duty with reference to personal effects retained in the passenger's possession and control is to exercise reasonable care to protect such effects from loss or injury.[97] Within this rule carriers have been held not to be insurers but liable for loss of or injury to effects of passengers kept within their possession and control, and resulting from negligence, that is, failure on the part of the carrier or his servants to use reasonable care in the protection of the property.[98] But the rule of liability in such cases does not extend to large sums of money or other property of exceptional value retained by the passenger in his control, without the knowledge of

Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690; Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

Georgia.— Pullman's Palace Car Co. *v.* Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498.

Kentucky.— Pullman Palace Car Co. *v.* Hunter, 21 Ky. 1248, 54 S. W. 845, 47 L. R. A. 286; Pullman Palace Car Co. *v.* Gaylord, 9 Ky. L. Rep. 58.

Mississippi.—Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

Missouri.—Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134; Wilson *v.* Baltimore, etc., R. Co., 32 Mo. App. 682; Root *v.* New York Cent. Sleeping-Car Co., 28 Mo. App. 199.

New York.— Williams *v.* Webb, 22 Misc. (N. Y.) 513, 49 N. Y. Suppl. 1111, 27 Misc. (N. Y.) 508, 58 N. Y. Suppl. 300.

Pennsylvania.— Pfaelzer *v.* Pullman Palace Car Co., 4 Wkly. Notes Cas. (Pa.) 240.

Texas.— Pullman Palace Car Co. *v.* Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31.

United States.— Barrott *v.* Pullman's Palace Car Co., 51 Fed. 796.

See 9 Cent. Dig. tit. "Carriers," § 1583 *et seq.*

Mileage tickets carried by a traveling commercial agent are properly a part of his baggage. Cooney *v.* Pullman Palace-Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

93. See *infra*, III, I, 2.

94. Runyan *v.* Central R. Co., 61 N. J. L. 537, 41 Atl. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284, 65 N. J. L. 228, 47 Atl. 422.

95. Runyan *v.* Central R. Co., 61 N. J. L. 537, 41 Atl. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284, 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744; Dowd *v.* Albany R. Co., 47 N. Y. App. Div. 202, 62 N. Y. Suppl. 179.

The remedy for violation of such a regulation by taking into a passenger-car articles prohibited from being carried there is not to take such articles away from the passenger by force, but to expel the passenger for refusal to comply with the regulation. Bullock *v.* Delaware, etc., R. Co., 60 N. J. L. 24, 36 Atl. 773, 37 L. R. A. 417.

96. Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

97. Greenfield First Nat. Bank *v.* Marietta, etc., R. Co., 20 Ohio St. 259, 5 Am. Rep. 655; Henderson *v.* Louisville, etc., R. Co., 123 U. S. 61, 8 S. Ct. 60, 31 L. ed. 92.

98. *Massachusetts.*— Murray *v.* International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290; Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200.

Mississippi.—Illinois Cent. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

New York.— Weeks *v.* New York, etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104; Schalscha *v.* Third Ave. R. Co., 19 Misc. (N. Y.) 141, 43 N. Y. Suppl. 251.

Ohio.— Greenfield First Nat. Bank *v.* Marietta, etc., R. Co., 20 Ohio St. 259, 5 Am. Rep. 655.

Pennsylvania.— American Steamship Co. *v.* Bryan, 83 Pa. St. 446.

Texas.—Bonner *v.* De Mendoza, (Tex. App. 1891) 16 S. W. 976.

United States.—Walsh *v.* The H. M. Wright, Newb. Adm. 494, 29 Fed. Cas. No. 17,115.

England.—Bunch *v.* Great Western R. Co., 17 Q. B. D. 215 [*affirmed* in 13 App. Cas. 31, 52 J. P. 147, 57 L. J. Q. B. 361, 58 L. T. Rep. N. S. 128, 36 Wkly. Rep. 785]; Talley *v.* Great Western R. Co., L. R. 6 C. P. 44, 40

the carrier,[99] nor does it enable the passenger to recover for personal effects lost while retained in his control, if the loss is due to his own negligence.[1] These general principles determine the liability of the carrier of passengers by boat or vessel with reference to baggage and personal effects taken by the passenger to his state-room, and thus retained within his control and not delivered into the possession of the carrier as bailee, and in such cases the carrier is only liable for failure to afford reasonable protection to the property of the passenger.[2] The same difficulty arises with reference to baggage taken by the passenger with him into his sleeping-car. The weight of authority is that the carrier of passengers in a sleeping-car is liable only for negligence in reference to such baggage.[3]

2. Carrier's Responsibility For Baggage as Bailee — a. Same as That of Carrier of Goods. As to personal baggage of the passenger, delivered to and taken possession of by the carrier, the liability of the latter is that of a common carrier of goods.[4] It is immaterial whether the baggage is carried on the same train with the passenger or not.[5] Carriers of passengers by stage-coach are com-

L. J. C. P. 9, 23 L. T. Rep. N. S. 413, 19 Wkly. Rep. 154; Bergheim *v.* Great Eastern R. Co., 3 C. P. D. 221, 47 L. J. C. P. 318, 38 L. T. Rep. N. S. 160, 26 Wkly. Rep. 301. But see Le Conteur *v.* London, etc., R. Co., L. R. 1 Q. B. 54, 6 B. & S. 961, 12 Jur. N. S. 266, 35 L. J. Q. B. 40, 13 L. T. Rep. N. S. 325, 14 Wkly. Rep. 80, 118 E. C. L. 961; Richards *v.* London, etc., R. Co., 7 C. B. 839, 13 Jur. 986, 18 L. J. C. P. 251, 6 R. & Can. Cas. 49, 62 E. C. L. 839; Great Northern R. Co. *v.* Shepherd, 8 Exch. 30, 21 L. J. Exch. 286, 7 R. & Can. Cas. 310, which cases hold that the carrier is liable for luggage in passenger-cars as a carrier of goods.

See 9 Cent. Dig. tit. "Carriers," § 1519.

99. Del Valle *v.* Steamboat Richmond, 27 La. Ann. 90; Weeks *v.* New York, etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104; Greenfield First Nat. Bank *v.* Marietta, etc., R. Co., 20 Ohio St. 259, 5 Am. Rep. 655.

1. Lincoln *v.* New York, etc., Steamship Co., 30 Misc. (N. Y.) 752, 62 N. Y. Suppl. 1085; Tower *v.* Utica, etc., R. Co., 7 Hill (N. Y.) 47, 42 Am. Dec. 36; Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010; Bonner *v.* De Mendoza, (Tex. App. 1891) 16 S. W. 976; Henderson *v.* Louisville, etc., R. Co., 123 U. S. 61, 8 S. Ct. 60, 31 L. ed. 92; The John Brooks, 1 Hask. (U. S.) 439, 13 Fed. Cas. No. 7,335.

2. *Kentucky.*— Steamboat Crystal Palace *v.* Vanderpool, 16 B. Mon. (Ky.) 302.

Maine.— Abbott *v.* Bradstreet, 55 Me. 530.

Massachusetts.— Clark *v.* Burns, 118 Mass. 275, 19 Am. Rep. 456.

Michigan.— McKee *v.* Owen, 15 Mich. 115.

Pennsylvania.— American Steamship Co. *v.* Bryan, 83 Pa. St. 446.

Wisconsin.— Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

United States.— The R. E. Lee, 2 Abb. (U. S.) 49, 20 Fed. Cas. No. 11,690, 5 Am. L. Rev. 181, 3 Am. L. T. Rep. (U. S. Cts.) 168, 2 Chic. Leg. N. 397, 2 Chic. Gaz. 298; Walsh *v.* The H. M. Wright, Newb. Adm. 494, 29 Fed. Cas. No. 17,115.

See 9 Cent. Dig. tit. "Carriers," § 1529.

In New York there are cases holding that carriers of passengers by steamboat become liable as common carriers for baggage taken to the passenger's state-room as fully as though the baggage had been delivered into the possession and control of the carrier, and therefore without proof of negligence of the carrier. Gore *v.* Norwich, etc., Transp. Co., 2 Daly (N. Y.) 254; Mudgett *v.* Bay State Steamboat Co., 1 Daly (N. Y.) 151; Van Horn *v.* Kermit, 4 E. D. Smith (N. Y.) 453; Macklin *v.* New Jersey Steamboat Co., 7 Abb. Pr. N. S. (N. Y.) 229; Crozier *v.* Boston, etc., Steamboat Co., 43 How. Pr. (N. Y.) 466. These cases disapprove the earlier New York case of Cohen *v.* Frost, 2 Duer (N. Y.) 335. The latest New York case puts the liability of the carrier of passengers by steamboat on the same ground as that of innkeeper, distinguishing the carriage by steamboat from that by sleeping-car. Adams *v.* New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 56 Am. St. Rep. 616, 34 L. R. A. 682.

3. See *supra*, III, H, 6, a.

4. *Kentucky.*— Seasongood *v.* Owensboro, etc., R. Co., 14 Ky. L. Rep. 430.

Louisiana.— Moore *v.* Steamer Evening Star, 20 La. Ann. 402; Blossman *v.* Hooper, 16 La. Ann. 160.

New York.— Merrill *v.* Grinnell, 30 N. Y. 594; Flaherty *v.* Greenman, 7 Daly (N. Y.) 481; Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Camden, etc., R., etc., Co. *v.* Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488.

Ohio.— Keith *v.* New York Cent. R. Co., 2 Ohio Dec. (Reprint) 125, 1 West. L. Month. 451.

South Carolina.— Dill *v.* South Carolina R. Co., 7 Rich. (S. C.) 158, 62 Am. Dec. 407.

Vermont.— Ranchau *v.* Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761.

United States.— Walsh *v.* The H. M. Wright, Newb. Adm. 494, 29 Fed. Cas. No. 17,115.

See also *supra*, I, B, 2; and 9 Cent. Dig. tit. "Carriers," § 1519.

5. Warner *v.* Burlington, etc., R. Co., 22 Iowa 166, 92 Am. Dec. 389; Estes *v.* St. Paul, etc., R. Co., 55 Hun (N. Y.) 605, 7 N. Y. Suppl. 863, 27 N. Y. St. 594; Camden, etc., R., etc., Co. *v.* Belknap, 21 Wend. (N. Y.) 354; Wilson *v.* Chesapeake, etc., R. Co., 21

mon carriers, and therefore liable for loss of baggage as common carriers of goods.[6] As a part of the duty to transport the passenger it is the duty of the carrier, under reasonable limitations as to weight and value, to carry his personal baggage without additional charge, the compensation for the carriage of the passenger serving also as compensation for the transportation of his baggage.[7] But as a carrier of goods is not liable as common carrier unless the carriage is for compensation,[8] so if the passenger is carried gratuitously,[9] or if transportation of baggage is secured on the erroneous assumption that one is a passenger,[10] the carrier is liable only as any other carrier of goods without compensation, that is, for such negligence as would charge a gratuitous bailee.[11] The carrier of baggage being liable as common carrier of goods, he will be excused for loss thereof or injury thereto only by act of God or the public enemy.[12] The presumption as to the condition of the goods and as to where loss or injury occurred is the same as with reference to transportation of goods.[13]

b. Limitation of Liability. The same rule as to limitation of liability applies in transportation of baggage as in transportation of other goods, and a limitation assented to by the passenger and not relieving the carrier from responsibility for negligence is valid.[14] A ticket purporting to set out the terms of the transporta-

Gratt. (Va.) 654. But it has been said that it is the duty of the railroad company to carry the trunk of a passenger on the same train as the passenger, and a failure to do so, where there are no circumstances to excuse, constitutes negligence. Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462.

In the absence of any special arrangement authorizing it as a part of the contract of transportation of the passenger, baggage carried not in connection with the transportation of the passenger, but on a later train, is carried as freight, subject to charge for transportation as goods. Graffam *v.* Boston, etc., R. Co., 67 Me. 234; Wilson *v.* Grand Trunk R. Co., 56 Me. 60, 96 Am. Dec. 435; The Elvira Harbeck, 2 Blatchf. (U. S.) 336, 8 Fed. Cas. No. 4,424.

6. Cole *v.* Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Holister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Peixotti *v.* McLaughlin, 1 Strobh. (S. C.) 468, 47 Am. Dec. 563; Bomar *v.* Maxwell, 9 Humphr. (Tenn.) 620, 51 Am. Dec. 682.

7. *California.*— Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404.

Illinois.— Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

Indiana.— Perkins *v.* Wright, 37 Ind. 27.

Maine.— Wilson *v.* Grand Trunk R. Co., 56 Me. 60, 96 Am. Dec. 435.

New Jersey.— Runyan *v.* Central R. Co., 61 N. J. L. 537, 41 Atl. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284.

New York.—Orange County Bank *v.* Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129.

United States.— The Elvira Harbeck, 2 Blatchf. (U. S.) 336, 8 Fed. Cas. No. 4,424.

See 9 Cent. Dig. tit. "Carriers," § 1506.

8. See *supra*, II, C.

9. Rice *v.* Illinois Cent. R. Co., 22 Ill. App. 643; Flint, etc., R. Co. *v.* Weir, 37 Mich. 111, 26 Am. Rep. 499.

10. Beers *v.* Boston, etc., R. Co., 67 Conn. 417, 34 Atl. 541, 52 Am. St. Rep. 293, 32 L. R. A. 535; Fairfax *v.* New York Cent., etc., R. Co., 37 N. Y. Super. Ct. 516; Burkett *v.* New York Cent., etc., R. Co., 24 Misc. (N. Y.) 76, 53 N. Y. Suppl. 394; Brown *v.* The Elvira Harbeck, 4 Fed. Cas. No. 2,005.

11. **It is not necessary to expressly prove payment of fare** where the carriage is not understood to be gratuitous. Glasco *v.* New York Cent. R. Co., 36 Barb. (N. Y.) 557; Van Horn *v.* Kermit, 4 E. D. Smith (N. Y.) 453; McGill *v.* Rowland, 3 Pa. St. 451, 45 Am. Dec. 654.

12. McCormick *v.* Pennsylvania Cent. R. Co., 80 N. Y. 353; Spaids *v.* New York Mail Steamship Co., 3 Daly (N. Y.) 139; Long *v.* Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741.

The burden is on the carrier to show that the loss was by an excepted cause. Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462.

If the negligence of the carrier contributes to the loss, although caused primarily by act of God, the carrier will be liable. Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 53 Am. St. Rep. 332, 35 L. R. A. 356; Edson *v.* Pennsylvania Co., 70 Ill. App. 654; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209. But mere negligent delay will not render the carrier liable for subsequent loss by act of God. Wald *v.* Pittsburg, etc., R. Co., 60 Ill. App. 460; Long *v.* Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741. And see, in general, *supra*, II, D, 2, e.

13. Caldwell *v.* Erie Transfer Co., 13 Misc. (N. Y.) 37, 33 N. Y. Suppl. 993, 67 N. Y. St. 843; The New England, 110 Fed. 415; The Priscilla, 106 Fed. 739. And see *supra*, II, R, 3, b.

14. See *supra*, II, E, 2, b.

In England it seems that an absolute release from liability is upheld save so far as is prohibited by statute. Peninsular, etc., Steam Nav. Co. *v.* Shand, 3 Moore P. C. N. S. 272, 16 Eng. Reprint 103; Zunz *v.* South

tion of the passenger and his baggage will be deemed a contract, and the passenger will be bound by valid limitations of liability as to baggage plainly incorporated therein, the presumption being as in case of a bill of lading[15] that the person accepting it does so with knowledge of its contents and with the intention to be bound thereby.[16] The ordinary passenger ticket, however, does not purport to set forth the terms of the contract between the passenger and the carrier, and is merely evidence of the right to transportation,[17] and stipulations limiting the carrier's liability as to baggage embodied in or printed on the back of such a ticket are not *prima facie* binding on the passenger, and to constitute limitations of the carrier's liability must be shown to have been known to and accepted by him.[18] And the same rule applies to limitations printed on baggage checks or receipts.[19] Public notices as to restrictions of liability will not be binding on the passenger unless his assent thereto is shown.[20] The carrier may, by reasonable

Eastern R. Co., L. R. 4 Q. B. 539, 10 B. & S. 594, 38 L. J. Q. B. 209, 20 L. T. Rep. N. S. 873, 17 Wkly. Rep. 1096. And so in Canada. Dixon *v.* Richelieu Nav. Co., 18 Can. Supreme Ct. 704. Thus it has been held in England that a railroad company may exempt itself from liability for baggage on an excursion train. Rumsey *v.* North Eastern R. Co., 14 C. B. N. S. 641, 10 Jur. N. S. 208, 32 L. J. C. P. 244, 8 L. T. Rep. N. S. 666, 11 Wkly. Rep. 911, 108 E. C. L. 641; Stewart *v.* London, etc., R. Co., 3 H. & C. 135, 10 Jur. N. S. 805, 33 L. J. Exch. 199, 10 L. T. Rep. N. S. 302, 12 Wkly. Rep. 689.

Burden of proof.— In an action against a carrier to recover for loss of baggage, the burden of proving limitation of liability is on defendant. Verner *v.* Sweitzer, 32 Pa. St. 208.

A contract of limitation will be construed most strongly against the carrier. Earle *v.* Cadmus, 2 Daly (N. Y.) 237.

Statutes prohibiting limitation of liability by common carriers are applicable to baggage. Davis *v.* Chicago, etc., R. Co., 83 Iowa 744, 49 N. W. 77. But the provision of U. S. Rev. Stat. (1878) § 4281, exempting a master or owner of a vessel from liability for loss of articles, the value of which is not disclosed to him, does not apply to land carriage of passenger's baggage. New York Cent., etc., R. Co. *v.* Fraloff, 100 U. S. 24, 25 L. ed. 531.

15. See *supra*, II, E, 5, c.

16. *Massachusetts.*— Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 25 Am. St. Rep. 660, 12 L. R. A. 340.

Missouri.— Aiken *v.* Wabash R. Co., 80 Mo. App. 876.

New York.— Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; Wheeler *v.* Oceanic Steam Nav. Co., 72 Hun (N. Y.) 5, 25 N. Y. Suppl. 578, 55 N. Y. St. 715; Marmorstein *v.* Pennsylvania R. Co., 13 Misc. (N. Y.) 32, 34 N. Y. Suppl. 97, 68 N. Y. St. 172.

United States.— The Majestic, 60 Fed. 624, 20 U. S. App. 503, 9 C. C. A. 161.

England.— Pratt *v.* South Eastern R. Co., [1897] 1 Q. B. 718, 66 L. J. Q. B. 418, 76 L. T. Rep. N. S. 465, 45 Wkly. Rep. 503; Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470, 32 L. T. Rep. N. S. 709; Burke *v.* South Eastern R. Co., 5 C. P. D. 1, 44 J. P. 283, 49 L. J. C. P. 107, 41 L. T. Rep. N. S. 554, 28 Wkly. Rep. 306.

See 9 Cent. Dig. tit. "Carriers," § 1549.

17. See *supra*, III, D, 2, a.

18. *Kansas.*— Kansas City, etc., R. Co. *v.* Rodebaugh, 38 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715.

Massachusetts.— Brown *v.* Eastern R. Co., 11 Cush. (Mass.) 97.

New York.— Wamsley *v.* Atlas Steamship Co., 50 N. Y. App. Div. 199, 63 N. Y. Suppl. 761; Lechowitzer *v.* Hamburg American Packet Co., 6 Misc. (N. Y.) 536, 27 N. Y. Suppl. 140, 57 N. Y. St. 862.

Ohio.— Baltimore, etc., R. Co. *v.* Campbell, 36 Ohio St. 647, 38 Am. Rep. 617.

Pennsylvania.— Verner *v.* Sweitzer, 32 Pa. St. 208; Camden, etc., R. Co. *v.* Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Baker *v.* North Pennsylvania R. Co., 5 Wkly. Notes Cas. (Pa.) 292.

Vermont.— Ranchau *v.* Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761.

United States.— The Majestic, 166 U. S. 375, 17 S. Ct. 597, 41 L. ed. 1039; New Jersey Cent. R. Co. *v.* Wiegand, 79 Fed. 991, 39 U. S. App. 761, 25 C. C. A. 681; Mauritz *v.* New York, etc., R. Co., 23 Fed. 765.

Canada.— Bate *v.* Canadian Pac. R. Co., 18 Can. Supreme Ct. 697.

See 9 Cent. Dig. tit. "Carriers," § 1548.

In England it is said that such a notice brought to the attention of the passenger is binding. Richardson *v.* Rowntree, [1894] App. Cas. 217, 58 J. P. 493, 63 L. J. Q. B. 283, 70 L. T. Rep. N. S. 817, 6 Reports 95.

19. Indianapolis, etc., R. Co. *v.* Cox, 29 Ind. 360, 95 Am. Dec. 640; Malone *v.* Boston, etc., R. Corp., 12 Gray (Mass.) 388, 74 Am. Dec. 598; Madan *v.* Sherard, 73 N. Y. 329, 29 Am. Rep. 153; Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Grossman *v.* Dodd, 63 Hun (N. Y.) 324, 17 N. Y. Suppl. 855, 43 N. Y. St. 375; Woodruff *v.* Sherrard, 9 Hun (N. Y.) 322; Prentice *v.* Decker, 49 Barb. (N. Y.) 21. But see Merrill *v.* Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915, wherein it was held under statutory provisions that the passenger was presumed to have assented to limitations of liability contained in a baggage receipt delivered to him.

20. *Louisiana.*— Logan *v.* Pontchartrain R. Co., 11 Rob. (La.) 24, 43 Am. Dec. 199.

regulation brought to the notice of the passenger, requiring disclosure of exceptional value or compliance with other reasonable conditions, limit his liability.[21] But notice of the regulation must be brought home to the passenger before commencement of the journey.[22] Regulations or stipulations relied on as limiting the carrier's liability must be reasonable.[23] And any stipulation or regulation that the carrier will not be liable for negligence is invalid, the rule being the same as that already discussed with regard to the limitation of liability of carriers of goods.[24] The validity and construction of a contract limiting liability is to be governed by the law of the place where the contract is made,[25] but as to the common-law duty

Maine.— Bean *v.* Green, 12 Me. 422.

New York.—Macklin *v.* New Jersey Steamboat Co., 7 Abb. Pr. N. S. (N. Y.) 229; Powell *v.* Myers, 26 Wend. (N. Y.) 591; Clark *v.* Faxton, 21 Wend. (N. Y.) 153; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

Ohio.— Jones *v.* Voorhees, 10 Ohio 145.

Pennsylvania.—Camden, etc., R. Co. *v.* Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481. *Compare* Whitesell *v.* Crane, 8 Watts & S. (Pa.) 369.

Wisconsin.— Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

See 9 Cent. Dig. tit. "Carriers," § 1546.

21. Nevins *v.* Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; Macklin *v.* New Jersey Steamboat Co., 7 Abb. Pr. N. S. (N. Y.) 229; Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533.

Dogs.— The carrier may impose conditions as to the transportation of dogs in baggage-cars, and a passenger having knowledge thereof must comply with such conditions, or he cannot hold the carrier liable for loss of such property. Kansas City, etc., R. Co. *v.* Higdon, 94 Ala. 286, 10 So. 282, 33 Am. St. Rep. 119, 14 L. R. A. 515; Cantling *v.* Hannibal, etc., R. Co., 54 Mo. 385, 14 Am. Rep. 476; Honeyman *v.* Oregon, etc., R. Co., 13 Oreg. 352, 10 Pac. 628, 57 Am. Rep. 20.

Excess baggage.— If in compliance with a rule that the passenger must pay extra compensation for baggage over a specified weight or value, or of a certain character, such extra charge is paid, then the carrier becomes liable, the payment of the extra charge constituting an additional contract to that involved in the purchase of the ticket. Trimble *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 403, 57 N. Y. Suppl. 437; Glovinsky *v.* Cunard Steamship Co., 6 Misc. (N. Y.) 388, 26 N. Y. Suppl. 751, 56 N. Y. St. 407.

A notice that the carrier will not be liable for baggage unless the same has been checked will not be effective to limit liability, where the passenger was unable to secure a check on account of the absence of the baggage agent. Freeman *v.* Newton, 3 E. D. Smith (N. Y.) 246.

Release of liability.—A regulation that the agents of the carrier shall not accept trunks containing merchandise, such as sample cases, without a release of liability, will not bind the passenger unless such regulation is brought to his attention. Trimble *v.* New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115. But if known to him the carrier will thereby be relieved from liability for such property, although the agent checks it without requiring compliance with the condition. Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 84 N. W. 1042.

22. Malone *v.* Boston, etc., R. Corp., 12 Gray (Mass.) 388, 74 Am. Dec. 598; Brown *v.* Eastern R. Co., 11 Cush. (Mass.) 97; Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Lechowitzer *v.* Hamburg American Packet Co., 8 Misc. (N. Y.) 213, 28 N. Y. Suppl. 577, 59 N. Y. St. 486; Walker *v.* Skipwith, Meigs (Tenn.) 502, 33 Am. Dec. 161; Wilson *v.* Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

23. Nevins *v.* Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; Glovinsky *v.* Cunard Steamship Co., 4 Misc. (N. Y.) 266, 24 N. Y. Suppl. 136, 53 N. Y. St. 528; The New England, 110 Fed. 415.

A notice or regulation that all baggage is at the owner's risk will not relieve the carrier from liability, such a provision being unreasonable. Camden, etc., R., etc., Co. *v.* Belknap, 21 Wend. (N. Y.) 354; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Smith *v.* North Carolina R. Co., 64 N. C. 235.

24. *Alabama.*— Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607.

Indiana.— Louisville, etc., R. Co. *v.* Nicholai, 4 Ind. App. 119, 30 N. E. 424.

New York.— Prentice *v.* Decker, 49 Barb. (N. Y.) 21; Weinborg *v.* National Steamship Co., 57 N. Y. Super. Ct. 586, 8 N. Y. Suppl. 195, 29 N. Y. St. 219; Camden R., etc., Co. *v.* Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488.

Pennsylvania.— Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533.

Tennessee.—Coward *v.* East Tennessee, etc., R. Co., 16 Lea (Tenn.) 225, 57 Am. Rep. 226.

See also *supra*, II, E, 2, b; and 9 Cent. Dig. tit. "Carriers," § 1544.

25. Wald *v.* Pittsburg, etc., R. Co., 60 Ill. App. 460; Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 25 Am. St. Rep. 660, 12 L. R. A. 340.

The provision in a ticket issued by an English steamship company in connection with the transportation of a passenger from an American to an English port that the contract shall be governed by the law of England will not be effectual as against the rules of public policy recognized by the courts of the United States as to limitation of liability. The New England, 110 Fed. 415.

imposed on the carrier, the law of the place of performance will govern as to his liability.[26]

c. What Constitutes Baggage. In general the term "baggage" (or "luggage," which means the same thing),[27] includes such articles of necessity and convenience as are usually carried by passengers for personal use and comfort or protection during the continuance of the journey,[28] and in determining the question, the station in life, circumstances, and business of the passenger, and the nature and extent of the contemplated journey, may be taken into account.[29] Articles intended as presents, or carried for the convenience of others, do not come within the meaning of the term.[30] There is no question as to the right to carry wearing apparel for the passenger's reasonable use, no matter how valuable, if suitable to his circumstances and condition in life.[31] Weapons, such as one is in the habit of carrying or taking with him for purposes of defense or adornment, are included.[32] It seems to be thought that tools of a traveling jeweler may be classed as baggage.[33] Books carried by a student have been regarded as

Further as to the conflict of laws as affecting validity of contractual limitation see *supra*, II, E, 8.

26. Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271; Brown *v.* Camden, etc., R. Co., 83 Pa. St. 316.

The laws of another state will be presumed to be the same as those of the state where the action is tried. Davis *v.* Chicago, etc., R. Co., 83 Iowa 744, 49 N. W. 77.

27. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404.

28. *Georgia.*—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.— Werner *v.* Evans, 94 Ill. App. 328.

Mississippi.— New Orleans, etc., R. Co. *v.* Moore, 40 Miss. 39.

New York.—Hirschsohn *v.* Hamburg American Packet Co., 34 N. Y. Super. Ct. 521; Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388; Nordemeyer *v.* Loescher, 1 Hilt. (N. Y.) 499.

Ohio.— Smith *v.* Cincinnati, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 192, 2 Ohio N. P. 29.

Tennessee.— Bomar *v.* Maxwell, 9 Humphr. (Tenn.) 621, 51 Am. Dec. 682.

Texas.— International, etc., R. Co. *v.* Philips, 63 Tex. 590; Mexican Nat. R. Co. *v.* Ware, (Tex. Civ. App. 1900) 60 S. W. 343; Texas, etc., R. Co. *v.* Capps, 2 Tex. Civ. App. Cas. § 33.

England.— Hudston *v.* Midland R. Co., L. R. 4 Q. B. 366, 28 L. J. Q. B. 213, 20 L. T. Rep. N. S. 526, 17 Wkly. Rep. 705; Great Northern R. Co. *v.* Shepherd, 8 Exch. 30, 21 L. J. Exch. 286, 7 R. & Can. Cas. 310.

See 9 Cent. Dig. tit. "Carriers," § 1520.

29. *Illinois.*—Hebard *v.* Riegel, 67 Ill. App. 584.

New York.— Nevins *v.* Bay State Steamboat Co., 4 Bosw. (N. Y.) 225.

Tennessee.—Coward *v.* East Tennessee, etc., R. Co., 16 Lea (Tenn.) 225, 57 Am. Rep. 226.

Texas.— Missouri Pac. R. Co. *v.* York, 2 Tex. App. Civ. Cas. § 638.

United States.— New York Cent., etc., R. Co. *v.* Fraloff, 100 U. S. 24, 25 L. ed. 531; Hannibal, etc., R. Co. *v.* Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423.

England.— Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. Rep. N. S. 618, 19 Wkly. Rep. 873.

See 9 Cent. Dig. tit. "Carriers," § 1520.

30. *California.*— Metz *v.* California Southern R. Co., 85 Cal. 329, 24 Pac. 610, 20 Am. St. Rep. 228, 9 L. R. A. 431.

Illinois.— Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268.

Massachusetts.— Dunlap *v.* International Steamboat Co., 98 Mass. 371.

New York.— Nevins *v.* Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; Hurwitz *v.* Hamburg-American Packet Co., 56 N. Y. Suppl. 379.

Texas.—Andrews *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1894) 25 S. W. 1040.

United States.— The Ionic, 5 Blatchf. (U. S.) 538, 13 Fed. Cas. No. 7,059.

See 9 Cent. Dig. tit. "Carriers," § 1522.

The carrier is liable for the loss of property of the passenger received as luggage which was designed for the personal use of himself or family, and was of a kind customarily carried as baggage, although not intended to be used for the comfort or convenience of the passenger on his journey, not including, however, articles purchased for a person not a member of his family. Dexter *v.* Syracuse, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527.

31. New York Cent., etc., R. Co. *v.* Fraloff, 100 U. S. 24, 25 L. ed. 531.

Linen cut into shirt bosoms is wearing apparel. Duffy *v.* Thompson, 4 E. D. Smith (N. Y.) 178.

32. Davis *v.* Michigan Southern, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151; Woods *v.* Devin, 13 Ill. 746, 56 Am. Dec. 483; Merrill *v.* Grinnell, 30 N. Y. 594; Bruty *v.* Grand Trunk R. Co., 32 U. C. Q. B. 66.

A passenger traveling on business is not entitled to recover for two revolvers, one being all that can be properly considered as included within personal baggage. Chicago, etc., R. Co. *v.* Collins, 56 Ill. 212. But see *contra*, Woods *v.* Devin, 13 Ill. 746, 56 Am. Dec. 483.

33. Kansas City, etc., R. Co. *v.* Morrison, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252. But see Porter *v.* Hilderbrand, 14 Pa. St. 129.

baggage,[34] and there has been the same holding as to catalogues or manuscript price-books carried by a traveling salesman.[35] But pictures or engravings are not baggage.[36] Costumes and paraphernalia of a traveling theatrical company are not personal baggage.[37] Bedding of a passenger by steamboat, and intended for use during a journey, may be included as baggage.[38] Bicycles are not personal baggage, and a common carrier may refuse to receive or carry them as such.[39] In general, watches, jewelry, opera-glasses, and like articles of personal adornment or convenience, suitable and intended for use during the continuance of a journey, are properly included as baggage.[40] As to money, it is held that a traveler has the right to carry as part of his baggage such reasonable amount as will be required to meet his actual and contingent expenses.[41] But sums of money carried for business purposes, to make purchases, or because the passenger is a public official charged with its custody, is not baggage, and the carrier will not be liable for the loss thereof.[42] The question of whether any particular article, or any particular sum of money, may properly be deemed baggage, in view of the nature of the journey and the circumstances and condition of the passenger, is for the jury.[43] It is evident that merchandise, not having the characteristics of

34. Hopkins *v.* Westcott, 6 Blatchf. (U. S.) 64, 12 Fed. Cas. No. 6,692, 7 Am. L. Reg. N. S. 533.

35. Staub *v.* Kendrick, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619; Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

36. Wheeler *v.* Oceanic Steam Nav. Co., 52 Hun (N. Y.) 75, 5 N. Y. Suppl. 101, 22 N. Y. St. 590.

37. Michigan Southern, etc., R. Co. *v.* Oehm, 56 Ill. 293; Oakes *v.* Northern Pac. R. Co., 20 Oreg. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318.

Manuscript music of an opera company is properly baggage when carried in a trunk checked by the company. Texas, etc., R. Co. *v.* Morrison's Faust Co., 20 Tex. Civ. App. 144, 48 S. W. 1103.

38. Hirschsohn *v.* Hamburgh American Packet Co., 34 N. Y. Super. Ct. 521.

Articles of bedding not intended for use on the trip are not baggage. St. Louis, etc., R. Co. *v.* Hardway, 17 Ill. App. 321; Connolly *v.* Warren, 106 Mass. 146, 8 Am. Rep. 300; Texas, etc., R. Co. *v.* Ferguson, 1 Tex. App. Civ. Cas. § 1253. But see *contra*, Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

39. State *v.* Missouri Pac. R. Co., 71 Mo. App. 385.

40. *Alabama.*— Cooney *v.* Pullman Palace-Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

Indiana.— Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221.

Kentucky.—American Contract Co. *v.* Cross, 8 Bush (Ky.) 472, 8 Am. Rep. 471.

New York.— McCormick *v.* Hudson River R. Co., 4 E. D. Smith (N. Y.) 181.

Ohio.— Jones *v.* Voorhees, 10 Ohio 145; Keith *v.* New York Cent. R. Co., 2 Ohio Dec. (Reprint) 125, 1 West. L. Month. 451.

Canada.— Bruty *v.* Grand Trunk R. Co., 32 U. C. Q. B. 66.

41. Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749; Weeks *v.* New York, etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104; Torpey *v.* Williams, 3 Daly (N. Y.) 162; Duffy *v.* Thompson, 4 E. D. Smith (N. Y.) 178; Camden, etc., R. Co. *v.* Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Johnson *v.* Stone, 11 Humphr. (Tenn.) 419.

The amount is to be measured not by the requirements of the transit over a particular part of the entire route, but must embrace what may be needed for the whole of the contemplated journey, including reasonable allowance for accidents or sickness and sojourning by the way. Merrill *v.* Grinnell, 30 N. Y. 594.

42. *California.*— Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404.

Connecticut.—Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

Georgia.— Hutchings *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.—Davis *v.* Michigan Southern, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151; Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578.

Indiana.— Doyle *v.* Kiser, 6 Ind. 242.

Massachusetts.— Jordan *v.* Fall River R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44.

Missouri.— Whitmore *v.* Steamboat Caroline, 20 Mo. 513.

New York.—Orange County Bank *v.* Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129.

Ohio.— Greenfield First Nat. Bank *v.* Maricetta, etc., R. Co., 20 Ohio St. 259, 5 Am. Rep. 655.

England.— Phelps *v.* London, etc., R. Co., 19 C. B. N. S. 321, 11 Jur. N. S. 652, 34 L. J. C. P. 259, 12 L. T. Rep. N. S. 496, 13 Wkly. Rep. 782, 115 E. C. L. 321.

See 9 Cent. Dig. tit. "Carriers," § 1522.

43. *Florida.*— Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Georgia.— Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Kansas.— Kansas City, etc., R. Co. *v.* Morrison, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252.

New York.— Merrill *v.* Grinnell, 30 N. Y. 594; Grant *v.* Newton, 1 E. D. Smith (N. Y.)

personal effects, carried for the passenger's use, is not baggage, and the carrier will not be liable therefor, even though taken in a trunk, such as is usually used for holding personal effects, or mingled with other articles which are properly baggage;[44] and this applies to goods or samples carried for sale, or for the purpose of making sales.[45] If the carrier accepts as baggage articles or merchandise not properly having that character, with knowledge that they are offered for transportation as baggage, he thereby waives any objection on that ground, and his liability therefor is the same as that with reference to baggage in general.[46] The carrier is under no obligation, however, to make inquiry as to the contents of

95; Rawson *v.* Pennsylvania R. Co., 2 Abb. Pr. N. S. (N. Y.) 220.

Texas.— Bonner *v.* Blum, (Tex. Civ. App. 1894) 25 S. W. 60.

Vermont.— Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

United States.— New York Cent., etc., R. Co. *v.* Fraloff, 100 U. S. 24, 25 L. ed. 531.

44. *Georgia.*— Georgia R. Co. *v.* Johnson, 113 Ga. 589, 38 S. E. 954.

Indiana.— Doyle *v.* Kiser, 6 Ind. 242.

Maine.— Blumenthal *v.* Maine Cent. R. Co., 79 Me. 550, 11 Atl. 605.

Massachusetts.— Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140; Collins *v.* Boston, etc., R., 10 Cush. (Mass.) 506.

Minnesota.— McKibbin *v.* Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052.

Mississippi.— Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671.

Missouri.— Rider *v.* Wabash, etc., R. Co., 14 Mo. App. 529.

New York.— Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388; Bell *v.* Drew, 4 E. D. Smith (N. Y.) 59.

Ohio.— Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 Ohio St. 274, 58 N. E. 813; Smith *v.* Cincinnati, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 192, 2 Ohio N. P. 29.

Pennsylvania.— Verner *v.* Sweitzer, 32 Pa. St. 208.

Texas.— Jones *v.* Priester, 1 Tex. App. Civ. Cas. § 613.

England.— Belfast, etc., R. Co. *v.* Keys, 9 H. L. Cas. 556, 8 Jur. N. S. 367, 4 L. T. Rep. N. S. 841, 9 Wkly. Rep. 793.

See 9 Cent. Dig. tit. "Carriers," § 1521.

45. *Georgia.*—Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Iowa.— Weber Co. *v.* Chicago, etc., R. Co., 92 Iowa 364, 60 N. W. 637, 113 Iowa 188, 84 N. W. 1042.

Massachusetts.— Alling *v.* Boston, etc., R. Co., 126 Mass. 121, 30 Am. Rep. 667.

Missouri.— Spooner *v.* Hannibal, etc., R. Co., 23 Mo. App. 403.

New York.— Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767.

Ohio.—Pennsylvania Co. *v.* Miller, 35 Ohio St. 541, 35 Am. Rep. 620.

Texas.— Texas, etc., R. Co. *v.* Capps, 2 Tex. App. Civ. Cas. § 33.

See 9 Cent. Dig. tit. "Carriers," § 1521.

46. *Arkansas.*—Kansas City, etc., R. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 46 Am. St. Rep. 212, 28 L. R. A. 501.

Illinois.—Hamburg-American Packet Co. *v.* Gattman, 127 Ill. 598, 20 N. E. 662; Lake Shore, etc., R. Co. *v.* Hochstim, 67 Ill. App. 514.

Kansas.— Chicago, etc., R. Co. *v.* Conklin, 32 Kan. 55, 3 Pac. 762.

Missouri.— Rider *v.* Wabash, etc., R. Co., 14 Mo. App. 529; Ross *v.* Missouri, etc., R. Co., 4 Mo. App. 582.

New York.— Stoneman *v.* Erie R. Co., 52 N. Y. 429; Glovinsky *v.* Cunard Steamship Co., 6 Misc. (N. Y.) 388, 26 N. Y. Suppl. 751, 56 N. Y. St. 407.

Ohio.— Toledo, etc., R. Co. *v.* Dages, 57 Ohio St. 38, 47 N. E. 1039, 63 Am. St. Rep. 702.

Oregon.— Oakes *v.* Northern Pac. R. Co., 20 Oreg. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318.

Texas.— Snaman *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 1023; Ft. Worth, etc., R. Co. *v.* I. B. Rosenthal Millinery Co., (Tex Civ. App. 1895) 29 S. W. 196.

United States.— Hannibal, etc., R. Co. *v.* Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423; Central Trust Co. *v.* Wabash, etc., R. Co., 39 Fed. 417; Jacobs *v.* Tutt, 33 Fed. 412; Hellman *v.* Holladay, 1 Woolw. (U. S.) 365, 11 Fed. Cas. No. 6,340.

England.— Great Northern R. Co. *v.* Shepherd, 8 Exch. 30, 21 L. J. Exch. 286, 7 R. & Can. Cas. 310.

See 9 Cent. Dig. tit. "Carriers," § 1531.

It is said that mere knowledge on the part of the baggage-master that the passenger is attempting to carry merchandise as baggage will not charge the carrier with liability therefor, it being outside of the scope of his authority to accept merchandise as baggage. Blumantle *v.* Fitchburg R. Co., 127 Mass. 322, 34 Am. Rep. 376. Perhaps this is true if the passenger has notice of limitation on the authority of the baggage-master in this respect, but in the absence of such notice the act of the agent will be binding upon his principal. Minter *v.* Pacific R. Co., 41 Mo. 503, 97 Am. Dec. 288; Sherlock *v.* Chicago, etc., R. Co., 85 Mo. App. 46. Accordingly if the passenger has knowledge that the carrier's agent is prohibited from checking sample cases as baggage, except upon execution of a release of liability, and without compliance with such conditions induces the baggage-master to violate his duty in that respect, he cannot hold the

trunks offered to be checked as baggage.[47] And if merchandise is checked under the form of baggage, or mingled with articles of baggage without the carrier's knowledge, he is not liable therefor.[48] While actual knowledge is not necessary to charge the carrier with liability for merchandise checked as baggage, if the circumstances are such as to indicate the fact,[49] yet the mere appearance of the trunk or case offered to be checked as one ordinarily in use for carrying merchandise or samples will not in itself charge the carrier with knowledge that it does contain merchandise rather than personal baggage.[50] The fact of delivery of a trunk or other receptacle in which personal baggage is generally carried is an implied representation that it contains baggage only, and a failure to disclose the nature of the contents as being other than baggage will constitute such concealment as to relieve the carrier from liability so far as the contents are not baggage.[51] So far as the articles are properly baggage, there is no obligation to disclose their value, however exceptional it may be, in the absence of reasonable inquiry.[52] The carrier may make an extra charge for value beyond a reasonable limit fixed, and require information as to the value for the purpose of determining such charge.[53] The carrier may also make an extra charge for weight beyond a reasonable limit, or for accepting merchandise which is not properly baggage, and upon accepting the charge for excess becomes liable as common carrier with reference to the merchandise thus accepted to the same extent as though the goods were carried as freight.[54]

carrier liable. Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 84 N. W. 1042.

A railroad company receiving baggage from a connecting line is not chargeable with knowledge of the baggage-master of such connecting line that the trunk of the passenger contains merchandise, there being no presumption that the agent of the connecting line had authority to bind the line receiving the baggage without actual notice. Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 Ohio St. 274, 58 N. E. 813. Nor is the carrier bound by knowledge of the baggage-master acquired otherwise than as agent. Georgia Cent. R. Co. *v.* Joseph, 125 Ala. 313, 28 So. 35.

47. Haines *v.* Chicago, etc., R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199; Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 Ohio St. 274, 58 N. E. 813; Pennsylvania Co. *v.* Miller, 35 Ohio St. 541, 1 Ky. L. Rep. 184, 35 Am. Rep. 620; Greenwich Ins. Co. *v.* Memphis, etc., Packet Co., 1 Ohio N. P. 126.

The carrier may make such inquiry if there is reason to think that the passenger is attempting to transport merchandise as baggage, and decline to receive his trunk, if a satisfactory showing is not made. Norfolk, etc., R. Co. *v.* Irvine, 85 Va. 217, 7 S. E. 233, 1 L. R. A. 110.

48. *Kansas.*— Southern Kansas R. Co. *v.* Clark, 52 Kan. 398, 34 Pac. 1054.

Maine.— Blumenthal *v.* Maine Cent. R. Co., 79 Me. 550, 11 Atl. 605.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 44 N. H. 325.

New York.— Richards *v.* Westcott, 7 Bosw. (N. Y.) 6; Simpson *v.* New York, etc., R. Co., 16 Misc. (N. Y.) 613, 38 N. Y. Suppl. 341, 73 N. Y. St. 812; Gurney *v.* Grand Trunk R. Co., 14 N. Y. Suppl. 321, 37 N. Y. St. 155; Pardee *v.* Drew, 25 Wend. (N. Y.) 459.

Ohio.— Toledo, etc., R. Co. *v.* Bowler, etc., Co., 9 Ohio Cir. Dec. 465; Greenwich Ins. Co. *v.* Memphis, etc., Packet Co., 4 Ohio S. & C. Pl. Dec. 405.

United States.— Wunsch *v.* Northern Pac. R. Co., 62 Fed. 878; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

See 9 Cent. Dig. tit. "Carriers," § 1532.

49. Rider *v.* Wabash, etc., R. Co., 14 Mo. App. 529; Trimble *v.* New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115.

50. Sloman *v.* Great Western R. Co., 6 Hun (N. Y.) 546; Humphreys *v.* Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. ed. 587.

51. *Illinois.*— Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348, 24 Am. Rep. 248; Cincinnati, etc., R. Co. *v.* Marcus, 38 Ill. 219.

Maine.—Blumenthal *v.* Maine Cent. R. Co., 79 Me. 550, 11 Atl. 605.

Minnesota.— Haines *v.* Chicago, etc., R. Co., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199.

New York.— Sloman *v.* Great Western R. Co., 6 Hun (N. Y.) 546; Tanco *v.* Booth, 15 N. Y. Suppl. 110, 39 N. Y. St. 82.

United States.— The Ionic, 5 Blatchf. (U. S.) 538, 13 Fed. Cas. No. 7,059; Hellman *v.* Holladay, 1 Woolw. (U. S.) 365, 11 Fed. Cas. No. 6,340.

See 9 Cent. Dig. tit. "Carriers," § 1532.

52. Camden, etc., R. Co. *v.* Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; New York Cent., etc., R. Co. *v.* Fraloff, 100 U. S. 24, 25 L. ed. 531.

53. New York Cent., etc., R. Co. *v.* Fraloff, 100 U. S. 24, 25 L. ed. 531.

54. Trimble *v.* New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; Sloman *v.* Great Western R. Co., 67 N. Y. 208; Perley *v.* New York Cent., etc., R. Co., 65 N. Y. 374.

The transaction as to excess value or weight, or as to merchandise which would not otherwise be properly checked as baggage, ex-

d. Acceptance; When Liability Commences. To constitute such delivery of baggage to the carrier as to charge him with reference thereto, it is necessary that there be also an express or implied acceptance.[55] The delivery must be with intention to become a passenger.[56] The facilities offered for the receipt of baggage and the general custom of the place will furnish a basis for determining how long before the passenger actually intends to enter upon his journey he may deliver his baggage to the carrier so as to render the carrier liable therefor.[57] Where baggage is left with the carrier in anticipation of a journey not about to be commenced, and to be called for and checked when the passenger is ready to begin his journey, the carrier is liable, therefore, as warehouseman only.[58] A regulation that baggage shall not be checked until a ticket has been procured is reasonable, but the carrier cannot limit his liability as carrier by refusing to take charge of baggage until the procurement of a ticket.[59] The giving of a receipt or check is a matter of convenience, and the time when the carrier's liability commences will not depend upon the issuance of such receipt or check, but upon the actual acceptance of the baggage for transportation.[60] The authority of a person acting as

tra compensation being charged, may be treated as a separate contract (Talcott *v.* Wabash R. Co., 159 N. Y. 461, 54 N. E. 1; Millard *v.* Missouri, etc., R. Co., 86 N. Y. 441; Wasserberg *v.* Cunard Steamship Co., 8 Misc. (N. Y.) 78, 28 N. Y. Suppl. 520, 58 N. Y. St. 833; Glovinsky *v.* Cunard Steamship Co., 6 Misc. (N. Y.) 388, 26 N. Y. Suppl. 751, 56 N. Y. St. 407; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209), and knowledge of the carrier of the contents of the receptacles will be immaterial where no inquiry is made, the whole transaction being treated as a contract for the carriage of goods (Stoneman *v.* Erie R. Co., 52 N. Y. 429; Butler *v.* Hudson River R. Co., 3 E. D. Smith (N. Y.) 571; Camden, etc., R. Co. *v.* Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Missouri Pac. R. Co. *v.* Slater, 3 Tex. App. Civ. Cas. § 7; Baldraff *v.* Camden, etc., R. Co., 2 Fed. Cas. No. 794, 25 Hunt. Mer. Mag. 77. But see *contra*, Talcott *v.* Wabash R. Co., 66 Hun (N. Y.) 456, 21 N. Y. Suppl. 318, 50 N. Y. St. 423).

55. Michigan Southern, etc., R. Co. *v.* Meyres, 21 Ill. 627; Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410; McQuesten *v.* Sanford, 40 Me. 117; Ball *v.* New Jersey Steamboat Co., 1 Daly (N. Y.) 491.

Where the acceptance is by mistake or accident, the owner of the baggage not being a passenger, the carrier is not liable for the baggage as carrier. Fairfax *v.* New York Cent., etc., R. Co., 37 N. Y. Super. Ct. 516.

56. Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410; Wright *v.* Caldwell, 3 Mich. 51.

Necessity of purchase of ticket.— But it is not essential that the owner shall have actually purchased a ticket or commenced the journey. The intention to become a passenger in ordinary course is sufficient. Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

57. *Connecticut.*— Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143.

Illinois.— Woods *v.* Devin, 13 Ill. 746, 56 Am. Dec. 483.

Indiana.— Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

Iowa.— Green *v.* Milwaukee, etc., R. Co., 38 Iowa 100, 41 Iowa 410.

Louisiana.—Logan *v.* Pontchartrain R. Co., 11 Rob. (La.) 24, 43 Am. Dec. 199.

Maine.— Wilson *v.* Grand Trunk R. Co., 57 Me. 138, 2 Am. Rep. 26.

New York.— Rogers *v.* Long Island R. Co., 1 Thomps. & C. (N. Y.) 396.

Wisconsin.— Goldberg *v.* Ahnapee, etc., R. Co., 105 Wis. 1, 80 N. W. 920, 76 Am. St. Rep. 899, 47 L. R. A. 221; Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

See 9 Cent. Dig. tit. "Carriers," § 1502.

58. *Arkansas.*— Little Rock, etc., R. Co. *v.* Hunter, 42 Ark. 200.

Iowa.— Van Gilder *v.* Chicago, etc., R. Co., 44 Iowa 548.

Massachusetts.— Murray *v.* International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290.

Mississippi.— Illinois Cent. R. Co. *v.* Tronstine, 64 Miss. 834, 2 So. 255.

Missouri.— Goodbar *v.* Wabash R. Co., 53 Mo. App. 434.

See 9 Cent. Dig. tit. "Carriers," § 1540.

59. Coffee *v.* Louisville, etc., R. Co., 76 Miss. 569, 25 So. 157, 71 Am. St. Rep. 535, 45 L. R. A. 112.

Refusal to carry passenger without notice to remove baggage.—Where a ship-owner refused to carry a passenger, and proceeded on the voyage without giving the passenger notice and opportunity to remove his baggage, it was held that such ship-owner was liable in trespass for carrying away the baggage. Holmes *v.* Doane, 3 Gray (Mass.) 328.

Where carrier refused to check baggage until a ticket had been procured, and subsequently owner refused to take passage, but the carrier nevertheless transported the baggage to the proposed destination, held that the carrier was liable for the baggage, although its destruction after reaching the proposed destination was without negligence on the carrier's part. McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303.

60. Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Chicago, etc., R. Co. *v.*

agent to bind the carrier by acceptance of baggage for transportation will be established by proof that such person has been allowed, in the ordinary course of business, to thus receive baggage and bind the carrier with reference thereto.[61] But the carrier will not be liable for the acts of its servants not authorized nor held out as authorized to receive baggage.[62]

e. Delivery; When Liability Terminates. In general the liability of the carrier for baggage terminates as soon as the baggage has reached its destination and been delivered to the owner.[63] For misdelivery of the baggage of a passenger

Clayton, 78 Ill. 616; Check *v.* Little Miami R. Co., 2 Disn. (Ohio) 237.

Delivery of a check is, however, prima facie evidence of acceptance of the baggage by the carrier, and is sufficient to show its receipt, in the absence of evidence to the contrary.

Colorado.— Denver, etc., R. Co. *v.* Roberts, 6 Colo. 333.

Illinois.— Chicago, etc., R. Co. *v.* Clayton, 78 Ill. 616; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749; Davis *v.* Michigan Southern, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151.

Kansas.— Atchison, etc., R. Co. *v.* Brewer, 20 Kan. 669.

Minnesota.— Ahlbeck *v.* St. Paul, etc., R. Co., 39 Minn. 424, 40 N. W. 364, 12 Am. St. Rep. 661.

Nebraska.— Chicago, etc., R. Co. *v.* Steear, 53 Nebr. 95, 73 N. W. 466.

South Carolina.— Dill *v.* South Carolina R. Co., 7 Rich. (S. C.) 158, 62 Am. Dec. 407.

Virginia.— Wilson *v.* Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

See 9 Cent. Dig. tit. "Carriers," § 1504.

Presumption as to good condition.— The presumption is that the baggage for which the carrier issues a check was received in good condition. St. Louis, etc., R. Co. *v.* Hawkins, 39 Ill. App. 406. As the carrier may refuse to receive baggage not properly packed and in good condition, the presumption is that when received it was in good condition and properly packed for transportation. Hannibal, etc., R. Co. *v.* Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423.

61. *Arkansas.*— St. Louis, etc., R. Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 46 Am. St. Rep. 212, 28 L. R. A. 501.

Louisiana.— Fisher *v.* Geddes, 15 La. Ann. 14.

Massachusetts.— Jordan *v.* Fall River R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44.

New York.— Rogers *v.* Long Island R. Co., 2 Lans. (N. Y.) 269.

Texas.— International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632; Texas, etc., R. Co. *v.* Morrison's Faust Co., 20 Tex. Civ. App. 144, 48 S. W. 1103.

Vermont.— Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

United States.— Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

See 9 Cent. Dig. tit. "Carriers," § 1511.

Agents at union depots.— Where by arrangement between a railroad company and a company having control of a union depot, the agent of the latter is in the habit of handling baggage for the former, such an agent will be presumed to have authority to bind the railroad company. Ahlbeck *v.* St. Paul, etc., R. Co., 39 Minn. 424, 40 N. W. 364, 12 Am. St. Rep. 661; Jacobs *v.* Tutt, 33 Fed. 412.

62. Michigan Southern, etc., R. Co. *v.* Meyres, 21 Ill. 627; Chillicothe *v.* Raynard, 80 Mo. 185; Elkins *v.* Boston, etc., R. Co., 23 N. H. 275; Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

The baggage-master of one railroad has no authority as such to contract for the carriage of baggage beyond his company's line. Marmorstein *v.* Pennsylvania R. Co., 13 Misc. (N. Y.) 32, 34 N. Y. Suppl. 97, 68 N. Y. St. 172.

Liability of steamboat owner for money deposited with servant.— The owner of a steamboat is liable for money or other valuables properly carried by the passenger as baggage and deposited with the captain or clerk of a steamboat. Dunn *v.* Branner, 13 La. Ann. 452. But such deposit with the clerk must be in accordance with some rule or well-known usage. Whitmore *v.* Steamboat Caroline, 20 Mo. 513. If the money is not such as is proper baggage, the carrier if liable at all is liable only as bailee. Wilcox *v.* Steamboat Philadelphia, 9 La. 80, 29 Am. Dec. 436; Jenkins *v.* Motlow, 1 Sneed (Tenn.) 248, 60 Am. Dec. 154.

63. Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Patten *v.* Johnson, 131 Mass. 297; Matteson *v.* New York Cent., etc., R. Co., 76 N. Y. 381; The State of New York, 7 Ben. (U. S.) 450, 22 Fed. Cas. No. 13,328.

A regulation by which baggage is not delivered at certain stations where passengers are allowed to terminate the transportation is unreasonable. Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. St. 140, 16 Atl. 607, 10 Am. St. Rep. 517, 2 L. R. A. 489.

Failure to tender a check for the baggage at destination will not relieve the carrier from liability, where he makes an unqualified and continued refusal to deliver such baggage on demand. Cleveland, etc., R. Co. *v.* Tyler, 9 Ind. App. 689, 35 N. E. 523.

Where passenger delivered his check to the baggage-master, with the **arrangement that baggage should be retained in the baggage-room** until a later time, for the passenger's convenience, held that the question whether there had been a delivery to the passenger was for the jury. Matteson *v.* New York Cent., etc., R. Co., 76 N. Y. 381. And to same effect see Hodkinson *v.* London, etc., R. Co., 14 Q. B. D. 228, 32 Wkly. Rep. 662.

the carrier will be liable without regard to negligence on his part, as for conversion.[64]

f. Liability as Warehouseman. The conflict of authority which exists with reference to carriage of goods as to when the liability of the carrier as such terminates, and his responsibility as bailee begins,[65] seems not to apply to transportation of baggage. The duty of the passenger is to know when his baggage will arrive and to take it away. The liability of the carrier as to baggage continues therefore until the baggage has reached its destination and the passenger has had a reasonable opportunity to take it away. After that time the carrier's liability is that of warehouseman only.[66] In determining what is a reasonable time, regard must be had to the circumstances of the case.[67] But in the absence of some special circumstances excusing the passenger from doing so, it is his duty to take his baggage without delay.[68] If the delay in delivering the baggage to the passenger is due to the carrier's fault in not transporting it properly, or otherwise

Where passenger stopped over at an intermediate station and requested that his baggage be delivered to him there, but the carrier transported it to the original destination, where it was lost without the carrier's fault, held that the carrier was not liable. Howell *v.* Grand Trunk R. Co., 92 Hun (N. Y.) 423, 36 N. Y. Suppl. 544, 71 N. Y. St. 640.

64. Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, 46 N. W. 456; Morris *v.* Third Ave. R. Co., 1 Daly (N. Y.) 202; Powell *v.* Myers, 26 Wend. (N. Y.) 591; Trice *v.* Miller, 3 Tex. App. Civ. Cas. § 440.

65. See *supra*, II, J, 3, d.

66. *Arkansas.*— Kansas City, etc., R. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781.

Illinois.— Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268; Chicago, etc., R. Co. *v.* Addizoat, 17 Ill. App. 632.

Indiana.— Indiana, etc., R. Co. *v.* Zilly, 20 Ind. App. 569, 51 N. E. 141; Pennsylvania Co. *v.* Liveright, 14 Ind. App. 518, 41 N. E. 350.

Kentucky.— Seasongood *v.* Owensboro, etc., R. Co., 14 Ky. L. Rep. 430.

Michigan.—Laffrey *v.* Grummond, 74 Mich. 186, 41 N. W. 894, 16 Am. St. Rep. 624, 3 L. R. A. 287.

Missouri.— Felton *v.* Chicago, etc., R. Co., 86 Mo. App. 332; Cohen *v.* St. Louis, etc., R. Co., 59 Mo. App. 66.

New York.— Matteson *v.* New York Cent., etc., R. Co., 57 N. Y. 552, 76 N. Y. 381; Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Graves *v.* Fitchburg R. Co., 29 N. Y. App. Div. 591, 51 N. Y. Suppl. 636; Mortland *v.* Philadelphia, etc., R. Co., 81 Hun (N. Y.) 473, 30 N. Y. Suppl. 1021, 63 N. Y. St. 215; Burgevin *v.* New York, etc., R. Co., 69 Hun (N. Y.) 479, 23 N. Y. Suppl. 415, 52 N. Y. St. 617; Holdridge *v.* Utica, etc., R. Co., 56 Barb. (N. Y.) 191; Nevins *v.* Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; Klein *v.* Hamburg-American Packet Co., 3 Daly (N. Y.) 390; Torpey *v.* Williams, 3 Daly (N. Y.) 162; Van Horn *v.* Kermit, 4 E. D. Smith (N. Y.) 453; Hurwitz *v.* Hamburg-American Packet Co., 56 N. Y. Suppl. 379.

North Carolina.— Kahn *v.* Atlantic, etc., R. Co., 115 N. C. 638, 20 S. E. 169.

Ohio.— Pennsylvania Co. *v.* Miller, 35 Ohio St. 541, 35 Am. Rep. 620.

Texas.— Galveston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1893) 24 S. W. 668.

Vermont.— Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

Wisconsin.—Hœger *v.* Chicago, etc., R. Co., 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271.

United States.— Wiegand *v.* New Jersey Cent. R. Co., 75 Fed. 370; Jacobs *v.* Tutt, 33 Fed. 412.

England.— Patscheider *v.* Great Western R. Co., 3 Ex. D. 153, 38 L. T. Rep. N. S. 149, 26 Wkly. Rep. 268.

See 9 Cent. Dig. tit. "Carriers," § 1542.

67. George F. Ditman Boot, etc., Co. *v.* Keokuk, etc., R. Co., 91 Iowa 416, 59 N. W. 257, 51 Am. St. Rep. 352; Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212; Graves *v.* Fitchburg R. Co., 29 N. Y. App. Div. 591, 51 N. Y. Suppl. 636; Burgevin *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 479, 23 N. Y. Suppl. 415, 52 N. Y. St. 617; Jones *v.* Norwich, etc., Transp. Co., 50 Barb. (N. Y.) 193; Curtis *v.* Avon, etc., R. Co., 49 Barb. (N. Y.) 148; Cary *v.* Cleveland, etc., R. Co., 29 Barb. (N. Y.) 35.

68. Lewis *v.* Louisville, etc., R. Co., 13 Ky. L. Rep. 144; Texas, etc., R. Co. *v.* Capps, 2 Tex. App. Civ. Cas. § 33; Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Wiegand *v.* New Jersey Cent. R. Co., 75 Fed. 370; Jacobs *v.* Tutt, 33 Fed. 412.

The fact that the passenger, on account of illness, is given a lay-over and does not reach his destination until after the arrival of his baggage does not extend the time of the carrier's liability as common carrier. Chicago, etc., R. Co. *v.* Boyce, 73 Ill. 510, 24 Am. Rep. 268.

Where the facts are not in dispute, the question of whether the passenger applies for his baggage within a reasonable time is for the court. Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Mortland *v.* Philadelphia, etc., R. Co., 81 Hun (N. Y.) 473, 30 N. Y. Suppl. 1021, 63 N. Y. St. 215; Burgevin *v.* New York Cent., etc., R. Co., 69

postponing delivery, the liability of the carrier is thereby extended until the lapse of what is a reasonable time under the circumstances for the passenger to receive his baggage.[69] But retention of the baggage by the agent of the carrier for the accommodation of the passenger will not extend the carrier's liability.[70] If the passenger does not apply for his baggage within a reasonable time,[71] the duty of the carrier is to store and keep it with reasonable care, and his liability therefor is that of warehouseman; this duty, however, not being that arising under an independent contract, but a part of his duty as carrier, covered by the original contract of transportation.[72] In some cases it has been said that even where the retention of possession by the carrier is at the request of the passenger, the liability is that of bailee for hire, involving the necessity of using ordinary care.[73] But on the other hand it has been held, with perhaps better reason, that in such cases the carrier is merely a gratuitous bailee, liable only for gross negligence.[74]

g. Connecting Carriers. Connecting carriers may by joint arrangement become bound as partners for the transportation of baggage by each over his portion of the common route.[75] Or the first of connecting carriers may by

Hun (N. Y.) 479, 23 N. Y. Suppl. 415, 52 N. Y. St. 617.

69. *Georgia.*—Georgia R., etc., Co. *v.* Phillips, 93 Ga. 801, 20 S. E. 646.

Indiana.—Toledo, etc., R. Co. *v.* Hammond, 33 Ind. 379, 5 Am. Rep. 221; Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462.

Minnesota.—Shaw *v.* Northern Pac. R. Co., 40 Minn. 144, 41 N. W. 548.

Missouri.— Felton *v.* Chicago, etc., R. Co., 86 Mo. App. 332; Prickett *v.* New Orleans Anchor Line, 13 Mo. App. 436.

New Hampshire.— Hedding *v.* Gallagher, 69 N. H. 650, 45 Atl. 96, 76 Am. St. Rep. 204.

New York.— Dininny *v.* New York, etc., R. Co., 49 N. Y. 546; Burgevin *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 479, 23 N. Y. Suppl. 415, 52 N. Y. St. 617.

See 9 Cent. Dig. tit. "Carriers," § 1542.

70. Louisville, etc., R. Co. *v.* Mahan, 8 Bush (Ky.) 184; National Line Steamship Co. *v.* Smart, 107 Pa. St. 492.

71. For acts of carrier as warehouseman which will amount to negligence, rendering it liable for loss, see the following cases:

Indiana.— Indiana, etc., R. Co. *v.* Zilly, 20 Ind. App. 569, 51 N. E. 141.

Iowa.— Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212; Warner *v.* Burlington, etc., R. Co., 22 Iowa 166, 92 Am. Dec. 389.

Kansas.— Kansas City, etc., R. Co. *v.* Patten, 3 Kan. App. 338, 45 Pac. 108.

Kentucky.—Wald *v.* Louisville, etc., R. Co., 92 Ky. 645, 13 Ky. L. Rep. 853, 18 S. W. 850.

Massachusetts.— Nealand *v.* Boston, etc., R. Co., 161 Mass. 67, 36 N. E. 592; Clark *v.* Eastern R. Co., 139 Mass. 423, 1 N. E. 128.

New York.— Fairfax *v.* New York Cent., etc., R. Co., 67 N. Y. 11, 73 N. Y. 167, 29 Am. Rep. 119.

North Carolina.— Kahn *v.* Atlantic, etc., R. Co., 115 N. C. 638, 20 S. E. 169.

Failure to deliver on demand.— It is said that failure of the carrier holding baggage as warehouseman to deliver it on demand is *prima facie* sufficient to show negligence, the burden being on him to account for the loss. Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61. *Contra,* Kahn *v.* Atlantic, etc., R. Co., 115 N. C. 638, 20 S. E. 169.

72. *Iowa.*— Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.

Kansas.— Kansas City, etc., R. Co. *v.* Patten, 3 Kan. App. 338, 45 Pac. 108.

Kentucky.— Ohio, etc., R. Co. *v.* Newhoff, 12 Ky. L. Rep. 467.

Massachusetts.— Nealand *v.* Boston, etc., R., 161 Mass. 67, 36 N. E. 592.

Missouri.— Blackmore *v.* Missouri Pac. R. Co., 162 Mo. 455, 62 S. W. 993.

New York.— Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61.

See 9 Cent. Dig. tit. "Carriers," § 1541.

Putting in unsafe place.— It is the duty of the carrier to safely store the baggage, if not called for, and if he puts it in an unsafe place his liability as carrier continues. Bartholomew *v.* St. Louis, etc., R. Co., 53 Ill. 227, 5 Am. Rep. 45; Chicago, etc., R. Co. *v.* Fairclough, 52 Ill. 106; St. Louis, etc., R. Co. *v.* Hardway, 17 Ill. App. 321.

73. Pennsylvania Co. *v.* Miller, 35 Ohio St. 541, 35 Am. Rep. 620; National Line Steamship Co. *v.* Smart, 107 Pa. St. 492; Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479, 17 S. W. 133, (Tex. Civ. App. 1893) 24 S. W. 668.

74. Van Gilder *v.* Chicago, etc., R. Co., 44 Iowa 548; Marshall *v.* Pontiac, etc., R. Co., 126 Mich. 45, 85 N. W. 242; Jones *v.* Norwich, etc., Transp. Co., 50 Barb. (N. Y.) 193; Minor *v.* Chicago, etc., R. Co., 19 Wis. 40, 88 Am. Dec. 670. Where the passenger had surrendered her baggage-check and left her trunk with the baggage-master for safe-keeping, for her accommodation, held, in the absence of evidence that the baggage-master had authority to make such arrangement, the carrier did not become liable as warehouseman. Mattison *v.* New York Cent. R. Co., 57 N. Y. 552.

75. Wolff *v.* Central R. Co., 68 Ga. 653, 45 Am. Rep. 501; Hawley *v.* Screven, 62 Ga. 347, 35 Am. Rep. 126; Peterson *v.* Chicago, etc., R. Co., 80 Iowa 92, 45 N. W. 573; Missouri Pac.

express contract bind himself for the entire transportation to a destination beyond his own line, and thus render himself liable for loss of or damage to the baggage, whether on his own line or on the line of a connecting carrier who acts as his agent in carrying out the contract of transportation.[76] But in the absence of any partnership arrangement or contract for through transportation, the presumption is the same as in the case of carriage of goods according to the American rule.[77] And even where the contract purports to be a through contract to destination,[78] the receiving carrier may still by special stipulation limit his liability to his own line.[79] Under the general rule, which limits the first carrier's liability to his own line and delivery to the connecting line, the baggage must be actually put into the possession of the agent of the connecting line before the liability of the first carrier is

R. Co. *v.* Slater, 3 Tex. App. Civ. Cas. § 7; Texas, etc., R. Co. *v.* Ferguson, 1 Tex. App. Civ. Cas. § 1253; Texas, etc., R. Co. *v.* Fort, 1 Tex. App. Civ. Cas. § 1252; St. Louis, etc., R. Co. *v.* Hindsman, 1 Tex. App. Civ. Cas. § 204.

What does not show partnership.— The mere fact that one carrier acts for others in a connecting line, accounting for a proportion of receipts for through business, will not show that there is a partnership. Croft *v.* Baltimore, etc., R. Co., 1 MacArthur (D. C.) 492; Check *v.* Little Miami R. Co., 2 Disn. (Ohio) 237.

76. *Illinois.*— Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749.

Massachusetts.— Najac *v.* Boston, etc., R. Co., 7 Allen (Mass.) 329, 83 Am. Dec. 686.

Missouri.— Lin *v.* Terre Haute, etc., R. Co., 10 Mo. App. 125.

New York.— Talcott *v.* Wabash R. Co., 159 N. Y. 461, 54 N. E. 1; Isaacson *v.* New York Cent., etc., R. Co., 94 N. Y. 278, 46 Am. Rep. 142; Hart *v.* Rensselaer, etc., R. Co., 8 N. Y. 37, Seld. Notes (N. Y.) 46, 59 Am. Dec. 447; Cary *v.* Cleveland, etc., R. Co., 29 Barb. (N. Y.) 35; Torpey *v.* Williams, 3 Daly (N. Y.) 162; Weed *v.* Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534.

Tennessee.—Coward *v.* East Tennessee, etc., R. Co., 16 Lea (Tenn.) 225, 57 Am. Rep. 226; Louisville, etc., R. Co. *v.* Weaver, 9 Lea (Tenn.) 38, 42 Am. Rep. 654.

Texas.— International, etc., R. Co. *v.* Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541.

Virginia.— Wilson *v.* Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

Wisconsin.— Candee *v.* Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566.

United States.—Maskos *v.* American Steam Ship Co., 11 Fed. 698.

See 9 Cent. Dig. tit. "Carriers," § 1551.

77. Under this rule the receiving carrier is liable to the end of his own line, and until delivery to the connecting line, being presumed to act as agent of the owner in delivering the baggage to such connecting line, and being relieved from further responsibility after such delivery has been made. Lessard *v.* Boston, etc., R. Co., 69 N. H. 648, 45 Atl. 712; Kessler *v.* New York Cent., etc., R. Co., 61 N. Y. 538; Milnor *v.* New York, etc., R. Co., 53 N. Y. 363; Straiton *v.* New York, etc., R. Co., 2 E. D. Smith (N. Y.) 184; Marmorstein *v.* Pennsylvania R. Co., 13 Misc. (N. Y.) 32, 34 N. Y. Suppl. 97, 68 N. Y. St. 172; New York Cent. Trust Co. *v.* Wabash, etc., R. Co., 31 Fed. 247; Mauritz *v.* New York, etc., R. Co., 23 Fed. 765. See also *supra*, II, M, 3.

In England the presumption is that the first carrier is liable to destination. Mytton *v.* Midland R. Co., 4 H. & N. 615, 28 L. J. Exch. 385, 7 Wkly. Rep. 737.

78. What does not constitute through contract.— The delivery for transportation of baggage to a point beyond the carrier's line does not in itself show a through contract. Hyman *v.* Central Vermont R. Co., 66 Hun (N. Y.) 202, 21 N. Y. Suppl. 119, 49 N. Y. St. 313; Marmorstein *v.* Pennsylvania R. Co., 13 Misc. (N. Y.) 32, 34 N. Y. Suppl. 97, 68 N. Y. St. 172. Neither will the collection of fare in advance for the entire journey, without any agreement as to risk, render the first carrier liable for the entire transportation of baggage to its destination beyond the first carrier's line. Baltimore, etc., R. Co. *v.* Campbell, 36 Ohio St. 647, 38 Am. Rep. 617.

The second of two connecting carriers does not become liable for the entire transportation of baggage under the sale of a through ticket by the first line. Felder *v.* Columbia, etc., R. Co., 21 S. C. 35, 53 Am. Rep. 656; Furstenheim *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 238.

Steamboat forming part of a connecting line.—A railroad company is not liable for loss of baggage upon a steamboat forming part of a connecting line, where no community of interest in or control over the carriage of passengers by the boat line is shown to exist in the railroad line. Green *v.* New York Cent., etc., R. Co., 12 Abb. Pr. N. S. (N. Y.) 473.

79. *Iowa.*— Peterson *v.* Chicago, etc., R. Co., 80 Iowa 92, 45 N. W. 573.

New York.— Talcott *v.* Wabash R. Co., 89 Hun (N. Y.) 492, 35 N. Y. Suppl. 574, 70 N. Y. St. 235; Nealon *v.* Grand Trunk R. Co., 5 N. Y. St. 256.

Pennsylvania.— Pennsylvania Cent. R. Co. *v.* Schwarzenberger, 45 Pa. St. 208, 84 Am. Dec. 490.

Texas.— Gulf, etc., R. Co. *v.* Ions, 3 Tex. Civ. App. 619, 22 S. W. 1011.

Wisconsin.—Candee *v.* Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566.

See 9 Cent. Dig. tit. "Carriers," § 1553.

Contra.— Coward *v.* East Tennessee, etc.,

terminated.[80] But the presumption is, as in case of goods,[81] that failure to deliver at the end of the transportation, or delivery in bad condition, is through the fault of the last carrier until he has exonerated himself by showing that he did not receive the baggage or received it in the condition in which it reaches its destination.[82]

h. Charges; Lien. The carrier has a lien on the baggage of the passenger for the entire charge of transportation of the passenger and baggage, and it is immaterial whether the baggage has been checked, if it is still in the possession of the carrier when he seeks to enforce his lien.[83] While thus retaining baggage under a lien, the carrier is liable therefor as bailee.[84] A connecting carrier employed by the first carrier in carrying out the contract of through transportation cannot enforce a lien on the baggage if charges have been paid in advance, but may otherwise detain the baggage for the entire charges of the transportation.[85]

i. Actions For Delay, Loss, or Injury — (i) *Form of Action.* Action for loss of or injury to baggage is usually brought in tort,[86] and especially is this the proper form of action where the passenger has accepted and retained the baggage in a damaged condition.[87] But the action may be brought on special contract, and where that is substantially the form of action, allegations as to defend-

R. Co., 16 Lea (Tenn.) 225, 57 Am. Rep. 226; Wilson *v.* Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

80. *Alabama.*—Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486, 94 Am. Dec. 607.

Georgia.— Rome R. Co. *v.* Wimberly, 75 Ga. 316, 58 Am. Rep. 468.

Maryland.— Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330.

New York.— Hyman *v.* Central Vermont R. Co., 66 Hun (N. Y.) 202, 21 N. Y. Suppl. 119, 49 N. Y. St. 313.

Vermont.— Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

See 9 Cent. Dig. tit. "Carriers," § 1550.

Presumption and burden of proof.— Although the first carrier limits liability to his own line, he has the burden of showing safe delivery to the connecting line in order to relieve himself from responsibility. Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330; International, etc., R. Co. *v.* Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541. On the other hand it is said that failure of the last carrier to deliver baggage at the end of the transportation is not evidence of any negligence on the part of the carrier who received the baggage and checks it over both lines. Stimson *v.* Connecticut River R. Co., 98 Mass. 83, 93 Am. Dec. 140.

81. See *supra*, II, M, 5.

82. *Alabama.*— Montgomery, etc., R. Co., *v.* Culver, 75 Ala. 587, 51 Am. Rep. 483.

Georgia.— Savannah, etc., R. Co. *v.* McIntosh, 73 Ga. 532.

Maryland.— Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330.

Massachusetts.— Moore *v.* New York, etc., R. Co., 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298.

Missouri.— Lin *v.* Terre Haute, etc., R. Co., 10 Mo. App. 125.

New York.— McCormick *v.* Hudson River R. Co., 4 E. D. Smith (N. Y.) 181; Fox *v.* Wabash R. Co., 16 Misc. (N. Y.) 370, 38 N. Y. Suppl. 88, 74 N. Y. St. 384.

See 9 Cent. Dig. tit. "Carriers," § 1551.

Contra.— Kessler *v.* New York Cent., etc., R. Co., 61 N. Y. 538.

Illustrations.— Thus, where a passenger by rail, having a check for baggage, delivers it at destination to a baggage express company for further carriage of the baggage to the passenger's residence, the presumption as against the express company is that it received the baggage from the railroad company in good condition. Springer *v.* Westcott, 2 N. Y. App. Div. 295, 37 N. Y. Suppl. 909, 72 N. Y. St. 855; Myerson *v.* Woolverton, 9 Misc. (N. Y.) 186, 29 N. Y. Suppl. 737, 61 N. Y. St. 78. But the mere fact that the servants of the baggage express company unloaded the baggage from the baggage-car and placed it in the baggage-room of the carrier will not render the baggage company subsequently receiving checks for delivery to the passenger's residence liable for a portion of the baggage found to be missing when the checks are presented by the baggage company to the railroad company. Aikin *v.* Westcott, 123 N. Y. 363, 25 N. E. 503, 33 N. Y. St. 623.

83. Hutchings *v.* Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156; Roberts *v.* Koehler, 30 Fed. 94.

84. Southwestern R. Co. *v.* Bently, 51 Ga. 311.

85. Nordemeyer *v.* Loescher, 1 Hilt. (N. Y.) 499.

86. Weed *v.* Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534.

87. Atchison, etc., R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1043.

After action properly brought for conversion the plaintiff is not bound to accept the baggage when tendered so as to have his right of recovery reduced to damages for detention and injury to the property. Lake Shore, etc., R. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724.

Waiver of action for tort.— Even if there has been a conversion, yet if the passenger subsequently accepts the baggage he waives his right of action for the tort. McCormick *v.* Pennsylvania Cent. R. Co., 80 N. Y. 353.

ant's disregard of duty as a common carrier will be treated as surplusage.[88] Assumpsit is of course not maintainable if the baggage is being carried free.[89]

(II) *Who May Sue.* The person checking the baggage in connection with his transportation as passenger may bring action for breach of the contract with reference to such baggage, although he is not the real owner thereof.[90] On the other hand, the real owner may bring the action, although he is not the person who as passenger checked the baggage for transportation.[91] Thus, where sample cases are checked by a traveling salesman, his principal, to whom the goods belonged, may maintain an action for their loss.[92] And this is true even though the principal was undisclosed and the baggage was checked as the property of the agent.[93]

(III) *Damages*[94]—(A) *For Delay.* For delay in the delivery of baggage due to negligence of the carrier, the passenger is entitled to recover the value of the use of the property during the time of such delay, and any incidental expense involved in being deprived of the use thereof,[95] but not damages on account of loss of profits or other special injuries arising out of circumstances not known to the carrier.[96] If the articles transported as baggage have depreciated in value during the delay, the difference in value may be allowed as damages,[97] but not where there was no intention to sell the articles thus carried.[98]

(B) *For Loss or Injury.* In general the measure of damage for loss of

88. Spencer *v.* Wabash R. Co., 36 N. Y. App. Div. 446, 55 N. Y. Suppl. 948.

89. Flint, etc., R. Co. *v.* Weir, 37 Mich. 111, 26 Am. Rep. 499.

90. Baltimore Steam Packet Co. *v.* Smith, 23 Md. 402, 87 Am. Dec. 575; Malone *v.* Boston, etc., R. Corp., 12 Gray (Mass.) 388, 74 Am. Dec. 598; Rogers *v.* Long Island R. Co., 1 Thomps. & C. (N. Y.) 396.

The same rule applies as to property of another taken as baggage by a passenger upon a sleeping-car. Pullman Palace Car Co. *v.* Gavin, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298.

91. Curtis *v.* Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271; Meux *v.* Great Eastern R. Co., [1895] 2 Q. B. 387, 59 J. P. 662, 64 L. J. Q. B. 657, 73 L. T. Rep. N. S. 247, 43 Wkly. Rep. 680. But it is otherwise if the action is on contract. Becker *v.* Great Eastern R. Co., L. R. 5 Q. B. 241, 39 L. J. Q. B. 122, 22 L. T. Rep. N. S. 299, 18 Wkly. Rep. 627.

92. Sloman *v.* Great Western R. Co., 67 N. Y. 208; Toledo, etc., R. Co. *v.* Ambach, 10 Ohio Cir. Ct. 490, 3 Ohio Dec. 372, 6 Ohio Cir. Dec. 574; Ft. Worth, etc., R. Co. *v.* I. B. Rosenthal Millinery Co., (Tex. Civ. App. 1895) 29 S. W. 196.

93. Lake Shore, etc., R. Co. *v.* Hochstim, 67 Ill. App. 514; Trimble *v.* New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115.

Extent and limits of rule.— If, however, the agent places in his trunk money collected for his employer, from which he is to retain traveling expenses, accounting only for the balance, his employer has not such title to the money as that he can sue for its loss. Weed *v.* Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534. And it is said that if a member of a partnership takes personal property of the partnership with him as baggage, the firm has no right of action against the carrier for injury thereto. Pennsylvania R. Co. *v.* Knight, 58 N. J. L. 287, 33 Atl. 845. If a traveling agent checks sample cases of his principal as his personal baggage, the carrier is not liable to the principal for injury thereto, even under an assignment of the claim by the salesman, as the contract of transportation is personal, and a claim for breach thereof is therefore not assignable. Missouri Pac. R. Co. *v.* Liveright, 7 Kan. App. 772, 53 Pac. 763. But on the other hand it is said that where baggage is wrongfully detained, the owner may assign his title thereto, and the assignee, after a new demand, may maintain an action in trover. Cass *v.* New York, etc., R. Co., 1 E. D. Smith (N. Y.) 522.

Under contract to transport baggage and personal effects of members of a theatrical company, each member may maintain a separate suit for the amount of his damages by reason of the loss of any portion of the baggage or effects belonging to him. Spencer *v.* Wabash R. Co., 36 N. Y. App. Div. 446, 55 N. Y. Suppl. 948.

94. See, generally, Damages.

95. International, etc., R. Co. *v.* Philips, 63 Tex. 590; Texas, etc., R. Co. *v.* Douglas, (Tex. Civ. App. 1895) 30 S. W. 487; Gulf, etc., R. Co. *v.* Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303.

A statute authorizing the recovery of damages due to detention of baggage refers to damage to the baggage on that account and not to detention of the passenger on account of delay of his baggage. Anderson *v.* Toledo, etc., R. Co., 32 Iowa 86.

96. Texas, etc., R. Co. *v.* Taylor, 3 Tex. App. Civ. Cas. § 192; Texas Mexican R. Co. *v.* Willis, 3 Tex. App. Civ. Cas. § 71.

97. International, etc., R. Co. *v.* Philips, 63 Tex. 590.

98. St. Louis, etc., R. Co. *v.* Hindsman, 1 Tex. App. Civ. Cas. § 204.

baggage is the value thereof, without regard to extra expense incurred on account of such loss, unless it was within the contemplation of the parties;[99] and the owner cannot recover for expense of searching for it in addition to its value,[1] nor attorney's fees in bringing the action.[2] But the value of personal baggage is to be determined by what it is worth to its owner, and not by what it would bring on the market.[3] The value is to be measured as of the place of destination,[4] or at the place of delivery to the carrier, unless it appears that there is a difference in value at that place and at place of destination.[5] But inasmuch as it is the real loss to the owner which is to be determined, and articles of personal baggage are not supposed to be intended for sale, the actual worth where the suit is brought, and not the cost to the passenger at the beginning of the journey, is the proper test.[6] However, evidence of the cost and length of time and manner of use is admissible on the question of value.[7] In case of loss, interest from the date

99. Merrill *v.* Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915; Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356; New Orleans, etc., R. Co. *v.* Moore, 40 Miss. 39.

1. Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671; Texas, etc., R. Co. *v.* Ferguson, 1 Tex. App. Civ. Cas. § 1253; St. Louis, etc., R. Co. *v.* Hindsman, 1 Tex. App. Civ. Cas. § 204.

2. New Orleans, etc., R. Co. *v.* Moore, 40 Miss. 39.

3. Cooney *v.* Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690; Fairfax *v.* New York Cent., etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119; Simpson *v.* New York, etc., R. Co., 16 Misc. (N. Y.) 613, 38 N. Y. Suppl. 341, 73 N. Y. St. 812. However, even if the property has not a money value, the measure of its value must be ascertained by some money standard, based upon the evidence. Nevins *v.* Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; Fraloff *v.* New York Cent., etc., R. Co., 10 Blatchf. (U. S.) 16, 9 Fed. Cas. No. 5,025. It is said that if there is no proof of value or nature of contents of a lost trunk, the jury may give damages proportionate to the value of the articles which, in their judgment, they think the trunk might fairly contain. Dill *v.* South Carolina R. Co., 7 Rich. (S. C.) 158, 62 Am. Dec. 407. At any rate, slight and *prima facie* evidence as to the contents of the trunk is admissible and competent. Peixotti *v.* McLaughlin, 1 Strobh. (S. C.) 468, 47 Am. Dec. 563.

4. Lake Shore, etc., R. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724.

5. The Steam-Boat Majors *v.* Mason, 5 Kan. 670.

6. Douglass *v.* Railroad Co., 1 Phila. (Pa.) 337, 9 Leg. Int. (Pa.) 50.

7. Glovinsky *v.* Cunard Steamship Co., 6 Misc. (N. Y.) 388, 26 N. Y. Suppl. 751, 56 N. Y. St. 407.

In the absence of better evidence, testimony of a witness who saw the trunk packed some time before shipment was held admissible to show the contents of the trunk and their value. Sugg *v.* Memphis, etc., Packet Co., 40 Mo. 442.

The owner may testify as to the value of the articles, though he is not shown to have any special knowledge in respect thereto, since every one is presumed to know the value of articles in common use. Parmelee *v.* Raymond, 43 Ill. App. 609.

The plaintiff, at common law, not being a competent witness, could not testify as to the contents or value.

Georgia.— Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460.

Illinois.— Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749; Illinois Cent. R. Co. *v.* Taylor, 24 Ill. 323; Davis *v.* Michigan Southern, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151.

Louisiana.— Block *v.* Steamboat Trent, 18 La. Ann. 664.

Maine.— Pudor *v.* Boston, etc., R. Co., 26 Me. 458.

Massachusetts.— Snow *v.* Eastern R. Co., 12 Metc. (Mass.) 44.

North Carolina.— Smith *v.* North Carolina R. Co., 60 N. C. 202; Herring *v.* Utley, 53 N. C. 270.

Pennsylvania.— Bingham *v.* Rogers, 6 Watts & S. (Pa.) 495, 40 Am. Dec. 581.

But by general statutory provisions in most of the states making parties competent as witnesses, this rule no longer applies, and even without such a general statute it has been held in some cases, either by virtue of some special statutory provision, or by reason of an exception arising from the necessity of the case, that the plaintiff was competent to give such testimony in the absence of any other means of proof.

Alabama.— Douglass *v.* Montgomery, etc., R. Co., 37 Ala. 638, 79 Am. Dec. 76.

Illinois.— Parmelee *v.* Austin, 20 Ill. 35; Parmelee *v.* McNulty, 19 Ill. 556.

Indiana.— Indiana Cent. R. Co. *v.* Gulick, 19 Ind. 83.

Maine.— Herman *v.* Drinkwater, 1 Me. 27.

Massachusetts.— Harlow *v.* Fitchburg R. Co., 8 Gray (Mass.) 237.

Missouri.— Williams *v.* Frost, 39 Mo. 516; Nolan *v.* Ohio, etc., R. Co., 39 Mo. 114.

New York.— Garvey *v.* Camden, etc., R. Co., 1 Hilt. (N. Y.) 280, 4 Abb. Pr. (N. Y.) 171; Davis *v.* Cayuga, etc., R. Co., 10 How. Pr. (N. Y.) 330.

Ohio.— Mad River, etc., R. Co. *v.* Fulton, 20 Ohio 318.

Pennsylvania.— Whitesell *v.* Crane, 8 Watts & S. (Pa.) 369.

of the loss may be added to the value,[8] and exemplary damages may be given where the loss or injury is the result of wilfulness or gross negligence.[9] Where a penalty is provided for by statute, the passenger is not limited to the recovery of such penalty, but may have actual damages.[10] And a statute limiting the carrier's liability for baggage does not prevent recovery of a larger amount where the liability is that of warehouseman.[11]

(IV) *EVIDENCE*:[12] Loss of baggage may be sufficiently established by proof of delivery to the carrier and failure to deliver it at destination, even without demand and refusal, if there is other evidence of loss.[13] But mere proof of non-delivery, without proof of demand and refusal, or other evidence of loss, is not sufficient to show a conversion.[14] Where negligence is the basis of the action, proof of delivery to the carrier and failure to account for the property without explanation is sufficient to take the case to the jury.[15]

CARRIES. Bears.[1]

CARRYING ARMS or **WEAPONS.** Wearing weapons; going armed.[2] (See, generally, WEAPONS.)

CARRYING AWAY. The act of removal or asportation, by which the crime of larceny is completed, and which is essential to constitute it.[3] (Carrying Away: Persons — Generally, see KIDNAPPING; Infant Females, see ABDUCTION. Property, see LARCENY; TRESPASS.)

CARRYING ON. Managing or being engaged in; continuing to prosecute.[4] (Carrying On: Business — By Foreign Corporation, see CORPORATIONS; Covenants Against, see COVENANTS; DEEDS; GOOD WILL; LANDLORD AND TENANT; License For, see LICENSES. See also CARRY ON.)

CARRYING OUT. Performance.[5]

CARRYING WEAPONS. See CARRYING ARMS.

CARRY ON. To continue; to prosecute;[6] to help forward;[7] to manage;[8] to transact.[9] (See also CARRYING ON.)

Tennessee.— Johnson *v.* Stone, 11 Humphr. (Tenn.) 419.

See 9 Cent. Dig. tit. "Carriers," § 1567; and EVIDENCE.

8. Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212; Bonner *v.* Blum, (Tex. Civ. App. 1894) 25 S. W. 60; Texas, etc., R. Co. *v.* Ferguson, 1 Tex. App. Civ. Cas. § 1253.

9. Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. St. 140, 16 Atl. 607, 10 Am. St. Rep. 517, 2 L. R. A. 489.

10. Norfolk, etc., R. Co. *v.* Irvine, 84 Va. 553, 5 S. E. 532.

11. Wiegand *v.* New Jersey Cent. R. Co., 75 Fed. 370.

12. See, generally, EVIDENCE.

13. McCormick *v.* Pennsylvania Cent. R. Co., 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6; Garvey *v.* Camden, etc., R. Co., 1 Hilt. (N. Y.) 280, 4 Abb. Pr. (N. Y.) 171.

14. Tolano *v.* National Steam Nav. Co., 5 Rob. (N. Y.) 318, 4 Abb. Pr. N. S. (N. Y.) 316, 35 How. Pr. (N. Y.) 496.

15. Wheeler *v.* Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 34 N. Y. St. 866, 21 Am. St. Rep. 729; Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; Van Horn *v.* Kermit, 4 E. D. Smith (N. Y.) 453; Downey *v.* Inman, etc., Steamship Co., 2 N. Y. Suppl. 659, 18 N. Y. St. 1017. Where baggage was sent to the station by an expressman and at the end of the journey it was found that articles had been stolen therefrom, it was held that the railroad company was not liable in the absence of proof that the trunk had not been opened before delivery at the station. Ringwalt *v.* Wahash R. Co., 45 Nebr. 760, 64 N. W. 219.

1. Owen *v.* State, 31 Ala. 387, 389.

2. Page *v.* State, 3 Heisk. (Tenn.) 198 note, 200 note.

3. Burrill L. Dict.

4. Century Dict. *sub voc.* "Carry."

5. Cartmel *v.* Newton, 79 Ind. 1, 5.

6. Webster Dict. [*quoted* in Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137]; Worcester Dict. [*quoted* in Florsheim Bros. Dry Goods Co. *v.* Lester, 60 Ark. 120, 123, 29 S. W. 34, 46 Am. St. Rep. 162, 27 L. R. A. 505; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137].

7. Worcester Dict. [*quoted* in Florsheim Bros. Dry Goods Co. *v.* Lester, 60 Ark. 120, 123, 29 S. W. 34, 46 Am. St. Rep. 162, 27 L. R. A. 505; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137].

8. Webster Dict. [*quoted* in Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137].

9. Territory *v.* Harris, 8 Mont. 140, 144, 19 Pac. 286.

CAR SERVICE. A demurrage charge made by railway companies on each car detained over a certain number of hours in unloading.[10]

CART. Primarily a carriage with two wheels, but having the more extended signification of a carriage in general.[11] (Cart: Exemption From Attachment or Execution, see EXEMPTIONS.)

CARTA. In old English law, a charter, deed, or writing.[12]

CARTA DE FORESTA. See CHARTA DE FORESTA.

CARTAGE. A charge made by railway companies for the expense of delivering goods when the consignee does not take them on the track.[13]

CART-BOTE. Wood or timber which a tenant is allowed by law to take from an estate, for the purpose of repairing instruments, including necessary vehicles, of husbandry.[14]

CARTEL. An instrument or writing for settling the exchange of prisoners.[15]

CARTEL-SHIP. A vessel commissioned in time of war to exchange the prisoners of any two hostile powers[16] or to carry any particular proposal from one to another.[17]

CARTMEN. See CARRIERS.

CART-WAY. A way established by law for a person who has not the benefit of a public highway, and for that reason alone.[18]

CARUCATE, CARVAGE, or **CARVE OF LAND.** A quantity of land containing as much as might be tilled by one plow in a year and a day.[19]

CA. SA. See CAPIAS AD SATISFACIENDUM.

CASE. In a legal sense[20] a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice;[21] a subject on which the judicial power is capable of acting, and which has been submitted to it by a party in the forms required by law;[22] a state of facts involving a question for discussion,[23] especially a cause or suit in court;[24] a question contested before a court of justice[25] in an action or suit at law or in equity;[26] an action or suit in law or

10. Everingham *v.* Halsey, 108 Iowa 709, 713, 78 N. W. 220.

11. Favers *v.* Glass, 22 Ala. 621, 624, 58 Am. Dec. 272; Webb *v.* Brandon, 4 Heisk. (Tenn.) 285, 288.

12. Burrill L. Dict.

13. Everingham *v.* Halsey, 108 Iowa 709, 713, 78 N. W. 220.

14. Burrill L. Dict.

15. Burrill L. Dict.

16. The Venus, 4 C. Rob. 355, 357.

17. Wharton L. Lex.

18. State *v.* Purify, 86 N. C. 681, 682 [*citing* Battle Rev. c. 104, § 38].

19. Burrill L. Dict. [*citing* Coke Littl. 5*a*, 69*a*].

This quantity varies in different counties from sixty to one hundred and twenty acres. Wharton L. Lex.

20. **Distinguished from "controversy."**— "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." Matter of Pacific R. Commission, 12 Sawy. (U. S.) 559, 32 Fed. 241, 255.

Distinguished from "suit," "criminal prosecution," and "proceeding in rem."— "The definition of a 'case' is wider than that of a 'suit' or 'criminal prosecution,' or a 'proceeding *in rem*,' although in law it usually applies to one of them. It may embrace, however, any state of facts involving matters for decision (see Webster *in verb*), and such has been the common practice, as above shown." Oliver *v.* Martin, 36 Ark. 134, 139. See also Gold *v.* Vermont Cent. R. Co., 19 Vt. 478, 484, where it is said: "In common parlance it has a more extended meaning than the word 'suit,' or 'action,' and may include application for divorce, applications for the establishment of highways, applications for orders of support of relatives, and other special proceedings unknown to the common law."

21. Kimball *v.* Semple [*quoted* in Calderwood *v.* Peyser, 42 Cal. 110, 115]; Gibson *v.* Sidney, 50 Nebr. 12, 14, 69 N. W. 314; Kundolf *v.* Thalheimer, 12 N. Y. 593, 596 [*quoted* in Buell *v.* Dodge, 63 Cal. 553, 554].

22. Bank of Commerce *v.* Franklin, 88 Ill. App. 198, 203 [*citing* Oshorn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204].

23. *In re* Bogart, 2 Sawy. (U. S.) 396, 405, 3 Fed. Cas. No. 1,596, 7 Am. L. Rev. 749, 17 Int. Rev. Rec. 155 [*citing* Webster Dict.].

24. Smith *v.* Waterbury, 54 Conn. 174, 177, 7 Atl. 17 [*quoting* Webster Dict.].

25. *Connecticut.*— Smith *v.* Waterbury, 54 Conn. 174, 177, 7 Atl. 17 [*quoting* Bouvier L. Dict.].

Illinois.— Bank of Commerce *v.* Franklin, 88 Ill. App. 198, 203 [*quoting* Bouvier L. Dict.].

Iowa.— Gebhard *v.* Sattler, 40 Iowa 152, 156 [*citing* Bouvier L. Dict.]; Home Ins. Co. *v.* North Western Packet Co., 32 Iowa 223, 7 Am. Rep. 183.

New York.— Southwick *v.* Southwick, 49 N. Y. 510, 517.

Texas.— Slaven *v.* Wheeler, 58 Tex. 23, 25 [*citing* Bouvier L. Dict.]; *Ex p.* Towles, 48 Tex. 413, 433.

26. Buell *v.* Dodge, 63 Cal. 553, 554 [*citing* Bouvier L. Dict.].

equity;[27] an action or cause in court;[28] action;[29] cause;[30] suit;[31] a pending suit;[32] proceeding;[33] a generic term, which embraces many different species of actions,[34] and includes all cases, special or otherwise;[35] a statement of the proceedings on the trial of an issue of fact;[36] the paper book made up for the use of the supreme court, containing all proceedings in the court below necessary to the understanding of a matter to be submitted to the judgment of the supreme court, and the proceedings taken by way of appeal to bring the case into the supreme court;[37] a brief name for action on the case.[38] In its ordinary usage an event,[39] occasion,[40] result, happening, side, party;[41] a covering, box, or sheath; that which incloses or contains.[42] (Case: Action on, see CASE, ACTION ON. Agreed or Stated — Generally, see SUBMISSION OF CONTROVERSY; On Appeal, see APPEAL AND ERROR. Certified or Reserved, see APPEAL AND ERROR; COURTS. Made — Generally, see SUBMISSION OF CONTROVERSY; On Appeal, see APPEAL AND ERROR. Trespass on, see CASE, ACTION ON.)

27. *Ex p.* Towles, 48 Tex. 413, 433.

28. Wingate *v.* Haywood, 40 N. H. 437, 445.

29. *Connecticut.*— Smith *v.* Waterbury, 54 Conn. 174, 177, 7 Atl. 17 [*quoting* Bouvier L. Dict.].

Iowa.— Home Ins. Co. *v.* North Western Packet Co., 32 Iowa 223, 236, 7 Am. Rep. 183.

Nevada.— Comstock Mill, etc., Co. *v.* Allen, 21 Nev. 325, 328, 31 Pac. 434.

New York.— Beecher *v.* Allen, 5 Barb. (N. Y.) 169, 173.

United States.— Clarkson *v.* Manson, 18 Blatchf. (U. S.) 443, 4 Fed. 257, 261.

30. *Connecticut.*— Smith *v.* Waterbury, 54 Conn. 174, 177, 7 Atl. 17 [*quoting* Bouvier L. Dict.].

Michigan.— Theisen *v.* Johns, 72 Mich. 285, 293, 40 N. W. 727.

Nebraska.— Gibson *v.* Sidney, 50 Nebr. 12, 14, 69 N. W. 314.

New York.— Kundolf *v.* Thalheimer, 12 N. Y. 593, 596 [*quoted* in Buell *v.* Dodge, 63 Cal. 553, 554]; Benson *v.* Cromwell, 26 Barb. (N. Y.) 218, 221, 6 Abb. Pr. (N. Y.) 83; Beecher *v.* Allen, 5 Barb. (N. Y.) 169, 173.

Ohio.— Mack *v.* Bonner, 3 Ohio St. 366, 368.

South Carolina.— Sullivan *v.* Thomas, 3 S. C. 531, 547.

United States.— Blyew *v.* U. S., 13 Wall. (U. S.) 581, 595, 20 L. ed. 638; Clarkson *v.* Manson, 18 Blatchf. (U. S.) 443, 4 Fed. 257, 261.

See also ACTIONS, 1 Cyc. 714; CAUSE.

31. *Connecticut.*— Smith *v.* Waterbury, 54 Conn. 174, 177, 7 Atl. 17 [*quoting* Bouvier L. Dict.].

Illinois.— Bank of Commerce *v.* Franklin, 88 Ill. App. 198, 203.

Iowa.— Home Ins. Co. *v.* North Western Packet Co., 32 Iowa 223, 236, 7 Am. Rep. 183.

Nevada.— Comstock Mill, etc., Co. *v.* Allen, 21 Nev. 325, 328, 31 Pac. 434.

New Jersey.— New Brunswick Steamboat, etc., Transp. Co. *v.* Baldwin, 14 N. J. L. 440, 442.

Ohio.—Piqua Branch State Bank *v.* Knoup, 6 Ohio St. 342, 358.

South Carolina.— Sullivan *v.* Thomas, 3 S. C. 531, 547.

West Virginia.—Dickey *v.* Smith, 42 W. Va. 805, 809, 26 S. E. 373.

United States.— Clarkson *v.* Manson, 18 Blatchf. (U. S.) 443, 4 Fed. 257, 261.

32. Wells *v.* Graham, 39 W. Va. 605, 606, 20 S. E. 576.

33. Comstock Mill, etc., Co. *v.* Allen, 21 Nev. 325, 328, 31 Pac. 434.

34. Carrol *v.* Green, 92 U. S. 509, 513, 23 L. ed. 738.

35. Kundolf *v.* Thalheimer, 12 N. Y. 593, 596 [*quoted* in Buell *v.* Dodge, 63 Cal. 553, 554].

36. Sullivan *v.* Thomas, 3 S. C. 531, 547.

37. Sullivan *v.* Thomas, 3 S. C. 531, 547.

38. Abbott L. Dict.

39. Dickey *v.* Smith, 42 W. Va. 805, 809, 26 S. E. 373; *In re* Bogart, 2 Sawy. (U. S.) 396, 405, 3 Fed. Cas. No. 1,596, 7 Am. L. Rev. 749, 17 Int. Rev. Rec. 155 [*citing* Webster Dict.].

40. Southwick *v.* Southwick, 49 N. Y. 510, 517.

41. Dickey *v.* Smith, 42 W. Va. 805, 809, 26 S. E. 373.

42. Webster Dict. [*quoted* in Bradley *v.* Dull, 19 Fed. 913, 914].

CASE, ACTION ON

By Archibald C. Boyd

CROSS-REFERENCES

For Action on the Case For :
Breach of Duty by :
Adjoining Landowner, see ADJOINING LANDOWNERS.
Agent, see PRINCIPAL AND AGENT.
Attorney, see ATTORNEY AND CLIENT.
Auctioneer, see AUCTIONS AND AUCTIONEERS.
Bailee, see BAILMENTS.
Carrier, see CARRIERS ; SHIPPING.
Depositary, see DEPOSITARIES.
Druggist, see DRUGGISTS.
Executor or Administrator, see EXECUTORS AND ADMINISTRATORS.
Factor or Broker, see FACTORS AND BROKERS.
Guardian, see GUARDIAN AND WARD.
Innkeeper, see INNKEEPERS.
Master, see MASTER AND SERVANT.
Municipal Corporation, see MUNICIPAL CORPORATIONS.
Officer, see OFFICERS.
Pawnbrokers, see PAWNBROKERS.
Physician or Surgeon, see PHYSICIANS AND SURGEONS.
Servant, see MASTER AND SERVANT.
Telegraph Company, see TELEGRAPHS AND TELEPHONES.
Vendor, see SALES ; VENDOR AND PURCHASER.
Warehouseman, see WAREHOUSEMEN.
Conspiracy, see CONSPIRACY.
Criminal Conversation, see HUSBAND AND WIFE.
Deceit, see FRAUD.
Enticement of Apprentice, see APPRENTICES.
Of Child, see PARENT AND CHILD.
Of Husband or Wife, see HUSBAND AND WIFE.
Of Servant, see MASTER AND SERVANT.
Fraud, see FRAUD.
Libel and Slander, see LIBEL AND SLANDER.
Malicious Prosecution, see MALICIOUS PROSECUTION.
Negligence, see NEGLIGENCE.
Nuisance, see NUISANCES.
Seduction, see SEDUCTION.
See also, generally, ASSUMPSIT, ACTION OF ; ELECTION OF REMEDIES ; TRESPASS.

I. DEFINITION.

An "action on the case" is a form of action founded on the common law and acts of parliament. It lies generally to recover damages for torts not committed

with force, actual or implied; or having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate but consequential; or where the interest in the property was only in reversion — in all of which cases trespass is not sustainable.[1]

II. HISTORY.

A. In General. Originally actions at law were commenced by the issuance of a writ out of chancery which performed a two-fold function. It authorized the law court in which the action was directed to be brought to assume jurisdiction thereof and it enforced the appearance of defendant. Plaintiff was required to set forth specifically and with particularity in the writ the grounds and nature of his cause of action. Very early in the history of the common law approved forms for writs, applicable to the usual and common causes of action, were preserved in the register of writs for use by the persons charged with the issuance thereof. If none of the approved forms found in the register were applicable to the facts of plaintiff's case he was authorized to bring a special action on his own case. This fact gave rise to the name "action on the case."[2] In the course of time, as novel subjects of litigation became more frequent, the clerks charged with the issuance of writs became reluctant to issue writs, forms for which were not found in the register, and doubted their authority so to do. To enforce the issuance of writs in such cases parliament enacted the Statute of Westminster II.[3] Thus it will be seen that the statute did not give rise to the action on the case but was designed merely to enforce plaintiff's right to have a writ issued on his special case.[4]

B. Abolition of Distinctions Between Case and Trespass. The distinctions existing at common law between trespass and case have very generally been abolished or modified by statute, and this is true even as to states which retain the common-law system of pleading.[5]

1. Abbott L. Dict.; Bouvier L. Dict.; Chitty Pl. 132; Emrich *v.* Little Rock Traction Co., Ark. (1902) 70 S. W. 1035.

Other definitions are: A form of action which lies to recover damages for injuries for which the more ancient forms of action will not lie. Stephen Pl. 15.

A form of action designed to afford relief in all cases where one man is injured by the wrongful act of another where no other remedy is provided. Van Pelt *v.* McGraw, 4 N. Y. 110.

A remedy for all personal wrongs committed without force — where the injury is consequential. Anderson L. Dict. [*cited* in Emrich *v.* Little Rock Traction, etc., Co., (Ark. 1902) 70 S. W. 1035].

"Case" is used as a brief name for "action on the case." Abbott L. Dict.; Black L. Dict.; Burrill L. Dict., where it is said: "The action is sometimes called 'case' from the circumstance of the plaintiff's case being anciently set forth in the original writ by which it was commenced."

"Trespass on the case" is the technical name of the action now usually denominated "action on the case." Abbott L. Dict.; Burrill L. Dict.

2. *Alabama.*— Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170.

Illinois.— Doremus *v.* Hennessy, 62 Ill. App. 391; Wright *v.* Chicago, etc., R. Co., 7 Ill. App. 438.

Maine.— Hathorn *v.* Calef, 53 Me. 471.

New Hampshire.— Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547.

England.— Kinlyside *v.* Thornton, 2 W. Bl. 1111; 3 Bl. Comm. 123; 1 Chitty Pl. (16th Am. ed.) 138, 139.

See also Bouvier L. Dict.; and ACTIONS, II, B, 3, b [1 Cyc. 703].

3. 13 Edw. I, c. 24 (Statute of Westminster II) provided that when no writ applicable to plaintiff's case was found in the register, and a writ in a like case was found and plaintiff's case fell under a like principle and required the same remedy, then in such case the clerks were authorized to agree in making a writ applicable to plaintiff's case.

4. Hathorn *v.* Calef, 53 Me. 471; Webb's Case, 8 Coke 45*b*; 3 Bl. Comm. 123; Bouvier L. Dict. In Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 229, 46 Am. Rep. 688, Mulkey, J., said: "The writ in case, as its very name imports, was invented for the express purpose of giving a remedy where none of the old forms of writs were applicable," and the Statute of Westminster II was enacted with a view of promoting the remedy by that writ. In Kinlyside *v.* Thornton, 2 W. Bl. 1111, Sir William Blackstone said: "It by no means follows, because of cases unprovided for by the Register, the statute of Westm. 2, directs an action on the case to be framed, that the action on the case in general did not subsist at common law."

5. Delaware.— Del. Rev. Code, c. 106, § 11, abolishes the distinctions between actions on

III. NATURE AND SCOPE OF REMEDY.

A. In General. The term "action on the case" is usually understood to mean an action in form *ex delicto*.[6] It is founded on the mere justice and conscience of plaintiff's right to recover and is in the nature of a bill in equity.[7] To support it it is not necessary that there should be any moral turpitude in the act complained of.[8]

B. Direct or Consequential Nature of Injury — 1. In General. For a tort committed with force and intentionally, the immediate consequence of which is injury, trespass is the appropriate remedy. If the injury proceeds from mere negligence, or is not the immediate consequence of the tort, case is the appropriate remedy.[9] An injury is considered as immediate when the

the case and trespass; so that an action on the case will lie for a wrong properly the subject-matter of an action of trespass (Smethurst *v.* Journey, 1 Houst. (Del.) 196), and trespass for an injury properly the subject of an action on the case (Coe *v.* English, 6 Houst. (Del.) 456).

Illinois.—Starr & C. Anno. Stat. (Ill.) c. 110, par. 22, abolishing the distinction between counts in trespass and counts in case and providing that either form of action may be used for the class of actions properly the subject of trespass or case does away with the technical distinction between the forms of action, but does not give any other remedy for acts done under the legal process of a court of competent jurisdiction than before existed, viz., an action on the ground of malice and want of probable cause; also under the statute counts in trespass and case may be joined in one declaration and the action be called trespass or case, but the count in case must contain all of the elements necessary to make a good cause of action in case, and the count in trespass in like manner must contain all the elements to make a good cause of action in trespass; neither does it in any way affect the rule that the proof must correspond with the allegations. Blalock *v.* Randall, 76 Ill. 224; Gay *v.* De Werff, 17 Ill. App. 417.

Michigan.— How. Anno. Stat. Mich. § 7759, providing that where by the wrongful act of any person, an injury is produced either to the person, personal property, or rights of another or to his servant, child, or wife for which an action of trespass may by law be brought, an action of trespass on the case may be brought to recover damages for such injury, whether it was wilful or accompanied by force or not, and whether such injury was a direct and immediate consequence from such wrongful act or whether it was consequential and indirect, does not authorize the maintenance of an action of trespass on the case for a wrongful entry on plaintiff's land and the doing of acts thereon injurious thereto, since the word "rights" must be deemed to refer to rights growing out of personal property or personal in their nature. Wood *v.* Michigan Air Line R. Co., 81 Mich. 358, 45 N. W. 980.

Pennsylvania.— The distinctions between trespass and case so far as they relate to procedure were abolished by the Pennsylvania act of May 25, 1887. Duffield *v.* Rosenzweig, 144 Pa. St. 520, 23 Atl. 4.

Virginia.— Va. Code (1873), c. 145, § 6, provides that in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case. Hence in an action on the case a declaration setting out facts constituting a trespass is not demurrable. Daingerfield *v.* Thompson, 33 Gratt. (Va.) 136, 36 Am. Rep. 783.

West Virginia.—W. Va. Code (1860), c. 148, § 7, providing that "in any case in which an action of trespass will lie, an action of trespass on the case may also be maintained," does not authorize the maintenance of trespass for an injury properly the subject-matter of an action on the case. Hence an action of trespass *vi et armis* will not lie for damages alleged to have resulted from the wrongful ejectment of plaintiff from defendant's train by the latter's servants. Barnum *v.* Baltimore, etc., R. Co., 5 W. Va. 10.

Canada.— A declaration may be framed as in case, though the injury complained of is a trespass. Brown *v.* Thompson, 9 N. Brunsw. 228.

6. *Alabama.*— Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170.

Connecticut.—Humiston *v.* Smith, 22 Conn. 19.

Illinois.— Carter *v.* White, 32 Ill. 509.

Kentucky.— Albert *v.* Blue, 10 B. Mon. (Ky.) 92.

North Carolina.— Hughes *v.* Wheeler, 65 N. C. 418.

In its most comprehensive sense "action on the case" includes assumpsit as well as an action in form *ex delicto*. Bouvier L. Dict. See also ASSUMPSIT, ACTION OF, II, A [4 Cyc. 320].

7. Hynson *v.* Taylor, 3 Ark. 552; Jones *v.* Buzzard, 2 Ark. 415; Doremus *v.* Hennessy, 62 Ill. App. 391; Adams *v.* Paige, 7 Pick. (Mass.) 542.

8. Doremus *v.* Hennessy, 62 Ill. App. 391; Adams *v.* Paige, 7 Pick. (Mass.) 542.

9. *Alabama.*— Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Drake *v.* Lady Ensley Coal, etc., Co., 102 Ala. 501, 14 So. 749, 48 Am. St. Rep. 77, 24 L. R. A. 64; Alabama Midland R.

act complained of itself, and not merely a consequence of that act, occasions the injury.[10]

2. Injury Both Direct and Consequential. Where an act results in a consequential as well as a direct injury the trespass may be waived and an action on the case for the consequential injuries maintained.[11]

Co. *v.* Martin, 100 Ala. 511, 14 So. 401; Bay Shore R. Co. *v.* Harris, 67 Ala. 6; Pruitt *v.* Ellington, 59 Ala. 454; Durden *v.* Barnett, 7 Ala. 169; Rhodes *v.* Roberts, 1 Stew. (Ala.) 145.

Arkansas.— Emrich *v.* Little Rock Traction, etc., Co., (Ark. 1902) 70 S. W. 1035; Brooks *v.* Clifton, 22 Ark. 54.

Connecticut.— Newton *v.* New York, etc., R. Co., 56 Conn. 21, 12 Atl. 644; Bristol Mfg. Co. *v.* Gridley, 28 Conn. 201; Gates *v.* Miles, 3 Conn. 64.

Delaware.— Ross *v.* Horsey, 3 Harr. (Del.) 60.

Florida.— Crawford *v.* Waterson, 5 Fla. 472.

Illinois.— Frankenthal *v.* Camp, 55 Ill. 169; Painter *v.* Baker, 16 Ill. 103; Doremus *v.* Hennessy, 62 Ill. App. 391.

Indiana.— Wabash, etc., Canal *v.* Spears, 16 Ind. 441, 79 Am. Dec. 444.

Kentucky.— Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush (Ky.) 667; Johnson *v.* Castleman, 2 Dana (Ky.) 377; Jones *v.* Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98.

Maine.— Knight *v.* Dunbar, 83 Me. 359, 22 Atl. 216; Crockett *v.* Millett, 65 Me. 191; Clough *v.* Tenney, 5 Me. 446.

Maryland.— Scott *v.* Bay, 3 Md. 431; Turner *v.* Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; Knott *v.* Digges, 6 Harr. & J. (Md.) 230.

Massachusetts.— Campbell *v.* Phelps, 17 Mass. 244; Cole *v.* Fisher, 11 Mass. 137; Barnes *v.* Hurd, 11 Mass. 57; Adams *v.* Hemmenway, 1 Mass. 145.

New Hampshire.— Sawyer *v.* Concord R. Co., 58 N. H. 517; Cate *v.* Cate, 50 N. H. 144, 9 Am. Dec. 179.

New Jersey.— Dale Mfg. Co. *v.* Grant, 34 N. J. L. 138; Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229; Furman *v.* Applegate, 23 N. J. L. 28; Vanhorn *v.* Freeman, 6 N. J. L. 322.

New York.— Hay *v.* Cohoes Co., 3 Barb. (N. Y.) 42; Moran *v.* Dawes, 4 Cow. (N. Y.) 412; Panton *v.* Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369.

North Carolina.— Hogwood *v.* Edwards, 61 N. C. 350; Shaw *v.* Etheridge, 52 N. C. 225; Kelly *v.* Lett, 35 N. C. 50; Metcalf *v.* Alley, 24 N. C. 38; Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677.

Ohio.— Allison *v.* McCune, 15 Ohio 726, 45 Am. Dec. 605.

Pennsylvania.— Williams *v.* Hay, 120 Pa. St. 485, 14 Atl. 379, 6 Am. St. Rep. 719; Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. 62; Chester County *v.* Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713; Northern Cent. R. Co. *v.* Holland, 117 Pa. St. 613, 12 Atl. 575; Meyer *v.* Horst, 106 Pa. St. 552; Drew *v.* Peer, 93 Pa. St. 234; Keller *v.* Stoltz, 71 Pa. St. 356; Goodman *v.* Gay, 15 Pa. St. 188, 53 Am. Dec. 589; Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. (Pa.) 143; Strickler *v.* Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649; Cotteral *v.* Cummins, 6 Serg. & R. (Pa.) 343; Legaux *v.* Feasor, 1 Yeates (Pa.) 586.

Rhode Island.— Taylor *v.* Granger, 19 R. I. 410, 34 Atl. 153; Vogel *v.* McAuliffe, 18 R. I. 791, 31 Atl. 1; Trafford *v.* Hubbard, 15 R. I. 326, 4 Atl. 762, 8 Atl. 690; Fallon *v.* O'Brien, 12 R. I. 518, 34 Am. Rep. 713; Clark *v.* Peckham, 9 R. I. 455; Garraty *v.* Duffy, 7 R. I. 476.

South Carolina.— Hamilton *v.* Feemster, 4 Rich. (S. C.) 573; Marshall *v.* White, Harp. (S. C.) 122; Carsten *v.* Murray, Harp. (S. C.) 113.

Tennessee.— Childress *v.* Yourie, Meigs (Tenn.) 561.

Vermont.— Gregoir *v.* Leonard, 71 Vt. 410, 45 Atl. 748; Felch *v.* Gilman, 22 Vt. 38; Waterman *v.* Hall, 17 Vt. 128, 42 Am. Dec. 484; Henry *v.* Edson, 2 Vt. 499.

Virginia.— Jordan *v.* Wyatt, 4 Gratt. (Va.) 151, 47 Am. Dec. 720; Shaver *v.* White, 6 Munf. (Va.) 110, 8 Am. Dec. 730; Winslow *v.* Beal, 6 Call (Va.) 44.

England.— Lotan *v.* Cross, 2 Campb. 464; Covell *v.* Laming, 1 Camph. 497; Leame *v.* Bray, 3 East 593; Sharrod *v.* London, etc., R. Co., 4 Exch. 580, 14 Jur. 23; Reynolds *v.* Clarke, 1 Str. 634; Ogle *v.* Barnes, 8 T. R. 188; Day *v.* Edwards, 5 T. R. 648; Scott *v.* Shepherd, 2 W. Bl. 892, 3 Wils. C. P. 403.

See 1 Cent. Dig. tit. "Action on the Case," § 13.

10. Scott *v.* Bay, 3 Md. 431; Vogel *v.* McAuliffe, 18 R. I. 791, 31 Atl. 1.

The terms "immediate" and "consequential" should be understood, not in reference to the time which the act occupies or the space through which it passes or the place from which it has begun or the intention with which it is done or the instrument or agent employed or the lawfulness or unlawfulness of the act, but in reference to the progress and termination of the act, to its being done on the one hand and its having been done on the other. If the injury is inflicted by the act at any moment of its progress, from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or more exactly a collateral consequence. Jordan *v.* Wyatt, 4 Gratt. (Va.) 151, 47 Am. Dec. 720.

11. *Connecticut.*— Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611.

3. Injury Direct but Caused by Negligence. Some authorities hold that where an injury is the effect of negligence, though the force be immediate or direct, plaintiff may maintain his action of trespass on the case, or trespass at his option.[12] Other authorities hold that trespass is the proper action in such case.[13] If the act which occasions the injury is intentionally or wilfully done negligence is of course negatived, and if the injury is direct trespass only will lie.[14]

C. Injury Common to All. Case cannot be sustained where the injury is alike common to all, and where no right peculiar to the party has been affected.[15]

IV. CAUSES OF ACTION.

A. In General. The action is an outgrowth of the principle that whenever the law gives a right or prohibits an injury it will also afford a remedy. Hence

Kentucky.— Hays *v.* Younglove, 7 B. Mon. (Ky.) 545.

Maine.— Clough *v.* Tenney, 5 Me. 446.

Maryland.— Knott *v.* Digges, 6 Harr. & J. (Md.) 230.

New Hampshire.— Carleton *v.* Cate, 56 N. H. 130; Fifield *v.* Bailey, 55 N. H. 380; Gilson *v.* Fisk, 8 N. H. 404.

New Jersey.— Furman *v.* Applegate, 23 N. J. L. 28.

New York.— Morris *v.* Scott, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236; Platt *v.* Niles, 1 Edm. Sel. Cas. (N. Y.) 230.

North Carolina.— Kelly *v.* Lett, 35 N. C. 50.

Pennsylvania.— McIntire *v.* Westmoreland Coal Co., 118 Pa. St. 108, 11 Atl. 808; Meyer *v.* Horst, 106 Pa. St. 552.

Rhode Island.— Trafford *v.* Hubbard, 15 R. I. 326, 4 Atl. 762, 8 Atl. 690.

South Carolina.— Hamilton *v.* Feemster, 4 Rich. (S. C.) 573.

Vermont.— Waterman *v.* Hall, 17 Vt. 128, 42 Am. Dec. 484.

England.— Smith *v.* Goodwin, 4 B. & Ad. 413, 2 L. J. K. B. 192, 1 N. & M. 371, 2 N. & M. 114, 24 E. C. L. 185; Branscomb *v.* Bridges, 1 B. & C. 145, 2 D. & R. 256, 1 L. J. K. B. O. S. 64, 25 Rev. Rep. 335, 8 E. C. L. 63; Bennett *v.* Allcott, 2 T. R. 166.

Illegal tax.— Where the person of an individual has been arrested or his property seized, in order to enforce the payment of a tax, the assessment of which was wrongful, he generally has his election to treat the arrest as the immediate cause of the injury and declare in trespass, or to treat the wrongful assessment under which the warrant and arrest or seizure were founded as the cause of action and the arrest as consequential and declare in case. Osgood *v.* Clark, 26 N. H. 307; Perry *v.* Buss, 15 N. H. 222.

Where the owner of goods who has negotiated a sale thereof is prevented from consummating the sale by reason of the wrongful seizure of the goods by a third person, he may maintain an action on the case, as well as trespass, against the person so seizing the property, since he may waive the trespass and treat the loss of the sale as the consequential injury. Frankenthal *v.* Camp, 55 Ill. 169.

12. *Alabama.*— Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Alabama Midland R. Co. *v.* Martin, 100 Ala. 511, 14 So. 401; Bay Shore R. Co. *v.* Harris, 67 Ala. 6; Pruitt *v.* Ellington, 59 Ala. 454; Moody *v.* McClelland, 39 Ala. 45, 84 Am. Dec. 770; Bell *v.* Troy, 35 Ala. 184.

Arkansas.— Bizzell *v.* Booker, 16 Ark. 308; Ferrier *v.* Wood, 9 Ark. 85.

Indiana.— Schuer *v.* Veeder, 7 Blackf. (Ind.) 342.

Kentucky.— Johnson *v.* Castleman, 2 Dana (Ky.) 377.

New Hampshire.— Dalton *v.* Favour, 3 N. H. 465.

New York.— Wilson *v.* Smith, 10 Wend. (N. Y.) 324; McAllister *v.* Hammond, 6 Cow. (N. Y.) 342; Blin *v.* Campbell, 14 Johns. (N. Y.) 432. *Compare* Percival *v.* Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210.

North Carolina.— Baldridge *v.* Allen, 24 N. C. 206; Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677.

Rhode Island.— Brennan *v.* Carpenter, 1 R. I. 474.

Vermont.— Howard *v.* Tyler, 46 Vt. 683; Claflin *v.* Wilcox, 18 Vt. 605.

Virginia.—Jordan *v.* Wyatt, 4 Gratt. (Va.) 151, 47 Am. Dec. 720. *Compare* Taylor *v.* Rainhow, 2 Hen. & M. (Va.) 423.

England.— Moreton *v.* Hardern, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553; Williams *v.* Holland, 10 Bing. 112, 25 E. C. L. 61, 6 C. & P. 23, 25 E. C. L. 302, 2 L. J. C. P. 190, 3 Moore & S. 540; Rogers *v.* Imbleton, 2 B. & P. N. R. 117; Turner *v.* Hawkins, 1 B. & P. 472; Ogle *v.* Barnes, 8 T. R. 188.

13. *Connecticut.*— Gates *v.* Miles, 3 Conn. 64.

Massachusetts.— Barnes *v.* Hurd, 11 Mass. 57.

New Jersey.—Waldron *v.* Hopper, 1 N. J. L. 390.

Ohio.— Case *v.* Mark, 2 Ohio 169.

England.— Lotan *v.* Cross, 2 Campb. 464; Covell *v.* Laming, 1 Campb. 497; Leame *v.* Bray, 3 East 593.

14. Claflin *v.* Wilcox, 18 Vt. 605; Jordan *v.* Wyatt, 4 Gratt. (Va.) 151, 47 Am. Dec. 720; Canadian Pac. R. Co. *v.* Clark, 73 Fed. 76, 74 Fed. 362, 38 U. S. App. 573, 20 C. C. A. 447.

15. Hall *v.* Eaton, 25 Vt. 458.

where there has been an injury for which none of the established forms of action will lie an action on the case may be maintained.[16]

B. Abuse or Perversion of Legal Process. Whenever an injury to a person or his property is effected by a regular process of a court of competent jurisdiction, case is the proper remedy and trespass is not sustainable, although the process may have been maliciously adopted.[17] But if plaintiff's property is seized under an execution issued against a third person the seizure cannot be

16. *Alabama.*— Aderholt *v.* Smith, 83 Ala. 486, 3 So. 794; Hurst *v.* Bell, 72 Ala. 336; Hussey *v.* Peebles, 53 Ala. 432; Kelly *v.* McCaw, 29 Ala. 227.

Illinois.— Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Gillespie *v.* Hughes, 86 Ill. App. 202; Doremus *v.* Hennessy, 62 Ill. App. 391; Delano *v.* Case, 17 Ill. App. 531.

Maine.— Hathorn *v.* Calef, 53 Me. 471.

Massachusetts.— Lamb *v.* Stone, 11 Pick. (Mass.) 527.

New Hampshire.— Owen *v.* Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547.

Ohio.— Allison *v.* McCune, 15 Ohio 726, 45 Am. Dec. 605.

Pennsylvania.— Berry *v.* Hamill, 12 Serg. & R. (Pa.) 210.

Vermont.— Griffin *v.* Farwell, 20 Vt. 151.

England.—Webb's Case, 8 Coke 45*b*; Grainger *v.* Hill, 4 Bing. N. Cas. 212, 2 Jur. 235, 7 L. J. C. P. 85, 3 Scott 561, 33 E. C. L. 675; Ashby *v.* White, 6 Mod. 45, 1 Salk. 19; Winsmore *v.* Greenbank, Willes 577.

The action is suited to every wrong and grievance that a person may suffer, and varies according to the circumstances of the case. Millar *v.* Taylor, 4 Burr. 2303.

Want of precedent.— It is no objection to a particular action, framed in case, that there is no precedent therefor. Hunt *v.* Dowman, Cro. Jac. 478; Winsmore *v.* Greenbank, Willes, 577.

17. *Alabama.*— Warfield *v.* Campbell, 35 Ala. 349; Sheppard *v.* Furniss, 19 Ala. 760; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59; Duckworth *v.* Johnston, 7 Ala. 578.

Arkansas.— Emrich *v.* Little Rock Traction, etc., Co., (Ark. 1902) 70 S. W. 1035; Chrisman *v.* Carney, 33 Ark. 316; Dixon *v.* Watkins, 9 Ark. 139.

Connecticut.— Cannon *v.* Sipples, 39 Conn. 505; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324; Swift *v.* Chamberlain, 3 Conn. 537; Luddington *v.* Peck, 2 Conn. 700.

Georgia.— Riley *v.* Johnston, 13 Ga. 260.

Illinois.— Blalock *v.* Randall, 76 Ill. 224; Gay *v.* De Werff, 17 Ill. App. 417.

Kentucky.—Lovier *v.* Gilpin, 6 Dana (Ky.) 321; Owens *v.* Starr, 2 Litt. (Ky.) 230.

Maine.— Plummer *v.* Dennett, 6 Me. 421, 20 Am. Dec. 316.

Maryland.— Warfield *v.* Walter, 11 Gill & J. (Md.) 80; Turner *v.* Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329.

Massachusetts.— Adams *v.* Paige, 7 Pick. (Mass.) 542; Hayden *v.* Shed, 11 Mass. 500.

Mississippi.— Mask *v.* Rawls, 57 Miss. 270.

New York.— Beaty *v.* Perkins, 6 Wend. (N. Y.) 382.

North Carolina.— Zachary *v.* Holden, 47 N. C. 453.

Pennsylvania.—Kennedy *v.* Barnett, 64 Pa. St. 141; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Berry *v.* Hamill, 12 Serg. & R. (Pa.) 210; Royer *v.* Swazey, 10 Wkly. Notes Cas. (Pa.) 432.

Rhode Island.— Hobbs *v.* Ray, 18 R. I. 84, 25 Atl. 694.

South Carolina.— Hamilton *v.* Feemster, 4 Rich. (S. C.) 573; Miller *v.* Grice, 1 Rich. (S. C.) 147; Fripp *v.* Martin, 1 Speers (S. C.) 236; Cooper *v.* Halbert, 2 McMul. (S. C.) 419; Brown *v.* Wood, 1 Bailey (S. C.) 457; McHugh *v.* Pundt, 1 Bailey (S. C.) 441.

Virginia.— Shaver *v.* White, 6 Munf. (Va.) 110, 8 Am. Dec. 730.

United States.— Smith *v.* Miles, Hempst. (U. S.) 34, 22 Fed. Cas. No. 13,079*a*.

England.—Grainger *v.* Hill, 4 Bing. N. Cas. 212, 2 Jur. 235, 7 L. J. C. P. 85, 3 Scott 561, 33 E. C. L. 675; Elsee *v.* Smith, 2 Chit. 304, 1 D. & R. 97, 24 Rev. Rep. 639, 18 E. C. L. 648; Bourden *v.* Alloway, 11 Mod. 180; Belk *v.* Broadbent, 3 T. R. 183; Chapman *v.* Pickersgill, 2 Wils. C. P. 145.

Canada.— Kendrick *v.* Lee, 6 U. C. Q. B. O. S. 27. See also Wyle *v.* Cayley, 14 U. C. Q. B. 285; Moore *v.* Malcolm, Taylor (U. C.) 272; Caldwell *v.* Winslow, 7 N. Brunsw. 203.

See 1 Cent. Dig. tit. "Action on the Case," § 19; and, generally, PROCESS.

One who maliciously and without probable cause makes charges before the commissioner of the land-office concerning one who has taken steps to preëmpt land, necessitating the attendance of the latter on an examination before the officers of the land-office on such charges, in order to procure his patent, may maintain case against the person so maliciously filing such charges. Hoyt *v.* Macon, 2 Colo. 113.

Though a capias is set aside for irregularity, case will lie against the parties suing out the same maliciously. Cameron *v.* Playter, 3 U. C. Q. B. 138.

Where the process is void trespass will lie. Duckworth *v.* Johnston, 7 Ala. 578; Hunt *v.* McArthur, 24 U. C. Q. B. 254. But where an arrest is made under void process the person arrested may waive the trespass and sue in case where the issuance of the process was malicious and without probable cause. Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611; Hays *v.* Younglove, 7 B. Mon. (Ky.) 545; Morris *v.* Scott, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236; Platt *v.* Niles, 1 Edm. Sel. Cas. (N. Y.) 230.

justified under the process and trespass is the only remedy for the injury caused thereby.[18]

C. Breach of Duty Imposed by Contract. For the breach of an ordinary contract which involves no element of tort, an action of assumpsit is the proper remedy,[19] and an action on the case will not lie; but when a duty is imposed by the contract or grows out of it by legal implication, and injury results from the violation or disregard of that duty, an action on the case will lie, although assumpsit may also be maintained.[20] Case, however, will not lie where the breach of duty complained of is defendant's refusal to turn over to plaintiff money received by the former for the latter's use. Assumpsit is the only remedy.[21]

D. Breach of Duty Imposed by Law. Wherever there is carelessness, recklessness, want of reasonable skill, or the violation or disregard of a duty which the law implies from the conditions or attendant circumstances, and individual injury results therefrom, an action on the case lies in favor of the party injured.[22]

18. Wickliffe *v.* Sanders, 6 T. B. Mon. (Ky.) 296; Campbell *v.* Phelps, 17 Mass. 244.

19. See, generally, ASSUMPSIT, ACTION OF, 4 Cyc. 317; CONTRACTS.

20. The contract is laid as mere inducement and the tort arising from the breach of duty is the gravamen of the action.

Alabama.— Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644, 7 So. 106; Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170; Adams *v.* Robinson, 65 Ala. 586; Wilkinson *v.* Moseley, 30 Ala. 562; Myers *v.* Gilbert, 18 Ala. 467; Blick *v.* Briggs, 6 Ala. 687.

Arkansas.— Brooks *v.* Clifton, 22 Ark. 54; Ferrier *v.* Wood, 9 Ark. 85.

Illinois.— Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Sturges *v.* Keith, 57 Ill. 451, 11 Am. Rep. 28; Standard Brewery *v.* Hales, etc., Malting Co., 70 Ill. App. 363.

Maine.— Hinks *v.* Hinks, 46 Me. 423.

Maryland.— Philadelphia, etc., R. Co. *v.* Constable, 39 Md. 149.

Massachusetts.— Ashley *v.* Root, 4 Allen (Mass.) 504.

New Hampshire.—Welch *v.* Concord R. Co., 68 N. H. 206, 44 Atl. 304.

New York.— Church *v.* Mumford, 11 Johns. (N. Y.) 479; Howe *v.* Cook, 21 Wend. (N. Y.) 29; Orange Bank *v.* Brown, 3 Wend. (N. Y.) 158.

North Carolina.— Twidy *v.* Saunderson, 31 N. C. 5.

Pennsylvania.— Lindeman *v.* Lindsey, 69 Pa. St. 93, 8 Am. Rep. 219; Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65; McCall *v.* Forsyth, 4 Watts & S. (Pa.) 179; Zell *v.* Arnold, 2 Penr. & W. (Pa.) 292; Shreeve *v.* Adams, 6 Phila. (Pa.) 260, 24 Leg. Int. (Pa.) 396.

Vermont.— Gregoir *v.* Leonard, 71 Vt. 410, 45 Atl. 748; Hyde *v.* Moffat, 16 Vt. 271.

Virginia.— Ferrill *v.* Brewis, 25 Gratt. (Va.) 765; Southern Express Co. *v.* McVeigh, 20 Gratt. (Pa.) 264.

United States.— Emigh *v.* Pittsburgh, etc., R. Co., 4 Biss. (U. S.) 114, 8 Fed. Cas. No. 4,449.

England.— Boorman *v.* Brown, 3 Q. B. 511, 11 Cl. & F. 1, 2 G. & D. 793, 11 L. J. Exch. 437, 43 E. C. L. 843, 8 Eng. Reprint 1003; Pozzi *v.* Shipton, 8 A. & E. 963, 8 L. J. Q. B. 1, 1 P. & D. 4, 35 E. C. L. 931; Burnett *v.* Lynch, 5 B. & C. 589, 4 D. & R. 368, 4 L. J. K. B. O. S. 274, 29 Rev. Rep. 343, 11 E. C. L. 597; Hancock *v.* Caffyn, 8 Bing. 358, 1 L. J. C. P. 104, 1 Moore & S. 521, 21 E. C. L. 576; Courtenay *v.* Earle, 10 C. B. 73, 15 Jur. 15, 20 L. J. C. P. 7, 70 E. C. L. 73; Ansell *v.* Waterhouse, 2 Chit. 1, 6 M. & S. 385, 18 Rev. Rep. 413, 18 E. C. L. 469; Brown *v.* Edgington, 1 Drink. 106, 10 L. J. C. P. 66, 2 M. & G. 279, 2 Scott N. R. 496, 40 E. C. L. 601; Slater *v.* Baker, 2 Wils. C. P. 359; Dickon *v.* Clifton, 2 Wils. C. P. 319.

See 1 Cent. Dig. tit. "Action on the Case," § 36.

Case or assumpsit.—Where property is lost while in the possession of a bailee thereof through the latter's negligence, the owner may recover therefor either in an action of assumpsit or in case as he may elect. Ferrier *v.* Wood, 9 Ark. 85. So also a passenger on a stage-coach may maintain an action of trespass on the case for injuries sustained by him while a passenger, caused by the upsetting of the coach, since he may waive the breach of the contract of transportation and sue for the wrong. McCall *v.* Forsyth, 4 Watts & S. (Pa.) 179. In Burnett *v.* Lynch, 5 B. & C. 589, 8 D. & R. 368, 4 L. J. K. B. O. S. 274, 29 Rev. Rep. 343, 11 E. C. L. 597, it was held that where a lessee, under a lease containing covenants to keep the leased premises in repair, assigns the lease to one who agrees to perform the covenants of the lease, the lessee might maintain an action on the case against his assignee to recover for damages which he has been compelled to pay to the lessor for failure of the assignee to perform the covenants of the lease, and that he was not restricted to an action of assumpsit for breach of the agreement contained in the assignment, but may treat the cause of action as a tort growing out of the assignee's failure to perform his duty.

21. Riley *v.* La Rue, 20 R. I. 425, 39 Atl. 753; Royce *v.* Oakes, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845.

22. *Alabama.*—Britt *v.* Pitts, 111 Ala. 401, 20 So. 484; Alabama Midland R. Co. *v.* Martin, 109 Ala. 511, 14 So. 401; Mobile L. Ins.

E. Enforcement of Rights Given by Statute. Where a statute prescribes a remedy other than case for the enforcement of a right or liability created by the statute case will not lie, though independent of the statute it would be the appropriate form of remedy.[23] But if the statute merely imposes a duty or liability, without providing any remedy, an action on the case will lie if appropriate to the character of the injury.[24]

F. False and Fraudulent Representations. For any deceit resulting in damage to plaintiff he may recover in an action on the case.[25] So where a person in the sale of property knowingly makes false representations concerning the quality or title of the property, and such representations are relied on by plaintiff under circumstances which warrant him in so doing, and he is injured

Co. *v.* Randall, 74 Ala. 170; Moore *v.* Appleton, 26 Ala. 633; Blick *v.* Briggs, 6 Ala. 687; Sawyer *v.* Ballew, 4 Port. (Ala.) 116.

Connecticut.— Sharp *v.* Curtiss, 15 Conn. 526.

Illinois.— Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Mount *v.* Hunter, 58 Ill. 246; Standard Brewery *v.* Hales, etc., Malting Co., 70 Ill. App. 363.

Massachusetts.— Heridia *v.* Ayres, 12 Pick. (Mass.) 334; Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35.

Ohio.— Brown County *v.* Butt, 2 Ohio 348.

Pennsylvania.— Neely *v.* McCormick, 25 Pa. St. 255.

Tennessee.— Jones *v.* Allen, 1 Head (Tenn.) 626.

Vermont.— Gregoir *v.* Leonard, 71 Vt. 410, 45 Atl. 748.

Virginia.— Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99; Southern Express Co. *v.* McVeigh, 20 Gratt. (Va.) 264.

West Virginia.— Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800.

United States.— Cockrill *v.* Butler, 78 Fed. 679; Emigh *v.* Pittsburgh, etc., R. Co., 4 Biss. (U. S.) 114, 8 Fed. Cas. No. 4,449.

England.— Pearson *v.* Iles, Dougl. 535.

See 1 Cent. Dig. tit. "Action on the Case," § 12.

Breach of corporate duty.— Case will lie against a corporation for neglect of a corporate duty, by which plaintiff suffers. Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35; Lynn *v.* Turner, Cowp. 86.

Breach of duty by trustee.— If a trustee of property in whom the absolute title is apparently vested transfers it to a third person who takes without notice of the equities of a *cestui que trust*, the latter may maintain an action on the case against the trustee for the wrongful conveyance, since it is a breach of his duty as trustee. Gillespie *v.* Hughes, 86 Ill. App. 202.

Sheriff's refusal to release exempt property.— Where an officer, levying an execution, wrongfully refuses to set aside property claimed by the execution debtor, and to which he was entitled under the exemption laws, the debtor's most appropriate remedy is case, since it is the duty of the officer to allow the debtor to retain the exempt property, and his failure so to do is a breach of duty resulting in injury to plaintiff. Van Dresor *v.* King, 34 Pa. St. 201, 75 Am. Dec. 643.

23. Sharp *v.* Curtis, 15 Conn. 526; McMullen *v.* Vanzant, 73 Ill. 190; Knowlton *v.* Ackley, 8 Cush. (Mass.) 93; Wiley *v.* Yale, 1 Metc. (Mass.) 553.

Assumpsit where case is prescribed.— In Hathorn *v.* Calef, 53 Me. 471, it was held that where the remedy provided by a statute for the enforcement of a stock-holder's liability to the creditors of the corporation is by an action on the case, the remedy may he by an action in form assumpsit, since the latter is but a form of action on the case.

24. Mount *v.* Hunter, 58 Ill. 246; Wright *v.* Freeman, 5 Harr. & J. (Md.) 467; Knowlton *v.* Ackley, 8 Cush. (Mass.) 93; Wiley *v.* Yale, 1 Metc. (Mass.) 553; Heridia *v.* Ayres, 12 Pick. (Mass.) 334; Cogswell *v.* Essex Mill Corp., 6 Pick. (Mass.) 94; Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. 62; Chester County *v.* Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713.

25. Harris *v.* Powers, 57 Ala. 139; Munroe *v.* Pritchett, 16 Ala. 785, 50 Am. Dec. 203; and, generally, FRAUD.

Fraud in execution of written contract.— An action on the case will lie to recover for fraud whereby plaintiff was induced to enter into a written contract. Oliver *v.* Oliver, 4 Rawle (Pa.) 141, 26 Am. Dec. 123.

False representation concerning solvency of prospective purchaser.— Where a person represents to a seller that a third person who wishes to purchase property from the seller is solvent, and the person making such representations knows at the time of his making them that such representations are false and untrue, and the person to whom they are made relies thereon and extends credit to the person concerning whom the representations were made and thereby loses his property, he may maintain an action on the case against the person making such false representations. Upton *v.* Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634.

Where a person falsely represents himself to be the agent of another, the one injured thereby may maintain an action on the case against him for deceit. Roberts *v.* Britton, 14 Vt. 195; Clark *v.* Foster, 8 Vt. 98.

thereby, case is an appropriate form of action for the recovery of the damages sustained.[26]

G. Injury by Animal. When an injury is committed by an animal belonging to defendant, under such circumstances as will render him liable therefor, case is an appropriate form of action for the recovery of damages.[27]

H. Injury to Incorporeal Right — 1. In General. Where the right or property injured is intangible and incapable of manual possession case is the appropriate remedy.[28]

2. Interference With, or Interruption Of, Easement — a. In General. For an interference with, or an interruption of, an easement case is the appropriate remedy.[29]

26. *Alabama.*— Morgan *v.* Patrick, 7 Ala. 185; Cullum *v.* State Branch Bank, 4 Ala. 21, 37 Am. Dec. 725; Cozzins *v.* Whitaker, 3 Stew. & P. (Ala.) 322.

Arkansas.— Johnson *v.* McDaniel, 15 Ark. 109.

Connecticut.—Humiston *v.* Smith, 22 Conn. 19.

Maine.— Martin *v.* Jordan, 60 Me. 531.

New Hampshire.— Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

New York.— Ward *v.* Wiman, 17 Wend. (N. Y.) 193; Culver *v.* Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Wardell *v.* Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383; Frost *v.* Raymond, 2 Cai. (N. Y.) 188, 2 Am. Dec. 228.

Rhode Island.— Burgess *v.* Wilkinson, 13 R. I. 646.

Vermont.— Vail *v.* Strong, 10 Vt. 457.

United States.— Fenwick *v.* Grimes, 5 Cranch C. C. (U. S.) 603, 8 Fed. Cas. No. 4,734; Allen *v.* Schuchardt, 1 Fed. Cas. No. 236, 1 Am. L. Reg. N. S. 13.

England.— Brown *v.* Edgington, 1 Drink. 106, 10 L. J. C. P. 66, 2 M. & G. 279, 2 Scott N. R. 496, 40 E. C. L. 601; Comyns Dig. tit. Action on the Case for Deceit, A, 8.

See 1 Cent. Dig. tit. "Action on the Case," § 26; and, generally, Sales; Vendor and Purchaser.

Several persons fraudulently conspired to induce plaintiff to purchase land from one of their number to which he had no title and plaintiff, in reliance on the misrepresentations, paid the reputed owner the price of the land and received a warranty deed from him. It was held that plaintiff may maintain an action on the case against the several defendants and is not limited to an action on the covenants of the deed. Bostwick *v.* Lewis, 1 Day (Conn.) 250, 2 Am. Dec. 73.

27. Durden *v.* Barnett, 7 Ala. 169; Dilts *v.* Kinney, 15 N. J. L. 130; Wales *v.* Ford, 8 N. J. L. 267; Goodman *v.* Gay, 15 Pa. St. 188, 53 Am. Dec. 589; Mulherrin *v.* Henry, 11 Pa. Co. Ct. 49. See also Animals, XI, A, 4, b [2 Cyc. 380].

As to case for injury to animal see Animals, XII, A, 3, b, (1) [2 Cyc. 421].

28. *Connecticut.*— Wetmore *v.* Robinson, 2 Conn. 529.

Indiana.— Martin *v.* Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52.

Kentucky.— Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush (Ky.) 667.

Maine.— Matthews *v.* Treat, 75 Me. 594.

Maryland.— Shafer *v.* Smith, 7 Harr. & J. (Md.) 67; Wright *v.* Freeman, 5 Harr. & J. (Md.) 467.

New Hampshire.— Carleton *v.* Cate, 56 N. H. 130; Smith *v.* Wiggin, 48 N. H. 105.

New Jersey.— Osborne *v.* Butcher, 26 N. J. L. 308; Runyon *v.* Bordine, 14 N. J. L. 472.

New York.— Wilson *v.* Smith, 10 Wend. (N. Y.) 324; Lambert *v.* Hoke, 14 Johns. (N. Y.) 383.

Pennsylvania.— Drew *v.* Peer, 93 Pa. St. 234; Union Petroleum Co. *v.* Bliven Petroleum Co., 72 Pa. St. 173; Lindeman *v.* Lindsey, 69 Pa. St. 93, 8 Am. Rep. 219; Okeson *v.* Patterson, 29 Pa. St. 22; Schnable *v.* Koehler, 28 Pa. St. 181; Shroder *v.* Brenneman, 23 Pa. St. 348; Greenwalt *v.* Horner, 6 Serg. & R. (Pa.) 70.

Vermont.— Sprague *v.* Fletcher, 67 Vt. 46, 30 Atl. 693; Perrin *v.* Granger, 33 Vt. 101; Wilson *v.* Wilson, 2 Vt. 68.

West Virginia.— Ridgeley *v.* West Fairmont, 46 W. Va. 445, 33 S. E. 235.

England.— Millar *v.* Taylor, 4 Burr. 2303; Bryan *v.* Whistler, 8 B. & C. 288, 6 L. J. K. B. O. S. 302, 2 M. & R. 318, 15 E. C. L. 147.

See 1 Cent. Dig. tit. "Action on the Case," § 5.

For a disturbance of plaintiff's right to use a pew in a church, the title to which is in the church corporation, case is the appropriate remedy. The thing acted upon (plaintiff's right to use the pew) has no actual substantial existence. It is impossible of manual possession and physical force cannot be applied to it. Marshall *v.* White, Harp. (S. C.) 122. See also Perrin *v.* Granger, 33 Vt. 101; Ridout *v.* Harris, 17 U. C. C. P. 88.

Unlawful publication of literary product.— Case is the proper form of remedy for the recovery of damages for the unlawful publication by defendant of the literary products of plaintiff, since the right is incorporeal. Millar *v.* Taylor, 4 Burr. 2303.

29. *Alabama.*— Blick *v.* Briggs, 6 Ala. 687.

Connecticut.— Wetmore *v.* Robinson, 2 Conn. 529.

Indiana.—Martin *v.* Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52.

Maine.— Matthews *v.* Treat, 75 Me. 594.

b. Water Rights or Easements. For an obstruction of a stream or a wrongful diversion of the waters thereof resulting in an injury to plaintiff's water-power, case is the appropriate remedy, since the injury is consequential and not direct.[30] For the same reason case is the appropriate remedy for the recovery of damages occasioned by the construction of a dam or other obstruction in a stream and resulting in the flooding of plaintiff's land,[31] or the pollution of the water of a stream so as to render it unfit for the use of a lower riparian owner.[32] So where a dam owner, without notice to lower riparian owners and contrary to statute, discharges an unusual amount of water from his mill-pond, resulting in injury to lower riparian owners, the remedy of the latter is in case and not trespass, since the injury is consequential and not direct.[33]

I. Injury to Property Subject to Lien. Where plaintiff has a lien on the property injured he may maintain an action on the case, where the injuries complained of diminish the value of his security or operate to make it ineffectual.[34]

Maryland.— Wright *v.* Freeman, 5 Harr. & J. (Md.) 467.

Massachusetts.— Cushing *v.* Adams, 18 Pick. (Mass.) 110.

New Hampshire.— Smith *v.* Wiggin, 48 N. H. 105.

New Jersey.— Osborne *v.* Butcher, 26 N. J. L. 308.

New York.— Hay *v.* Cohoes Co., 3 Barb. (N. Y.) 42; Lambert *v.* Hoke, 14 Johns. (N. Y.) 383.

Pennsylvania.— Lindeman *v.* Lindsey, 69 Pa. St. 93, 8 Am. Rep. 219; Okeson *v.* Patterson, 29 Pa. St. 22; Schnable *v.* Koehler, 28 Pa. St. 181; Shroder *v.* Brenneman, 23 Pa. St. 348; Greenwalt *v.* Homer, 6 Serg. & R. (Pa.) 70; Jones *v.* Park, 10 Phila. (Pa.) 165, 31 Leg. Int. (Pa.) 372; Leary *v.* Harter, 1 Leg. Gaz. (Pa.) 20.

Vermont.— Wilson *v.* Wilson, 2 Vt. 68.

West Virginia.— Ridgeley *v.* West Fairmont, 46 W. Va. 445, 33 S. E. 235.

England.— Bryan *v.* Whistler, 8 B. & C. 288, 6 L. J. K. B. O. S. 302, 2 M. & R. 318, 15 E. C. L. 147.

See 1 Cent. Dig. tit. "Action on the Case," § 6; and, generally, EASEMENTS.

Interference with right of ingress and egress.— Case is the appropriate remedy for the obstruction of a way which interferes with plaintiff's ingress and egress to and from his property. Runyon *v.* Bordine, 14 N. J. L. 472; Ridgeley *v.* West Fairmont, 46 W. Va. 445, 33 S. E. 235.

Obstruction of right of way.— Plaintiff may maintain an action on the case for the obstruction of a right of way over the land of a third person, caused by defendant's wrongful act in placing an obstruction on plaintiff's land directly in front of the place where the right of way connected with plaintiff's land. Carleton *v.* Cate, 56 N. H. 130. See also Brown *v.* Chapman, 3 Burr. 1418, 1 W. Bl. 427.

30. Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. 62; Strickler *v.* Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649; Eastwood *v.* Helliwell, 4 U. C. Q. B. O. S. 38; and, generally, WATERS.

Removal of dam.— Case is the appropriate remedy for diminution of the water-power of plaintiff's mill by diverting the water therefrom by removal of a part of plaintiff's dam. The force employed to remove the portions of the dam is not the gist of the action but the consequential loss of the power. Meyer *v.* Horst, 106 Pa. St. 552. But when the injury to the dam is the gist of the action trespass and not case is the appropriate remedy. Wilson *v.* Smith, 10 Wend. (N. Y.) 324.

31. Crockett *v.* Millett, 65 Me. 191; Keller *v.* Stoltz, 71 Pa. St. 356; Smith *v.* Crandall, 3 N. Brunsw. 1. See also Philps *v.* St. John Water Co., 9 N. Brunsw. 24.

Where defendant obstructed a drainage ditch, causing plaintiff's crops to be inundated and injured thereby, case is the appropriate remedy, since the injury is consequential and not direct. Shaw *v.* Etheridge, 52 N. C. 225. So where plaintiff, with consent of an adjoining owner, placed an obstruction in a ditch which constituted the boundary line between their lands, and defendant, with the consent of the adjoining landowner, removed such obstruction, which caused another ditch belonging to plaintiff to become clogged with sand, it was held that plaintiff's remedy was by an action on the case and not trespass, since the injury was consequential. Hogwood *v.* Edwards, 61 N. C. 350.

32. Drake *v.* Lady Ensley Coal, etc., Co., 102 Ala. 501, 14 So. 749, 48 Am. St. Rep. 77, 24 L. R. A. 64.

33. Ross *v.* Horsey, 3 Harr. (Del.) 60.

Where defendant purposely and wilfully collected a head of water and then liberated it and it flowed down upon and injured plaintiff's dam the injury was held to be direct and immediate and trespass and not case the appropriate remedy. Kelly *v.* Lett, 35 N. C. 50.

34. This doctrine is based on the theory that the wrong is done to property of which plaintiff has neither the possession nor the right to possession, and since trespass, detinue, or trover will not lie, the law for the injury to plaintiff's rights will afford a remedy by an action on the case.

Alabama.— Ehrman *v.* Oats, 101 Ala. 604, 14 So. 361; Aderholt *v.* Smith, 83 Ala. 486, 3 So. 794; Hurst *v.* Bell, 72 Ala. 336; Collier *v.* Faulk, 69 Ala. 58; Rees *v.* Coats, 65 Ala. 256; Hudson *v.* Vaughan, 57 Ala. 609.

J. Injury to Realty. When defendant does some act on his own land which results in an injury to the land or other property of an adjoining owner case may be maintained.[35] Case also lies where a person having a right to enter on the land of another after entering on such other's land does some unnecessary injury.[36]

K. Injury to Reversionary Interest. Where an injury to property, either real or personal, is committed with force, and is the direct and immediate result of the act complained of, trespass and not case is the appropriate remedy, if at the time of the commission of the wrong the owner is in possession or if not in possession, is entitled to the immediate possession; but if plaintiff is not in possession or is not entitled to the immediate possession, case is the appropriate remedy. Hence for an injury to property which affects its reversionary value, and in which plaintiff has only a reversionary interest, case is the appropriate remedy.[37]

L. Loss of Services of Another. In the United States the rule is that

New Jersey.—Hall *v.* Snowhill, 14 N.J.L. 8.

New York.— Goulet *v.* Asseler, 22 N. Y. 225; Yates *v.* Joyce, 11 Johns. (N. Y.) 136.

Pennsylvania.— McCutcheon *v.* City, 7 Phila. (Pa.) 207.

South Carolina.—Michalson *v.* All, 43 S. C. 459, 21 S. E. 323, 49 Am. St. Rep. 857.

See 1 Cent. Dig. tit. "Action on the Case," § 29.

A landlord having a lien upon a crop may maintain a special action on the case against a stranger with notice of the lien, who destroys, removes, or so converts the crop or changes its character that the landlord cannot enforce his lien. Hussey *v.* Peebles, 53 Ala. 432. See also Collier *v.* Faulk, 69 Ala. 58.

A mortgagee of property may maintain an action on the case against one who, after default, diminishes the value of his security by removing fixtures from the mortgaged premises. Allison *v.* McCune, 15 Ohio 726, 45 Am. Dec. 605.

35. Knight *v.* Dunbar, 83 Me. 359, 22 Atl. 216; Felch *v.* Gilman, 22 Vt. 38; and, generally, ADJOINING LANDOWNERS, 1 Cyc. 766.

Excavating.— An action on the case will lie to recover for injury to plaintiff's property, caused by defendant's negligence in excavating on his own property adjoining plaintiff's property. Panton *v.* Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369.

Overhanging eaves.— Where defendant builds a house on his own land so near to plaintiff's land that the roof thereof sheds water on plaintiff's land, the latter cannot recover therefor in an action for trespass, since case is the appropriate remedy, the injury being consequential. Garraty *v.* Duffy, 7 R. I. 476.

36. Turner *v.* Rising Sun, etc., Turnpike Co., 71 Ind. 547; Edelman *v.* Yeakel, 27 Pa. St. 26.

Where the injury complained of was the consequence of storing heavy articles in a storehouse, as the result of which the house fell down, and not the immediate result of force, the proper form of action is case and not trespass. Brooks *v.* Clifton, 22 Ark. 54.

37. *Alabama.*— Williams *v.* Brassell, 51 Ala. 397; Davis *v.* Young, 20 Ala. 151; Myers *v.* Gilbert, 18 Ala. 467.

Arkansas.— Emrich *v.* Little Rock Traction, etc., Co., (Ark. 1902) 70 S. W. 1035; Ferrier *v.* Wood, 9 Ark. 85.

Connecticut.—Randall *v.* Cleveland, 6 Conn. 328.

Delaware.— Coe *v.* English, 6 Houst. (Del.) 456; Cann *v.* Warren, 1 Houst. (Del.) 188.

Florida.— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160.

Illinois.— Topping *v.* Evans, 58 Ill. 209; Halligan *v.* Chicago, etc., R. Co., 15 Ill. 558; Frankenthal *v.* Mayer, 54 Ill. App. 160.

Kentucky.— Walden *v.* Conn, 84 Ky. 312, 8 Ky. L. Rep. 281, 1 S. W. 537, 4 Am. St. Rep. 204; Robertson *v.* Rodes, 13 B. Mon. (Ky.) 325.

Maine.— Files *v.* Magoon, 41 Me. 104.

Massachusetts.— Ayer *v.* Bartlett, 9 Pick. (Mass.) 156; Lienow *v.* Ritchie, 8 Pick. (Mass.) 235; Baker *v.* Sanderson, 3 Pick. (Mass.) 348.

New Hampshire.— Lane *v.* Thompson, 43 N. H. 320; Brown *v.* Dinsmoor, 3 N. H. 103; Elliot *v.* Smith, 2 N. H. 430.

New Jersey.—Hall *v.* Snowhill, 14 N.J.L. 8.

New York.— Campbell *v.* Arnold, 1 Johns. (N. Y.) 511.

North Carolina.— Williams *v.* Lanier, 44 N. C. 30; Copeland *v.* Parker, 25 N. C. 513; Hilliard *v.* Dortch, 10 N. C. 246; McGowen *v.* Chapen, 6 N. C. 61.

Oklahoma.— Casey *v.* Mason, 8 Okla. 665, 59 Pac. 252.

Pennsylvania.— Spencer *v.* Campbell, 9 Watts & S. (Pa.) 32; Fitler *v.* Shotwill, 7 Watts & S. (Pa.) 14; Ripka *v.* Sergeant, 7 Watts & S. (Pa.) 9, 42 Am. Dec. 214.

Rhode Island.— Bacon *v.* Bullard, 20 R. I. 404, 39 Atl. 751.

Vermont.— Kent *v.* Buck, 45 Vt. 18.

West Virginia.—Rogers *v.* Coal River Boom, etc., Co., 41 W. Va. 593, 23 S. E. 919, 26 S. E. 1008.

See 1 Cent. Dig. tit. "Action on the Case," §§ 10, 11.

As to case by bailor see BAILMENTS, VI, B, 1, a, (II) [5 Cyc. 221].

Case may be maintained by the mortgagee for an injury to his reversionary interest, where he has not the right to immediate possession. Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472. And case will lie by the holder

when defendant's wrongful act results in the loss to plaintiff of the services of another, to which plaintiff is entitled, the latter may maintain an action on the case therefor, since the injury complained of is consequential and not direct. Hence for the enticing away or debauching of plaintiff's daughter, resulting in the loss of her services, case is an appropriate remedy.[38] It will also lie for criminal conversation,[39] or for an assault on plaintiff's child or wife which deprives him of their services.[40] In England there seems to have been a diversity of opinion as to what form of remedy should be pursued, the earlier practice seeming to favor the framing of the declaration in trespass.[41] Subsequently such actions were held to be in case and not trespass.[42] The later decisions are a recurrence to the view that such actions are actions of trespass and not case.[43]

M. Wrongful Acts of Servant. If injuries are done by a servant in the course of his master's business, which resulted from negligence or want of proper care or skill on the part of the servant, the master will be liable in an action on the case.[44]

of a mortgage on lands against the mortgagor or a purchaser from the mortgagor of the equity of redemption for acts of waste committed with the knowledge that the value of the security will be injured thereby. Van Pelt *v.* McGraw, 4 N. Y. 110.

Injury to unassigned dower interest.— A widow may maintain an action of trespass on the case against one who, subsequent to the death of her husband but before the assignment of dower, enters on the premises and does acts injurious to the freehold. This on the theory that her dower interest is in its nature a reversionary interest. Rogers *v.* Potter, 32 N. J. L. 78.

38. *Kentucky.*— Jones *v.* Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98.

Maine.— Clough *v.* Tenney, 5 Me. 446.

New Jersey.— Furman *v.* Applegate, 23 N. J. L. 28; Vanhorn *v.* Freeman, 6 N. J. L. 322.

New York.—Moran *v.* Dawes, 4 Cow. (N. Y.) 412; Martin *v.* Payne, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288.

Pennsylvania.— Ream *v.* Rank, 3 Serg. & R. (Pa.) 215.

Vermont.— Claflin *v.* Wilcox, 18 Vt. 605.

Virginia.— Parker *v.* Elliott, 6 Munf. (Va.) 587.

See 1 Cent. Dig. tit. "Action on the Case," § 16; and, generally, SEDUCTION.

39. Van Vacter *v.* McKillip, 7 Blackf. (Ind.) 578; Haney *v.* Townsend, 1 McCord (S. C.) 206; Claflin *v.* Wilcox, 18 Vt. 605; and, generally, HUSBAND AND WIFE.

40. Drew *v.* Peer, 93 Pa. St. 234; Hoover *v.* Heim, 7 Watts (Pa.) 62.

41. Batchelor *v.* Bigg, 3 Wils. C. P. 319, decided in 1772, was an action of trespass for criminal conversation. Tullidge *v.* Wade, 3 Wils. C. P. 18, decided in 1769, was an action of trespass *per quod servitium amisit* by a father against one who had debauched his daughter and gotten her with child. No question was raised as to the appropriateness of the form of action in either case.

42. Cooke *v.* Sayer, imperfectly reported in 2 Burr. 753, was an action for criminal conversation and is said by Lord Ellenborough in Macfadzen *v.* Olivant, 6 East 387, to have been an action on the case. Bennett *v.* Allcott, 2 T. R. 166, was an action of trespass for breaking and entering plaintiff's house and debauching plaintiff's daughter. Defendant's defense of entry on plaintiff's premises under a license was excluded as not being admissible under the plea of not guilty. Buller, J., said "that if the trespass in entering the premises had not been proven (or if defendant had justified such act) defendant would have been entitled to a verdict." From which it appears that for the debauching of plaintiff's daughter case is the appropriate remedy. Macfadzen *v.* Olivant, 6 East 387, holds that an action for criminal conversation is case. This case refers to Parker *v.* Ironfield (an unreported case) as being an action for the seduction of plaintiff's daughter and in which Justice Buller indorsed on the paper book the words "this is an action on the case."

43. Woodward *v.* Walton, 2 B. & P. N. R. 476; Ditcham *v.* Bond, 2 M. & S. 436.

44. *Alabama.*— Lindsay *v.* Griffin, 22 Ala. 629.

Arkansas.— Emrich *v.* Little Rock Traction, etc., Co., (Ark. 1902) 70 S. W. 1035.

Connecticut.— Havens *v.* Hartford, etc., R. Co., 28 Conn. 69.

Illinois.— Illinois Cent. R. Co. *v.* Reedy, 17 Ill. 580.

Kentucky.— Johnson *v.* Castleman, 2 Dana (Ky.) 377.

Massachusetts.— Campbell *v.* Phelps, 17 Mass. 244, 18 Mass. 62, 11 Am. Dec. 139; Barnes *v.* Hurd, 11 Mass. 57.

New Jersey.— Price *v.* New Jersey R., etc., Co., 31 N. J. L. 229.

New York.— Broughton *v.* Whallon, 8 Wend. (N. Y.) 474.

Ohio.— Hamilton County *v.* Cincinnati, etc., Turnpike Co., Wright (Ohio) 603.

Pennsylvania.— Drew *v.* Peer, 93 Pa. St. 234; Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. (Pa.) 143; McCutcheon *v.* City, 7 Phila. (Pa.) 207.

United States.— Canadian Pac. R. Co. *v.* Clark, 73 Fed. 76, 74 Fed. 362, 38 U. S. App. 573, 20 C. C. A. 447.

England.— Bretherton *v.* Wood, 3 B. & B. 54, 6 Moore C. P. 141, 9 Price 408, 23 Rev. Rep. 556; Huggett *v.* Montgomery, 2 B. & P.

But if the injury be committed by the servant wilfully, trespass and not case is the appropriate remedy.[45]

V. DEFENSES.

When parties by an express agreement assume the performance of an obligation, which, aside from the agreement, the law implies, whatever will in law excuse a breach of the express obligation will, in an action on the case for breach of the implied obligation, be a defense thereto.[46] Coverture, however, is not a defense, as the action is in form *ex delicto*.[47]

VI. PERSONS LIABLE.

Case will lie against a private or public corporation for a wrong which is the appropriate subject-matter of an action on the case.[48]

VII. JURISDICTION AND VENUE.

A. Jurisdiction. In states where justices of the peace have jurisdiction of actions *ex contractu* but not of actions *ex delicto*, an action on the case to recover for injuries caused by defendant's negligence and unskilfulness in performing a contract, though an action for the breach of a duty imposed on defendant by a contract, is not an action *ex contractu* so as to give a justice jurisdiction thereof.[49]

B. Venue. A statute providing that where "the foundation of the suit is some crime or offense or trespass for which a civil action in damages may lie, in which case the suit may be brought in the county where . . . the trespass was committed" includes that class of wrongs for which an action on the case will lie.[50]

VIII. LIMITATIONS OF ACTION.

A statute providing that actions on the case must be brought within a certain time after the cause of action shall have accrued is not abrogated by the subsequent adoption of a code abolishing "the forms of all actions and suits."[51]

N. R. 446; Turner *v.* Hawkins, 1 B. & P. 472; Sharrod *v.* London, etc., R. Co., 4 Exch. 580, 14 Jur. 23; Morley *v.* Gaisford, 2 H. Bl. 442.

See 1 Cent. Dig. tit. "Action on the Case," § 15; and, generally, MASTER AND SERVANT.

Where animals are killed by a railroad train by reason of the negligence of the employees in charge of the train, case is the appropriate remedy against the railroad company for the recovery of damages for the injury so inflicted. Selma, etc., R. Co. *v.* Webb, 49 Ala. 240.

Where a servant is commanded by the master to do a lawful act and he does it in an unlawful way so as to injure another, the latter may have his remedy by an action on the case, but if the act commanded is unlawful in and of itself, and not from the mode of doing it, trespass would lie. St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

45. Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; Savignac *v.* Roome, 6 T. R. 125, which latter case holds that where defendant's servant wilfully drove defendant's carriage against plaintiff's and injured it, trespass and not case is the appropriate form of action for the redress of the injury.

46. **Thus where plaintiff delivered to defendant** a quantity of barley for malting under an agreement by the latter to return it to plaintiff, the law, aside from the agreement, would have implied the obligation on defendant's part to return it, and plaintiff may at his election bring an action on the case for breach of defendant's duty to return, but defendant may show in defense that the barley was destroyed while in his possession through no fault of his own. Standard Brewery *v.* Hale, etc., Malting Co., 70 Ill. App. 363.

47. Britt *v.* Pitts, 111 Ala. 401, 20 So. 484. See also HUSBAND AND WIFE.

48. *Alabama.*— Smoot *v.* Wetumpka, 24 Ala. 112.

Massachusetts.—Riddle *v.* Proprietors Merrimack River Locks, etc., 7 Mass. 169, 5 Am. Dec. 35.

New York.— Church of Ascension *v.* Buckhart, 3 Hill (N. Y.) 193.

Pennsylvania.— Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65.

England.— Lynn *v.* Turner, Cowp. 86.

49. Zell *v.* Arnold, 2 Penr. & W. (Pa.) 292.

Where justices do not have jurisdiction of actions on the case, a justice has no jurisdiction of an action to recover for injuries caused by the negligence of defendant's servants. Illinois Cent. R. Co. *v.* Reedy, 17 Ill. 580.

50. Hill *v.* Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618. See also, generally, VENUE.

51. Cockrill *v.* Butler, 78 Fed. 679 [*reversed* in 86 Fed. 7, 29 C. C. A. 529]. See also, generally, LIMITATIONS OF ACTIONS.

In Arkansas, special actions on the case, ex-

IX. PARTIES.

A. Plaintiffs. Where a wrong constitutes a direct as well as a consequential injury to land in the possession of a life-tenant, the latter may waive the trespass and join with the remainderman in an action on the case for the recovery of the consequential damages sustained by him.[52]

B. Defendants. Where several persons join in the commission of a wrong giving rise to an action on the case, plaintiff may join as parties defendant one or all persons jointly participating in the wrong complained of.[53]

X. PLEADING.[54]

A. Declaration — 1. In General. The name given to a declaration by plain-

cept actions for assault and battery, criminal conversation, false imprisonment and slander, are governed by the three year statute of limitations. Emrich *v.* Little Rock Traction, etc., Co., (Ark. 1902) 70 S. W. 1035 [*criticizing* Patterson *v.* Thompson, 24 Ark. 55]; Cockrell *v.* Cooper, 86 Fed. 7, 29 C. C. A. 529.

Change of action to case.— Where an action, on a cause of action which is the appropriate subject-matter of an action on the case, is commenced, in a form other than case, prior to the expiration of the period of limitations applicable to case, it may, subsequent to the expiration of such period, be changed, by amendment, to case, where the amendment does not change the cause of action set forth in the original declaration. Smith *v.* Bellows, 77 Pa. St. 441.

Application of statute.— If the declaration sets forth a cause of action for which case is the appropriate remedy the period of limitations applicable to actions on the case will be applied. Thus, an action brought under a statute providing that if the owner of diseased sheep shall knowingly let them be at large and they shall mingle with sheep belonging to other persons resulting in injury to such other's sheep he shall be liable for the injuries resulting therefrom is an action on the case within the statute of limitations applicable to actions on the case. Mount *v.* Hunter, 58 Ill. 246. So where the owner of land by the construction of a dam on his own land overflows the land of another, an action by the latter to recover therefor is an action on the case within the statute of limitations applicable to actions on the case. Wabash, etc., Canal *v.* Spears, 16 Ind. 441, 79 Am. Dec. 444.

52. McIntire *v.* Westmoreland Coal Co., 118 Pa. St. 108, 11 Atl. 808. See also, generally, PARTIES.

Action by assignor.— A court of law has jurisdiction of an action of trespass on the case to recover damages for loss by fire, though plaintiff has assigned parts of any recovery that may be had, and may apportion the judgment to satisfy the different assignments. Tyler *v.* Ricamore, 87 Va. 466, 12 S. E. 799.

A licensee of land with authority to cut and take away timber therefrom may maintain an action on the case against a person who wrongfully enters thereon and cuts the timber, in consequence of which the licensee sustains damage. Beckwith *v.* McPhelm, 7 N. Brunsw. 501.

53. Andrews *v.* Boedecker, 126 Ill. 605, 18 N. E. 651, 9 Am. St. Rep. 649; Winslow *v.* Newlan, 45 Ill. 145; Pozzi *v.* Shipton, 8 A. & E. 963, 8 L. J. Q. B. 1, 1 P. & D. 4, 35 E. C. L. 931; Ansell *v.* Waterhouse, 2 Chit. 1, 6 M. & S. 385, 18 Rev. Rep. 413, 18 E. C. L. 469. See also, generally, PARTIES.

Breach of duty imposed by contract.— An action on the case for breach of a duty imposed by contract may be maintained against one or all of the obligors in the contract. Orange Bank *v.* Brown, 3 Wend. (N. Y.) 158; Pozzi *v.* Shipton, 8 A. & E. 963, 8 L. J. Q. B. 1, 1 P. & D. 4, 35 E. C. L. 931; Ansell v. Waterhouse, 2 Chit. 1, 6 M. & S. 385, 18 Rev. Rep. 413, 18 E. C. L. 469; Govett *v.* Radnidge, 3 East 62, 6 Rev. Rep. 539.

Breach of warranty.— Where defendant has been induced to purchase property by false representations as to its quality or the condition of the title thereto, made under circumstances which constitute them a warranty, he may at his election waive his action on the warranty and maintain an action on the case against one or all of the joint contractors, though in assumpsit all of the joint contractors would be necessary parties defendant. Vail *v.* Strong, 10 Vt. 457.

Negligence of agent.— Where an injury is sustained by reason of the wrongful act of one who at the time of the commission of the wrong was acting as the agent of two or more persons and such wrong was committed in the course of the principals' business under such circumstances as to make the principals liable for the agent's acts, the injured party may maintain an action against one or all of the principals. Bretherton *v.* Wood, 3 B. & B. 54, 6 Moore C. P. 141, 9 Price 408, 23 Rev. Rep. 556; Moreton *v.* Hardern, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553; Leslie *v.* Wilson, 3 B. & B. 171, 6 Moore C. P. 415, 23 Rev. Rep. 605; Mitchell *v.* Tarbutt, 5 T. R. 649, 2 Rev. Rep. 684. And an agent and his principal may both be joined as parties defendant in an action on the case. Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

54. See also, generally, PLEADING.

tiff is not conclusive as to its form.[55] Such question is to be determined from the nature of the wrong alleged and the character of the relief sought.[56]

2. ALLEGATION AS TO DAMAGES. If the damages sustained have not necessarily resulted from the act complained of, and therefore are not implied by law, plaintiff must allege the particular or special damages sustained and meant to be relied on at the trial.[57]

3. ALLEGATION AS TO NEGLIGENCE. If the gist of the action is defendant's negligence, the declaration should allege the specific acts of negligence relied on as a ground for recovery.[58]

4. ALLEGATION AS TO TITLE. In an action by a reversioner for an injury to the freehold, plaintiff's specific interest in the property affected should be alleged.[59]

5. ALLEGATION AS TO WRONGFULNESS OF ACT. The act causing the injury must be averred to be wrongful or some equivalent averment must be used.[60]

55. *Alabama.*— Sheppard *v.* Furniss, 19 Ala. 760.

Connecticut.— New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542.

Illinois.— Toledo, etc., R. Co. *v.* McLaughlin, 63 Ill. 389; Carter *v.* White, 32 Ill. 509. See also Kimbell *v.* Miller, 54 Ill. App. 665.

Indiana.— Hines *v.* Kinnison, 8 Blackf. (Ind.) 119.

Michigan.—Wood *v.* Michigan Air Line Co., 81 Mich. 358, 45 N. W. 980.

New York.— Howe *v.* Cooke, 21 Wend. (N. Y.) 29.

South Carolina.—P———r *v.* Bogan, 2 McCord (S. C.) 386.

Vermont.— Waterman *v.* Hall, 17 Vt. 128, 42 Am. Dec. 484; Coggswell *v.* Baldwin, 15 Vt. 404, 40 Am. Dec. 686.

See 1 Cent. Dig. tit. "Action on the Case," § 42.

A variance between the writ and the declaration can only be taken advantage of by plea. The objection is not available under the general issue and is not ground for arrest of judgment. Toledo, etc., R. Co. *v.* McLaughlin, 63 Ill. 389; P———r *v.* Bogan, 2 McCord (S. C.) 386; Young *v.* Grey, 1 McCord (S. C.) 211; Haney *v.* Townsend, 1 McCord (S. C.) 206.

56. *Alabama.*— Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Bell *v.* Troy, 35 Ala. 184; Sheppard *v.* Furniss, 19 Ala. 760.

Connecticut.— New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542; Havens *v.* Hartford, etc., R. Co., 28 Conn. 69.

Illinois.— Toledo, etc., R. Co. *v.* McLaughlin, 63 Ill. 389; Topping *v.* Evans, 58 Ill. 209; Carter *v.* White, 32 Ill. 509.

Kentucky.— Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401.

Maryland.— Philadelphia, etc., R. Co. *v.* Constable, 39 Md. 149.

Massachusetts.— Barnes *v.* Hurd, 11 Mass. 57.

Michigan.— Wood *v.* Michigan Air Line R. Co., 81 Mich. 358, 45 N. W. 980.

New Hampshire.— Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

New York.— Howe *v.* Cook, 21 Wend. (N. Y.) 29; Bayard *v.* Smith, 17 Wend. (N. Y.) 88.

Rhode Island.— Royce *v.* Oakes, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845.

Vermont.— Waterman *v.* Hall, 17 Vt. 128, 42 Am. Dec. 484; Coggswell *v.* Baldwin, 15 Vt. 404, 40 Am. Dec. 686.

United States.— Canadian Pac. R. Co. *v.* Clark, 73 Fed. 76, 74 Fed. 362, 38 U. S. App. 573, 20 C. C. A. 447.

England.— Smith *v.* Goodwin, 4 B. & Ad. 413, 2 L. J. K. B. 192, 1 N. & M. 371, 2 N. & M. 114, 24 E. C. L. 185.

Though the transaction may have had its origin in contract, if the facts stated show that the cause of action is a violation or disregard of duties which the law imposes from the contractual relations and conditions of the parties, the count will be regarded as in case. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644, 7 So. 106.

57. Rowand *v.* Bellinger, 3 Strobh. (S. C.) 373.

58. Wilson *v.* Coffin, 2 Cush. (Mass.) 316.

59. George *v.* Fisk, 32 N. H. 32.

Description of property injured.— Since the action is in the nature of a bill in equity, much latitude will be allowed in the description of the property to which the injury is done. Taber *v.* Packwood, 2 Day (Conn.) 52.

Right of way.— A declaration in an action on the case for the obstruction of a right of way alleging that plaintiffs were seized in their demesne as of fee of the premises sufficiently alleges that they were in the possession and occupation of the right of way. Cushing *v.* Adams, 18 Pick. (Mass.) 110.

Where the action is for consequential injuries to property in plaintiff's possession, resulting from defendant's wrongful act, it is not necessary for plaintiff to allege title in himself, since possession is sufficient to sustain the action. North *v.* Cates, 2 Bibb (Ky.) 591.

60. Guilford *v.* Kendall, 42 Ala. 651; Burnap *v.* Dennis, 4 Ill. 478. See also Beard *v.* Yates, 2 Hun (N. Y.) 466.

The declaration must show an invasion of the legal right of plaintiff either with a proper allegation of injury or the invasion of such a right that the law implies such resulting injury. Sprague *v.* Fletcher, 67 Vt. 46, 30 Atl. 693.

6. Breach of Duty Imposed by Contract. If case is brought on a breach or omission of duty growing out of a contract, the contract itself need not be formally stated in the declaration unless it constitutes a material part of plaintiff's case.[61]

7. Breach of Duty Imposed by Law. In an action on the case for the breach of an obligation imposed by law, it is, as a general rule, sufficient to allege facts out of which the duty arises, and that defendant failed to perform such duty.[62]

8. Duplicity. A declaration in case stating facts constituting more than one cause of action against defendant is not bad for duplicity, unless plaintiff relies on each of them as a distinct ground of recovery.[63]

9. Joinder of Counts. In the absence of statutory provisions authorizing it[64] counts in case cannot be joined with counts in trespass,[65] nor with counts in

If the act complained of is alleged to be unlawful, it is not sufficient to allege that it is unlawful but the facts which constitute the unlawfulness must be set out. Perry *v.* Buss, 15 N. H. 222.

Malice.— It is not necessary to lay the act to be done maliciously. Cotteral *v.* Cummins, 6 Serg. & R. (Pa.) 343.

Plaintiff may allege facts which in themselves constitute a trespass, where they constitute only a part of his cause of action. Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609.

61. **The gist of the action is the breach of the duty,** and no more need be stated than is necessary to show the duty and the breach. Moseley *v.* Wilkinson, 24 Ala. 411; Newell *v.* Horn, 47 N. H. 379; Webster *v.* Hodgkins, 25 N. H. 128; Barney *v.* Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; Bailey *v.* Moulthrop, 55 Vt. 13.

62. Leach *v.* Bush, 57 Ala. 145; World's Columbian Exposition Co. *v.* France, 91 Fed. 64, 62 U. S. App. 704, 33 C. C. A. 333.

Where the law implies the existence of the obligation, it is not necessary to allege its existence. Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401.

Where a statute imposes an obligation and provides that for a breach thereof the party aggrieved thereby may recover his damages in an action on the case, plaintiff need not recite the statute in his declaration, but it is enough if he states facts showing the breach thereof. Bayard *v.* Smith, 17 Wend. (N. Y.) 88. It is not, however, enough for plaintiff to allege that defendant neglected a duty imposed by statute, and that he would not have been injured if the duty had been performed, but he must also show that the duty was imposed for his benefit, and was one which defendant owed to him. Smith *v.* Tripp, 13 R. I. 152.

63. Raymond *v.* Sturges, 23 Conn. 134; Higson *v.* Thompson, 8 U. C. Q. B. 561.

What constitutes duplicity.— In a count in case alleging that plaintiff's slave was killed while working for defendant under a contract of employment, by reason of defendant's negligence in not repairing the building in which the slave was working and which fell on him, and also alleging that defendant, knowing the condition of the building, fraudulently represented to the slave and one who was working with him that it was safe, is not bad for duplicity, since the allegation as to fraudulent representation may be treated as surplusage and the count still charge a good cause of action. Perry *v.* Marsh, 25 Ala. 659.

64. **Alabama.**— Ala. Code (1886), § 2673, provides that counts in trespass and trespass on the case may be joined when they relate to the same subject-matter.

Arkansas.— Counts in trespass and counts in case may be joined in one declaration. Chrisman *v.* Carney, 33 Ark. 316.

Illinois.— Under Ill. Rev. Stat. (1874), p. 777, § 22, abolishing the distinction between actions on the case and trespass, counts in trespass and in case may be united in one declaration. Barker *v.* Koozier, 80 Ill. 205; Krug *v.* Ward, 77 Ill. 603; Gay *v.* De Werff, 17 Ill. App. 417.

Michigan.— Howell's Stat. Mich. § 7759, providing that in any case where trespass will lie, trespass on the case may be brought, removes all objections to a joinder of a count in trespass with one in case. Bellant *v.* Brown, 78 Mich. 294, 44 N. W. 326.

Vermont.— Vt. Stat. (1894), § 1153, provides that counts in trespass may be joined with counts in trespass on the case in one declaration, if for the same cause of action. Howard *v.* Tyler, 46 Vt. 683.

Virginia.— Under Va. Code, c. 148, § 7, providing that in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case, a count in trespass may be joined with a count in case, in an action purporting to be in case. Ferrill *v.* Brewis, 25 Gratt. (Va.) 765; Parsons *v.* Harper, 16 Gratt. (Va.) 64.

65. *Alabama.*— Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Guilford *v.* Kendall, 42 Ala. 651; Bell *v.* Troy, 35 Ala. 184; Sheppard *v.* Furniss, 19 Ala. 760.

Indiana.— Hines *v.* Kinnison, 8 Blackf. (Ind.) 119.

New Jersey.— Dale Mfg. Co. *v.* Grant, 34 N. J. L. 138.

Rhode Island.— Hunt *v.* Pratt, 7 R. I. 283.

South Carolina.— Haney *v.* Townsend, 1 McCord (S. C.) 206.

United States.— Nybladh *v.* Herterius, 41 Fed. 120.

England.— Turner *v.* Hawkins, 1 B. & P. 472; Haward *v.* Bankes, 2 Burr. 1113.

assumpsit.[66] A count in trover may, however, be joined in a declaration with a count in trespass on the case.[67]

10. Amendment. Plaintiff may amend his declaration so as to change the form of the action to an action on the case, where the amendment does not change the cause of action.[68]

B. Plea. Not guilty is an appropriate plea to a declaration in case and puts in issue every essential fact alleged in the declaration,[69] except matters set out merely by way of inducement.[70] A special plea alleging facts which may be given in evidence under the plea of not guilty is bad.[71]

XI. ISSUES AND PROOF.

A. In General. The pleading and the proof must correspond.[72] And the acts or omissions of defendant which are insisted on as a tortious violation of the duty imposed by his contract must be proved as alleged.[73]

B. Matters Admissible Under General Issue. Under the general issue, defendant may give in evidence any facts or circumstances which in equity are sufficient to bar plaintiff's claim.[74]

66. Howe *v.* Cook, 21 Wend. (N. Y.) 29; Corbett *v.* Packington, 6 B. & C. 268, 13 E. C. L. 131; Courtenay *v.* Earle, 10 C. B. 73, 15 Jur. 15, 20 L. J. C. P. 7, 70 E. C. L. 73. See also Assumpsit, Action of, 4 Cyc. 345, note 26.

67. Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170; Elmore *v.* Simon, 67 Ala. 526; Wilkinson *v.* Moseley, 30 Ala. 562; Dixon *v.* Barclay, 22 Ala. 370; Ferrier *v.* Wood, 9 Ark. 85; Ferrill *v.* Brewis, 25 Gratt. (Va.) 765; Dickon *v.* Clifton, 2 Wils. C. P. 319.

68. Smith *v.* Bellows, 77 Pa. St. 441, holding that where plaintiff has sued for money had and received by defendant under fraudulent representations it is not error to permit the plaintiff to amend his declaration so as to change the form of the action to one of trespass on the case for the deceit. See also Coggswell *v.* Baldwin, 15 Vt. 404, 40 Am. Dec. 686.

Where plaintiff has brought an action on the case for a wrong properly the subject-matter of an action of trespass, and the declaration alleges facts which show that he has also suffered an injury which is the proper subject-matter of an action on the case, he may amend so as to constitute the facts permitting him to sustain case, as the gravamen of his ground of recovery. Hobbs *v.* Ray, 18 R. I. 84, 25 Atl. 694. So a declaration which the pleader has termed in trespass but which should have been case may after trial be amended so as to conform to the facts proven. Price *v.* New Jersey R., etc., Co., 32 N. J. L. 19.

69. Plowman *v.* Foster, 6 Coldw. (Tenn.) 52.

Non-assumpsit is not a good plea. Wilkinson *v.* Moseley, 30 Ala. 562.

Conclusion.— Where a plea contains matter of fact and matter of record it may conclude to the country. Allen *v.* Crofoot, 7 Cow. (N. Y.) 46.

70. Watkins *v.* Lee, 7 Dowl. P. C. 498, 3 Jur. 484, 8 L. J. Exch. 266, 5 M. & W. 270.

71. Bridge *v.* Grand Junction R. Co., 3 M. & W. 244; Nellis *v.* Wilkes, 1 U. C. Q. B. 46.

Under a statute providing that where counts in case and trespass are joined the pleadings must conform to those in trespass, where counts in case and trespass are joined in an action to recover for personal injuries, defendant must plead contributory negligence specially in order to avail himself of such defense. Canadian Pac. R. Co. *v.* Clark, 73 Fed. 76, 74 Fed. 362, 38 U. S. App. 753, 20 C. C. A. 447.

72. *Arkansas.*— Johnson *v.* McDaniel, 15 Ark. 109.

Connecticut.— Walcott *v.* Canfield, 3 Conn. 194.

Illinois.—Gay *v.* De Werff, 17 Ill. App. 417; St. Louis, etc., R. Co. *v.* Summit, 3 Ill. App. 155.

Massachusetts.— Putnam *v.* Kingsbury, 16 Pick. (Mass.) 371.

New York.— Wilson *v.* Smith, 10 Wend. (N. Y.) 324.

Tennessee.— Manning *v.* Wells, 9 Humphr. (Tenn.) 746, 51 Am. Dec. 688.

Vermont.— Vail *v.* Strong, 10 Vt. 457.

Virginia.— Olinger *v.* McChesney, 7 Leigh (Va.) 660.

England.— Grainger *v.* Hill, 1 Arn. 42, 4 Bing. N. Cas. 212, 2 Jur. 235, 7 L. J. C. P. 85, 3 Scott 561, 33 E. C. L. 675; Weall *v.* King, 12 East 452, 11 Rev. Rep. 445.

Statutes abolishing the distinctions between the forms of actions in trespass and in case do not abrogate the rule that the proof must correspond with the allegations of the declaration. Chrisman *v.* Carney, 33 Ark. 316; Gay *v.* De Werff, 17 Ill. App. 417. *Compare* Duffield *v.* Rosenzweig, 144 Pa. St. 520, 23 Atl. 4.

73. Wilkinson *v.* Moseley, 18 Ala. 288.

74. *Arkansas.*— Hynson *v.* Taylor, 3 Ark. 552; Jones *v.* Buzzard, 2 Ark. 415.

Delaware.— Rust *v.* Flowers, 1 Harr. (Del.) 475.

XII. EVIDENCE.[75]

A. Burden of Proof. In an action of case for damages sustained by the carelessness of defendant the burden of showing negligence is upon plaintiff.[76]

B. Admissibility. In case for damages for unlawful and violent dispossession, brought by tenants against a landlord, evidence of the temper and disposition of defendant and his wife, who committed the acts of violence, are admissible to sustain the allegation that plaintiffs were kept out of possession by threats and violence.[77]

XIII. AMOUNT OF RECOVERY.

As the action is "founded on the plaintiff's title in justice and equity to receive a compensation in damages" the damages are to be estimated by the jury in view of all the circumstances of the particular case.[78]

CASES AT LAW. Ordinary common-law actions, as distinguished from suits in equity or admiralty, and special proceedings.[1]

CAS FORTUIT. CASUS FORTUITUS,[2] *q. v.*

CASH. A box;[3] specie;[4] gold and silver or its equivalent;[5] money;[6] current money[7] or bills;[8] money at command;[9] ready money;[10] money in chest, or

Illinois.—Kapischki *v.* Koch, 180 Ill. 44, 54 N. E. 179; Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Fulton *v.* Merrill, 23 Ill. App. 599.

New Hampshire.— Hills *v.* Boston, etc., R. Co., 18 N. H. 179.

Pennsylvania.— Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Greenwalt *v.* Horner, 6 Serg. & R. (Pa.) 71.

Tennessee.— Plowman *v.* Foster, 6 Coldw. (Tenn.) 52; Jones *v.* Allen, 1 Head (Tenn.) 626.

Vermont.— Kidder *v.* Jennison, 21 Vt. 108.

West Virginia.— Ridgeley *v.* West Fairmont, 46 W. Va. 445, 33 S. E. 235.

United States.— Canadian Pac. R. Co. *v.* Clark, 73 Fed. 76, 74 Fed. 362, 38 U. S. App. 753, 20 C. C. A. 447.

England.— Bird *v.* Randall, 3 Burr. 1345, 1 W. Bl. 373, 387; Holden *v.* Liverpool New Gas, etc., Co., 3 C. B. 1, 10 Jur. 883, 15 L. J. C. P. 301, 54 E. C. L. 1; Slater *v.* Swann, 2 Str. 872; Barker *v.* Dixon, 1 Wils. C. P. 44.

See 1 Cent. Dig. tit. "Action on the Case," § 45.

A matter of defense arising after the commencement of the suit may be shown under the general issue. Kapischki *v.* Koch, 180 Ill. 44, 54 N. E. 179; Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271.

The statute of limitations cannot be shown under the general issue but must be specially pleaded. Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271.

75. See, generally, EVIDENCE.

76. Bachelder *v.* Heagan, 18 Me. 32; Tourtellot *v.* Rosebrook, 11 Metc. (Mass.) 460.

77. Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888.

Intent.— In case for damages caused by defendants' sending out circulars and doing other acts affecting plaintiff's credit and business reputation, the proof of such acts is admissible to show the intent of defendants, and as contributing to the destruction of plaintiff's business. Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609.

78. Jones *v.* Allen, 1 Head (Tenn.) 626.

Waste.—In an action on the case for waste, the damages are confined to the actual injury done to the premises. Linton *v.* Wilson, 3 N. Brunsw. 223.

1. State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 216, 41 N. W. 1020, 3 L. R. A. 510.

2. Burrill L. Dict.

3. Hooper *v.* Flood, 54 Cal. 218, 221.

4. Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 219, 34 Am. Dec. 228; Farr *v.* Sims, Rich. Eq. Cas. (S. C.) 122, 131, 24 Am. Dec. 396.

5. St. John *v.* Mobile, 21 Ala. 224, 226.

6. Kitchell *v.* Jackson, 44 Ala. 302, 304; Hooper *v.* Flood, 54 Cal. 218, 221; Delaume *v.* Agar, McGloin (La.) 97, 105.

7. State *v.* Moore, 48 Nebr. 870, 878, 67 N. W. 876.

8. Farr *v.* Sims, Rich. Eq. Cas. (S. C.) 122, 131, 24 Am. Dec. 396.

9. Dazet *v.* Landry, 21 Nev. 291, 295, 30 Pac. 1064 [*citing* Wharton L. Dict.; Worcester Dict.]; Blair *v.* Wilson, 28 Gratt. (Va.) 165, 175 [*quoting* Worcester Dict.].

10. *California.*— Hooper *v.* Flood, 54 Cal. 218, 221.

Louisiana.— Delaume *v.* Agar, McGloin (La.) 97, 105 [*quoting* Webster Dict.].

Nevada.— Dazet *v.* Landry, 21 Nev. 291, 295, 30 Pac. 1064 [*citing* Wharton L. Dict.; Worcester Dict.].

Ohio.— Wilson *v.* Davis, 1 Dayton (Ohio) 170.

Virginia.— Blair *v.* Wilson, 28 Gratt. (Va.) 165, 175 [*quoting* Worcester Dict.].

United States.— Palliser *v.* U. S., 136 U. S. 256, 257, 10 S. Ct. 1034, 34 L. ed. 514.

on hand;[11] money on hand, which a merchant, trader or other person has to do business with;[12] money in hand, either in current coin or other legal tender, or in bank bills or checks paid and received as money;[13] not on credit.[14] (Cash: As Medium of Payment, see COMMERCIAL PAPER; PAYMENT. On Hand, see CASH ON HAND. Sale, see CASH SALE. Surrender Value, see CASH SURRENDER VALUE.)

CASH-ACCOUNT. In bookkeeping the record of all cash transactions; an account of money received and expended.[15]

CASH-BOOK. In bookkeeping an account-book in which is kept a record of all cash transactions.[16]

CASHIER. An officer or agent whose business is mainly to take care of the money of an institution, of a private person, or of a firm;[17] an officer of a moneyed institution or commercial house or bank who is intrusted with, and whose duty it is to take care of, the cash or money of an institution or bank;[18] one who has charge of money, or who superintends the books, payments, and receipts of a bank or moneyed institution;[19] sometimes abbreviated "cash."[20] In military law, to deprive an officer of his rank.[21] (Cashier: Of Bank,[22] see BANKS AND BANKING. Of Corporation, see CORPORATIONS.)

CASH MARKET VALUE. The price which the owner, if desirous of selling, would, under ordinary circumstances surrounding the sale of property, have sold the property for, and a person desirous of purchasing would, under such circumstances, have paid for it.[23]

CASH ON HAND. Money at hand ready to be used, actual cash or its equivalent, and actually on hand.[24]

CASH SALE. A sale for ready money, as distinguished from one upon credit.[25] (See, generally, AUCTIONS AND AUCTIONEERS; FACTORS AND BROKERS; PRINCIPAL AND AGENT; SALES; VENDOR AND PURCHASER.)

CASH SURRENDER VALUE. The cash value — ascertainable by known rules — of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, having contract right to do so.[26]

CASSATION. In French law, the act of annulling; reversal.[27] (Cassation: Court of, see COURT OF CASSATION.)

CASSETUR BILLA. Literally, "Let the bill be quashed." The form of judgment for defendant on a plea in abatement where the action was commenced by bill; the form of entry made by plaintiff, after plea in abatement, where the plea could not be confessed and avoided, traversed, or demurred to.[28]

CASSETUR BREVE. Literally, "Let the writ be quashed." The form of the judgment for defendant on a plea in abatement, where the action was commenced by original writ.[29]

CAST. To invest with; to place upon;[30] to overcome, overthrow, or defeat in a civil action at law;[31] to form into a particular shape, by pouring liquids into a mold;[32] that which is formed by founding; anything shaped in or as if in a mold.[33]

11. Webster Dict. [*quoted* in Delaume *v.* Agar, McGloin (La.) 97, 105].
12. Blair *v.* Wilson, 28 Gratt. (Va.) 165, 175 [*quoting* Bouvier L. Dict.].
13. Palliser *v.* U. S., 136 U. S. 256, 257, 10 S. Ct. 1034, 34 L. ed. 514.
14. Catlin *v.* Smith, 24 Vt. 85, 86.
15. Black L. Dict.
16. Black L. Dict.
17. Anderson L. Dict. [*quoted* in Rosenberg *v.* Texarkana First Nat. Bank, (Tex. Civ. App. 1894) 27 S. W. 897, 898].
18. Black L. Dict. [*quoted* in Rosenberg *v.* Texarkana First Nat. Bank, (Tex. Civ. App. 1894) 27 S. W. 897, 898].
19. Sturges *v.* Circleville Bank, 11 Ohio St. 153, 167, 78 Am. Dec. 296.
20. Nave *v.* Hadley, 74 Ind. 155, 157.
21. Black L. Dict.
22. Bank cashier's bond see BONDS, 5 Cyc. 810, note 1; 847, note 57.
23. Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 474, 62 N. E. 221.
24. State *v.* New York, etc., R. Co., 60 Conn. 326, 333, 22 Atl. 765.
25. Delaume *v.* Agar, McGloin (La.) 97, 105. See also Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204, 210.
26. *In re* Welling, 113 Fed. 189, 192. See also BANKRUPTCY, 5 Cyc. 350, note 71.
27. Abbott L. Dict.
28. Burrill L. Dict.
29. Burrill L. Dict.
30. Anderson L. Dict.
31. Black L. Dict.
32. Webster Dict. [*quoted* in Gary *v.* Cockley, 65 Fed. 497, 501, 13 C. C. A. 17].
33. Century Dict. [*quoted* in Gary *v.* Cockley, 65 Fed. 497, 501, 13 C. C. A. 17].

CASTIGATORY. A ducking-stool.[34]

CASTING VOTE. One which is given when the assembly is equally divided, and when the question pending is in such a situation that a vote more on either side will cast the preponderance on that side, and decide the question accordingly.[35]

CASTRATION. The act of gelding.[36] (Castration: Of Animals Running at Large, see ANIMALS.)

CASUAL. Not designedly brought about;[37] happening by accident or brought about by an unknown cause.[38] (Casual: Ejector, see CASUAL EJECTOR. Poor, see POOR PERSONS.)

CASUAL EJECTOR. The nominal defendant in an action of ejectment.[39] (See, generally, EJECTMENT.)

CASUALTY. Inevitable accident; event not to be foreseen or guarded against.[40] (Casualty: Insurance, see CASUALTY INSURANCE. See also ACCIDENT; ACT OF GOD.)

CASUALTY INSURANCE. Insurance against loss, through accidents, or casualties resulting in bodily injury or death;[41] but more properly insurance against the effects of accidents resulting in injuries to property.[42] (See, generally, INSURANCE.)

CASU CONSIMILI. Literally, "In a like case." A writ of entry granted where a tenant by the curtesy, or tenant for life, aliened in fee, or in tail; or for another's life; and was brought by him in reversion against the party to whom such tenant so aliened to his prejudice, and in the tenant's lifetime.[43]

CASU PROVISO. Literally, "In the case provided." A writ of entry where a tenant in dower, aliened in fee, or for life, etc., and it lay for him in reversion against the alienee.[44]

CASUS BELLI. An occurrence giving rise to or justifying war.[45]

CASUS FŒDERIS. A case within a treaty or compact, or to which it applies.[46]

CASUS FORTUITUS. An inevitable accident; a fortuitous event;[47] a loss happening in spite of all human effort and sagacity.[48] (See also ACCIDENT; ACT OF GOD; CASUALTY.)

CASUS FORTUITUS NON EST SPERANDUS, ET NEMO TENETUR DIVINARE. A maxim meaning "A fortuitous event is not to be expected, and no man is bound to foresee it."[49]

CASUS FORTUITUS NON EST SUPPONENDUS. A maxim meaning "A fortuitous event is not to be presumed."[50]

CASUS OMISSUS. A point unprovided for by statute.[51] (See, generally, STATUTES.)

CASUS OMISSUS ET OBLIVONI DATUS DISPOSITIONI JURIS COMMUNIS RELIN-

34. Jacob L. Dict. [*quoted* in U. S. *v.* Royall, 3 Cranch C. C. (U. S.) 620, 27 Fed. Cas. No. 16,202].

35. Cushing Law & Pr. Leg. Assembl. § 306 [*quoted* in Wooster *v.* Mullins, 64 Conn. 340, 342, 30 Atl. 144, 25 L. R. A. 694].

"By the common law, a casting vote sometimes signifies the single vote of a person who never votes; but in the case of an equality, sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote." People *v.* Church of Atonement, 48 Barb. (N. Y.) 603, 606.

36. Bouvier L. Dict.

37. Hovey *v.* Foster, 118 Ind. 502, 506, 21 N. E. 39.

38. *In re* Appropriations, 13 Colo. 316, 325, 22 Pac. 464; Lewis *v.* Lofley, 92 Ga. 804, 808, 19 S. E. 57.

39. Burrill L. Dict.

40. Standard Dict. [*quoted* in Ennis *v.* Fourth St. Bldg. Assoc., 102 Iowa 520, 522, 71 N. W. 426]; Crystal Springs Distillery Co. *v.* Cox, 47 Fed. 693, 695.

41. State *v.* Federal Invest. Co., 48 Minn. 110, 111, 50 N. W. 1028.

42. Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 408, 29 N. E. 529, where it is pointed out that insurance against the effects of accidents resulting in bodily injury or death is "accident insurance."

43. Jacob L. Dict.

44. Jacob L. Dict.

45. Wharton L. Lex.

46. Burrill L. Dict.

47. Black L. Dict.

48. The Majestic, 166 U. S. 375, 386, 17 S. Ct. 597, 41 L. ed. 1039.

49. Burrill L. Dict.

50. Black L. Dict.

51. Wharton L. Lex.

QUITUR. A maxim meaning "A case omitted and consigned to oblivion is left to the disposal of the common law." [52]

CASUS OMISSUS PRO OMISSO HABENDUS EST. A maxim meaning "A case omitted is to be held as intentionally omitted." [53]

CAT. A domesticated carnivorous quadruped; [54] a whip, consisting of nine lashes, with which criminals are flogged. [55]

CATALLA. In old English law, CHATTELS, [56] *q. v.*

CATALLA JUSTE POSSESSA AMITTI NON POSSUNT. A maxim meaning "Chattels justly possessed cannot be lost." [57]

CATALLA REPUTANTUR INTER MINIMA IN LEGE. A maxim meaning "Chattels are considered in law among the least things." [58]

CATALLIS CAPTIS NOMINE DISTRICTIONIS. An obsolete writ that lay where a house was within a borough, for rent issuing out of the same, and which warranted the taking of doors, windows, etc., by way of distress. [59]

CATALLIS REDENDIS. An obsolete writ that lay where goods delivered to a man to keep till a certain day were not upon demand redelivered at the day. [60]

CATCHING BARGAIN. A bargain for a loan or payment of money made on oppressive, extortionate, or unconscionable terms, between a person having money and another person having little or no property immediately available, but having property in reversion or expectancy. [61] (See, generally, ASSIGNMENTS; DESCENT AND DISTRIBUTION; USURY.)

CATCHINGS. Things caught, and in the possession, custody, power, and dominion of the party, with a present capacity to use them for his own purposes. [62] (Catchings: Insurance of, see MARINE INSURANCE. Seamen's Share of, see SEAMEN.)

CATCHPOLE. A sheriff's officer or BAILIFF, [63] *q. v.*

CATHEDRAL. The church of the bishop and head of the diocese, in which is his seat of dignity. [64]

CATHOLIC CREDITOR. In Scotch law, a creditor whose debt is secured on all or several distinct parts of the debtor's property. [65]

CATHOLIC EMANCIPATION ACT. The English statute [66] by which Roman Catholics were restored, in general, to the full enjoyment of all civil rights, except that of holding ecclesiastical offices, and certain high appointments in the state. [67]

CATTLE. [68] Beasts of pasture not wild nor domesticated; [69] kine, horses and some other animals appropriated to the use of man; [70] domestic quadrupeds collectively, especially those of the bovine genus, sometimes also including sheep, goats, horses, mules, asses, and swine; [71] a collective name for domestic quadru-

52. Burrill L. Dict.
53. Trayner Leg. Max.
54. Century Dict.
Liability of owner for injury by see ANIMALS, 2 Cyc. 368, note 77.
Property in see ANIMALS, 2 Cyc. 307, note 13.
55. Wharton L. Lex.
56. Burrill L. Dict.
57. Wharton L. Lex.
58. Black L. Dict.
59. Wharton L. Lex.
60. Wharton L. Lex.
61. Sweet L. Dict.
62. Rogers *v.* Mechanics' Ins. Co. 1 Story (U. S.) 603, 607, 20 Fed. Cas. No. 12,016, 4 Law Rep. 297.
63. Wharton L. Lex.
64. Wharton L. Lex.
65. Black L. Dict.
66. 10 Geo. IV, c. 7.
67. Burrill L. Dict.
68. **Derivation.**—"Richardson says the term is derived from chattels, and signifies *bona mobilia*, or movables. . . . Webster derives it from the Norman French '*catal*,' or the Old English 'catel,' signifying 'goods, cattle, movables.'" U. S. *v.* Mattock, 2 Sawy. (U. S.) 148, 149, 26 Fed. Cas. No. 15,744.
69. Johnson Dict. [*quoted* in U. S. *v.* Mattock, 2 Sawy. (U. S.) 148, 149, 26 Fed. Cas. No. 15,744].
70. Richardson Dict. [*quoted* in U. S. *v.* Mattock, 2 Sawy. (U. S.) 148, 149, 26 Fed. Cas. No. 15,744].
71. Webster Dict. [*quoted* in U. S. *v.* Mattock, 2 Sawy. (U. S.) 148, 149, 26 Fed. Cas. No. 15,744]. See also Endere *v.* McDonald, 5 Ind. App. 297, 31 N. E. 1056; Randall *v.* Richmond, etc., R. Co., 107 N. C. 748, 749, 12 S. E. 605, 11 L. R. A. 460; McIntosh *v.* State, 18 Tex. App. 284, 285.

peds, including the bovine tribe, also horses, asses, mules, sheep, goats, and swine, but especially applied to bulls, oxen, cows, and their young;[72] live stock; domestic quadrupeds which serve for tillage or other labor, or as food for man.[73] (Cattle: Gate, see CATTLE-GATE. Generally, see ANIMALS. Guards, see RAILROADS. Insurance of, see LIVE-STOCK INSURANCE.)

CATTLE-GATE. A right to pasture cattle in the land of another.[74] (See also BEAST-GATE.)

CAUCUS. See ELECTIONS.

CAUSA. A cause, occasion, or reason; a condition; a suit or action pending.[75]

CAUSA CAUSÆ EST CAUSA CAUSATI. A maxim meaning "The cause of a cause is the cause of the thing caused."[76]

CAUSA CAUSANS. The immediate cause.[77]

CAUSA ET ORIGO EST MATERIA NEGOTII. A maxim meaning "The cause and origin is the substance of the thing."[78]

CAUSA JACTITATIONIS MATRIMONII. A form of action which anciently lay in the spiritual court against a party who boasted or gave out that he or she was married to plaintiff, whereby a common reputation of their marriage might ensue.[79]

CAUSA MATRIMONII PRÆLOCUTI. Literally, "In consideration of a marriage before agreed upon." A writ of entry that formerly lay where a woman had given lands to a man in fee simple, with the intent that he should marry her, and he refused to do so within a reasonable time, after having been required by the woman.[80]

CAUSA MORTIS. With reference to, or in contemplation of, death.[81] (Causa Mortis: Donatio, see GIFTS.)

CAUSA PROXIMA NON REMOTA SPECTATUR.[82] A maxim meaning "The immediate and not the remote cause is to be considered."[83]

72. Worcester Dict. [*quoted* in People *v.* Barnes, 65 Cal. 16, 17, 2 Pac. 493; Endere *v.* McDonald, 5 Ind. App. 297, 31 N. E. 1056; Henderson *v.* Wabash, etc., R. Co., 81 Mo. 605, 606; State *v.* Groves, 119 N. C. 822, 823, 25 S. E. 819; Randall *v.* Richmond, etc., R. Co., 104 N. C. 410, 413, 10 S. E. 691; Decatur First Nat. Bank *v.* St. Louis Home Sav. Bank, 21 Wall. (U. S.) 294, 299, 22 L. ed. 560]. See also Newark, etc., Horse Car R. Co. *v.* Hunt, 50 N. J. L. 308, 311, 12 Atl. 697.

73. Century Dict. [*quoted* in Mathews *v.* State, 39 Tex. Crim. 553, 554, 47 S. W. 647, 48 S. W. 189].

74. Burrill L. Dict.

75. Burrill L. Dict.

76. Black L. Dict.

Applied in Rosewell *v.* Prior, 12 Mod. 635, 639.

Sometimes written *causa causantis, causa est causati.* See Marble *v.* Worcester, 4 Gray (Mass.) 395, 398.

77. Wharton L. Lex.

78. Burrill L. Dict.

Applied in Shelley's Case, 1 Coke 93*b*, 99*b*.

79. 3 Bl. Comm. 93.

80. Burrill L. Dict. See also 3 Bl. Comm. 183 note.

81. Burrill L. Dict.

82. Sometimes written *non remota sed proxima causa spectatur* (Gerson *v.* Slemons, 30 Ark. 50, 55), *non remota causa sed proxima spectatur* (Lynn Gas, etc., Co. *v.* Meriden F. Ins. Co., 158 Mass. 570, 575, 33 N. E. 690, 35 Am. St. Rep. 540, 20 L. R. A. 297), or *causa propinqua non remota spectatur* (China *v.* Southwick, 12 Me. 238, 240; Cowles *v.* Kidder, 24 N. H. 364, 383, 57 Am. Dec. 287).

83. Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 364, 1 Am. Rep. 431.

Applied in the following cases:

Arkansas.— Little Rock, etc., R. Co. *v.* Conatser, 61 Ark. 560, 564, 33 S. W. 1057; James *v.* James, 58 Ark. 157, 158, 23 S. W. 1099; Gerson *v.* Slemons, 30 Ark. 50, 55.

Kansas.— Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354, 375, 15 Am. Rep. 362.

Maine.— Bigelow *v.* Reed, 51 Me. 325, 332; China *v.* Southwick, 12 Me. 238, 240.

Maryland.— Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117, 136; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115, 142.

Massachusetts.— Freeman *v.* Mercantile Mut. Acc. Assoc., 156 Mass. 351, 353, 30 N. E. 1013, 17 L. R. A. 753.

Missouri.— Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 244, 20 S. W. 439, 34 Am. St. Rep. 379.

New Hampshire.— Gilman *v.* Noyes, 57 N. H. 627, 632; State *v.* Manchester, etc., R. Co., 52 N. H. 528, 552; Cowles *v.* Kidder, 24 N. H. 364, 383, 57 Am. Dec. 287.

New York.— Read *v.* Spaulding, 5 Bosw. (N. Y.) 395, 408.

Ohio.— Kirchner *v.* Myers, 35 Ohio St. 85, 94, 35 Am. Rep. 598; Barnesville First Nat. Bank *v.* Western Union Tel. Co., 30 Ohio St. 555, 567, 27 Am. Rep. 485; Daniels *v.* Ballantine, 23 Ohio St. 532, 539, 13 Am. Rep. 264; Childs *v.* Little Miami R. Co., 1 Cinc. Super. Ct. 480, 483.

Pennsylvania.— Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 364, 1 Am. Rep. 431.

CAUSA VAGA ET INCERTA NON EST CAUSA RATIONABILIS. A maxim meaning "A vague and uncertain cause is not a reasonable cause." [84]

CAUSE. In a legal sense a suit [85] at law or in equity; [86] litigation; [87] an action [88] at law; [89] case; [90] prosecution; [91] a judicial proceeding; [92] any question, civil or criminal, contested before a court of justice; [93] the origin or foundation of a thing, as of a suit or action; a ground of action; [94] the subject of difference between the parties, as settled by the pleadings, whether oral or written; [95] sufficient charges, notice thereof, and a hearing; [96] consideration. [97] In ordinary meaning [98] that which produces an effect; [99] that which produces or effects a result; that from which anything proceeds, and without which it would not exist; [1] to compel. [2] (Cause: Challenge of Jurors For, see JURIES. List, see CAUSE-LIST. Of Action, see CAUSE OF ACTION. Of Death of Insured, see ACCIDENT INSURANCE; LIFE INSURANCE. Probable, see MALICIOUS PROSECUTION. Proximate, of Injury, see NEGLIGENCE. Removal of Officer For, see OFFICERS.)

CAUSE-LIST. In England, an official list of actions, demurrers, petitions, appeals, etc., set down for trial or argument in open court, [3] analogous to the calendar or docket in American courts. [4]

West Virginia.— Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14, 38.

Wisconsin.— Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

United States.— General Mut. Ins. Co. *v.* Sherwood, 14 How. (U. S.) 351, 364, 14 L. ed. 452; Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213, 223, 9 L. ed. 691; Columbia Ins. Co. *v.* Lawrence, 10 Pet. (U. S.) 507, 517, 9 L. ed. 512.

England.— Marsden *v.* City, etc., Assur. Co., L. R. 1 C. P. 232, 234, 1 H. & R. 53, 12 Jur. N. S. 76, 35 L. J. C. P. 60, 13 L. T. Rep. N. S. 465, 14 Wkly. Rep. 106; Wadham *v.* Marlow, 1 H. Bl. 437, note *a*.

84. Wharton L. Lex.

Applied in Specot's Case, 5 Coke 57*a*, 57*b*.

85. *Georgia.*— Nacoochee Hydraulic Min. Co. *v.* Davis, 40 Ga. 309, 320 [*quoting* Bouvier L. Dict.].

Illinois.— Koon *v.* Nichols, 85 Ill. 155, 156.

Indiana.— Hendricks *v.* Frank, 86 Ind. 278, 283.

Nebraska.— Gibson *v.* Sidney, 50 Nebr. 12, 14, 69 N. W. 314 [*quoting* Black L. Dict.].

New Hampshire.— Farnum's Petition, 51 N. H. 376, 383 [*quoting* Bouvier L. Dict.].

New Jersey.— State *v.* Hancock, 54 N. J. L. 393, 400, 24 Atl. 726.

United States.— *Ex p.* Milligan, 4 Wall. (U. S.) 2, 112, 18 L. ed. 281 [*quoted* in State *v.* Newell, 13 Mont. 302, 304, 34 Pac. 28]; Taylor *v.* U. S., 45 Fed. 531, 539 [*quoting* Bouvier L. Dict.].

86. State *v.* Gordon, 8 Wash. 488, 490, 36 Pac. 498 [*citing* Anderson L. Dict.].

87. Black L. Dict. [*quoted* in Gibson *v.* Sidney, 50 Nebr. 12, 14, 69 N. W. 314].

88. *Georgia.*— Nacoochee Hydraulic Min. Co. *v.* Davis, 40 Ga. 309, 320 [*quoting* Bouvier L. Dict.].

Maine.— Scott *v.* Perkins, 28 Me. 22, 33, 48 Am. Dec. 470 (where the word is said to be applicable to every species of action); Bridgton *v.* Bennett, 23 Me. 420, 430.

Nebraska.— Gibson *v.* Sidney, 50 Nebr. 12, 14, 69 N. W. 314 [*quoting* Black L. Dict.].

New Hampshire.— Farnum's Petition, 51 N. H. 376, 383 [*quoting* Bouvier L. Dict.].

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89. State *v.* Gordon, 8 Wash. 488, 490, 36 Pac. 498 [*citing* Anderson L. Dict.].

90. Shirts *v.* Irons, 47 Ind. 445, 447; Erwin *v.* U. S., 37 Fed. 470, 479, 2 L. R. A. 229. See also ACTIONS, 1 Cyc. 714; CASE.

91. State *v.* Hancock, 54 N. J. L. 393, 400, 24 Atl. 726.

92. State *v.* Gordon, 8 Wash. 488, 490, 36 Pac. 498 [*citing* Anderson L. Dict.].

93. Black L. Dict. [*quoted* in Gibson *v.* Sidney, 50 Nebr. 12, 14, 69 N. W. 314]; Bouvier L. Dict. [*quoted* in Nacoochee Hydraulic Min. Co. *v.* Davis, 40 Ga. 309, 320; Roberts *v.* Robeson, 22 Ind. 456, 458; Farnum's Petition, 51 N. H. 376, 383; Taylor *v.* U. S., 45 Fed. 531, 539; Erwin *v.* U. S., 37 Fed. 470, 479, 2 L. R. A. 229].

94. U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 33, 27 Fed. Cas. No. 16,151, 7 Am. L. Reg. N. S. 233, 1 Am. L. T. Rep. (U. S. Cts.) 22.

95. Davidson *v.* Farrell, 8 Min. 258, 262.

96. State *v.* Walbridge, 62 Mo. App. 162, 164 [*quoted* in State *v.* Walbridge, 69 Mo. App. 657, 669].

97. Mouton *v.* Noble, 1 La. Ann. 192, 194, where it is said: "The civilians use the term 'cause' in relation to obligations, in the same sense as the word 'consideration' is used in the jurisprudence of England and the United States. It means the motive, the inducement to the agreement — *id quod inducet ad contrahendum.*"

98. Use of "inflict" for "cause" see ASSAULT AND BATTERY, 3 Cyc. 1036, note 31.

99. Thompson *v.* Louisville, etc., R. Co., 91 Ala. 496, 498, 8 So. 406, 11 L. R. A. 146.

1. Webster Dict. [*quoted* in State *v.* Dougherty, 4 Oreg. 202, 203].

2. Poole *v.* Vernon, 2 Hill (S. C.) 667, 670.

3. Sweet L. Dict.

4. Abbott L. Dict.

CAUSE OF ACTION.[5] The right which a party has to institute and carry through a proceeding;[6] a right to bring an action, which implies that there is some person in existence who can assert, and also a person who can lawfully be sued;[7] the right to bring a suit;[8] right of action;[9] a legal right of the plaintiff invaded by the defendant;[10] matter for which an action may be brought;[11] the ground on which an action may be sustained;[12] the fact or combination of facts which gives rise to a right of action;[13] every fact which is material to be proved to entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse.[14] Sometimes a person having a right of action.[15] (Cause of Action: Accrual of, see LIMITATIONS OF ACTIONS. Generally, see ACTIONS.)

CAUSEWAY. A way raised above the natural level of the ground by stones, earth, timber fascines, etc.,[16] serving as a dry passage over wet or marshy ground, or as a mole to confine water to a pond or restrain it from overflowing lower ground.[17]

5. Distinguished from "action."— The action is simply the right or power to enforce an obligation. It springs from the obligation, and hence the "cause of action" is simply the obligation. Frost *v.* Witter, 132 Cal. 421, 426, 64 Pac. 705, 84 Am. St. Rep. 53 [*citing* Pomeroy Pl. & Pr. § 453].

Distinguished from "remedy" and "relief."—"Cause of action" is to be distinguished from the "remedy," which is simply the means by which the obligation or the corresponding action is effectuated, and also from the "relief" sought. Frost *v.* Witter, 132 Cal. 421, 426, 64 Pac. 705, 84 Am. St. Rep. 53 [*citing* Pomeroy Pl. & Pr. § 453]. "A cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief, by the application of such remedies as the laws may afford. But the cause of action, and the remedy sought, are entirely different matters. The one precedes and, it is true, gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles. It is true, that the motive which prompts the action is a desire for relief, and to obtain this relief is the object of the action, and in this sense the relief sought is the cause of the action; but this is not the legal sense of the phrase 'cause of action.'" Emory *v.* Hazard Powder Co., 22 S. C. 476, 481, 53 Am. Rep. 730. See also ACTIONS, 1 Cyc. 643.

Distinguished from "subject of action."— Scarborough *v.* Smith, 18 Kan. 399, 406. See also ACTIONS, 1 Cyc. 643, note 5.

Distinguished from "subject-matter of litigation."— Wisconsin *v.* Torinus, 28 Minn. 175, 180, 9 N. W. 725.

6. Anderson L. Dict. [*quoted* in People *v.* Dodge, 104 Cal. 487, 490, 38 Pac. 203; Davis *v.* State, 119 Ind. 555, 558, 22 N. E. 9]; Meyer *v.* Van Collem, 28 Barb. (N. Y.) 230, 231.

7. Bouvier L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 148; Parker *v.* Enslow, 102 Ill. 272, 276, 40 Am. Rep. 588; Elliott *v.* Knight, 64 Ill. App. 87, 89].

8. Black L. Dict. [*quoted* in People *v.* Dodge, 104 Cal. 487, 490, 38 Pac. 203].

9. Graham *v.* Scripture, 26 How. Pr. (N. Y.) 501, 507; Bach *v.* Brown, 17 Utah 435, 439, 53 Pac. 991. See also ACTIONS, 1 Cyc. 642, note 3.

10. Suber *v.* Chandler, 18 S. C. 526, 530 [*quoted* in Drake *v.* Whaley, 35 S. C. 187, 190, 14 S. E. 397]. See also Kennerty *v.* Etiwan Phosphate Co., 21 S. C. 226, 234, 53 Am. Rep. 669.

11. Black L. Dict. [*quoted* in People *v.* Dodge, 104 Cal. 487, 490, 38 Pac. 203]; Bouvier L. Dict. [*quoted* in Smart *v.* Morrison, 15 Ill. App. 226, 229].

12. Black L. Dict. [*quoted* in People *v.* Dodge, 104 Cal. 487, 490, 38 Pac. 203; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 737, 20 S. E. 696].

13. Rapalje & L. L. Dict. [*quoted* in Bach *v.* Brown, 17 Utah 435, 439, 53 Pac. 991; Mason *v.* Union Pac. R. Co., 7 Utah 77, 83, 24 Pac. 796; Bruil *v.* Northwestern Mut. Relief Assoc., 72 Wis. 430, 433, 39 N. W. 529].

14. Williamson *v.* Chicago, etc., R. Co., 84 Iowa 583, 588, 51 N. W. 60. See also ACTIONS, 1 Cyc. 641, note 1. But *compare* Bliss Code Pl. § 113 [*quoted* in Bach *v.* Brown, 17 Utah 435, 439, 53 Pac. 991]; Bank of Commerce *v.* Rutland R. Co., 10 How. Pr. (N. Y.) 1, 9; Harvey *v.* Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580 [*quoted* in Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 737, 20 S. E. 696]; Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237; Jackson *v.* Spittall, L. R. 5 C. P. 542, 552, 39 L. J. C. P. 321, 22 L. T. Rep. N. S. 755, 18 Wkly. Rep. 1162, to the effect that in popular meaning, and for many purposes, in legal meaning, "cause of action" signifies the act on the part of defendant which gives plaintiff his cause of complaint. See also Williamson *v.* Chicago, etc., R. Co., 84 Iowa 583, 588, 51 N. W. 60; ACTIONS, 1 Cyc. 642, note 2.

15. Thus, where a legacy is left to a married woman, and she and her husband bring an action to recover it, she is called in the old books the "meritorious cause of action." Rose *v.* Bowler, 1 H. Bl. 108.

16. Webster Dict. [*quoted* in State *v.* Burlington, etc., R. Co., 99 Iowa 565, 567, 68 N. W. 819; Gray *v.* Burlington, etc., R. Co., 37 Iowa 119, 123].

17. Webster Dict. [*quoted* in Omaha, etc., R. Co. *v.* Severin, 30 Nebr. 318, 322, 46 N. W.

CAUTION. In admiralty and in Scotch law, security or bail.[18]

CAUTIONARY. In Scotch law, an instrument in which a person binds himself as surety for another.[19]

CAUTIONER. In Scotch law, a surety or guarantor.[20]

CAUTIOUS. Over prudent, fearful, timorous.[21]

CAVEAT. Literally, "Let him beware." A formal notice, or caution, given by a party interested, to a court, judge, or public officer, against the performance of certain judicial or ministerial acts;[22] a caution, entered in the spiritual court, to stop probates, administrations, faculties, and such like, from being granted without the knowledge of the party that enters.[23] (Caveat: Against Probate of Will,[24] see WILLS. On Application For Patent — For Invention, see PATENTS; For Public Lands, see PUBLIC LANDS.)

CAVEAT EMPTOR. A maxim meaning "Let a purchaser beware."[25] (See, generally, COVENANTS; SALES; VENDOR AND PURCHASER.)

CAVEAT VENDITOR. A civil-law maxim meaning "Let the seller beware."[26]

CAVEAT VIATOR. A maxim meaning "Let the traveller beware."[27] (See, generally, MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.)

C. C. See CEPI CORPUS.

CEDAR. *Cedrela odorato*, a cabinet wood of the mahogany group, capable of taking a high polish.[28]

CEDE. To yield up;[29] to yield, surrender, or give up;[30] to assign or transfer;[31] to grant.[32]

CEDENT. In Scotch law, an assignor.[33]

CEDO. Literally, "I grant." The ordinary word used in Mexican conveyances to pass title to lands.[34]

CÉDULE. In French law, the technical name of an act under private signature.[35]

CELEBRATION OF MARRIAGE. See MARRIAGE.

CELL. A very small room.[36]

CELLULOID. An arbitrary and fanciful trade-name for various compounds of pyroxyline.[37]

842 (*citing* Century Dict. as in substantial agreement)].

18. Burrill L. Dict.

19. Black L. Dict.

20. Burrill L. Dict.

21. Webster Dict. [*quoted* in McClafferty *v.* Philp, 151 Pa. St. 86, 90, 24 Atl. 1042, where it is said: "There is at least a shade of difference in meaning between the words 'cautious' and 'prudent'"].

22. Burrill L. Dict. See also Slocum *v.* Grandin, 38 N. J. Eq. 485, 488.

23. Williams Executors 573 [*quoted* in *Ex p.* Crafts, 28 S. C. 281, 285, 5 S. E. 718].

24. Error on order upon motion for dismissal of one caveat against probate of will see APPEAL AND ERROR, 2 Cyc. 589, note 86.

25. Broom Leg. Max.

26. Abbott L. Dict.

27. Black L. Dict.

28. *In re* Myers, 69 Fed. 237, 239, where it is said that this "is the only wood in the United States which is known as 'cedar' pure and simple."

29. Den *v.* Pierson, 16 N. J. L. 181, 184.

30. Baltimore *v.* Baltimore, etc., Turnpike Road, 80 Md. 535, 542, 31 Atl. 420.

31. Wharton L. Lex.

32. Baltimore *v.* Baltimore, etc., Turnpike Road, 80 Md. 535, 542, 31 Atl. 420.

33. Burrill L. Dict.

34. Mulford *v.* Le Franc, 26 Cal. 88, 108, where the word is erroneously spelled "sedo."

35. Campbell *v.* Nicholson, 3 La. Ann. 458, 461.

36. Pauly Jail-Building Co. *v.* Kearney County, 68 Fed. 171, 173, 32 U. S. App. 338, 15 C. C. A. 351.

37. Celluloid Mfg. Co. *v.* Read, 47 Fed. 712; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 32 Fed. 94.

CEMETERIES

By Archibald C. Boyd

CROSS-REFERENCES

For Exemption of Cemetery From:
Assessment For Local Improvements, see MUNICIPAL CORPORATIONS.
Taxation, see TAXATION.
Liability of Estate For Burial Expenses, see EXECUTORS AND ADMINISTRATORS.
Rights, Duties, and Liabilities as to Possession or Disposition of Dead Body, see DEAD BODIES.

I. DEFINITION.

A cemetery is a place where the dead bodies of human beings are buried.[1]

II. ESTABLISHMENT AND REGULATION.

A. Power to Establish and Regulate[2] — **1. IN GENERAL.** The legislature, in the exercise of its police power, has the right to provide for the establishment and discontinuance of cemeteries and to regulate their use.[3] But as burial places

1. Concordia Cemetery Assoc. *v.* Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536; Winters *v.* State, 9 Ind. 172; Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768. See also Application of St. Bernard Cemetery Assoc., 58 Conn. 91, 19 Atl. 514.

Other definitions are: A place of burial. Black L. Dict.

A place set apart for the burial of the dead. Bouvier L. Dict.

In California if six or more human bodies are buried at one place such place is a cemetery. Stockton *v.* Weber, 98 Cal. 433, 33 Pac. 332; Cal. Pol. Code, § 3106.

Classes of cemeteries.— A cemetery may be either a public or a private one. The former class is used by the general community or neighborhood or church, while the latter is used only by a family or a small portion of a community. Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768.

The words "cemetery" and "burial place" are synonymous in common parlance. Reg. *v.* Manchester, 5 E. & B. 702, 2 Jur. N. S. 182, 25 L. J. M. C. 45, 4 Wkly. Rep. 98, 85 E. C. L. 702. See also Jenkins *v.* Andover, 103 Mass. 94; Cowley *v.* Byas, 5 Ch. D. 944. 37 L. T. Rep. N. S. 238, 26 Wkly. Rep. 1.

2. As to power: To condemn land for cemetery see *infra,* V, A, 1. To regulate care and management of lots see *infra,* III, C, 2.

3. *Connecticut.*— Scovill *v.* McMahon, 62 Conn. 378, 26 Atl. 479, 36 Am. St. Rep. 350, 21 L. R. A. 58.

Illinois.— Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71; Ritchey *v.* Canton, 46 Ill. App. 185.

Massachusetts.— Woodlawn Cemetery *v.* Everett, 118 Mass. 354; Sohier *v.* Trinity Church, 109 Mass. 1.

Missouri.— Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

New Hampshire.— Page *v.* Symonds, 63 N. H. 17, 56 Am. Rep. 481.

are indispensable and concern the public health they are not the subject of absolute prohibition by legislative action.[4]

2. Delegation of Power to Municipality. The power existing in the legislature to regulate the burial of the dead[5] may be delegated by the legislature to municipalities.[6] If the power has been so delegated[7] municipalities may, by ordinance, establish such regulations concerning the manner of digging graves, their depth, and the interment of dead bodies as are reasonable[8] in their character and necessary for the protection of the public health and welfare.[9] They may even prohibit future burials in existing cemeteries or the establishment of new ceme-

New Jersey.—Newark *v.* Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843.

New York.— People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, 41 N. Y. St. 244; Went *v.* Williamsburgh Methodist Protestant Church, 80 Hun (N. Y.) 266, 30 N. Y. Suppl. 157, 62 N. Y. St. 31; Coates *v.* New York, 7 Cow. (N. Y.) 585.

North Carolina.— Humphrey *v.* Front St. M. E. Church, 109 N. C. 132, 13 S. E. 793.

Pennsylvania.— Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377.

Wisconsin.—Pfleger *v.* Groth, 103 Wis. 104, 79 N. W. 19.

United States.— *In re* Wong Yung Quy, 6 Sawy. (U. S.) 442, 2 Fed. 624.

England.— Reg. *v.* Manchester, 5 E. & B. 702, 2 Jur. N. S. 182, 25 L. J. U. C. 45, 4 Wkly. Rep. 98, 85 E. C. L. 702.

See 9 Cent. Dig. tit. "Cemeteries," § 1.

An act prohibiting interments in certain places is not unconstitutional, either as impairing the obligation of contracts or taking private property for public use without compensation, but stands on the ground of being an authority to make police regulations in respect of nuisances. Scovill *v.* McMahon, 62 Conn. 378, 26 Atl. 479, 36 Am. St. Rep. 350, 21 L. R. A. 58; Newark *v.* Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843; Coates *v.* New York, 7 Cow. (N. Y.) 585. *Compare* Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71.

4. Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71. See also Application of St. Bernard Cemetery Assoc., 58 Conn. 91, 19 Atl. 514.

5. See *supra*, II, A, 1.

6. *Illinois.*—Ritchey *v.* Canton, 46 Ill. App. 185.

Missouri.— Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

New Hampshire.— Page *v.* Symonds, 63 N. H. 17, 56 Am. Rep. 481.

New York.— People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, 41 N. Y. St. 244.

North Carolina.— Humphrey *v.* Front St. M. E. Church, 109 N. C. 132, 13 S. E. 793.

Pennsylvania.— Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377.

7. Delegation of power.— Under a charter giving a city power "to make any and all regulations necessary to secure, protect, preserve and restore the general health," the city has power to pass an ordinance regulating the burial of the dead. Graves *v.* Bloomington, 17 Ill. App. 476. So a charter provision authorizing a city "to make regulations to secure the general health of the inhabitants, and prevent and remove nuisances" (Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593), or a charter provision authorizing a city "to regulate the burial of the dead" (Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114), is a sufficient grant of police power to authorize the prohibition of burials and the discontinuance of graveyards in the populous districts of cities. See also People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, 41 N. Y. St. 244.

8. Reasonableness of regulation.—A county ordinance making it unlawful to establish, extend, or enlarge any cemetery within the limits of the county, without first obtaining permission of the supervisors, but impliedly permitting burials in cemeteries already established, without restriction, is unreasonable in making the right to pursue a lawful avocation depend upon the arbitrary will of the supervisors and unequal in its operation, in assuming to limit the unrestricted privilege of burial to one class of citizens and to deny it to another class within the same district. Los Angeles County *v.* Hollywood Cemetery Assoc., 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75. And an ordinance permitting burials within a district to an extent greater in number than it prevents cannot be upheld as an exercise of the police power. *Ex p.* Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618. See also Austin *v.* Murray, 16 Pick. (Mass.) 121, holding that a city ordinance which amounts to a prohibition of interment of dead bodies within the city is void. And see *Ex p.* Wygant, 39 Oreg. 429, 64 Pac. 867, 87 Am. St. Rep. 673, 54 L. R. A. 636.

9. *California.*— Los Angeles County *v.* Hollywood Cemetery Assoc., 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75.

Illinois.— Ritchey *v.* Canton, 46 Ill. App. 185; Graves *v.* Bloomington, 17 Ill. App. 476.

Indiana.— Bogert *v.* Indianapolis, 13 Ind. 134.

Missouri.— Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

New York.— People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, 41 N. Y. St. 244.

Oregon.— *Ex p.* Wygant, 39 Oreg. 429, 64 Pac. 867, 87 Am. St. Rep. 673, 54 L. R. A. 636.

Texas.— Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

teries within specified portions of their corporate limits.[10] The power when thus possessed is a continuing power which may be exercised by the municipality from time to time as the public health and welfare may require.[11]

B. Power to Change Control. The control of a cemetery which has been acquired by a town solely for public use and in which it has no beneficial interest may lawfully be taken from it by the legislature and vested in a city which has been organized within its limits, and which embraces the cemetery within its boundaries, if the rights and beneficial interests in the property of the inhabitants of both city and town are saved to them.[12]

III. COMPANIES AND ASSOCIATIONS.

A. Charter or Articles of Association — 1. In General. The purposes for which cemetery corporations may be organized are public rather than private.[13] Accordingly a corporation organized for the avowed purpose of establishing a public cemetery without capital stock or contributions from its members cannot be adapted to the acquisition of profits and emoluments by the directors and incorporators.[14]

2. Enlargement of Cemetery. Under a statute authorizing individuals to associate for the purpose of procuring and establishing a burying-ground individuals may associate to enlarge a burying-ground theretofore used as a public burying-ground.[15]

B. Membership. Ownership of a lot is not equivalent to membership in a society which by its charter was to consist of such persons as might be admitted members and comply with the articles and rules of the society.[16]

See, generally, MUNICIPAL CORPORATIONS.

10. *Missouri.*— Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

New York.— People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, 41 N. Y. St. 244; Coates *v.* New York, 7 Cow. (N. Y.) 585.

North Carolina.— Humphreys *v.* Front St. M. E. Church, 109 N. C. 132, 13 S. E. 793.

South Carolina.— Charleston *v.* Wentworth St. Baptist Church, 4 Strobh. (S. C.) 306.

Texas.— Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

Cemetery outside corporate limits.— The authorities of a city have no power to prohibit the establishment of cemeteries outside of the city limits nor have they any control over them when so established. Begein *v.* Anderson, 28 Ind. 79.

11. People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, 41 N. Y. St. 244.

Under a charter giving a city authority to establish cemeteries, it has discretion to judge of their necessity and to select their location. Greencastle *v.* Hazelett, 23 Ind. 186.

12. Columbus *v.* Columbus, 82 Wis. 374, 52 N. W. 425, 16 L. R. A. 695. But see Mount Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515, holding that a statute requiring a city to transfer a cemetery to a new corporation thereby created is invalid, as it directs a transfer of the public rights of the city to a private corporation without compensation.

A statute providing that where a township is divided its burying-ground shall belong to the township in which it lies thereafter does not apply to a case where the cemetery falls within the limits of a city incorporated from the township. Board of Health *v.* East Saginaw, 45 Mich. 257, 7 N. W. 808.

13. Wolford *v.* Crystal Lake Cemetery Assoc., 54 Minn. 440, 56 N. W. 56.

In New Jersey the existence of stock or shareholders in a cemetery association is not contemplated or authorized by the statute providing for the organization of such associations. Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

In Pennsylvania, if the articles of association show that the corporators have complied with the statute, the court has no discretion in refusing a charter. *In re* Oakland Cemetery Co., 12 Pa. Co. Ct. 145. And an application for a charter by a cemetery company need not specifically locate the grounds to be used for the cemetery. *In re* Highland Cemetery Co., 4 Pa. Dist. 653, 16 Pa. Co. Ct. 533.

Alteration or amendment of charter.— A power reserved to the legislature to alter, amend, or repeal the charter of a cemetery corporation authorizes the legislature to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right. Close *v.* Glenwood Cemetery, 107 U. S. 466, 2 S. Ct. 267, 27 L. ed. 408.

14. Brown *v.* Maplewood Cemetery Assoc., 85 Minn. 498, 89 N. W. 872.

15. Edwards *v.* Stonington Cemetery Assoc., 20 Conn. 466.

16. Com. *v.* Union Burial-ground Soc., 78 Pa. St. 308.

Right to vote.— Where the charter and by-laws of a cemetery company provide that

C. Powers and Duties of Company or Association — 1. Power to Alienate or Encumber Lands. Lands once legally devoted to and used for burial become appropriated to a public purpose in such a sense that the power of the body in which the legal title may rest to use or alienate the same while such dedication remains in force is restricted.[17] It has accordingly been held that a cemetery corporation has no power to create debts on the faith of lands dedicated for a cemetery,[18] or to mortgage the same.[19]

2. Power to Regulate Care and Management of Lots. The proprietors of a cemetery may make rules and regulations for the care and management of lots in the cemetery.[20] Such authority is sometimes conferred by statute.[21] The rules and regulations must be reasonable,[22] equal in their operation, and uniform in their application to all owners of lots in the cemetery.[23]

3. Duty to Account For Revenues. A cemetery association organized for the purpose of establishing a public cemetery, without capital stock or contributions from its members, is a trustee for the benefit of those who lawfully make use of

every person being the purchaser of one or more of the burial lots, and subscribing to the articles and by-laws, shall become a member of the company, and be entitled to one vote for every lot so purchased, the trustees of the company have no right, as such, to cast a number of votes equal to the unsold lots remaining in their hands. They can vote as purchasers of lots, like other persons. Com. *v.* Fisher, 2 Brewst. (Pa.) 394, 7 Phila. (Pa.) 264.

17. Wolford *v.* Crystal Lake Cemetery Assoc., 54 Minn. 440, 56 N. W. 56.

In Maryland, to justify a decree for the sale of a burying-ground, under Maryland Acts 1868, c. 211, it must appear that the sale is necessary as well as for the interest and advantage of those interested. Reed *v.* Stouffer, 56 Md. 236.

Sale for other than burial purposes.—Without the consent of the stock-holders of a cemetery company and of those who have buried their dead in the cemetery upon the faith of its being perpetually used for the purposes for which it was dedicated, it is not within the power of the directors of the company to sell any part of its property for other purposes than that of burial of the dead. Woodland Cemetery Co. *v.* Ellison, 23 Ky. L. Rep. 2222, 67 S. W. 14.

18. Oakland Cemetery Co. *v.* People's Cemetery Assoc., 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 503, holding that cemetery lands are not subject to levy and sale under execution.

19. Wolford *v.* Crystal Lake Cemetery Assoc., 54 Minn. 440, 56 N. W. 56.

As to mortgage by lot owner see *infra*, VI, E.

Acceptance of benefits.— As it is beyond the power of a cemetery corporation to mortgage its cemetery lands, it cannot validate or give legal effect to its void act by ratification or by acceptance of benefits thereunder. Wolford *v.* Crystal Lake Cemetery Assoc., 54 Minn. 440, 56 N. W. 56.

20. Rosehill Cemetery Co. *v.* Hopkinson, 114 Ill. 209, 29 N. E. 685.

As to power to restrict right of burial see *infra*, VII, A.

21. Rosehill Cemetery Co. *v.* Hopkinson, 114 Ill. 209, 29 N. E. 685; Johnstown Cemetery Assoc. *v.* Parker, 28 Misc. (N. Y.) 280, 59 N. Y. Suppl. 821.

Imposition of fine.— As a cemetery association is not a governmental agency the legislature has no authority to give it the power to make certain acts within a cemetery illegal and impose a fine therefor. Johnstown Cemetery Assoc. *v.* Parker, 28 Misc. (N. Y.) 280, (N. Y.) 280, 59 N. Y. Suppl. 821.

22. **Reasonableness of regulation.**—A regulation by a cemetery association prohibiting lot owners from cutting grass and weeds on their lots is not a reasonable regulation within a statute providing that the directors may make reasonable rules for the care and management of lots in the cemetery. Johnstown Cemetery Assoc. *v.* Parker, 28 Misc. (N. Y.) 280, 59 N. Y. Suppl. 821.

23. Rosehill Cemetery Co. *v.* Hopkinson, 114 Ill. 209, 29 N. E. 685, holding that a cemetery corporation has no power to make or enforce a rule which would confer a right upon one lot owner in regard to the improvement of his property and deny the same right to another lot owner.

A purchaser of a cemetery lot from a private corporation is not bound by an ordinance enacted after a transfer of the cemetery to a city prohibiting any grave from being dug except by permission of the city sexton. Ritchey *v.* Canton, 46 Ill. App. 185. So where the charter of a cemetery company provided "that every lot, conveyed in said cemetery, shall be held by the proprietor for the purpose of sepulture alone, and for none other, as real estate" and by an instrument in writing, under seal, a lot in a cemetery was conveyed to a grantee, his heirs and assigns forever for such purpose, together with the right to cultivate trees, shrubs, and plants in the same, and he had exercised this right for more than twenty years, employing skilful and competent persons of his own selection to do the work, the cemetery company cannot by any subsequent order prevent the exercise of this right by the lot-holder personally or by any agent or servant he may employ. Silverwood *v.* Latrobe, 68 Md. 620, 13 Atl. 161.

lots sold to them by it, and is in duty bound to account to its beneficiaries, the lot owners, for moneys received therefrom.[24]

4. Duty to Care For and Repair Lots. A provision in a charter of a cemetery association that the association shall, out of the proceeds of sales of lots, keep the grounds in repair and in good order does not charge the association with the duty of caring for and keeping in repair lots which have been sold to individuals for burial purposes.[25]

IV. LOCATION.

A. Consent of Adjacent Landowners. By statute in some states a cemetery cannot be laid out within a certain distance of a dwelling-house, store, or other place of business without the consent of the owner of the same.[26] Such prohibition has been held to apply as well to a purchase as to land acquired by an appropriation proceeding.[27]

B. Consent of Public Authorities. The consent and approval[28] of the municipal authorities within or near whose limits it is proposed to locate a cemetery is sometimes required.[29] Such consent may be granted by the municipal

24. Brown *v.* Maplewood Cemetery Assoc., 85 Minn. 498, 89 N. W. 872. But see Bourland *v.* Springdale Cemetery Assoc., 158 Ill. 458, 42 N. E. 86, holding that there is nothing in the nature or object of a cemetery association which necessarily impresses upon its property or revenues a trust character. See also Fay *v.* Milford, 124 Mass. 79.

The denial by the members of a cemetery association of any trust relation to the lot owners who have buried their dead in the cemetery, and a refusal to account for moneys received and appropriated by them, authorize judicial interference to compel the recognition of the trust relation and the restoration of such funds to the treasury for the proper improvement and maintenance of the burial grounds. Brown *v.* Maplewood Cemetery Assoc., 85 Minn. 498, 89 N. W. 872. See also Hullman *v.* Honcomp, 5 Ohio St. 237, holding that a special and express trust created by the appropriation of a lot of ground by a cemetery association for the exclusive purpose of the burial of the dead of a certain religious society and the appropriation of the surplus means of the association solely to pious and charitable uses are objects which will be upheld and the execution of the trust strictly enforced in a court of equity, upon the application of any member of the association, where there has been an abuse or perversion of such trust.

25. Bourland *v.* Springdale Cemetery Assoc., 158 Ill. 458, 42 N. E. 86. But see Houston Cemetery Co. *v.* Drew, 13 Tex. Civ. App. 536, 36 S. W. 802, holding that a lot owner in a cemetery association may maintain a bill in equity against the corporation and its directors and officers for failure to keep the walks, drives, and approaches in proper repair.

26. Eastman *v.* Hampstead, 66 N. H. 195, 20 Atl. 975. See also Application of St. Bernard Cemetery Assoc., 58 Conn. 91, 19 Atl. 514; Cowley *v.* Byas, 5 Ch. D. 944, 37 L. T. Rep. N. S. 238, 26 Wkly. Rep. 1.

In acquiring land for burial purposes, and calculating the distance thereof from dwellings, township authorities must consider, not only the dwellings erected, but such as may be erected, allowing for the improvements made in the township. Camp *v.* Barre, 66 Vt. 495, 29 Atl. 811.

A statute providing that no cemetery shall be laid out within twenty rods of a dwelling-house, store, or other place of business without the consent of the owner of the same is a limitation of the authority conferred upon certain officers to exercise the public right of eminent domain and not a regulation of the private rights of landowners. Carter *v.* Moulton, 58 N. H. 64.

27. Stevens *v.* Manchester, 63 N. H. 390; Henry *v.* Perry Tp., 48 Ohio St. 671, 30 N. E. 1122; Norton *v.* Montville Tp., 8 Ohio Cir. Ct. 335.

Addition to cemetery.— A statute prohibiting township trustees from establishing a cemetery within two hundred yards of a dwelling-house applies to the location of an addition to a cemetery. Norton *v.* Montville Tp., 8 Ohio Cir. Ct. 335.

28. By granting consent to the location of a proposed cemetery the municipal authorities necessarily approve that location. Burdette *v.* Fairview, 66 N. J. L. 523, 49 Atl. 1029.

In New Jersey, on the hearing of an application to locate a cemetery made to the state board of health, under N. J. Pub. Laws 1885, p. 165, § 6, the state board acts judicially, and persons interested have a right to be heard. Dodd *v.* State Bd. of Health, (N. J. 1902) 51 Atl. 456.

29. Woodlawn Cemetery *v.* Everett, 118 Mass. 354; Burdette *v.* Fairview, 66 N. J. L. 523, 49 Atl. 1029; Porch *v.* St. Bridget's Congregation, 81 Wis. 599, 51 N. W. 1007.

The statute requiring the question of "cemetery or no cemetery" to be submitted to a vote of the electors of the township has no application to the acquisition of additional cemetery grounds. Norton *v.* Montville Tp., 8 Ohio Cir. Ct. 335.

authorities on motion. It is not necessary that it be given by ordinance or formal resolution[30]

C. Enjoining Location — 1. Of Proposed Cemetery. Chancery has jurisdiction to enjoin the action of municipal boards in establishing burial-places should they proceed to exercise it illegally or improperly to the injury of others.[31]

2. Of Established Cemetery. A cemetery is not a nuisance *per se*.[32] If, however, it can be shown that a cemetery is so situated that the burial of the dead there will injure life or health, either by corrupting the surrounding atmosphere or the water of wells or springs, the court will grant its injunctive relief, upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief and one which cannot be adequately redressed by an action at law.[33]

V. ACQUISITION OF, AND TITLE TO, LANDS.

A. Mode of Acquisition — 1. By Condemnation Proceedings. The legislature may lawfully provide for the compulsory taking of land for a public cemetery. Provision for the proper and decent burial of the dead is a public necessity and duty.[34]

A statute which forbids rural cemeteries to acquire land for cemetery purposes in certain counties, without first obtaining the consent of the supervisors of the county, applies only to the counties named therein. People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, 41 N. Y. St. 244.

30. Porch *v.* St. Bridget's Congregation, 81 Wis. 599, 51 N. W. 1007.

Sufficiency of application.— Under a statute providing that no corporation shall lay out or establish any cemetery within certain limits in or near a city or village without first obtaining the consent of the municipal authorities thereof, a communication addressed to the mayor and common council of a city and signed by the pastor, secretary, and treasurer of an incorporated religious society, asking that permission be granted to such society to maintain a cemetery on certain lots, is a sufficient application. Porch *v.* St. Bridget's Congregation, 81 Wis. 599, 51 N. W. 1007. And under a statute providing that all persons making application to the municipal authorities for the location or enlargement of any cemetery shall accompany the application with a descriptive map of the premises they propose to occupy, the map required need not describe the property shown thereon by metes and bounds, but it sufficiently complies with the statute if, from an examination of it, the municipal authorities can readily determine the location, size, and shape of such property. Burdette *v.* Fairview, 66 N. J. L. 523, 49 Atl. 1029.

31. Upjohn *v.* Board of Health, 46 Mich. 542, 9 N. W. 845.

32. *Alabama.*— Kingsbury *v.* Flowers, 65 Ala. 479, 39 Am. Rep. 14.

California.— Los Angeles County *v.* Hollywood Cemetery Assoc., 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75.

Illinois.— Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71; Lake View *v.* Letz, 44 Ill. 81.

Indiana.— Begein *v.* Anderson, 28 Ind. 79.

Maine.— Barnes *v.* Hathorn, 54 Me. 124.

North Carolina.— Clark *v.* Lawrence, 59 N. C. 83, 78 Am. Dec. 241; Ellison *v.* Washington, 58 N. C. 57, 75 Am. Dec. 430.

Ohio.— Henry *v.* Perry Tp., 48 Ohio St. 671, 30 N. E. 1122.

Oregon.— *Ex p.* Wygant, 39 Oreg. 429, 64 Pac. 867, 87 Am. St. Rep. 673, 54 L. R. A. 636.

Texas.— Dunn *v.* Austin, 77 Tex. 139, 11 S. W. 1125.

Wisconsin.—Pfleger *v.* Groth, 103 Wis. 104, 79 N. W. 19.

See, generally, Nuisances.

33. Lake View *v.* Letz, 44 Ill. 81; Lowe *v.* Prospect Hill Cemetery Assoc., 58 Nebr. 94, 78 N. W. 488, 46 L. R. A. 237; Clark *v.* Lawrence, 59 N. C. 83, 78 Am. Dec. 241; Ellison *v.* Washington, 58 N. C. 57, 75 Am. Dec. 430; Dunn *v.* Austin, 77 Tex. 139, 11 S. W. 1125.

A naked averment that a cemetery is a nuisance, without a statement of reasons to render it such, is not sufficient to authorize proceedings for its abatement. Begein *v.* Anderson, 28 Ind. 79.

Complainant sought to enjoin the location of a burying-ground near his residence for the reason, among others, that it would destroy his well. It was held to be a strong circumstance against his application that he had voluntarily bought and erected his residence in the immediate vicinity of the burying-ground which defendants were merely proposing to enlarge without bringing it nearer. Upjohn *v.* Board of Health, 46 Mich. 542, 9 N. W. 845.

34. *Connecticut.*— Westfield Cemetery Assoc. *v.* Danielson, 62 Conn. 319, 26 Atl. 345; Evergreen Cemetery Assoc. *v.* New Haven, 43 Conn. 234, 21 Am. Rep. 643; Edwards *v.* Stonington Cemetery Assoc., 20 Conn. 466.

Indiana.— Farneman *v.* Mt. Pleasant Cemetery Assoc., 135 Ind. 344, 35 N. E. 271.

Massachusetts.— Balch *v.* Essex County, 103 Mass. 106.

Michigan.— *Compare* Board of Health *v.*

2. By Dedication — a. In General. Land may be dedicated to the public for use as a cemetery.[35] And one who has dedicated land as a public cemetery, the dedication having been accepted, is estopped from denying it.[36]

b. Requisites and Sufficiency. To constitute a dedication of land for a cemetery it is not necessary that any conveyance be made,[37] or that there be any person capable of taking a conveyance otherwise than in trust.[38] A dedication may arise out of the conduct of the owner and the acts of those who rely thereon.[39]

B. Title Acquired. Where land is conveyed for the sole purpose of a burying-ground and it does not appear that the consideration paid was less than its full value, or that the grantor had any interest in or reason for having the land

Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114, holding that a statute which authorizes rural cemeteries to take property to enlarge their cemeteries is unconstitutional, in that it authorizes private corporations to exercise the power of eminent domain for private purposes.

New York.— *Compare* Matter of Deansville Cemetery Assoc., 66 N. Y. 569, 23 Am. Rep. 86 [*reversing* 5 Hun (N. Y.) 482], holding that a statute authorizing the taking of lands by a rural cemetery association, by proceeding *in invitum*, is unconstitutional.

Vermont.— Edgecumbe *v.* Burlington, 46 Vt. 218.

See, generally, Eminent Domain.

Land taken for the burial of the dead by a corporation authorized to establish and conduct a cemetery is taken for public use, if all the public have the right of burial there, even though the expense may operate practically to exclude some. Evergreen Cemetery Assoc. *v.* Beecher, 53 Conn. 551, 5 Atl. 353.

A statutory provision that no cemetery shall be laid out within a certain distance of a dwelling-house does not prohibit the taking of a dwelling-house and land on which it stands. Crowell *v.* Londonderry, 63 N. H. 42.

35. *Illinois.*— Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613.

Indiana.— Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246; Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768.

Kansas.— Hayes *v.* Houke, 45 Kan. 466, 25 Pac. 860.

Maryland.— Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

Missouri.— Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

New York.— Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407.

Rhode Island.— Mowry *v.* Providence, 10 R. I. 52.

Vermont.— Pierce *v.* Spafford, 53 Vt. 394.

See, generally, Dedication.

The dedication of land for a public burying-ground is in its nature a dedication to a permanent use. Com. *v.* Viall, 2 Allen (Mass.) 512; Stockton *v.* Newark, 42 N. J. Eq. 531, 9 Atl. 203. See also Weisenberg *v.* Truman, 58 Cal. 63.

Where the owner of land permitted during his life the use of it by the public as a burying-ground and expected that some time a church would be erected thereon, but where it was not shown that he intended to vest the title in any denomination exclusively, a church organization not in existence until after his death cannot recover the land of his heirs or their grantees, or compel a conveyance of the same to such church organization. Hicks *v.* Danford, 47 Ind. 223.

36. *Alabama.*— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

District of Columbia.— Glenwood Cemetery *v.* Close, MacArthur & M. (D. C.) 96.

Indiana.— Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246.

Maryland.— Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

New York.— Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407.

See, generally, Dedication.

37. Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246; Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; Hunter *v.* Sandy Hill. 6 Hill (N. Y.) 407.

38. Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246.

39. *Illinois.*— Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613.

Indiana.— Redwood Cemetery Assoc. *v.* Bandy, 93 Ind. 246; Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768.

Kansas.— Hayes *v.* Houke, 45 Kan. 466, 25 Pac. 860.

Maryland.—Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

New York.— Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407.

Ohio.— *Compare* Price *v.* Methodist Episcopal Church, 4 Ohio 515.

Virginia.— Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246.

See, generally, Dedication.

Illustrations.— Stating to people living in the vicinity that the ground might be used for a burial-place; suffering it to be fenced and exclusively used for such purpose for a great number of years; the appropriation of lots in it; and the making of roads constitute a sufficient dedication. Pierce *v.* Spafford, 53 Vt. 394. A dedication of land for a graveyard is also shown where the proprietors of the land mark it on a plat as "donated for graveyard" and the plat was used for making sale of other lands while the public accepted the use thus indicated by burying their dead on the land for about ten years. Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

The owner of land who permits his neighbors to use a graveyard on it does not neces-

used solely for burial purposes, the conveyance vests in the grantee an absolute estate in fee simple.[40]

C. Appropriation For Other Purpose. The fact that lands have previously been devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain.[41] And in the absence of special limitation or prohibition[42] streets and highways may be laid out through cemeteries.[43] It has been held, however, that a municipal corporation which holds land dedicated to public use as a burying-ground cannot appropriate the land for any other purpose.[44]

D. Abandonment — 1. What Constitutes. A cemetery is none the less a graveyard because further interment in it becomes impossible. It only loses its character as a resting-place of the dead when those already interred are exhumed and removed.[45] Land, however, will be deemed abandoned as a graveyard if the

sarily dedicate it to a public use. Brown *v.* Gunn, 75 Ga. 441.

40. Field *v.* Providence, 17 R. I. 803, 24 Atl. 143.

If a grant of property to be used as a cemetery contains a condition that a good fence shall be erected and maintained around it, the grantor being then the owner of adjacent land, the stipulation will be construed to be a covenant and not a condition subsequent, and the grantor is not entitled to reënter for failure to erect the fence. Scovill *v.* McMahon, 62 Conn. 378, 26 Atl. 479, 36 Am. St. Rep. 350, 21 L. R. A. 58. And a grant of land, which had been used as a burial-place, to a town for a burying place forever, in consideration of the love and affection of the grantor to the town, and for other valuable considerations, is not a grant on condition subsequent, so as to forfeit it by a diversion of it to the uses of a schoolhouse site. Rawson *v.* Uxbridge School Dist. No. 5, 7 Allen (Mass.) 125, 83 Am. Dec. 670. See also Portland *v.* Terwilliger, 16 Oreg. 465, 19 Pac. 90.

41. Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; Matter of Bd. of Street Opening, 133 N. Y. 329, 31 N. E. 102, 45 N. Y. St. 213, 28 Am. St. Rep. 640, 16 L. R. A. 180. See also Wood *v.* Macon, etc., R. Co., 68 Ga. 539, holding that the state, though it may have dedicated property for a cemetery by the exercise of its right of eminent domain, has the power to dedicate a portion of the same property to another public use not inconsistent with and destructive of the first use.

42. Woodmere Cemetery *v.* Roulo, 104 Mich. 595, 62 N. W. 1010. See also Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 7 N. E. 627, holding that the word "through," in an act providing that "no road, street, alley or thoroughfare shall be laid out or opened through" the grounds of a cemetery association "or any part thereof," without the consent of the charterers, was intended to mean the same as the word "over" and the object was to prevent any part of the lands from being taken for road or street purposes.

A charter of a cemetery association prohibiting the opening of a road through its property, without its consent, does not apply **in** case of a dedication of a part of the land of the cemetery to the public use as a street, with the express consent of the cemetery company. Eastern Cemetery Co. *v.* Louisville, 13 Ky. L. Rep. 279, 15 S. W. 1117.

43. Matter of Bd. of Street Opening, 133 N. Y. 329, 31 N. E. 102, 45 N. Y. St. 213, 28 Am. St. Rep. 640, 16 L. R. A. 180. See also *In re* Twenty-second St., 102 Pa. St. 108, holding that the right to open streets in the exercise of the state's right of eminent domain is not lost because of a special act of the legislature granting to a corporation perpetual immunity against the opening of streets through its cemetery.

Authority conferred in general terms upon a city to take lands required for public purposes does not authorize a city to run streets through lands which have been already acquired for and are appropriated to public use as a cemetery. Evergreen Cemetery Assoc. *v.* New Haven, 43 Conn. 234, 21 Am. Rep. 643.

44. Stockton *v.* Newark, 42 N. J. Eq. 531, 9 Atl. 203; Rousseau *v.* Troy, 49 How. Pr. (N. Y.) 492. See also La Societa, etc. *v.* San Francisco, 131 Cal. 169, 63 Pac. 174, 53 L. R. A. 382, to the effect that a city holding its cemetery lots in trust for public use as a cemetery cannot lawfully grant any part thereof to a private individual or corporation.

Trustees of real estate for religious purposes holding in trust for erecting a church and a burying-ground on said real estate cannot create a new use or convey the estate for purposes inconsistent with those for which they hold it. Brown *v.* Lutheran Church, 23 Pa. St. 495.

45. Kansas City *v.* Scarritt, (Mo. 1902) 69 S. W. 283. See also Stockton *v.* Newark, 42 N. J. Eq. 531, 9 Atl. 203, holding that where land is given in trust for a burial-place the trust is not to be considered as at an end when the last body which can be buried in it has been deposited. And see Com. *v.* Wellington, 7 Allen (Mass.) 299, holding that where land has become a public burying-ground by use and occupation as such, it does not lose that character by mere disuse.

The mere passage of a city ordinance prohibiting future burials in a graveyard does not constitute an abandonment thereof. Kansas City *v.* Scarritt, (Mo. 1902) 69 S. W. 283.

Land had been dedicated by the owner

public and those interested in its use as such have permanently appropriated it to a use entirely inconsistent with its use as a graveyard and it has become impossible to use it for that purpose.[46]

2. Reversion to Original Owners. The title to land dedicated for a graveyard reverts to the grantor or his heirs, when the public cease to bury in the land and refuse or neglect to erect or preserve monuments to indicate the identity of those already buried, or to give and continue to the place the character and name of a graveyard.[47]

VI. TITLE AND RIGHTS OF OWNERS OR LICENSEES OF LOTS.

A. Mode of Acquisition — 1. In General. No formal deed is necessary to confer the exclusive right to the use of a lot in a cemetery for burial purposes. Oral permission from the proprietors is sufficient.[48]

thereof to the inhabitants of a town for a burying-ground for thirty-six years. The trustees of the town, without authority, opened a highway across it which was traveled for ten years and then discontinued. It was held not to amount to an abandonment. Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 407.

46. Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593, holding that where no burials have for a long time been made and cannot be made in a burying-ground, and in addition thereto the public and those interested in its use have failed to keep and preserve it as a resting-place for the dead and have permitted it to be thrown out to the commons and the graves to be worn away, gravestones and monuments to be destroyed, and the graves to lose their identity, and it has been so treated or neglected by the public as to entirely lose its identity as a graveyard and is no longer known, recognized, and represented as such by the public, such facts constitute an abandonment of its use as a graveyard.

Rights of lot owner.— Where a cemetery has been abandoned for more than twenty years, all the trustees deceased or resigned, all the dead removed except plaintiff's family, and the property, or a large part of it, sold, equity will not appoint trustees for the corporation upon the petition of plaintiff alone, although he cannot be deprived of his property in the land. Whipple *v.* Louisville Presb. Orphan Asylum, 2 Ky. L. Rep. 391.

47. Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; Mahoning County *v.* Young, 59 Fed. 96, 16 U. S. App. 253, 8 C. C. A. 27 [*reversing* 51 Fed. 585], the latter case holding that where land is dedicated for a burying-ground, whether by a common-law dedication under which the fee remains in the owner or pursuant to a statute under which the fee is vested in the county in trust for the purposes named only, a lawful and effectual abandonment of the land as a burying-ground restores the former owner to his right of possession. See also Newark *v.* Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843.

By abolishing a cemetery, the land for which had been conveyed by a city to a trustee to be used for cemetery purposes, the city terminated the trust relation and it thereupon became and was the duty of the trustee to reconvey the property. Schlessinger *v.* Mallard, 70 Cal. 326, 11 Pac. 728.

A grant of land to church societies for the use and purpose of a church and burying-place is a grant for that special purpose, and when the purpose fails the land reverts to the donor or his heirs. Gumbert's Appeal, 110 Pa. St. 496, 1 Atl. 437. But see Cincinnati Methodist Protestant Church *v.* Laws, 7 Ohio Cir. Ct. 211, holding that a conveyance of land to a religious corporation "for a place of burial and other purposes" vests a fee simple title in the grantees, which is not defeasible on the cessation of the use of the land for burial and like purposes.

48. Conger *v.* Treadway, 50 Hun (N. Y.) 451, 3 N. Y. Suppl. 152, 20 N. Y. St. 774; Conger *v.* Weyant, 3 Silv. Supreme (N. Y.) 588, 7 N. Y. Suppl. 809, 28 N. Y. St. 745. But see Bryan *v.* Whistler, 8 B. & C. 288, 6 L. J. K. B. O. S. 302, 2 M. & R. 318, 15 E. C. L. 147, holding that a grant to the exclusive use of a vault in a church burying-ground cannot rest in parol.

Certificates of lots in a cemetery issued by a religious corporation convey no title to the land, where such certificates are not acknowledged in the way pointed out by the statute in force at the time, and which provided that no estate in land of above seven years' duration could pass unless the deed conveying the same was acknowledged in the way indicated in the statute or in some one of its supplements. Baltimore Catholic Cathedral Church *v.* Manning, 72 Md. 116, 19 Atl. 599.

Order of court.— A church corporation may convey a burial lot without an order of court which is necessary for an absolute conveyance of the soil. Richards *v.* Northwest Protestant Dutch Church, 32 Barb. (N. Y.) 42, 11 Abb. Pr. (N. Y.) 30, 20 How. Pr. (N. Y.) 317.

Sale ultra vires.— A contract by a cemetery association to sell burial lots cannot be avoided by the association on the ground that it was *ultra vires* after the buyer has executed it and paid the price. Palmer *v.* Cypress Hill Cemetery, 14 N. Y. St. 591 [*affirmed* in 122 N. Y. 429, 25 N. E. 983, 34 N. Y. St. 30].

2. Adverse Possession. The title to an easement of a burial lot may be acquired by prescription where adverse possession for that purpose is held for the statutory period.[49]

B. Title Acquired — 1. In General. The purchaser of a lot in a cemetery, though under a deed absolute in form, does not take any title to the soil. He acquires only a privilege or license to make interments in the lot purchased, exclusively of others, so long as the ground remains a cemetery.[50] Such privilege or license is subject to the police power of the state, in the exercise of which not only future interments may be prohibited but the remains of persons theretofore buried may be removed.[51] Therefore, when by lawful authority the ground ceases to be a place of burial, a lot holder's right ceases, except for the purpose of removing remains previously buried.[52]

49. Hook *v.* Joyce, 94 Ky. 450, 15 Ky. L. Rep. 337, 22 S. W. 651, 21 L. R. A. 96; Conger *v.* Weyant, 3 Silv. Supreme (N. Y.) 588, 7 N. Y. Suppl. 809, 28 N. Y. St. 745. See also Adverse Possession, II, B, 3, a [1 Cyc. 994].

50. *Alabama.*— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

Georgia.— Jacobus *v.* Congregation Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141.

Indiana.— Dwenger *v.* Geary, 113 Ind. 106, 14 N. E. 903.

Maine.— Gowen *v.* Bessey, 94 Me. 114, 46 Atl. 792.

Maryland.—Rayner *v.* Nugent, 60 Md. 515; Partridge *v.* Baltimore First Independent Church, 39 Md. 631.

Massachusetts.— Sohier *v.* Trinity Church, 109 Mass. 1.

New Hampshire.— Page *v.* Symonds, 63 N. H. 17, 56 Am. Rep. 481.

New York.— Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 503; Went *v.* Williamsburgh Methodist Protestant Church, 80 Hun (N. Y.) 266, 30 N. Y. Suppl. 157, 62 N. Y. St. 31; McGuire *v.* St. Patrick's Cathedral, 54 Hun (N. Y.) 207, 7 N. Y. Suppl. 345, 27 N. Y. St. 192; People *v.* St. Patrick's Cathedral, 21 Hun (N. Y.) 184; Richards *v.* Northwest Protestant Dutch Church, 32 Barb. (N. Y.) 42, 11 Abb. Pr. (N. Y.) 30, 20 How. Pr. (N. Y.) 317; Matter of Reformed Presb. Church, 7 How. Pr. (N. Y.) 476; Coates *v.* New York, 7 Cow. (N. Y.) 585; Windt *v.* German Reformed Church, 4 Sandf. Ch. (N. Y.) 471. *Compare* Matter of Brick Presb. Church, 3 Edw. (N. Y.) 155.

Ohio.—Price *v.* Methodist Episcopal Church, 4 Ohio 515.

Pennsylvania.— Hancock *v.* McAvoy, 151 Pa. St. 460, 25 Atl. 47, 31 Am. St. Rep. 774, 18 L. R. A. 781; Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377; Jacobs *v.* Union Cemetery Assoc., 1 Pa. Super. Ct. 156.

Rhode Island.— See Gardner *v.* Swan Point Cemetery, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897.

See 9 Cent. Dig. tit. "Cemeteries," § 16.

A grant of a lot in a cemetery is analogous to the grant of a pew in a meeting-house. Dwenger *v.* Geary, 113 Ind. 106, 14 N. E. 903; Page *v.* Symonds, 63 N. H. 17, 56 Am. Rep. 481; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377.

Partition.— A church and burial-ground held by two distinct religious societies as tenants in common, under articles of association looking to a permanent union, are not the subject of partition. Brown *v.* Lutheran Church, 23 Pa. St. 495.

Title will not support ejectment.— A grant of the exclusive right of interment in certain burial lots, subject to the regulations of a cemetery company, conveys no such interest in the land as will support an action of ejectment. Hancock *v.* McAvoy, 151 Pa. St. 460, 25 Atl. 47, 31 Am. St. Rep. 774, 18 L. R. A. 781. But see *contra,* New York Bay Cemetery Co. *v.* Buckmaster, 49 N. J. L. 449, 9 Atl. 591.

51. *Illinois.*— Ritchey *v.* Canton, 46 Ill. App. 185.

Massachusetts.— Sohier *v.* Trinity Church, 109 Mass. 1.

New Hampshire.— Page *v.* Symonds, 63 N. H. 17, 56 Am. Rep. 481.

New York.—Went *v.* Williamsburgh Methodist Protestant Church, 80 Hun (N. Y.) 266, 30 N. Y. Suppl. 157, 62 N. Y. St. 31; Coates *v.* New York, 7 Cow. (N. Y.) 585.

North Carolina.— Humphrey *v.* Front St. M. E. Church, 109 N. C. 132, 13 S. E. 793.

Pennsylvania.— Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377.

See also *supra,* II, A, 1.

An act directing the vacation of a cemetery and the removal of the bodies is not an infringement of a lot-holder's rights (Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377), even though such act does not provide for compensation to such lot holder (Went *v.* Williamsburgh Methodist Protestant Church, 80 Hun (N. Y.) 266, 30 N. Y. Suppl. 157, 62 N. Y. St. 31).

Rights of burial in public burial-grounds are so far public that private interests in them are subject to the control of the public authorities having charge of police regulations. Perkins *v.* Lawrence, 138 Mass. 361; Sohier *v.* Trinity Church, 109 Mass. 1.

52. *Maryland.*— Rayner *v.* Nugent, 60 Md. 515; Partridge *v.* Baltimore First Independent Church, 39 Md. 631.

2. LENGTH OF POSSESSION. Possession of a burial lot, unless voluntarily relinquished, continues as long as the graves are marked and distinguishable as such and the cemetery continues to be used.[53]

C. Descent of Title. A burial lot is regarded as property in which title may in most cases descend to heirs.[54]

D. Exemption From Execution. By statute in some states a burial lot is exempt from seizure, either by direct legal process or by equitable proceedings attempting to subject it to judicial sale for satisfaction of a debt against the owner of the legal title to such lot.[55]

E. Mortgage of Lots. A mortgage of a burial lot is not void as against public policy.[56]

F. Sale of Lots. The ownership of lots in a cemetery is a qualified property or easement,[57] and its transfer is subject to the rules which may be prescribed by the constitution and by-laws of the cemetery association relative to the recording of such transfers.[58]

Massachusetts.— Sohier *v.* Trinity Church, 109 Mass. 1.

New Hampshire.— Page *v.* Symonds, 63 N. H. 17, 56 Am. Rep. 481.

New York.— Richards *v.* Northwest Protestant Dutch Church, 32 Barb. (N. Y.) 42, 11 Abb. Pr. (N. Y.) 30, 20 How. Pr. (N. Y.) 317; Matter of Reformed Presb. Church, 7 How. Pr. (N. Y.) 476; Windt *v.* German Reformed Church, 4 Sandf. Ch. (N. Y.) 471. *Compare* Matter of Brick Presb. Church, 4 Bradf. Surr. (N. Y.) 503.

Pennsylvania.— Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417.

If in the course of time it should become necessary to vacate a burying-ground, all that a licensee to bury therein can claim, either in law or in equity, is that he should have due notice, and the opportunity afforded him of removing the bodies and monuments to some other place of his own selection. Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377.

53. Jacobus *v.* Congregation Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141.

Non-residence.— Where an inhabitant of a town has acquired a license to use a lot in a public cemetery for burial purposes, his removal from the town does not constitute a revocation of his license or an abandonment of his lot. Gowen *v.* Bessey, 94 Me. 114, 46 Atl. 792. See also Hook *v.* Joyce, 94 Ky. 450, 15 Ky. L. Rep. 337, 22 S. W. 651, 21 L. R. A. 96.

54. Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621; Jacobus *v.* Congregation Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Matter of Brick Presb. Church, 3 Edw. (N. Y.) 155; Gardner *v.* Swan Point Cemetery, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897; Derby *v.* Derby, 4 R. I. 414. See also Matthews *v.* Jeffrey, 6 Q. B. D. 290, 45 J. P. 361, 50 L. J. Q. B. 164, 43 L. T. Rep. N. S. 796, 29 Wkly. Rep. 282, wherein it appeared that spaces were granted in perpetuity by a burial board to A and her heirs. A died intestate. It was held that the exclusive right of burial in the spaces vested in her heir.

Heirs have the right to dispose of any interest their ancestor may have had in a cemetery lot at the time of his death. Jacobs *v.* Union Cemetery Assoc., 1 Pa. Super. Ct. 156.

55. Pawnee First Nat. Bank *v.* Hazel, (Nebr. 1902) 89 N. W. 378. See also Oakland Cemetery Co. *v.* Peoples Cemetery Assoc., 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 503; and, generally, EXEMPTIONS.

56. Lantz *v.* Buckingham, 11 Abb. Pr. N. S. (N. Y.) 64, holding that a statute declaring that cemetery lots shall not be liable to sale on execution nor applied to payment of debts by assignment under insolvent laws does not preclude mortgaging such lots nor prevent a strict foreclosure of the mortgage. But see Thompson *v.* Hickey, 8 Abb. N. Cas. (N. Y.) 159, 59 How. Pr. (N. Y.) 434, holding that where a person has taken a conveyance of a burial lot and has made interments therein of the dead of his family, it is in such condition that it cannot be mortgaged to secure payment of a debt, or the return of money borrowed.

As to mortgage of cemetery grounds see *supra*, III, C, 1.

Rights of mortgagee.— The mortgagee of a burial-ground has notice of the purposes to which it is devoted and is bound by rights of burial temporary or in perpetuity granted by his mortgagor while left in possession. Moreland *v.* Richardson, 24 Beav. 33, 3 Jur. N. S. 1189, 26 L. J. Ch. 690, 5 Wkly. Rep. 672.

57. See *supra*, VI, B, 1.

58. Jacobs *v.* Union Cemetery Assoc., 1 Pa. Super. Ct. 156. See also Com. *v.* Mt. Moriah Cemetery Assoc., 10 Phila. (Pa.) 385, 32 Leg. Int. (Pa.) 464, 2 Wkly. Notes Cas. (Pa.) 244, holding that the charter of a cemetery company which prohibits the transfer of lots without the consent of the managers is binding upon grantees.

Injunction against sale.— If a man buys a burial lot in a cemetery, and his wife goes

G. Rights in Alleys and Approaches to Lots. The owner of a burial lot has the right to free and unobstructed access to the cemetery and to the use of the necessary driveways and approaches to his lot;[59] but no interest in the alleys which separate a lot from other lots, except a right of way, passes to a purchaser unless particularly expressed in the deed.[60]

H. Tombstones and Monuments.[61] The right to bury carries with it the right to do so according to the usual custom in the neighborhood, and includes the right of making mounds over and erecting stones and monuments at the grave.[62]

VII. RIGHT OF BURIAL.

A. In General. A right to use a lot in a cemetery of a religious corporation is a right to use the lot subject to and in conformity with the established rules and by-laws of the corporation in so far as they are not in violation of any law.[63] But where there is no restriction of the right of sepulture on the purchase of a

to expense in improving it, and interments are made there, she may have him enjoined from selling it. Schroder *v.* Wanzor, 36 Hun (N. Y.) 423.

Mandamus will not lie to compel a cemetery company to give its written consent to the sale of a portion of plaintiff's lot, without which consent the sale would be void, where it appears that the granting or withholding of such consent is not a ministerial act, but depends upon the company's judgment as to whether its consent can be given, in view of certain rules of the company and acts of the legislature. Dickens *v.* Cave Hill Cemetery Co., 93 Ky. 385, 14 Ky. L. Rep. 347, 20 S. W. 282.

59. Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621. See also Burke *v.* Wall, 29 La. Ann. 38, 29 Am. Rep. 316, holding that where a lot in a cemetery is sold with reference to a certain plan, on which plan appears an avenue leading up to or close beside the lot, affording a convenient highway to and from it, such avenue becomes a servitude in favor of the lot and cannot be legally obstructed.

60. Seymour *v.* Page, 33 Conn. 61, holding further that if the language of a deed conveying a lot in a cemetery is ambiguous upon the point as to whether an interest in alleys which separate the lot from other lots passed, and the grantee claims title to these alleys, evidence is admissible of the custom in other cemeteries in the same town and elsewhere respecting the control and care exercised by their respective proprietors over alleys and avenues in order to remove the ambiguity.

Improvement of avenue.— One who buys a lot in a cemetery in front of which is an avenue cannot enjoin the execution of an improvement made in good faith, although it contemplates the closing of the avenue, the value of the lot not being impaired, nor its means of access, and the owner not having protested until considerable expense had been incurred in making the changes. Perkins *v.* Lawrence, 138 Mass. 361.

61. As to prosecution for defacing tombstone see *infra*, VIII, B, 1, b.

62. Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 47 N. Y. St. 896, 30 Am. St. Rep. 699. See also Thompson *v.* Deeds, 93 Iowa 228, 61 N. W. 842, 35 L. R. A. 56, holding that where a daughter who owns a burial lot permits her father's remains to be interred therein she impliedly gives to his widow the right to erect a monument on the lot. And see Durell *v.* Hayward, 9 Gray (Mass.) 248, 69 Am. Dec. 284, holding that the right of a husband to dispose of the body of his deceased wife by a decent sepulture in a suitable place carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well-known and long-established usage of the community.

A license to build a tomb in a burying-ground conveys also a right of suitable access thereto, and the removal of an obstruction by the owner of the tomb is not a trespass. Lakin *v.* Ames, 10 Cush. (Mass.) 198. See also Fletcher *v.* Evans, 140 Mass. 241, 2 N. E. 837.

Ownership.— All monuments and erections capable of being removed, placed on the burial lots in a cemetery, under a license to bury therein, are the personal property of the lot holder and he has the right to remove the same upon the lot ceasing to be used for the purposes of burial. Partridge *v.* Baltimore First Independent Church, 39 Md. 631.

63. Hence, where a person applies for a burial lot in a cemetery of a distinctly Roman Catholic nature, it is with the tacit understanding that he is either a Roman Catholic, and as such eligible to burial therein, or that he applies in behalf of those who are in communion with that church. People *v.* St. Patrick's Cathedral, 21 Hun (N. Y.) 184 [*reversing* 58 How. Pr. (N. Y.) 55]. See also Dwenger *v.* Geary, 113 Ind. 106, 14 N. E. 903, holding that where a cemetery is placed under the charge of a religious organization, one who secures the privilege of burial therein, after this has been done, and after rules have been established, takes his privilege under the rules so established. And see McGuire *v.* St. Patrick's Cathedral, 54 Hun (N. Y.) 207, 7 N. Y. Suppl. 345, 27 N. Y. St. 192.

As to power to regulate care and management of lots see *supra*, III, C, 2.

lot, the managers of the cemetery have no power afterward to abridge such right by any unreasonable limitation thereon.[64]

B. Interference With Right. An unlawful and unwarranted interference with the exercise of the right of burial in a cemetery lot is a tort which gives a cause of action against the wrong-doer.[65]

C. Remedy For Enforcement of Right. The managers of a cemetery may be compelled by mandamus to permit the burial of persons entitled to sepulture therein.[66]

VIII. TRESPASSES AND OFFENSES.

A. Civil Liability — 1. RIGHT OF ACTION. While there is no right of property in a dead body in the ordinary sense of the term,[67] it is regarded as property so far as to entitle the next of kin to legal protection from unnecessary disturbance and wanton violation or invasion of its place of burial.[68]

2. FORM OF REMEDY[69] — a. Bill in Equity. Equity has jurisdiction to enjoin an unwarrantable disturbance or interference with a burial-ground or the graves therein.[70]

64. Mt. Moriah Cemetery Assoc. *v.* Com., 81 Pa. St. 235, 22 Am. Rep. 743, holding that a by-law of a cemetery association prohibiting the burial of negroes therein is void as to persons who were lot owners when the by-law was passed.

65. Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621.

66. Mt. Moriah Cemetery Assoc. *v.* Com., 81 Pa. St. 235, 22 Am. Rep. 743.

Enforcement in equity.— Where the right of burial in a certain cemetery is a mere license it confers no such property rights as are enforceable in equity. McGuire *v.* St. Patrick's Cathedral, 54 Hun (N. Y.) 207, 7 N. Y. Suppl. 345, 27 N. Y. St. 192.

67. See DEAD BODIES.

68. *Alabama.*— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

Georgia.— Jacobus *v.* Congregation Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141.

Illinois.— Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613.

Maine.— Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238.

Maryland.—Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464; Partridge *v.* Baltimore First Independent Church, 39 Md. 631.

Massachusetts.— Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

Michigan.— *Compare* Brown *v.* Barlow, (Mich. 1901) 87 N. W. 56.

Minnesota.— Brown *v.* Maplewood Cemetery Assoc., 85 Minn. 498, 89 N. W. 872.

New Hampshire.— Page *v.* Symonds, 63 N. H. 17, 56 Am. Rep. 481.

New York.— Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 47 N. Y. St. 896, 30 Am. St. Rep. 699; Matter of Brick Presb. Church, 3 Edw. (N. Y.) 155.

Pennsylvania.— Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377.

Utah.— Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564.

Wisconsin.— Hollman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899.

United States.— Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521.

See 9 Cent. Dig. tit. "Cemeteries," § 22.

Malicious injury to burial-ground.— Under a statute providing that if any one wilfully and maliciously injure any fence or other erection in or about a burial-ground he shall be liable to an action for damages, one is not liable for removing a stone wall from about a burial-ground, where such removal was not done maliciously. Fletcher *v.* Kezer, 73 Vt. 70, 50 Atl. 558.

69. **The Roman** law gave a civil remedy, the *actio sepulchri violati* to the relatives for any unlawful disturbance of a sepulchre. Fox *v.* Gordon, 16 Phila. (Pa.) 185, 40 Leg. Int. (Pa.) 374.

70. *Iowa.*— See Thompson *v.* Deeds, 93 Iowa 228, 61 N. W. 842, 35 L. R. A. 56.

Louisiana.— Burke *v.* Wall, 29 La. Ann. 38, 29 Am. Rep. 316. See also Choppin *v.* Dauphin, 48 La. Ann. 1217, 20 So. 681, 55 Am. St. Rep. 313, 33 L. R. A. 133.

Maryland.— Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

New York.— Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 47 N. Y. St. 896, 30 Am. St. Rep. 699.

Pennsylvania.— Pott *v.* Pottsville, 42 Pa. St. 132; Northern Liberties First Presb. Church *v.* Philadelphia Second Presb. Church, 2 Brewst. (Pa.) 372. See also *Ex p.* Girard, 5 Pa. L. J. Rep. 68.

Rhode Island.— See Gardner *v.* Swan Point Cemetery, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897.

United States.— Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521.

England.— See Moreland *v.* Richardson, 22 Beav. 596, 2 Jur. N. S. 726, 25 L. J. Ch. 883, 4 Wkly. Rep. 765.

A court of equity will enjoin the owner of land from defacing and meddling with graves on land dedicated to the public for burial purposes. Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613.

Burying-places laid out and consecrated to such use become public immunities or com-

b. Trespass Quare Clausum Fregit. An action of trespass *quare clausum fregit* may be maintained for breaking and entering a burial lot.[71]

3. Who May Sue. One who is in the rightful possession of a cemetery lot, or who holds title to the usufructuary interest therein, may maintain an action against one who wrongfully trespasses upon it.[72] And where a right of way to or a right to maintain a cemetery lot for burial purposes is held in common by several persons, any one or more of them may maintain an action to prevent an interruption or destruction of those rights, without making the others parties.[73]

4. Who May Be Sued. A cemetery corporation which voluntarily uses its funds for objects akin to the purpose of its organization is not a public charity, but is liable to the proprietor of a grave for the negligent burial of a stranger therein.[74]

5. Pleading. In trespass for removing a body from its burial-place the declara-

mon privileges, and if the right asserted would, when carried into effect, disturb the enjoyment of those immunities or privileges and the right itself be ill-founded, then as such disturbance would be more than a private trespass — would be a public nuisance going to the irreparable injury of the congregations complaining — chancery has jurisdiction to restrain its commission and to quiet the appellants in the possession and use of their cemetery. First Evangelical Church *v.* Walsh, 57 Ill. 363, 11 Am. Rep. 21.

71. If one has been permitted to bury his dead in a cemetery by the express or implied consent of those in proper control of it, he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to maintain an action of trespass *quare clausum fregit* against the owners of the fee or strangers who, without his consent, negligently or wantonly disturb it.

Alabama.— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26. *Compare* Bonham *v.* Loeb, 107 Ala. 604, 18 So. 300.

Maine.— Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238; Gowen *v.* Bessey, 94 Me. 114, 46 Atl. 792.

Maryland.— Smith *v.* Thompson, 55 Md. 5, 39 Am. Rep. 409; Partridge *v.* Baltimore First Independent Church, 39 Md. 631.

Massachusetts.— Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

Pennsylvania.— Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377.

Utah.— Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564.

Vermont.— Pierce *v.* Spafford, 53 Vt. 394.

Wisconsin.— Hollman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899.

England.— Spooner *v.* Brewster, 3 Bing. 136, 11 E. C. L. 75, 2 C. & P. 34, 12 E. C. L. 435, 3 L. J. C. P. O. S. 203, 10 Moore C. P. 494, 28 Rev. Rep. 613, Co. Lit. 18b.

72. *Alabama.*— Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

Georgia.— Jacobus *v.* Congregation Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141.

Maine.— Pulsifer *v.* Douglass, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238.

Maryland.— Partridge *v.* Baltimore First Independent Church, 39 Md. 631.

New York.— Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 47 N. Y. St. 896, 30 Am. St. Rep. 699.

Pennsylvania.— Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377.

Wisconsin.— Hollman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899.

If a gravestone or monument which has been erected upon a cemetery lot is defaced or removed during the lifetime of the person who erected it, he may at common law recover damages from the one who inflicted the injury; but if the injury is inflicted after his death the heirs at law of the person to whose memory the gravestone or monument was erected are entitled to maintain the action. Jacobus *v.* Congregation Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Sabin *v.* Harkness, 4 N. H. 415, 17 Am. Dec. 437; Matter of Brick Presb. Church, 3 Edw. (N. Y.) 155.

73. Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 47 N. Y. St. 896, 30 Am. St. Rep. 699. See also Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613, holding that one who has friends buried in a cemetery and thus interested in preserving for himself and the public the cemetery as it has been established, has the right to sue in behalf of himself and others having a like interest to prevent the defacing or meddling with graves therein.

74. Donnelly *v.* Boston Catholic Cemetery Assoc., 146 Mass. 163, 15 N. E. 505. See also Sacks *v.* Minneapolis, 75 Minn. 30, 77 N. W. 563, holding that the violation of a provision in a city charter that the city shall not condemn the grounds of a cemetery for street purposes without the consent of the owner makes the city liable in trespass for the damages to plaintiff in removing, without his consent, the bodies of his children from his burial lot in a cemetery. And see Long *v.* Rosedale Cemetery, 84 Fed. 135.

A city given power by statute to adopt regulations as to a public cemetery, and upon proper notice to compel lot owners or occupants to comply with such regulations, is liable in damages to a lot occupant if, without having adopted any regulations and without notice to him, it invades his lot and cuts down trees which he has planted therein in the improvement thereof. Hollman *v.* Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899.

tion should describe the close alleged to have been broken with reasonable accuracy.[75]

6. Damages — a. Elements of Damage. While the breaking and entering of plaintiff's close is the gist of the action, the circumstances accompanying the trespass and which give character to it may be shown and considered in mitigation or aggravation of the act.[76] The jury may also take into consideration not only the injury to the property but the injured feelings of plaintiff.[77]

b. Exemplary Damages. In a suit for damages for wrongfully disinterring a dead body, if the injury has been wanton and malicious, or is the result of gross negligence, or a reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages may be awarded.[78]

B. Criminal Prosecution — 1. Offenses — a. Disinterment of Dead Body. The disinterment of a dead body, without authority, is a misdemeanor and indictable at common law as an offense "highly indecent and *contra bonos mores*."[79] And the opening of a grave in a town cemetery by order of the town officers for the purpose of removing a body from a lot which has not been paid for to another part of the cemetery which is free, is within a statute making it a felony for any person, without due process of law, or the consent of specified relatives, to open any grave and remove any dead body therefrom.[80]

75. Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26, holding that a complaint is not demurrable on the ground that the close alleged to have been broken is not described with sufficient accuracy, where it is described as a burial-lot in a graveyard, near a city named in a certain county, which graveyard is now included in land occupied by a designated company but which for many years has been used and occupied as a burying-ground, having been dedicated for that purpose by defendant.

The answer in an action of trespass against a city for removing a dead body from plaintiff's lot in a public cemetery set up that the removal was made by the authority of a third person, who was the owner of the lot and in possession of the same, in good faith, with care and decency. It was held that the answer was good on demurrer, although it did not show from whom or how such third person acquired title. Hamilton *v.* New Albany, 30 Ind. 482.

76. Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564.

Excessive damages.— In an action against a cemetery association for damages for wilfully removing the body of plaintiff's child from a lot which it had sold to him, without notice to plaintiff, a verdict for plaintiff for one thousand one hundred and fifty dollars will not be set aside as excessive. Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564. But see Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26, holding that a verdict awarding one thousand seven hundred dollars damages for disinterring the body of plaintiff's child is excessive, where it appeared that defendant decently reburied the body in a new cemetery in lieu of the old.

77. Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 865, 56 Am. St. Rep. 26; Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621; Jacobus *v.* Congregation Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564. See also, generally, Damages.

78. Jacobus *v.* Congregation Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564.

Burial in plaintiff's lot.— Where defendant's conduct is malicious, punitive damages may be awarded in an action of trespass *quare clausum fregit* for burying a person in plaintiff's lot without his consent. Smith *v.* Thompson, 55 Md. 5, 39 Am. Rep. 409.

Interference with right of burial.— In a suit for an unlawful and unwarranted interference with the exercise of a right of burial, if the injury inflicted upon plaintiff was wanton and malicious, or the result of gross negligence or reckless disregard of the rights of others, exemplary damages may be awarded against defendant. Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621.

79. *Maine.*— Kanavan's Case, 1 Me. 226.

Massachusetts.— Com. *v.* Cooley, 10 Pick. (Mass.) 37.

New York.— Thompson *v.* Hickey, 8 Abb. N. Cas. (N. Y.) 159, 59 How. Pr. (N. Y.) 434.

Pennsylvania.— Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377; Fox *v.* Gordon, 16 Phila. (Pa.) 185, 40 Leg. Int. (Pa.) 374.

England.— Reg. *v.* Sharpe, 7 Cox C. C. 214, Dears. & B. 160, 3 Jur. N. S. 192, 26 L. J. M. C. 47, 5 Wkly. Rep. 318; Rex *v.* Lynn, 2 T. R. 733, 1 Leach 497; 1 Hale P. C. 515; 1 Russ. Cr. L. 414, note *a*; 4 Stephen Comm. 371.

80. State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721.

b. Disfiguring Cemetery. Cutting trees upon a public burial-ground for purpose of private profit, without the consent of the public authorities having charge of it, is a violation of a statute which provides a penalty for destroying trees within the limits of a place of burial, although the person who cuts them is the owner of the fee of the land and believes that his acts are lawful.[81]

2. INDICTMENT. In an indictment for defacing or destroying a tombstone it is not necessary to designate the name of the person whose tomb has been defaced, nor is it necessary to charge, in terms, that the dead body was that of a human being.[82] And an indictment for wrongfully desecrating and disfiguring a public burial-ground need not describe it by metes and bounds.[83]

CENSO. In the law of Spain and Mexico a ground rent, an annuity.[1]

CENSORIOUSNESS. Disposition to blame and condemn — the habit of censuring or reproaching.[2]

No specific intent, felonious or otherwise, on the part of defendants need be proved on a prosecution under a statute providing that any person who, without due process of law or the consent of specified relatives, opens any grave to remove a dead body therefrom shall be deemed guilty of a felony. State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721.

A person without being actually present at the unlawful disinterment of a dead body may be found guilty of the offense, if, with the intention of giving assistance, he be near enough to afford it should it be needed. Tate *v.* State, 6 Blackf. (Ind.) 110.

81. Com. *v.* Viall, 2 Allen (Mass.) 512. See also Com. *v.* Wellington, 7 Allen (Mass.) 299, holding that it is no defense to an indictment for wrongfully desecrating and disfiguring a public burying-ground to show that defendant was the owner of the fee of small lots in it, under titles derived from various grantees to whom they had been conveyed "to be used for burial-ground."

In Indiana, it has been held that the statute providing that if any person shall wilfully disfigure or injure any tombstone, monument, fence, tree, or shrubbery around or within any cemetery he shall be fined applies only to cemeteries dedicated in the manner provided by statute. Winters *v.* State, 9 Ind. 172 [*distinguished* in Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768].

82. State *v.* Wilson, 94 N. C. 1015.

An indictment for disinterring a dead body alleged that the burying-ground in A, where the body was interred, belonged to the First Congregational Parish in A. It was held that this allegation was unnecessary and that it did not become material by being inserted in the indictment and therefore need not be proved. Com. *v.* Cooley, 10 Pick. (Mass.) 37.

Form of indictment for violating sepulture is set out in People *v.* Dalton, 58 Cal. 226.

83. Com. *v.* Wellington, 7 Allen (Mass.) 299, holding, however, that if an indictment for wrongfully desecrating and disfiguring a public burying-ground contains an accurate description of it by metes and bounds the proof must correspond with the averment, and it is not sufficient to prove that a part of the lot described was a public burying-ground, although the acts complained of were committed upon that part.

An indictment for wilfully removing gates from a certain cemetery in violation of a statute which provides that whoever wilfully removes any fence or other work in or around any "public or private" cemetery or burial-place shall be fined, etc., is sufficient, although it does not state that such cemetery was either a public or private one. Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768 [*distinguishing* Winters *v.* State, 9 Ind. 172]. And an indictment for removing and destroying a fence intended for the protection of a graveyard which describes the place of the offense as "a certain graveyard near the town of W," in the county and state aforesaid is sufficiently definite. Phillips *v.* State, 29 Tex. 226.

Form of indictment for wilfully removing gates from a cemetery, is set out in Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768.

1. Trevino *v.* Fernandez, 13 Tex. 630, 635. See also Hart *v.* Burnett, 15 Cal. 530, 557.

"There are three principal species of 'censo' as known to the laws of Spain, viz.: the 'emphyteutic,' the '*consignativo*,' and the '*reservativo*.' The 'emphyteutic' is the right which one has to exact from another a certain annual pension or sum, by virtue of a transfer to him of the usufructuary right of real property, the legal title remaining in the grantor. This estate is subject to several burthens and liable to forfeiture on several contingencies which we need not now specify. The '*censo consignativo*' is the right to exact from another an annuity in virtue of having advanced money, and which money is made a charge upon lands of the person who promises to pay the annuity, the full title to such lands, however, remaining in the grantor of the annuity. The '*censo reservativo*' is the right to receive from another an annual pension by virtue of having transferred land to him by full and perfect title. (Sala and Escriche *verbo* Censo.)" Trevino *v.* Fernandez, 13 Tex. 630, 655.

2. Webster Dict. [*quoted* in Cooper *v.* Greeley, 1 Den. (N. Y.) 347, 360].

CENSURE. In ecclesiastical law, a spiritual punishment, consisting in withdrawing from a baptized person, whether belonging to the clergy or the laity, a privilege which the church gives him, or in wholly expelling him from the Christian communion.[3]

3. Phillimore Eccl. L. 1367.
The principal varieties of censures are — admonition, penance, suspension, excommunication, sequestration, deprivation, and degradation. Sweet L. Dict.

CENSUS

By Frank E. Jennings

CROSS-REFERENCES

For Matters Relating to:
Apportionment, on Basis of Population, of:
Direct Taxes, see Internal Revenue.
Representatives in Congress, see United States.
Census as Basis of Classification of:
Election Districts, see Elections.
Municipalities, see Counties; Municipal Corporations; Schools and School Districts; Statutes; Towns.
Judicial Notice of Census, see Evidence.

I. DEFINITION.

A census[1] in modern times[2] is an official enumeration[3] of the inhabitants of a state or country, with details of sex and age, family, occupation, possessions, etc.[4]

II. AUTHORITY FOR TAKING.

The taking of the census of the United States is provided for by the constitution,[5] and statutes have been passed, from time to time, providing methods for the taking of the same.[6]

1. The word is derived from the Latin *censere*, to reckon. Republic *v.* Paris, 10 Hawaii 579, 581.

2. **In old European law** it was "a tax, or tribute; a toll." Black L. Dict.

In Roman law it was "a numbering or enrollment of the people, with a valuation of their fortunes." Burrill L. Dict. [*quoted* in Huntington *v.* Cast, 149 Ind. 255, 259, 48 N. E. 1025].

3. **It must be an official enumeration** of the people, and as such a public record. Huntington *v.* Cast, 149 Ind. 255, 48 N. E. 1025. See also Childers *v.* Duvall, 69 Ark. 336, 63 S. W. 802.

4. Century Dict. [*quoted in* Huntington *v.* Cast, 149 Ind. 255, 258, 48 N. E. 1025].

Other definitions are: "The official counting or enumeration of the people of a state or nation, with statistics." Black L. Dict. [*quoted* in Huntington *v.* Cast, 149 Ind. 255, 259, 48 N. E. 1025].

"An official reckoning or enumeration of the inhabitants and wealth of a country." Bouvier L. Dict. [*quoted* in Huntington *v.* Cast, 149 Ind. 255, 259, 48 N. E. 1025].

"An official numbering of the people of a country or district." Standard Dict. [*quoted* in Huntington *v.* Cast, 149 Ind. 255, 258, 48 N. E. 1025].

"An official registration of the number of the people, the value of their estate, and other general statistics of the country." Webster Dict. [*quoted* in Republic *v.* Paris, 10 Hawaii 579, 581; Huntington *v.* Cast, 149 Ind. 255, 258, 48 N. E. 1025].

5. U. S. Const. art. 1, § 2, par. 3, which provides for taking the census once in every ten years.

In England the census is also taken once in every ten years. Wharton L. Lex.

6. **The manner of taking the census** previous to 1890 was prescribed by U. S. Rev. Stat. (1872), § 2175 *et seq.* This was modified by the act of congress of March 1, 1889 (25 U. S. Stat. at L. p. 760, c. 319), providing for the taking of the eleventh and subsequent censuses, which was, in turn, modified by the act of congress of July 6, 1892 (27 U. S. Stat. at L. p. 86, c. 153). The census office in the department of the interior was abolished by act of congress of March 3, 1893 (27 U. S. Stat. at L. p. 646, c. 210), the uncompleted work of the eleventh census being finished in

III. CONSTITUTIONALITY OF STATUTES.

Although the constitution[7] merely directs congress to take a census of the population for the purpose of apportioning representatives and direct taxes, yet laws requiring additional information concerning property are held to be constitutional.[8]

IV. APPOINTMENT AND COMPENSATION OF OFFICERS.

A state statute providing for the taking of a census at certain intervals and making it the governor's duty to appoint a superintendent of the census at least six months before each interval is directory only as to the time of appointment.[9] A United States census agent can recover for only such expenditures as are authorized by the secretary of the interior;[10] but the compensation specified in the agent's commission cannot be reduced by a rule of the department, of which the agent has not been informed,[11] and the fact that one is to be paid by the day contemplates a daily service.[12]

V. OFFENSES.[13]

A. Making False Return. The making of a false or fictitious census return is an indictable offense.[14]

B. Refusing to Furnish Information. The statute makes it a misdemeanor to refuse to render to the census enumerator the required information.[15]

the office of secretary of the interior. The act of congress of March 3, 1899 (30 U. S. Stat. at L. p. 1014, c. 419) provides for taking the twelfth and subsequent censuses.

7. U. S. Const. art. 1, § 2, par. 3.

8. U. S. *v.* Moriarity, 106 Fed. 886, where it was held that it could not be urged that the acquirement of such information is the taking of private property for public purposes without just compensation.

Where a state constitution required the taking of a census at certain regular periods, an act of the legislature providing for such an enumeration seven years after the prescribed period is constitutional, such enactment having been neglected by previous sessions of the legislature. People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 47 N. Y. St. 702, 16 L. R. A. 836.

9. **Hence, such appointment is valid,** even though made after the prescribed time. *In re* Census Superintendent, 15 R. I. 614, 15 Atl. 205 [*citing* People *v.* Allen, 6 Wend. (N. Y.) 486].

10. Barre *v.* U. S., 27 Ct. Cl. 357; Test *v.* U. S., 27 Ct. Cl. 352.

Per diem allowance for subsistence.—Under the census act of 1889 (25 U. S. Stat. at L. p. 760, c. 319), a special agent was appointed at six dollars per day, and actual expenses of subsistence and transportation. After his appointment, the act of congress of April 3, 1890 (26 U. S. Stat. at L. p. 34, c. 61) was passed, adding to the statute the clause "and a *per diem* allowance, in lieu of subsistence, of three dollars per day." It was held that the *per diem* allowance for subsistence was intended for agents when actually traveling only. Test *v.* U. S., 27 Ct. Cl. 352. And in Ebert *v.* U. S., 29 Ct. Cl. 183, it was held that a special agent whose duties are to be performed at his residence is not entitled to such allowance in lieu of subsistence.

11. Ogden *v.* U. S., 27 Ct. Cl. 469.

12. Ebert *v.* U. S., 29 Ct. Cl. 183, where it was held that although the information required by one who is appointed a special agent of the census office may have been the inducement of appointing him, nevertheless he cannot furnish a substitute who keeps his office open, and recover pay when absent from the country and unable to perform the duties of his office.

13. **For general matters relating to criminal law and criminal procedure** see CRIMINAL LAW.

14. U. S. *v.* Moriarity, 106 Fed. 886.

Requisites of indictment.—An indictment for making a false and fictitious census return need not charge that it was made to the supervisor of the district, he being the only one authorized to receive it; nor need it allege that the return was made upon a prescribed and adopted form. Nor is the indictment defective because a portion of such return contains information not required by statute and omits information which is so required. U. S. *v.* Moriarity, 106 Fed. 886.

For form of indictment for this offense see U. S. *v.* Moriarity, 106 Fed. 886.

15. U. S. *v.* Sarle, 45 Fed. 191.

For form of indictment for this offense see U. S. *v.* Sarle, 45 Fed. 191.

The information required by statute to be furnished is not limited merely to population and sex, but may include a knowledge of one's possessions, business, or profession. U. S. *v.* Moriarity, 106 Fed. 886; U. S. *v.* Sarle, 45 Fed. 191. In this latter case the statute made it a misdemeanor to refuse to render to the census enumerator a true account, "of every person belonging to such family in the

CENT. One of the minor coins of the United States weighing forty-eight grains and made of an alloy consisting of ninety-five per cent copper and five per cent tin and zinc in such proportions as shall be determined by the director of the mint.[1] The common abbreviation is "c" or "ct."[2]

CENTRAL CRIMINAL COURT. A court, established in London in 1834, having jurisdiction to try all offenses committed within the city of London, the county of Middlesex, and certain suburban parts of Essex, Kent and Surrey, and of offenses committed on the high seas, formerly within the jurisdiction of the High Court of Admiralty.[3]

CEPI CORPUS. Literally, "I have taken the body." The technical name of the return to a capias made by a sheriff that he has taken the body of the party.[4] It is commonly abbreviated "C. C."[5]

CEPIT IN ALIO LOCO. Literally, "He took in another place." In the old practice, a plea in bar,[6] in an action of replevin, by which defendant pleaded that he took the goods in another place than that mentioned in the declaration.[7]

CERTAIN. Clear or distinct;[8] particular.[9]

CERTAINTY. Being free from doubt;[10] absence of doubt;[11] a clear and distinct setting down of facts, so that they may be understood both by the party who is to answer the matters stated against him, the counsel who are to argue them, the jury who are to decide upon their existence, and the court who are the judges of the law arising out of them.[12] While it has been said that we have no precise idea of the signification of the word, which is as indefinite in itself as any word that can be used,[13] a distinction has long been made between three manner of certainties:[14] (1) To a common intent;[15] (2) To a certain intent in general;[16] (3) To a certain intent in every particular.[17] (Certainty: In Pleading — In Civil Actions, see PLEADING; In Criminal Prosecutions, see INDICTMENTS AND INFORMA-

various particulars required by law." It was held that it was within the offense created to refuse to answer inquiries concerning a farm belonging to one's wife, Carpenter, J., saying: "The particulars of the property of a person are certainly a part of a 'true account' of that person, in the sense of a census law, since they relate to him in an especial and individual sense."

A statute exacting a penalty from those "herein required," upon a failure to answer questions, has been held to be inoperative in the absence of any act requiring any such persons to answer questions. U. S. *v.* Mitchell, 58 Fed. 993.

1. U. S. Rev. Stat. (1872), § 3515.
2. Jackson *v.* Cummings, 15 Ill. 449, 453.
3. Sweet L. Dict.
4. Burrill L. Dict.
5. Anderson L. Dict.
6. Bullythorpe *v.* Turner, Willes 475, 477.
7. Sweet L. Dict.
8. Burrill L. Dict.
9. Bell *v.* Martin, 18 N. J. L. 167, 168.
10. State *v.* Shaw, 49 N. C. 440, 443.
11. Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 82, 15 S. W. 556.
12. State *v.* Burke, 151 Mo. 136, 143, 52 S. W. 226 [*quoted* in State *v.* Meysenburg, (Mo. 1902) 71 S. W. 229, 232]; State *v.* Terry, 109 Mo. 601, 619, 19 S. W. 206; State *v.* Hayward, 83 Mo. 299, 309.
13. De Grey, C. J., in Rex *v.* Horne, Cowp. 672, 682 [*quoted* in Kennebec Purchase *v.* Lowell, 2 Me. 149, 154].
14. Long's Case, 5 Coke 120*a*, 121*a*; Rex *v.* Horne, Cowp. 672, 682; Dovaston *v.* Payne, 2 H. Bl. 527, 530 (where Buller, J., says: "I remember to have heard Mr. Justice Aston treat these distinctions as a jargon of words, without meaning. They have however long been made, and ought not altogether to be departed from").

When different degrees required.— The first intent is sufficient in bars which are to defend the party and excuse himself; the second is required in indictments, counts, replications, etc., because they are to accuse or charge the party; the third is rejected in law. Long's Case, 5 Coke, 120*a*, 121*a*. But see Dovaston *v.* Payne, 2 H. Bl. 527, 530, to the effect that the certain intent in every particular applies only to the case of estoppels.

15. **Certainty to a common intent** describes the mode of statement in which words are used in their ordinary meaning, although by argument or inference they may be made to bear a different one. Abbott L. Dict.

16. **Certainty to a certain intent, in general,** is held to mean, what upon a fair and reasonable construction may be called certain, without recurring to possible facts, which do not appear. Moseley *v.* White, 1 Port. (Ala.) 410, 417 [*citing* 1 Chitty Pl. 238]; Fuller *v.* Hampton, 5 Conn. 416, 423 [*citing* 1 Chitty Pl. 237]; State *v.* Schmitt, 49 N. J. L. 579, 582, 9 Atl. 774 [*citing* 1 Chitty Pl. 213]; Spencer *v.* Southwick, 9 Johns. (N. Y.) 314, 317.

17. **Certainty to a certain intent in every particular** is that technical accuracy of statement which precludes all question, inference, or presumption against the party pleading. Abbott L. Dict.

TIONS. Necessity of, in Contracts — Generally, see BONDS; COMMERCIAL PAPER; CONTRACTS; VENDOR AND PURCHASER; To Warrant Specific Performance Thereof, see SPECIFIC PERFORMANCE. Of Award of Arbitrators, see ARBITRATION AND AWARD. Of Description — In Deed, see DEEDS; In Mortgage, see CHATTEL MORTGAGES; MORTGAGES. Of Gift, Devise, or Bequest For Charity, see CHARITIES. Of Report of Auditor or Referee, see REFERENCES. Of Verdict — In Civil Action, see TRIAL; In Criminal Prosecution, see CRIMINAL LAW. Of Will, see WILLS.)

CERTIFICATE. A writing by which an officer or other person bears testimony that a fact has or has not taken place;[18] a written testimony to the truth of any fact;[19] a writing so signed and authenticated as to be legal evidence;[20] a writing by which testimony is given that a fact has or has not taken place.[21] (Certificate: Admissibility in Evidence of Official,[22] see EVIDENCE. As to Grounds for Appeal, see APPEAL AND ERROR. Estoppel by Official, see ESTOPPEL. For Costs, see CERTIFICATE FOR COSTS. Land, see PUBLIC LANDS. Of Acknowledgment — Alteration of, see ALTERATIONS OF INSTRUMENTS; Generally, see ACKNOWLEDGMENTS. Of Affidavit, see AFFIDAVITS. Of Animal's Freedom From Disease, see ANIMALS. Of Bill of Exceptions, see APPEAL AND ERROR. Of Conviction of Crime, see CRIMINAL LAW. Of Deposit, see CERTIFICATE OF DEPOSIT. Of Election, see ELECTIONS. Of Evidence or Facts For Purpose of Review, see APPEAL AND ERROR. Of Examiners of Title, see ABSTRACTS OF TITLE. Of Identity of Chinese, see ALIENS. Of Incorporation, see CORPORATIONS. Of Indebtedness, see COUNTIES; MUNICIPAL CORPORATIONS; STATES. Of Marriage, see MARRIAGE. Of Naturalization, see ALIENS. Of Nomination For Office, see ELECTIONS. Of Performance of Work under Contract, see BUILDERS AND ARCHITECTS. Of Protest, see COMMERCIAL PAPER. Of Publication, see NEWSPAPERS; PROCESS. Of Purchase as Color of Title, see ADVERSE POSSESSION. Of Reasonable Doubt as Ground for Appeal, see CRIMINAL LAW. Of Record — For Purpose of Review, see APPEAL AND ERROR; For Change of Venue, see CRIMINAL LAW; VENUE. Of Registry, see CERTIFICATE OF REGISTRY. Of Residence of Chinese, see ALIENS. Of Sale For Taxes, see TAXATION. Of Service of Process, see PROCESS. Of Stock, see CORPORATIONS. Of Taking of Deposition, see DEPOSITIONS. Of Receiver, see RECEIVERS. On Impounding Animals, see ANIMALS.)

CERTIFICATE FOR COSTS. A certificate granted by a judge before whom a cause has been tried, stating some matter of fact which is necessary to be ascertained in order to fix the amount of the costs.[23] (See, generally, COSTS.)

CERTIFICATE OF DEPOSIT.[24] A written acknowledgment by a bank or banker of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the depositor, to the order of the depositor, or to some other person or to his order.[25] (See, generally, BANKS AND BANKING.)

CERTIFICATE OF REGISTRY. A certificate of the registration of a vessel according to the registry acts, for the purpose of giving her a national character.[26]

CERTIFICATION. The act of certifying; a certificate; the writing on the

18. Bouvier L. Dict. [*quoted* in State *v.* Rhine, 84 Iowa 169, 172, 50 N. W. 676].

19. Webster Dict. [*quoted* in State *v.* Rhine, 84 Iowa 169, 172, 50 N. W. 676].

20. Standard Dict. [*quoted* in People *v.* Foster, 27 Misc. (N. Y.) 576, 582, 58 N. Y. Suppl. 574].

21. Bouvier L. Dict. [*quoted* in People *v.* Foster, 27 Misc. (N. Y.) 576, 582, 58 N. Y. Suppl. 574].

22. Certificate of clerk as evidence of character of officer taking affidavit in another state see AFFIDAVITS, 2 Cyc. 16, note 69.

23. Burrill L. Dict.

24. Necessity of demand before action on see ASSUMPSIT, ACTION OF, 4 Cyc. 336, note 80.

25. Farmersville First Nat. Bank *v.* Greenville Nat. Bank, 84 Tex. 40, 42, 19 S. W. 334. See also Reed *v.* Board of Education, 39 Ohio St. 635, 638.

26. Burrill L. Dict.

face of a check by which it is certified.[27] (Certification: Of Cases and Questions to Appellate Courts, see APPEAL AND ERROR; COURTS. Of Checks, Drafts, and Notes, see BANKS AND BANKING. Of Facts Constituting Contempt Before Referee in Bankruptcy, see BANKRUPTCY. Of Recognizance, see BAIL.)

CERTIFY. To give certain knowledge or information of; make evident; vouch for the truth of; attest; to make statement as to matter of fact; to testify in writing; give a certificate of; make a declaration about in writing, under hand, or hand and seal; to make attestation either in writing or orally as to the truth or excellence of some thing;[28] to testify in writing; to make a declaration in writing;[29] to testify to in writing; to make known or establish as a fact;[30] to testify to a thing in writing.[31]

27. Century Dict.

28. Standard Dict. [*quoted* in People *v.* Foster, 27 Misc. (N. Y.) 576, 582, 58 N. Y. Suppl. 574].

29. Webster Dict. [*quoted* in State *v.* Gee, 28 Oreg. 100, 105, 42 Pac. 7].

30. Anderson L. Dict. [*quoted* in Chicago, etc., R. Co. *v.* People, (Ill. 1902) 65 N. E. 701, 704].

31. State *v.* Brill, 58 Minn. 152, 156, 59 N. W. 989 [*quoted* in Kipp *v.* Dawson, 59 Minn. 82, 85, 60 N. W. 845].

CERTIORARI

By James Beck Clark

CROSS-REFERENCES

For Matters Relating to:
Certiorari:
As Ancillary to:
Appeal and Error, see APPEAL AND ERROR.
Habeas Corpus, see HABEAS CORPUS.

For Matters Relating to — (*continued*)
Certiorari — (*continued*)
To Bring Up Record on Appeal, see APPEAL AND ERROR.
To Review:
Applications For Liquor Licenses, see INTOXICATING LIQUORS.
Assessments For Taxation, see TAXATION.
Bastardy Proceedings, see BASTARDS.
Condemnation Proceedings, see EMINENT DOMAIN.
Contempt Proceedings, see CONTEMPT.
Criminal Cases, see CRIMINAL LAW.
Drainage Proceedings, see DRAINS.
Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER.
Habeas Corpus, see HABEAS CORPUS.
Highway Proceedings, see STREETS AND HIGHWAYS.
Insolvency Proceedings, see INSOLVENCY.
Justice of the Peace, see JUSTICES OF THE PEACE.
Refusal to Admit to Bail, see BAIL.
Summary Proceedings by Landlord For Possession, see LANDLORD AND TENANT.
Proceedings in Certiorari as Part of Record on Appeal, see APPEAL AND ERROR.

I. NATURE AND SCOPE OF REMEDY.

A. Writ Defined and Distinguished From Other Remedies. Certiorari is a common-law writ,[1] issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case.[2] At common law when not ancillary to other process, certiorari is in the nature of a writ of error.[3] It has the same functions to inferior tribunals whose proceedings are not according to the course of the common law as the writ of error has to common-law courts. There is this difference, however, certiorari brings up the record for inspection only, while on error the proceedings below are superseded.[4] It differs from appeal in that it brings up the case on the

1. Bacon's definition.— "A certiorari is an original writ, issuing out of Chancery, or the King's Bench, directed in the king's name, to the judges or officers of inferior courts, commanding them to return the record of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause." Bacon Abr. tit. Certiorari (A) [*quoted* in Dean v. State, 63 Ala. 153, 154; Matter of Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337; Matter of Evingson, 2 N. D. 184, 190, 49 N. W. 733, 33 Am. St. Rep. 768].

"The substance of this definition has never been departed from except where the statute has broadened the scope of the writ." Matter of Evingson, 2 N. D. 184, 190, 49 N. W. 733, 33 Am. St. Rep. 768.

2. Smith *v.* Jones County, 30 Iowa 531; Hamilton *v.* Spiers, 2 Utah 225, 228. See also APPEAL AND ERROR, 2 Cyc. 507, note 3.

Inferior court defined.— In England an inferior court is a court other than one of the four great courts of the realm, i. e., the court of chancery, and the three great common-law courts, sitting at Westminster. Swift *v.* Judges Wayne Cir. Ct., 64 Mich. 479, 31 N. W. 434 [*citing* Tomlins L. Dict.]. The inferior court of the definition comprehends special tribunals, commissioners, magistrates, and officers exercising judicial powers affecting the property or rights of the citizen, and who act in a summary way, or in a new course different from the common law. Burrill L. Dict. In Washington *v.* Huger, 1 Desauss. (S. C.) 360, the South Carolina court refused to obey the writ when issued by the federal court because it was not inferior to the court which issued it, and further because if applicable the petition could proceed under the act relating to the removal of causes.

3. Writ of error defined see APPEAL AND ERROR, 2 Cyc. 508. See also 2 Cyc. 507, note 3.

Whether included in term "action" or "suit" see ACTIONS, 1 Cyc. 729.

4. *Iowa.*— Smith *v.* Jones County, 30 Iowa 531.

Massachusetts.— Farmington River Water Power Co. *v.* Berkshire County, 112 Mass. 206. See also Drowne *v.* Stimpson, 2 Mass. 441.

Missouri.— State *v.* Smith, 101 Mo. 174, 14 S. W. 108; Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776; Britton *v.* Steber, 62 Mo. 370; State *v.* Schneider, 47 Mo. App. 669; State *v.* Police Com'rs, 14 Mo. App. 297.

New York.— People *v.* Lawrence, 54 Barb. (N. Y.) 589.

Ohio.— Dixon *v.* Cincinnati, 14 Ohio 240.

record, while on appeal the case is brought up on the merits;[5] and from mandamus, for by that writ the case is proceeded with in the inferior court, in accordance with the order of the court granting it.[6] In some of the states the statutory writ of review is a substitute for certiorari, and sustains substantially the same relation to the code procedure as the writ of certiorari does to the common-law practice.[7]

B. Propriety of Writ — 1. Where No Other Remedy Exists — a. In General. It is the general rule that the writ will lie in all cases, where no adequate remedy exists by which an erroneous determination can be reviewed or excess of jurisdiction restrained.[8]

b. Procedure Unknown to the Common Law — (i) *In General.* Certiorari

Pennsylvania.— Harres *v.* Com., 35 Pa. St. 416. See also *In re* Peter, 1 Wkly. Notes Cas. (Pa.) 406, 32 Leg. Int. (Pa.) 160. A certiorari to the quarter sessions after final judgment or order is equivalent to a writ of error to the common pleas, except that it does not bring up the evidence. Mauch Chunk *v.* Nescopeck, 21 Pa. St. 46.

United States.— Harries *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697.

The uniform distinction is between judicial and ministerial acts; the former being merely voidable, and the latter void if unauthorized. Hence, judicial acts being valid until reversed, error or certiorari will lie. If the proceedings are in a court of record according to the course of the common law, error is the appropriate remedy, otherwise the remedy is by certiorari. Parks *v.* Boston, 8 Pick. (Mass.) 218, 19 Am. Dec. 322. See also Levant *v.* Penobscot County, 67 Me. 429.

Certiorari is not a substitute for error with a bill of exceptions. Jacksonville, etc., R. Co. *v.* Boy, 34 Fla. 389, 16 So. 290; Egerton *v.* Green Cove Springs, 18 Fla. 528; Basnet *v.* Jacksonville, 18 Fla. 523.

Error considered as certiorari.— Although a writ of error is irregular, yet if the record and the parties are before the court it may consider the writ as a certiorari. Jeans *v.* Jeans, 3 Harr. (Del.) 136; Vandusen *v.* Comstock, 3 Mass. 184; Drowne *v.* Stimpson, 2 Mass. 441.

5. *In re* Thirty-fourth St., Philadelphia, 81 Pa. St. 27. See also Appeal and Error, 2 Cyc. 515.

Certiorari is not a substitute for appeal. State *v.* Steuart, 5 Strobh. (S. C.) 29.

Effect of change of name of writ.— Although a statute provides that all appellate proceedings theretofore taken by error, appeal, or certiorari, shall thereafter be taken in a proceeding to be called an appeal, but does not extend the right of review, change its extent, or modify its exercise, the pre-existing mode of review by certiorari will remain applicable in the same cases, within the same limits, and with the same effect as before the statute. Rand *v.* King, 134 Pa. St. 641, 26 Wkly. Notes Cas. (Pa.) 81, 19 Atl. 806, holding that an appeal from an order striking a satisfaction of judgment from the record is in effect a common-law certiorari.

6. High Extr. Leg. Rem. § 147 *et seq.* See, generally, Mandamus.

7. Burnett *v.* Douglas County, 4 Oreg. 388; California, etc., Land Co. *v.* Gowen, 48 Fed. 771, 775.

8. *Alabama.*— Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947; Montgomery *v.* Belser, 53 Ala. 379; Bryant *v.* Stearns, 16 Ala. 302; Marion *v.* Chandler, 6 Ala. 899.

Arizona.— Territory *v.* Doan, (Ariz. 1900) 60 Pac. 893.

Arkansas.— Lyons *v.* Green, 68 Ark. 205, 56 S. W. 1075; Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559.

California.— People *v.* County Judge, 40 Cal. 479; Miller *v.* Sacramento County, 25 Cal. 93; People *v.* San Francisco Fire Dept., 14 Cal. 479; People *v.* Turner, 1 Cal. 152.

Dakota.— Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

Florida.— Jacksonville, etc., R. Co. *v.* Boy, 34 Fla. 389, 16 So. 290.

Georgia.—Warren *v.* Oliver, 111 Ga. 807, 35 S. E. 674; Howell *v.* Allen, 106 Ga. 16, 31 S. E. 759; Lathrop *v.* Soldiers' Loan, etc., Assoc., 45 Ga. 483; Harrell *v.* Pickett, 43 Ga. 271.

Idaho.— People *v.* Lindsay, 1 Ida. 394.

Illinois.— Indiana, etc., R. Co. *v.* McCoy, 23 Ill. App. 143.

Iowa.— Boyce *v.* Jenney, 50 Iowa 676.

Louisiana.—State *v.* Judges Civil Dist. Ct., 32 La. Ann. 1256.

Maine.— Dow *v.* True, 19 Me. 46.

Massachusetts.— Mendon *v.* Worcester County, 2 Allen (Mass.) 463.

Michigan.— See Townsend *v.* Tudor, 41 Mich. 263, 1 N. W. 1050.

Minnesota.— Massachusetts Mut. L. Ins. Co. *v.* Elliot, 24 Minn. 134 [*distinguishing* State *v.* Hennepin County Probate Ct., 28 Minn. 381, 10 N. W. 209].

Missouri.— State *v.* Moniteau County Ct., 45 Mo. App. 387.

New Jersey.—State *v.* Plainfield, 60 N. J. L. 260, 37 Atl. 615; State *v.* Bayonne, 58 N. J. L. 325, 33 Atl. 734. And see English *v.* Sharpe, 15 N. J. L. 457; Ferguson *v.* Earl, 14 N. J. L. 124; Young *v.* Stout, 10 N. J. L. 302; Parker *v.* Griggs, 4 N. J. L. 187.

New York.— People *v.* Betts, 55 N. Y. 600; People *v.* Cummings, 53 N. Y. App. Div. 36, 65 N. Y. Suppl. 581; People *v.* Morgan, 65 Barb. (N. Y.) 473.

North Carolina.— Hillsboro *v.* Smith, 110 N. C. 417, 14 S. E. 972; Smith *v.* Cheek, 50

will lie to review the determination of courts, tribunals, or officers empowered to proceed in a summary way or in a mode unknown to the common law, where no method of revision is specially provided.[9] So, it has been held that certiorari will

N. C. 213; Thompson *v.* Floyd, 47 N. C. 313; Reardon *v.* Guy, 3 N. C. 433.

Oregon.— Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111; La Fayette *v.* Clark, 9 Oreg. 225; Mountain *v.* Multnomah County, 8 Oreg. 470.

Pennsylvania.— Spencer *v.* Bloom, 149 Pa. St. 106, 30 Wkly. Notes Cas. (Pa.) 128, 24 Atl. 185.

Rhode Island.— Sherry *v.* O'Brien, 22 R. I. 319, 47 Atl. 690.

Tennessee.— Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182; State *v.* Shelby Taxing Dist., 16 Lea (Tenn.) 240; Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

Utah.—Young *v.* Cannon, 2 Utah 560.

West Virginia.— Poe *v.* Marion Mach. Works, 24 W. Va. 517.

Wisconsin.— State *v.* Waukesha County Cir. Ct., 108 Wis. 77, 83 N. W. 1115.

Canada.— See Reg. *v.* Vrooman, 3 Manitoba 509.

The writ has been allowed for inability to review an admeasurement of dower, because the person aggrieved was not a party to the proceeding (Earle *v.* Juzan, 7 Ala. 474) and where a creditor of a deceased insolvent's estate was not a party to the final decree (Stout *v.* Ward, 10 Ala. 628); to review an order granting an extension of time to answer or demur for a period in excess of the statutory limit (Gibson *v.* San Francisco Super. Ct., 83 Cal. 643, 24 Pac. 152; Baker *v.* Shasta County Super. Ct., 71 Cal. 583, 12 Pac. 685); to review non-appealable order made without jurisdiction, the enforcement of which would result in injury (California Pac. R. Co. *v.* Central Pac. R. Co., 47 Cal. 528); but the proceedings in a non-appealable case will not be reviewed where the court had jurisdiction and its proceedings were apparently regular (State *v.* Skinner, 33 La. Ann. 255, 378), and where the use of the writ in non-appealable cases is restricted to the correction of proceedings absolutely null and void, the qualification of the judge below cannot be considered on an application to review a judgment rendered by him (State *v.* Recorder, 48 La. Ann. 1375, 20 So. 908).

The writ will not lie to review the affirmance of a judgment of an inferior judicatory not of record. Tankersley *v.* Lipscomb, 3 Leigh (Va.) 813.

9. *Alabama.*— Cobb *v.* Thompson, 87 Ala. 381, 6 So. 373; Stanfill *v.* Dallas County, 80 Ala. 287; Miller *v.* Jones, 80 Ala. 89; Clarke *v.* Jack, 60 Ala. 271; *Ex p.* Buckley, 53 Ala. 42; Appling *v.* Bailey, 44 Ala. 333; Earle *v.* Juzan, 7 Ala. 474; Marion *v.* Chandler, 6 Ala. 899; *Ex p.* Tarlton, 2 Ala. 35.

Arkansas.— Lindsay *v.* Lindley, 20 Ark. 573; *Ex p.* Couch, 14 Ark. 337; Auditor *v.* Davies, 2 Ark. 494.

California.— California Pac. R. Co. *v.* Central Pac. R. Co., 47 Cal. 528.

Delaware.— Jeans *v.* Jeans, 3 Harr. (Del.) 136.

District of Columbia.— Bradshaw *v.* Earnshaw, 11 App. Cas. (D. C.) 495.

Florida.— Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214; Jacksonville, etc., R. Co. *v.* Boy, 34 Fla. 389, 16 So. 290.

Georgia.— Stewart *v.* State, 98 Ga. 202, 25 S. E. 424; Pilotage Com'rs *v.* Low, R. M. Charlt. (Ga.) 298.

Illinois.— Mason, etc., Special Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Miller *v.* Trustees Schools Tp., 88 Ill. 26; Doolittle *v.* Galena, etc., R. Co., 14 Ill. 381.

Iowa.— Lake *v.* Wolfe, 108 Iowa 184, 78 N. W. 811.

Maine.— Levant *v.* Penobscot County, 67 Me. 429; Hopkins *v.* Fogler, 60 Me. 266; Banks, Appellant, 29 Me. 288; Bath Bridge, etc., Co. *v.* Magoun, 8 Me. 292.

Maryland.— Williamson *v.* Carnan, 1 Gill & J. (Md.) 184.

Massachusetts.—Lynch *v.* Crosby, 134 Mass. 313; Tewksbury *v.* Middlesex County, 117 Mass. 563; Farmington River Water Power Co. *v.* Berkshire County, 112 Mass. 206; Palmer Co. *v.* Ferrill, 17 Pick. (Mass.) 58; Parks *v.* Boston, 8 Pick. (Mass.) 218, 19 Am. Dec. 322; Com. *v.* Ellis, 11 Mass. 462; Edgar *v.* Dodge, 4 Mass. 670; Winslow *v.* Anderson, 4 Mass. 376; Savage *v.* Gulliver, 4 Mass. 171. And see Randall, Petitioner, 11 Allen (Mass.) 472.

Michigan.— Jerome *v.* Williams, 13 Mich. 521; Parker *v.* Copland, 4 Mich. 528; Perkins *v.* Superintendents of Poor, 1 Mich. 504; Root *v.* Barnes, 1 Mich. 37; Warner *v.* Porter, 2 Dougl. (Mich.) 358; People *v.* Judges Branch Cir. Ct., 1 Dougl. (Mich.) 319.

Minnesota.— State *v.* Searle, 59 Minn. 489, 61 N. W. 553; Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949; Faribault *v.* Hulett, 10 Minn. 30; Tierney *v.* Dodge, 9 Minn. 166.

Mississippi.— Holberg *v.* Macon, 55 Miss. 112.

Missouri.— State *v.* Dowling, 50 Mo. 134; St. Charles *v.* Rogers, 49 Mo. 530; Snoddy *v.* Pettis County, 45 Mo. 361.

New Hampshire.— Hayward *v.* Bath, 35 N. H. 514.

New Jersey.— State *v.* Shafer, 63 N. J. L. 182, 42 Atl. 770; Curtis *v.* Steever, 36 N. J. L. 304; State *v.* District Medical Soc., 35 N. J. L. 200; Morris Canal, etc., Co. *v.* Mitchell, 31 N. J. L. 99; Mann *v.* Drost, 18 N. J. L. 336; Conard *v.* Conard, 17 N. J. L. 154; Lawrence *v.* Dickey, 12 N. J. L. 368; Phillips *v.* Phillips, 8 N. J. L. 122; State *v.* Chambers, 1 N. J. L. 458; Overseers of Poor *v.* Overseers of Poor, 1 N. J. L. 88.

New York.—People *v.* Board of R. Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861, 74 N. Y. St. 794; People *v.* Walsh, 67 How. Pr. (N. Y.) 482; Stone *v.* New York, 25

lie to all tribunals which are called extraordinary and special in contradistinction to the ordinary and common courts established for the trial of criminal offenses, and the determination of private rights.[10]

Wend. (N. Y.) 157; Lynde *v.* Noble, 20 Johns. (N. Y.) 80; Wildy *v.* Washburn, 16 Johns. (N. Y.) 49; Wood *v.* Peake, 8 Johns. (N. Y.) 69; Lawton *v.* Highway Com'rs, 2 Cai. (N. Y.) 179.

North Carolina.— Hillsboro *v.* Smith, 110 N. C. 417, 14 S. E. 972; Thompson *v.* Floyd, 47 N. C. 313; Brooks *v.* Morgan, 27 N. C. 481; Collins *v.* Haughton, 26 N. C. 420; Matthews *v.* Matthews, 26 N. C. 155; Dougan *v.* Arnold, 15 N. C. 99; Allen *v.* Williams, 2 N. C. 22.

Ohio.—Walpole *v.* Ink, 9 Ohio 142; Street *v.* Francis, 3 Ohio 277.

Pennsylvania.—Parks *v.* Watts, 112 Pa. St. 4, 6 Atl. 106; Wetherald *v.* Shupe, 109 Pa. St. 389, 16 Wkly. Notes Cas. (Pa.) 502, 2 Atl. 220; *In re* Thirty-fourth St., Philadelphia, 81 Pa. St. 27; Northampton County's Appeal, 57 Pa. St. 452; Hummel's Case, 9 Watts (Pa.) 416; Com. *v.* Beaumont, 4 Rawle (Pa.) 366; Lewis *v.* Wallick, 3 Serg. & R. (Pa.) 410; Lenox *v.* McCall, 3 Serg. & R. (Pa.) 95; Overseers of Poor *v.* Smith, 2 Serg. & R. (Pa.) 363; Ruhlman *v.* Com., 5 Binn. (Pa.) 24; Com. *v.* Tragle, 4 Pa. Super. Ct. 159, 40 Wkly. Notes Cas. (Pa.) 350; Wilt *v.* Philadelphia, etc., Turnpike Co., 1 Brewst. (Pa.) 411.

Tennessee.— State *v.* Shelby County Taxing Dist., 16 Lea (Tenn.) 240; Louisville, etc., R. Co. *v.* Bate, 12 Lea (Tenn.) 573; Williams *v.* Pointer, 3 Lea (Tenn.) 366; Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663; Nashville *v.* Pearl, 11 Humphr. (Tenn.) 249; Bob *v.* State, 2 Yerg. (Tenn.) 173; Trigg *v.* Boyce, 4 Hayw. (Tenn.) 100; Durham *v.* U. S., 4 Hayw. (Tenn.) 69; Kendrick *v.* State, Cooke (Tenn.) 474; Stuart *v.* Hall, 2 Overt. (Tenn.) 178; Murfree *v.* Leeper, 1 Overt. (Tenn.) 1.

Vermont.— Londonderry *v.* Babbitt, 54 Vt. 455; Stiles *v.* Windsor, 45 Vt. 520; Woodstock *v.* Gallup, 28 Vt. 587; Paine *v.* Leicester, 22 Vt. 44; Beckwith *v.* Houghton, 11 Vt. 602.

Virginia.—Wingfield *v.* Crenshaw, 3 Hen. & M. (Va.) 245; Mackaboy *v.* Com., 2 Va. Cas. 268.

Washington.—Wilson *v.* Seattle, 2 Wash. 543, 27 Pac. 474.

West Virginia.—Low *v.* Lincoln County Ct., 27 W. Va. 785; Poe *v.* Marion Mach. Works, 24 W. Va. 517.

Wisconsin.— State *v.* Whitford, 54 Wis. 150, 11 N. W. 424.

United States.— Campbell *v.* Strong, Hempst. (U. S.) 195, 4 Fed. Cas. No. 2,367*b*.

England.— Rex *v.* Glamorganshire, 1 Ld. Raym. 580; Groenwelt *v.* Burwell, 1 Ld. Raym. 213, 454, 1 Salk. 144; Bacon Abr. tit. Certiorari (A); 3 Bl. Comm. 32 *et seq.*; Tidd Pr. 398, 1051, 1131.

Canada.—*Ex p.* Jocelyn, 7 N. Brunsw. 637; Pinsent *v.* Boyd, 1 Newfound. 727.

See 9 Cent. Dig. tit. "Certiorari," § 20.

The Georgia act providing for the review by certiorari of the action of the county courts is applicable to proceedings on a possessory warrant had in vacation. Carter *v.* Commander, 35 Ga. 265.

Certiorari is appropriate where there is nothing to review but a question of law as to whether a court officer was in contempt for non-performance of duty (Glover *v.* Lumpkin, 99 Ga. 174, 25 S. E. 179); to review a judgment quashing an inquisition of lunacy (Com. *v.* Beaumont, 4 Rawle (Pa.) 366), an order refusing to vacate a forfeited recognizance (Com. *v.* Bird, 144 Pa. St. 194, 29 Wkly. Notes Cas. (Pa.) 14, 22 Atl. 877), the action of a sheriff, in amending his return and taking out and levying an alias execution after returning the original "satisfied" (Atkin *v.* Mooney, 61 N. C. 31), or a decree of divorce (Jeans *v.* Jeans, 3 Harr. (Del.) 136); and when an attachment has improperly issued on a defective affidavit and bond (Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330).

10. Whitehead *v.* Gray, 12 N. J. L. 36; Ludlow *v.* Ludlow, 4 N. J. L. 451.

Thus the writ has issued to review the appointment and proceedings of commissioners to value land taken for corporate purposes, and to appraise damages by special statutory authority (Smith *v.* Trenton Delaware Falls Co., 17 N. J. L. 5; Vanwickle *v.* Camden, etc., R., etc., Co., 14 N. J. L. 162; Bennett *v.* Camden, etc., R., etc., Co., 14 N. J. L. 145; Morris Canal, etc., Co. *v.* State, 12 N. J. L. 365, 14 N. J. L. 411), the laying out of a road under an act incorporating a turnpike company (State *v.* Newark, etc., Turnpike, 2 N. J. L. 318), and the return list of delinquents, and execution issued for the collection of fines imposed for the neglect of military duty (State *v.* Atkinson, 9 N. J. L. 271; State *v.* Kirby, 6 N. J. L. 143); to test the validity of a by-law of a municipality (State *v.* New Brunswick, 1 N. J. L. 450), the classification and assessment of militia under a statute (State *v.* Chambers, 1 N. J. L. 458), and the validity of an election (State *v.* Anderson, 1 N. J. L. 366, 1 Am. Dec. 207; State *v.* Middlesex County, 1 N. J. L. 283); and will lie to commissioners who have passed on the question of damages to an abutting owner by a change of street grade, but have failed to report in his favor (Stewart *v.* Hoboken, 57 N. J. L. 330, 31 Atl. 278).

In proceedings of a summary character by bodies exercising quasi-judicial functions which do not admit of any other remedy for a direct review, clear violations of law in doing those things which are within the jurisdiction of the body to do in a legal manner may be corrected by the common-law writ of certiorari. State *v.* Lawler, 103 Wis. 460, 79 N. W. 777. To same effect see State *v.* Dodge County, 56 Wis. 79, 13 N. W. 680; State *v.* Whitford, 54 Wis. 150, 11 N. W. 424.

(II) *Probate or Orphans' Courts.* This general rule has been held applicable to probate and orphans' courts and other like tribunals, upon which special jurisdiction has been conferred by statute.[11]

(III) *Proceedings Concerning Insolvents and Poor or Fraudulent Debtors.* Certiorari will lie to review the action of inferior tribunals, with respect to proceedings concerning insolvents, and poor or fraudulent debtors,[12] and proceedings on the arrest of an alleged fraudulent debtor, where the record discloses errors of law.[13]

11. *Alabama.*— McCulley *v.* Cunningham, 96 Ala. 583, 11 So. 694; Cawthorne *v.* Weisinger, 6 Ala. 714.

Arkansas.— Wyatt *v.* Burr, 25 Ark. 476.

Georgia.— McCaskill *v.* McCaskill, T. U. P. Charlt. (Ga.) 151.

Maryland.— Durham *v.* Hall, 3 Harr. & M. (Md.) 352; Bradford *v.* Richardson, 3 Harr. & M. (Md.) 348.

Michigan.— Matter of Reid, 80 Mich. 228, 45 N. W. 91.

Minnesota.— State *v.* Willrich, 72 Minn. 165, 75 N. W. 123. But see State *v.* Steele, 62 Minn. 28, 63 N. W. 1117.

Missouri.— State *v.* Moehlenkamp, 133 Mo. 134, 34 S. W. 468.

New Jersey.— State *v.* Mayhew, 9 N. J. L. 70; Burrough *v.* Mickle, 3 N. J. L. 472; Wood *v.* Tallman, 1 N. J. L. 177.

New Mexico.—Territory *v.* Valdez, 1 N. M. 533.

Ohio.— Ewing *v.* Hollister, 7 Ohio, Pt. II, 138.

Pennsylvania.— Walker's Appeal, 2 Dall. (Pa.) 190, 1 L. ed. 344.

United States.—Campbell *v.* Strong, Hempst. (U. S.) 195, 4 Fed. Cas. No. 2,367*b*.

But see Deans *v.* Wilcoxon, 18 Fla. 531; Peters *v.* Peters, 8 Cush. (Mass.) 529.

See 9 Cent. Dig. tit. "Certiorari," § 24.

It has been applied to the rejection. (McCaskill *v.* McCaskill, T. U. P. Charlt. (Ga.) 151) or construction (Matter of Reid, 80 Mich. 228, 45 N. W. 91 [*following* Kelly *v.* Reynolds, 39 Mich. 464, 33 Am. Rep. 418]) of a will; the grant of letters testamentary or of administration (Redd *v.* Dure, 40 Ga. 389, a grant of letters pending contest); the removal of an executor or administrator (*Ex p.* Boynton, 44 Ala. 261; Territory *v.* Valdez, 1 N. M. 533. But the writ will not issue to set aside the removal of an administrator and the appointment of an administrator *de bonis non*, where it is not apparent the court acted illegally or in disregard of the rights of others. Matter of Watts, 1 N. M. 541); the suspension of an executor and appointment of an administrator pending a contest (State *v.* Moehlenkamp, 133 Mo. 134, 34 S. W. 468); the settlement of the accounts of executors and administrators (Appling *v.* Bailey, 44 Ala. 333; State *v.* Ramsey County Probate Ct., 76 Minn. 132, 78 N. W. 1039; Vanpelt *v.* Veghte, 14 N. J. L. 207; State *v.* Mayhew, 9 N. J. L. 70; Burrough *v.* Mickle, 3 N. J. L. 472; Campbell *v.* Strong, Hempst. (U. S.) 195, 4 Fed. Cas. No. 2,367*b*); the appointment of guardians (Eldridge *v.* Lippincott, 1 N. J. L. 455. *Contra*, Thompson *v.* Hall, 77 Me. 160); the revocation of a guardianship (Tenbrook *v.* McColm, 10 N. J. L. 333); an order made on petition of an incompetent for restoration to capacity (State *v.* Ramsey County Probate Ct., 83 Minn. 58, 85 N. W. 917); a determination setting aside an order permitting suit on a guardian's bond, by an administrator of the ward (Welch *v.* Van Auken, 76 Mich. 464, 43 N. W. 371); the classification (Wyatt *v.* Burr, 25 Ark. 476; Derton *v.* Boyd, 21 Ark. 264) or rejection (Stout *v.* Ward, 10 Ala. 628; Cawthorne *v.* Weisinger, 6 Ala. 714; State *v.* Dakota County Probate Ct., 51 Minn. 241, 53 N. W. 463) of claims of creditors or persons claiming a distributive share in the estate (Fowler *v.* Trewhil, 10 Ala. 622; Graham *v.* Abercrombie, 8 Ala. 552); the refusal to allow time to present claim (Massachusetts Mut. L. Ins. Co. *v.* Elliot, 24 Minn. 134. But see State *v.* Hennepin County Probate Ct., 28 Minn. 381, 10 N. W. 209, where certiorari to review the grant of a similar application was held improper, because an appeal lay); and in proceedings to subject a decedent's lands to sale for the payment of debts (Ewing *v.* Hollister, 7 Ohio, Pt. II, 138).

Certiorari to review order of adoption see Adoption of Children, 1 Cyc. 927, note 9.

12. *Alabama.*— Cawthorne *v.* Weisinger, 6 Ala. 714, the improper rejection of the claims of creditors.

Maine.— Lewis *v.* Brewer, 51 Me. 108. As refusal to permit the examination of a debtor to the extent allowed by law. Marr *v.* Clark, 56 Me. 542; Little *v.* Cochran, 24 Me. 509.

New Jersey.— State *v.* Passaic C. Pl., 38 N. J. L. 182 (refusal to discharge a debtor in a proper case); State *v.* Stiles, 12 N. J. L. 296 (wrongful discharge of a debtor).

New York.— People *v.* Daly, 67 Barb. (N. Y.) 325 (wrongful discharge of a debtor); Spencer *v.* Hilton, 10 Wend. (N. Y.) 608 (the improper discharge of a complaint against a fraudulent debtor); Matter of Gilbert, 7 Wend. (N. Y.) 490; Learned *v.* Duval, 3 Johns. Cas. (N. Y.) 141.

Vermont.— Beckwith *v.* Houghton, 11 Vt. 602.

Canada.— *Ex p.* White, 20 N. Brunsw. 509 (wrongful discharge of a debtor); White *v.* Coleman, 9 N. Brunsw. 630.

See 9 Cent. Dig. tit. "Certiorari," § 28.

13. Morch *v.* Raubitschek, 159 Pa. St. 559, 33 Wkly. Notes Cas. (Pa.) 567, 28 Atl. 369; Grieb *v.* Kuttner, 135 Pa. St. 281, 26 Wkly. Notes Cas. (Pa.) 323, 19 Atl. 1040; Hart *v.* Cooper, 129 Pa. St. 297, 24 Wkly. Notes Cas. (Pa.) 358, 18 Atl. 122; Berger *v.* Smull, 39 Pa. St. 302; Gosline *v.* Place, 32 Pa. St. 520.

2. Where Other Remedy Exists — a. In General — (1) *Rule Stated.* It is a rule of general application that certiorari is not an appropriate remedy if efficient relief can be, or could have been, obtained by a resort to other available modes of redress or review,[14] for a party is not entitled to the writ if he fails to

14. *Alabama.*— *Ex p.* Howard-Harrison Iron Co., 130 Ala. 185, 30 So. 400; Lawler *v.* Lyness, 112 Ala. 386, 20 So. 574; Alabama Great Southern R. Co. *v.* Christian, 82 Ala. 307, 1 So. 121; Montgomery *v.* Belser, 53 Ala. 379.

Arkansas.— Lyons *v.* Green, 68 Ark. 205, 56 S. W. 1075; Little Rock Traction, etc., Co. *v.* Wilson, 66 Ark. 582, 53 S. W. 43; Merchants, etc., Bank *v.* Fitzgerald, 61 Ark. 605, 33 S. W. 1064 [*disapproving* Tucker *v.* Yell, 25 Ark. 420]; St. Louis, etc., R. Co. *v.* State, 55 Ark. 200, 17 S. W. 806; Petty *v.* Ducker, 51 Ark. 281, 11 S. W. 2; Baird *v.* Williams, 49 Ark. 518, 6 S. W. 1; Carolan *v.* Carolan, 47 Ark. 511, 2 S. W. 105; *Ex p.* Pearce, 44 Ark. 509; Hickey *v.* Matthews, 43 Ark. 341; Pettigrew *v.* Washington County, 43 Ark. 33; Phelps *v.* Buck, 40 Ark. 219; Haynel *v.* Semmes, 39 Ark. 399; Payne *v.* McCabe, 37 Ark. 318; McKay *v.* Jones, 30 Ark. 148; Baxter *v.* Brooks, 29 Ark. 173; Flournoy *v.* Payne, 28 Ark. 87; Wyatt *v.* Burr, 25 Ark. 476; Derton *v.* Boyd, 21 Ark. 264; *Ex p.* Allston, 17 Ark. 580.

California.— Elledge *v.* Lassen County Super. Ct., 131 Cal. 279, 63 Pac. 360; Southern California R. Co. *v.* San Diego County Super. Ct., 127 Cal. 417, 59 Pac. 789; Tucker *v.* San Francisco, 120 Cal. 512, 52 Pac. 808; Zuinchard *v.* Alameda, 113 Cal. 664, 45 Pac. 856; White *v.* San Francisco Super. Ct., 110 Cal. 54, 42 Pac. 471; Nohle *v.* Fresno County Super. Ct., 109 Cal. 523, 42 Pac. 155; Stoddard *v.* Stanislaus County Super. Ct., 108 Cal. 303, 41 Pac. 278; Weill *v.* Light, 98 Cal. 193, 32 Pac. 943; Gibson *v.* San Francisco Super. Ct., 85 Cal. 216, 24 Pac. 721; Reagan *v.* San Francisco, 75 Cal. 253, 17 Pac. 195; Matter of McConnell, 74 Cal. 217, 15 Pac. 746; Stuttmeister *v.* San Francisco Super. Ct., 71 Cal. 322, 12 Pac. 270; Slavonic Illyric Mut. Benev. Assoc. *v.* Santa Clara County Super. Ct., 65 Cal. 500, 4 Pac. 500; Newman *v.* San Francisco Super. Ct., 62 Cal. 545; Menzies *v.* Board of Equalization, 62 Cal. 179; Cereghino *v.* Finochio, 54 Cal. 603; Lamb *v.* Schottler, 54 Cal. 319; Faut *v.* Mason, 47 Cal. 7; Central Pac. R. Co. *v.* Board of Equalization, 46 Cal. 667; Bennett *v.* Wallace, 43 Cal. 25; People *v.* Shepard, 28 Cal. 115; Miliken *v.* Huber, 21 Cal. 166; Clary *v.* Hoagland, 13 Cal. 173; Fisk *v.* His Creditors, 12 Cal. 281; Kohlman *v.* Wright, 6 Cal. 230; Gray *v.* Schupp, 4 Cal. 185; People *v.* Turner, 1 Cal. 152.

Colorado.— Union Pac. R. Co. *v.* Bowler, 4 Colo. App. 25, 34 Pac. 940.

District of Columbia.— District of Columbia *v.* Nau, 20 D. C. 547; Hendley *v.* Clark, 8 App. Cas. (D. C.) 165; Barber *v.* Harris, 6 Mackey (D. C.) 586; District of Columbia *v.* Washington Gas Light Co., 3 Mackey (D. C.) 343.

Florida.—Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214; Jacksonville, etc., R. Co. *v.* Boy, 34 Fla. 389, 16 So. 290; Deans *v.* Wilcoxon, 18 Fla. 531; Edgerton *v.* Green Cove Springs, 18 Fla. 528; Basnet *v.* Jacksonville, 18 Fla. 523; Halliday *v.* Jacksonville, etc., Plank Road Co., 6 Fla. 304.

Georgia.— Wilson *v.* Burks, 71 Ga. 862; Witkowski *v.* Skalowski, 46 Ga. 41.

Idaho.— State *v.* Goode, (Ida. 1896) 44 Pac. 640; Rogers *v.* Hayes, (Ida. 1893) 32 Pac. 259; People *v.* Lindsay, 1 Ida. 394.

Illinois.— White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60 [*affirming* 83 Ill. App. 592]; Schlink *v.* Maxton, 153 Ill. 447, 38 N. E. 1063 [*affirming* 48 Ill. App. 471]; Smith *v.* Highway Com'rs, 150 Ill. 385, 36 N. E. 967; Wright *v.* Carrollton, 150 Ill. 138, 36 N. E. 980; Glennon *v.* Burton, 144 Ill. 551, 33 N. E. 23; School Trustees *v.* Shepherd, 139 Ill. 114, 28 N. E. 1073; Lees *v.* Drainage Com'rs, 125 Ill. 47, 16 N. E. 915 [*affirming* 24 Ill. App. 487]; Ennis *v.* Ennis, 110 Ill. 78; Scates *v.* Chicago, etc., R. Co., 104 Ill. 93; Hyslop *v.* Finch, 99 Ill. 171; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105; Doolittle *v.* Galena, etc., R. Co., 14 Ill. 381; Okerlind *v.* Fyke, 90 Ill. App. 192; Sanner *v.* Union Drainage Dist., 64 Ill. App. 62; Harvey *v.* Dean, 62 Ill. App. 41; Blair *v.* Sennott, 35 Ill. App. 368 [*affirmed* in 134 Ill. 78, 24 N. E. 969].

Iowa.— Oyster *v.* Bank, 107 Iowa 39, 77 N. W. 523; Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445; Ransom *v.* Cummins, 66 Iowa 137, 23 N. W. 301; State *v.* Schmidtz, 65 Iowa 556, 22 N. W. 673; Cedar Rapids, etc., R. Co. *v.* Whelan, 64 Iowa 694, 21 N. W. 141; Sunberg *v.* Linn County Dist. Ct., 61 Iowa 597, 16 N. W. 724; Independent School Dist. *v.* Dubuque County Dist. Ct., 48 Iowa 182; Harney *v.* Mitchell County, 44 Iowa 203; Hunt *v.* Free, 29 Iowa 156; Thompson *v.* Reed, 29 Iowa 117; O'Hare *v.* Hempstead, 21 Iowa 33; Edgar *v.* Greer, 14 Iowa 211; State *v.* Wilson, 12 Iowa 424; Fagg *v.* Parker, 11 Iowa 18; Davis County *v.* Horn, 4 Greene (Iowa) 94.

Louisiana.— State *v.* St. Paul, 104 La. 280, 29 So. 112; State *v.* St. Paul, 104 La. 103, 28 So. 839; State *v.* King, 52 La. Ann. 1548, 28 So. 105; State *v.* St. Paul, 52 La. Ann. 1039, 27 So. 571; Airey *v.* Pullman Palace-Car Co., 50 La. Ann. 648, 23 So. 512; State *v.* King, 49 La. Ann. 1527, 22 So. 806; State *v.* Guion, 49 La. Ann. 1227, 22 So. 353; State *v.* Tomkies, 49 La. Ann. 1162, 22 So. 336; State *v.* Perez, 48 La. Ann. 1348, 20 So. 164; State *v.* Monroe, 47 La. Ann. 1482, 17 So. 940; State *v.* Monroe, 45 La. Ann. 1322, 14 So. 59; Williams *v.* Judge Eighteenth Judicial Dist. Ct., 45 La. Ann. 1295, 14 So. 57; State *v.* Judge Twenty-first Dist. Ct., 45 La. Ann. 950, 13 So. 181; State *v.* Kruttschnitt,

exercise diligence in protecting his interests in the action or proceeding in ques-

44 La. Ann. 567, 10 So. 887; State *v.* Coco, 42 La. Ann. 408, 7 So. 620; State *v.* Ring, 42 La. Ann. 1191, 8 So. 398; State *v.* Judge Twenty-third Dist. Ct., 37 La. Ann. 846; State *v.* Levy, 36 La. Ann. 941; State *v.* Rightor, 35 La. Ann. 515; State *v.* Monroe, 33 La. Ann. 923; State *v.* Skinner, 32 La. Ann. 1092; State *v.* Judge Super. Dist. Ct., 26 La. Ann. 65; State *v.* Judge Fifth Dist. Ct., 15 La. Ann. 34; Stewart *v.* Barrow, 6 Mart. N. S. (La.) 381; Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42.

Maine.— Nobleboro *v.* Lincoln County, 68 Me. 548; Howland *v.* Penobscot County, 49 Me. 143; Sumner *v.* Oxford County, 37 Me. 112.

Maryland.— Weed *v.* Lewis, 80 Md. 126, 30 Atl. 610.

Massachusetts.— Randall, Petitioner, 11 Allen (Mass.) 472; McManagil *v.* Ross, 20 Pick. (Mass.) 99; Hayward, Petitioner, 10 Pick. (Mass.) 358; Savage *v.* Gulliver, 4 Mass. 171.

Michigan.—McNaughton *v.* Evert, 116 Mich. 141, 74 N. W. 486; Baudistel *v.* Jackson, 110 Mich. 357, 68 N. W. 292; John Hancock Mut. L. Ins. Co. *v.* Hill, 108 Mich. 129, 65 N. W. 748; John Hancock Mut. L. Ins. Co. *v.* Durfee, 97 Mich. 613, 57 N. W. 189; Nightingale *v.* Simmons, 66 Mich. 528, 33 N. W. 414; Galloway *v.* Corbitt, 52 Mich. 460, 18 N. W. 218; Dietz *v.* Frazier, 50 Mich. 227, 15 N. W. 95; Tucker *v.* Parker, 50 Mich. 5, 14 N. W. 676; Erie Preserving Co. *v.* Witherspoon, 49 Mich. 377, 13 N. W. 781; Ishpeming *v.* Maroney, 49 Mich. 226, 13 N. W. 527; Detroit Western Transit, etc., R. Co. *v.* Backus, 48 Mich. 582, 12 N. W. 861; Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 9 N. W. 249; Woodin *v.* Phœnix, 41 Mich. 655, 2 N. W. 923, 32 Am. Rep. 172; Smith *v.* Reed, 24 Mich. 240; Specht *v.* Detroit, 20 Mich. 168; Farwell *v.* Taylor, 12 Mich. 113; Parker *v.* Copland, 4 Mich. 528.

Minnesota.— State *v.* Mower County Probate Ct., 72 Minn. 434, 75 N. W. 700; State *v.* Olson, 56 Minn. 210, 57 N. W. 477; Fall *v.* Moore, 45 Minn. 515, 48 N. W. 404; Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949; State *v.* Hanft, 32 Minn. 403, 23 N. W. 308; State *v.* Buckham, 29 Minn. 462, 13 N. W. 902; State *v.* Hennepin County Probate Ct., 28 Minn. 381, 10 N. W. 209 [*distinguishing* Massachusetts Mut. L. Ins. Co. *v.* Elliot, 24 Minn. 134]; State *v.* Noonan, 24 Minn. 124; State *v.* Weston, 23 Minn. 366; Dousman *v.* St. Paul, 22 Minn. 387.

Mississippi.— Duggen *v.* McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527.

Missouri.— State *v.* Woodson, 161 Mo. 444, 61 S. W. 252; State *v.* Shelton, 154 Mo. 670, 55 S. W. 1008, 50 L. R. A. 798; State *v.* Moehlenkamp, 133 Mo. 134, 34 S. W. 468; State *v.* Nodaway County Ct., 80 Mo. 500; Boren *v.* Welty, 4 Mo. 250; Moore *v.* Bailey, 8 Mo. App. 156. See also State *v.* Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787.

Montana.— State *v.* Second Judicial Dist. Ct., 24 Mont. 494, 62 Pac. 820; State *v.* Napton, 24 Mont. 450, 62 Pac. 686; Hayes *v.* First Judicial Dist. Ct., 11 Mont. 225, 28 Pac. 259.

Nevada.— Wilson *v.* Morse, 25 Nev. 375, 60 Pac. 832; Nevada Cent. R. Co. *v.* Lander County Dist. Ct., 21 Nev. 409, 32 Pac. 673; Peacock *v.* Leonard, 8 Nev. 247; Leonard *v.* Peacock, 8 Nev. 157.

New Hampshire.—Logue *v.* Clark, 62 N. H. 184; Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64; Tucker's Petition, 27 N. H. 405.

New Jersey.— Reynolds *v.* West Hoboken, 63 N. J. L. 497, 43 Atl. 682; State *v.* Plainfield, 60 N. J. L. 260, 37 Atl. 615; State *v.* Ocean Grove Camp Meeting Assoc., 59 N. J. L. 369, 35 Atl. 907; Diament *v.* Lore, 31 N. J. L. 220; State *v.* Clothier, 30 N. J. L. 351; Holmes *v.* Morris, 16 N. J. L. 526.

New York.— People *v.* Board of Health, 140 N. Y. 1, 35 N. E. 320, 55 N. Y. St. 416, 37 Am. St. Rep. 522, 23 L. R. A. 481; Chemung Nat. Bank *v.* Elmira, 53 N. Y. 49; Adams *v.* Wheatfield, 46 N. Y. App. Div. 466, 61 N. Y. Suppl. 738; People *v.* Board of R. Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861, 74 N. Y. St. 794; People *v.* Wayne County, 49 Hun (N. Y.) 476, 2 N. Y. Suppl. 555, 18 N. Y. St. 898; People *v.* Grant, 41 Hun (N. Y.) 351; People *v.* Dennison, 28 Hun (N. Y.) 328; People *v.* McDonald, 4 Hun (N. Y.) 187, 6 Thomps. & C. (N. Y.) 473; People *v.* Overseers of Poor, 44 Barb. (N. Y.) 467; People *v.* Board of Pilot Com'rs, 37 Barb. (N. Y.) 126; People *v.* Board of Health, 33 Barb. (N. Y.) 344, 12 Abb. Pr. (N. Y.) 88, 20 How. Pr. (N. Y.) 458; People *v.* New York Soc., etc., 27 Misc. (N. Y.) 457, 58 N. Y. Suppl. 118, 29 N. Y. Civ. Proc. 191; People *v.* Wemple, 11 N. Y. Suppl. 246, 33 N. Y. St. 29; People *v.* Tucker, 3 N. Y. Suppl. 792, 19 N. Y. St. 903, 16 N. Y. Civ. Proc. 126; People *v.* Moore, 1 N. Y. Suppl. 405, 16 N. Y. St. 469; People *v.* Cobb, 14 Abb. N. Cas. (N. Y.) 493; Saratoga, etc., R. Co. *v.* McCoy, 5 How. Pr. (N. Y.) 378; Matter of Mt. Morris Square, 2 Hill (N. Y.) 14; People *v.* New York, 2 Hill (N. Y.) 9; People *v.* Covert, 1 Hill (N. Y.) 674; People *v.* Queens County, 1 Hill (N. Y.) 195; *Ex p.* Albany, 23 Wend. (N. Y.) 277; Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464; People *v.* Allegany County, 15 Wend. (N. Y.) 198; Starr *v.* Rochester, 6 Wend. (N. Y.) 564; Storm *v.* Odell, 2 Wend. (N. Y.) 287; Baldwin *v.* Goodyear, 4 Cow. (N. Y.) 536; Harwood *v.* French, 4 Cow. (N. Y.) 501.

North Carolina.— Watson *v.* Shields, 67 N. C. 235; Buis *v.* Arnold, 53 N. C. 233; *Ex p.* Daughtry, 28 N. C. 155; Petty *v.* Jones, 23 N. C. 408; Swaim *v.* Fentress, 15 N. C. 601; Street *v.* Clark, 1 N. C. 11.

Ohio.— Kern *v.* Foster, 16 Ohio 274.

Oregon.—Kearns *v.* Follansby, 15 Oreg. 596, 16 Pac. 478; Broback *v.* Huff, 11 Oreg. 395, 4 Pac. 1130; Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280; Sellers *v.* Corvallis, 5 Oreg. 273; Evans *v.* Christian, 4 Oreg. 375.

tion.[15] Hence the writ will not be awarded unless the party has first applied to the primary court or to a superior court for relief, or shows that they are incompetent to act in the matter or that such an application would be futile,[16] or until he has exhausted his remedies by procuring a rehearing to which he is entitled;[17] but if it is the absolute and imperative duty of the court below to take the action charged to have been neglected, it is not necessary that a formal application should have been priorly made.[18]

Pennsylvania.— Union Canal Co. *v.* Woodside, 11 Pa. St. 176.

South Carolina.— State *ex rel.* Buffington, 58 S. C. 114, 36 S. E. 433; State *v.* Moore, 54 S. C. 556, 32 S. E. 700; *Ex p.* Doyley, 2 McCord (S. C.) 185; Washington *v.* Huger, 1 Desauss. (S. C.) 360.

South Dakota.— Sioux Falls Nat. Bank *v.* McKee, 3 S. D. 1, 50 N. W. 1057.

Tennessee.— Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182; Tomlinson *v.* Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207; Swafford *v.* Howard, 8 Baxt. (Tenn.) 326; Johnson *v.* Gaines, 1 Coldw. (Tenn.) 288; O'Sullivan *v.* Larry, 2 Head (Tenn.) 54; Trigg *v.* Boyce, 4 Hayw. (Tenn.) 100; Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

Texas.— Wichita Valley R. Co. *v.* Peery, 88 Tex. 378, 31 S. W. 619; Mitchell *v.* Harrison, 32 Tex. 331; McDonald *v.* Cross, 16 Tex. 562; Wood *v.* Rich, 8 Tex. 280.

Utah.— Saunders *v.* Sioux City Nursery, 6 Utah 431, 24 Pac. 522.

Vermont.— Sowles *v.* Bailey, 69 Vt. 27, 37 Atl. 237.

Virginia.—Tankersley *v.* Lipscomb, 3 Leigh (Va.) 813.

Washington.— Parker *v.* Snohomish County Super. Ct., 25 Wash. 544, 66 Pac. 154; Falsetto *v.* Seattle, 18 Wash. 509, 52 Pac. 250; Gregory *v.* Dixon, 7 Wash. 27, 34 Pac. 212; Spooner *v.* Seattle, 6 Wash. 370, 33 Pac. 963; Seattle, etc., R. Co. *v.* State, 5 Wash. 807, 32 Pac. 744; Lewis *v.* Gilbert, 5 Wash. 534, 32 Pac. 459.

West Virginia.— Beasley *v.* Beckley, 28 W. Va. 81; Poe *v.* Marion Mach. Works, 24 W. Va. 517; Meeks *v.* Windon, 10 W. Va. 180.

Wisconsin.— State *v.* O'Neill, 104 Wis. 227, 80 N. W. 447; State *v.* Oshkosh, etc., R. Co., 100 Wis. 538, 77 N. W. 193; Wardsworth *v.* Sibley, 38 Wis. 484.

United States.—*Re* Tampa Suburban R. Co., 168 U. S. 583, 18 S. Ct. 177, 42 L. ed. 589; Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697; Fowler *v.* Lindsey, 3 Dall. (U. S.) 411, 1 L. ed. 658.

England.— Reg. *v.* Justices Middlesex, 9 A. & E. 540, 8 L. J. M. C. 85, 1 P. & D. 402, 2 W. W. & H. 100, 36 E. C. L. 291; Reg. *v.* Manchester, etc., R. Co., 8 A. & E. 413, 8 Jur. 857, 8 L. J. Q. B. 66, 3 N. & P. 439, 1 W. W. & H. 458, 35 E. C. L. 657; Reg. *v.* Justices Gloucestershire, 3 D. & L. 542, 10 Jur. 96, 15 L. J. M. C. 48, 2 N. Sess. Cas. 240, 1 Saund. & C. 33; Rex *v.* Somersetshire, 1 D. & R. 443; Rex *v.* Whitbread, 2 Dougl. 549; *In re* Pudding Norton Overseers, 33 L. J. M. C. 136, 10 L. T. Rep. N. S. 386, 12 Wkly. Rep. 762; *Ex p.* Watkins, 6 L. T. Rep. N. S. 605, 10 Wkly. Rep. 249; Bacon Abr. tit. Certiorari (A).

Canada.— *Ex p.* Ross, 33 N. Brunsw. 80; *Ex p.* Young, 32 N. Brunsw. 178; *Ex p.* Barberie, 31 N. Brunsw. 368; *Ex p.* Currie, 28 N. Brunsw. 475; *Ex p.* Price, 23 N. Brunsw. 85; *Ex p.* Kane, 21 N. Brunsw. 370; *Ex p.* Wilson, 17 N. Brunsw. 274; *Ex p.* Thomas, 13 N. Brunsw. 163; *Ex p.* Nowlin, 11 N. Brunsw. 141; *Ex p.* Harley, 10 N. Brunsw. 264; *Ex p.* Ross, 1 Can. Crim. Cas. 153; Reg. *v.* Herrell, 12 Manitoba 522; Wallace *v.* King, 20 Nova Scotia 283, 8 Can. L. T. 449; Eagar *v.* Carey, 13 Nova Scotia 49; Pictou *v.* McDonald, 12 Nova Scotia 334; *In re* School Section No. 29, 12 Nova Scotia 207; Hart *v.* Dunlop, 17 Quebec Super. Ct. 383; St. Paul *v.* Steel, 5 Quebec Super. Ct. 315.

See 9 Cent. Dig. tit. "Certiorari," § 4.

Effect of resort to wrong remedy where resort to right not precluded.— Nor will the writ lie where the aggrieved party has sought the wrong remedy in the first instance and is not precluded by the proceedings originally taken from resorting to the appropriate remedy. Mendelsohn *v.* Smith, 27 Mich. 2, where a claimant of goods attached them instead of bringing replevin.

15. Hermann *v.* Butler, 59 Ill. 225; Rielly *v.* Prince, 37 Ill. App. 102; People *v.* Woods, 39 N. Y. App. Div. 660, 57 N. Y. Suppl. 715.

Failure of an attorney for a party to except to an erroneous decree will not affect the right of the latter to resort to certiorari to review the decree. Bardes *v.* Hutchinson, 113 Iowa 610, 85 N. W. 797.

16. *Alabama.*— *Ex p.* Boynton, 44 Ala. 261.

Arkansas.— *Ex p.* Marr, 12 Ark. 84, 87.

Louisiana.— State *v.* Mayer, 52 La. Ann. 255, 26 So. 823; State *v.* Judge Third City Ct., 48 La. Ann. 1380, 20 So. 903.

Maine.— See Lewis *v.* Brewer, 51 Me. 108.

Missouri.— State *v.* Gill, 137 Mo. 627, 39 S. W. 81.

New Jersey.— Lehmann *v.* Hudson County Republican Committee, 62 N. J. L. 574, 41 Atl. 718, holding that a proceeding by an incorporated political organization will not be reviewed, until the remedy within the organization is first exhausted.

A motion for a new trial in the court below is an unnecessary preliminary to authorize the issue of the writ. Archie *v.* State, 99 Ga. 23, 25 S. E. 612.

17. Huddleston *v.* Detroit Timber, etc., Co., 106 La. 594, 31 So. 147; Colomb *v.* Rolling, 106 La. 37, 30 So. 293; People *v.* Hannibal, 65 Hun (N. Y.) 414, 20 N. Y. Suppl. 165, 47 N. Y. St. 567; People *v.* Pilot Com'rs, 37 Barb. (N. Y.) 126; People *v.* Chapin, 8 N. Y. St. 721.

18. Connell *v.* Chandler, 11 Tex. 249.

(II) *Exceptions to Rule* — (A) *Remedy Concurrent or Cumulative.* The writ will not be denied, however, where such other remedy is concurrent with that of certiorari, or cumulative thereto;[19] and for this reason the party aggrieved will not be precluded, because he may have a remedy by action,[20] although where the party has an opportunity to litigate the question in an action,[21] or another adequate remedy exists, the court as a rule is reluctant to grant the writ, or at least will exercise great caution in so doing.[22]

(B) *Remedy Inadequate* — (1) In General. So too where such other remedy is inadequate, and more expeditious and efficient relief can be afforded by this writ, it may be granted, although another mode of redress is available.[23]

(2) Where There Is Want of Jurisdiction. This rule is specially appli-

19. *Delaware.*— Williams *v.* Burchinal, 3 Harr. (Del.) 83.

Georgia.— Roser *v.* Marlow, R. M. Charlt. (Ga.) 542.

Iowa.— Abney *v.* Clark, 87 Iowa 727, 55 N. W. 6.

New Jersey.— Barclay *v.* Brabston, 49 N. J. L. 629, 9 Atl. 769; State *v.* Stanger, 49 N. J. L. 191, 6 Atl. 434; State *v.* Berry, 42 N. J. L. 60; Ritter *v.* Kunkle, 39 N. J. L. 259.

New York.— People *v.* Donohue, 15 Hun (N. Y.) 418.

Texas.— Ray *v.* Parsons, 14 Tex. 370.

Washington.— Woodbury *v.* Henningsen, 11 Wash. 12, 39 Pac. 243.

West Virginia.— Dunlevy *v.* Marshall County Ct., 47 W. Va. 513, 35 S. E. 956.

Canada.— *Ex p.* Montgomery, 8 N. Brunsw. 149; Wiggins *v.* Windsor, 15 Nova Scotia 256.

20. State *v.* Dowling, 50 Mo. 134; Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

Where a claimant whose claim has been rejected may maintain an action to collect the claim, if it has never been rejected, he is not precluded from a resort to certiorari, because of another remedy by action. People *v.* Westchester County, 53 N. Y. App. Div. 339, 65 N. Y. Suppl. 707 [*distinguishing* Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 62 N. Y. Suppl. 276]; People *v.* Coler, 48 N. Y. App. Div. 492, 62 N. Y. Suppl. 962. A claim allowed in part is not rejected so as to require the claimant to resort to an action at law. People *v.* Westchester County, 53 N. Y. App. Div. 339, 65 N. Y. Suppl. 707.

21. People *v.* Board of Health, 33 Barb. (N. Y.) 44, 12 Abb. Pr. (N. Y.) 88, 20 How. Pr. (N. Y.) 458.

22. Detroit Western Transit, etc., R. Co. *v.* Backus, 48 Mich. 582, 12 N. W. 861; Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 9 N. W. 249; People *v.* Highway Com'rs, 2 Code Rep. (N. Y.) 54.

23. *Alabama.*— *Ex p.* Boynton, 44 Ala. 261.

Arizona.— Royce *v.* Smith, 1 Ariz. 511, 25 Pac. 799; Reilly *v.* Tyng, 1 Ariz. 510, 25 Pac. 798.

Arkansas.—Carnall *v.* Crawford County, 11 Ark. 604.

California.— See Clary *v.* Hoagland, 5 Cal. 476.

Florida.— Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214.

Georgia.— Roser *v.* Marlow, R. M. Charlt. (Ga.) 542.

Idaho.— People *v.* Lindsay, 1 Ida. 394.

Iowa.— Callanan *v.* Lewis, 79 Iowa 452, 44 N. W. 892; Coburn *v.* Mahaska County, 4 Greene (Iowa) 242.

Louisiana.— See State *v.* Monroe, 50 La. Ann. 642, 23 So. 608 [*citing* State *v.* Judge Twenty-Second Judicial Dist., 37 La. Ann. 118].

Michigan.—Kroop *v.* Forman, 31 Mich. 144.

Missouri.— State *v.* Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787.

Montana.— State *v.* Second Judicial Dist. Ct., 18 Mont. 481, 46 Pac. 259; State *v.* Evans, 13 Mont. 239, 33 Pac. 1010.

Nevada.— Paul *v.* Armstrong, 1 Nev. 82.

New Jersey.— Davison *v.* Davison, 17 N. J. L. 169; New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; Kingsland *v.* Gould, 6 N. J. L. 161; Ludlow *v.* Ludlow, 4 N. J. L. 451; State *v.* Justices Middlesex County, 1 N. J. L. 283.

New York.—People *v.* Harris, 63 N. Y. 391; People *v.* Wemple, 60 Hun (N. Y.) 225, 14 N. Y. Suppl. 859, 38 N. Y. St. 17; People *v.* Stedman, 57 Hun (N. Y.) 280, 10 N. Y. Suppl. 787, 32 N. Y. St. 649; People *v.* Donohue, 15 Hun (N. Y.) 418; People *v.* Daly, 67 Barb. (N. Y.) 325; People *v.* Nash, 15 N. Y. Suppl. 29, 38 N. Y. St. 730.

North Carolina.— McLeran *v.* Melvin, 56 N. C. 195.

Texas.— Coupland *v.* Tullar, 21 Tex. 523; Moore *v.* Hardison, 10 Tex. 467; Hail *v.* Magale, 1 Tex. App. Civ. Cas. § 852.

Utah.— Golding *v.* Jennings, 1 Utah 135.

Washington.— State *v.* King County Super. Ct., 26 Wash. 278, 66 Pac. 385; State *v.* Tallman, 24 Wash. 426, 64 Pac. 759; Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165.

Wisconsin.— State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; State *v.* Ashland, 71 Wis. 502, 37 N. W. 809; State *v.* Fond du Lac, 42 Wis. 287; Pier *v.* Fond du Lac, 38 Wis. 470.

England.— Reg. *v.* Manchester, etc., R. Co., 8 A. & E. 413, 8 Jur. 857, 8 L. J. Q. B. 66, 3 N. & P. 439, 1 W. W. & H. 458, 35 E. C. L. 657; Rex *v.* Reeve, 2 Burr. 1040, 1 W. Bl. 231; Rex *v.* Jukes, 8 T. R. 542, 5 Rev. Rep. 445.

Canada.— *Ex p.* Ross, 1 Can. Crim. Cas. 153; Reg. *v.* Henill, 12 Manitoba 522; Tupper *v.* Murphy, 15 Nova Scotia 173.

cable where the tribunal below was apparently without jurisdiction, or errors or abuses going to the jurisdiction are complained of.[24]

b. Other Proceeding Pending — (I) *In General.* If the party aggrieved has elected another remedy under which he can obtain full redress he cannot resort to certiorari also;[25] but the right to the writ is not precluded by the institution or pendency of an action to annul a judgment rendered without jurisdiction,[26] or of a suit in equity for the same relief,[27] especially when the bill has been dismissed for want of jurisdiction.[28] So the pendency of an action to cancel municipal aid bonds will not bar the right to review the proceedings by which their issue was authorized,[29] and a motion for a new trial made in the primary court will not preclude an applicant who thereafter voluntarily dismisses it;[30] but a cause cannot be removed after arbitrators or referees have entered into consideration of the questions involved,[31] and it seems that where one party sues out habeas corpus and the other certiorari, and both writs are returned at the same time, preference will be given to the former.[32]

(II) *Appeal.* The writ will not be granted when an appeal is pending from the same determination and the questions sought to be reviewed thereon are the same;[33]

An action against a sheriff for surrendering attached property under an unauthorized and void order is not such a "speedy" remedy as will preclude the party aggrieved from resorting to certiorari. State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593.

"If one party only has a right of appeal, or no time is limited for bringing the appeal, the certiorari shall be immediately granted; . . . but if both parties have a right to appeal, and the time is fixed; in that case it shall not be granted until after the appeal hath been made, or the time for making it hath elapsed." Bacon Abr. tit. Certiorari (A), p. 166 note [*citing* Rex *v.* Harman, Andr. 343].

Injunction to prevent a tax sale is not a speedy and adequate remedy against an illegal assessment. Lewis *v.* Bishop, 19 Wash. 312, 53 Pac. 165.

The right to petition a public officer for relief is not a judicial appeal such as will preclude the right to the writ. *Ex p.* Kelly, 29 N. Brunsw. 271.

24. *Arkansas.*— St. Louis, etc., R. Co. *v.* State, 55 Ark. 200, 17 S. W. 806. See also Baxter *v.* Brooks, 29 Ark. 173.

District of Columbia.— District of Columbia *v.* Washington Gas Light Co., 3 Mackey, (D. C.) 343.

Florida.— Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214.

Illinois.— Highway Com'rs *v.* Hoblit, 19 Ill. App. 259.

Louisiana.— State *v.* Fowler, 47 La. Ann. 27, 16 So. 565.

Maryland.— Gaither *v.* Watkins, 66 Md. 576, 8 Atl. 464.

Michigan.— Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 9 N. W. 249.

Missouri.— State *v.* Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787.

Montana.— State *v.* Case, 14 Mont. 520, 37 Pac. 95; State *v.* Second Judicial Dist. Ct., 18 Mont. 481, 46 Pac. 259.

New Hampshire.— State *v.* Thompson, 2 N. H. 236; Durham *v.* Thompson, 2 N. H. 166.

New Jersey.— Diament *v.* Lore, 31 N. J. L. 220.

New Mexico.— Territory *v.* Valdez, 1 N. M. 533.

New York.— People *v.* Betts, 55 N. Y. 600; People *v.* Feitner, 41 N. Y. App. Div. 544, 58 N. Y. Suppl. 648; Easton *v.* Calendar, 11 Wend. (N. Y.) 90; Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

Oregon.— Garnsey *v.* Klamath County Ct., 33 Oreg. 201, 54 Pac. 539, 1089; Hill *v.* State, 23 Oreg. 446, 32 Pac. 160.

Pennsylvania.— Strouse *v.* Lawrence, 160 Pa. St. 421, 28 Atl. 930.

South Dakota.— State *v.* Hughes County, 1 S. D. 292, 46 N. W. 1127, 10 L. R. A. 588.

Wisconsin.— Owens *v.* State, 27 Wis. 456.

United States.—Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697.

England.— Bacon Abr. tit. Certiorari (A).

Canada.— *Ex p.* Nugent, 33 N. Brunsw. 22; *Ex p.* Levesque, 32 N. Brunsw. 174; *Ex p.* Legere, 27 N. Brunsw. 292; *Ex p.* Thompson, 2 Quebec 115.

25. Mathias *v.* Mason, 66 Mich. 524, 33 N. W. 412.

26. State *v.* Fowler, 47 La. Ann. 27, 16 So. 565.

27. Stuart *v.* Hall, 2 Overt. (Tenn.) 178.

28. Kingsland *v.* Gould, 6 N. J. L. 161.

29. People *v.* Morgan, 65 Barb. (N. Y.) 473.

30. Archie *v.* State, 99 Ga. 23, 25 S. E. 612.

31. Whitehead *v.* Gray, 12 N. J. L. 36; Grubb *v.* Grubb, 2 Dall. (Pa.) 191, 1 L. ed. 344.

32. Steiner *v.* Fell, 1 Dall. (Pa.) 22, 1 L. ed. 20.

33. *California.*— Broder *v.* Mono County Super. Ct., (Cal. 1893) 33 Pac. 630.

Louisiana.— State *v.* King, 42 La. Ann. 1191, 8 So. 398.

Michigan.— Palms *v.* Campau, 11 Mich. 109.

Mississippi.— Duggen *v.* McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527.

but an ineffectual appeal will not defeat the right.[34] Nor will the applicant be precluded by the taking of an appeal which he has not prosecuted.[35]

c. Prior Adjudication. The writ will not issue where it appears that the same questions were previously submitted and adjudicated by means of injunction,[36] by a prior writ of certiorari to which the petitioner was a party,[37] or on an appeal taken by him.[38]

3. Where Writ Not Beneficial. The writ will not be granted where the remedy afforded will be inadequate or where no beneficial result will follow;[39] and the writ may be denied where a review of non-prejudicial errors or irregularities is sought.[40]

4. Where Writ Would Be Prejudicial — a. In General. Certiorari is not appropriate where the effect of a reversal would be to cause a loss of more efficient remedies or otherwise to cause prejudice;[41] or where, should the writ be granted and the proceedings be quashed or reversed, mischievous con-

New Jersey.— White *v.* McCall, 1 N. J. L. 110.

New Mexico.— *In re* Henriques, 5 N. M. 169, 21 Pac. 80.

New York.— People *v.* Board of Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861, 74 N. Y. St. 794; People *v.* Dennison, 28 Hun (N. Y.) 328; People *v.* Wallace, 4 Thomps. & C. (N. Y.) 438.

North Carolina.— Williams *v.* Williams, 71 N. C. 427.

Pennsylvania.—City *v.* Kendrick, 1 Brewst. (Pa.) 406; Russell *v.* Shirk, 3 Pa. Co. Ct. 287.

Texas.— Harbison *v.* Harbison, (Tex. Civ. App. 1900) 56 S. W. 1006.

England.— Rex *v.* Justices Yorkshire, 1 A. & E. 563, 3 L. J. M. C. 117, 3 N. & M. 802, 28 E. C. L. 269; Warwick's Case, 2 Str. 991; Rex *v.* Sparrow, 2 T. R. 196, note *a*, 1 Rev. Rep. 459; Bacon Abr. tit. Certiorari (A).

Canada.— *In re* Kelly, 27 N. Brunsw. 553. But see *Ex p.* Wilson, 17 N. Brunsw. 274, holding that a motion *nisi* will be heard, although the party complaining may have proceeded in a summary way by review. And certiorari will lie for objections to the jurisdiction, although the applicant has taken an appeal. Reg. *v.* Starkey, 7 Manitoba 43. See also *In re* Watts, 5 Ont. Pr. 267.

See 9 Cent. Dig. tit. "Certiorari," § 13.

Appeal inhibited.— The writ will not lie although the appeal taken is inhibited in such a case. Reg. *v.* Johnson, 30 U. C. Q. B. 423.

34. Com. *v.* Fiegle, 2 Phila. (Pa.) 215, 14 Leg. Int. (Pa.) 36.

35. Poag *v.* Rowe, 16 Tex. 590.

36. State *v.* Robinson, 38 La. Ann. 968; *Ex p.* Wilson, 17 N. Brunsw. 274.

37. State *v.* Jersey City, 30 N. J. L. 247.

38. Broder *v.* Mono County Super. Ct., (Cal. 1893) 33 Pac. 630; State *v.* Rich, 58 N. J. L. 507, 34 Atl. 757.

Review of grounds existing prior to appeal. — One who appeals to a superior court from a justice's judgment and is defeated cannot review by certiorari rulings of the justice prior to the appeal on grounds which existed when the appeal was taken. Boroughs *v.* White, 69 Ga. 841.

39. *Arkansas.*— McCoy *v.* Jackson County Ct., 21 Ark. 475.

California.— Burr *v.* Sacramento County, 96 Cal. 210, 31 Pac. 38.

Iowa.— Ottumwa Independent Dist. *v.* Taylor, 100 Iowa 617, 69 N. W. 1009.

Louisiana.— State *v.* King, 47 La. Ann. 1512, 18 So. 513.

Massachusetts.— Carlton *v.* Choate, 5 Allen (Mass.) 577.

New York.— Chemung Nat. Bank *v.* Elmira, 53 N. Y. 49; People *v.* York, 43 N. Y. App. Div. 138, 59 N. Y. Suppl. 333; People *v.* Campbell, 22 N. Y. App. Div. 170, 48 N. Y. Suppl. 183; People *v.* Queens County, 1 Hill (N. Y.) 195.

Pennsylvania.— Allen *v.* Brown, 30 Pittsb. Leg. J. N. S. 409.

England.— Reg. *v.* Sheward, 9 Q. B. D. 741, 49 L. J. Q. B. 716 [*affirming* 42 L. T. Rep. N. S. 363, 28 Wkly. Rep. 506]; Matter of Daws, 8 A. & E. 936, 35 E. C. L. 917.

But see Oshkosh *v.* State, 59 Wis. 425, 18 N. W. 324, holding that the writ will be granted, although no benefit will accrue by the reversal of the alleged erroneous action.

See 9 Cent. Dig. tit. "Certiorari," § 14.

A superfluous ordinance passed without statutory authority is not reviewable. Lexington *v.* Sargent, 64 Miss. 621, 1 So. 903.

Where a fault in the construction of a public work has been remedied prior to the presentation of a petition for a writ of certiorari to quash a betterment assessment, it cannot be urged as a reason for granting the writ. Beals *v.* James, 173 Mass. 591, 54 N. E. 245.

Penalties and fines.— Proceedings to collect a penalty (Powell *v.* People, 47 Mich. 108, 10 N. W. 129) or a judgment imposing a fine (Ishpeming *v.* Maroney, 49 Mich. 226, 13 N. W. 527) will not be reviewed by the writ where the fine or penalty has been paid and the defendant absolved from further liability.

40. McPheters *v.* Morrill, 66 Me. 123; Creswell *v.* Richter, 13 Tex. 18; O'Brien *v.* Dunn, 5 Tex. 570. But see *Ex p.* McNeil, 8 N. Brunsw. 493. See also *infra*, I, C, 2.

41. Morrison *v.* Emsley, 53 Mich. 564, 19 N. W. 187; Stewart *v.* Blackburn, 25 U. C. Q. B. 16 (where the writ was refused because the effect of reversal would be to put on a second trial one who had been acquitted on the first).

sequences would ensue and the parties or third persons could not be placed *in statu quo*.[42]

b. To Public. Where great public detriment or inconvenience would or might have resulted from interfering with the proceedings of public bodies which exercise rights in which the people at large are concerned, and no substantial injury would result from its refusal, the writ has been denied,[43] and its allowance in such cases is discretionary.[44]

C. Discretion to Grant — 1. In General. Except where so made by statute [45] the writ of certiorari as used to correct the proceedings of inferior tribunals is not a writ of right, but issues only on special cause shown to the court to which application is made, and the court is vested with judicial discretion to grant or refuse the writ as justice may seem to require.[46]

42. Hagar *v.* Yolo County, 47 Cal. 222; Rutland *v.* Worcester County, 20 Pick. (Mass.) 71; Sowles *v.* Bailey, 69 Vt. 277, 37 Atl. 751.

43. School Trustees *v.* School Directors, 88 Ill. 100; State *v.* Anderson, 1 N. J. L. 366, 1 Am. Dec. 207; People *v.* Queens County, 1 Hill (N. Y.) 195; Elmendorf v. New York, 25 Wend. (N. Y.) 693; People *v.* Allegany County, 15 Wend. (N. Y.) 198.

44. People *v.* Stilwell, 19 N. Y. 531; Matter of Mt. Morris Square, 2 Hill (N. Y.) 14; People *v.* New York, 2 Hill (N. Y.) 9; People *v.* Allegany County, 15 Wend. (N. Y.) 198; Burnett *v.* Douglas County, 4 Oreg. 388; Truesdell's Appeal, 58 Pa. St. 148.

45. Such a statute was held unconstitutional in Thomas *v.* State, 9 Tex. 324.

46. *Arkansas.*— Sumerow *v.* Johnson, 56 Ark. 85, 19 S. W. 114; Black *v.* Brinkley, 54 Ark. 372, 15 S. W. 1030; *Ex p.* Pearce, 44 Ark. 509; Moore *v.* Turner, 43 Ark. 243; Flournoy *v.* Payne, 28 Ark. 87.

California.—Keys *v.* Marin County, 42 Cal. 252.

Dakota.— Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

Delaware.— Newell *v.* Hampton, 1 Marv. (Del.) 1, 40 Atl. 469.

Florida.— Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214; Jacksonville, etc., R. Co. *v.* Boy, 34 Fla. 389, 16 So. 290.

Georgia.— Davis *v.* Matthews, T. U. P. Charlt. (Ga.) 111.

Illinois.— Mason, etc., Special Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Lees *v.* Drainage Com'rs, 125 Ill. 47, 16 N. E. 915 [*affirming* 24 Ill. App. 487]; Jo Daviess County *v.* Magoon, 109 Ill. 142; Hyslop *v.* Finch, 99 Ill. 171; School Trustees *v.* School Directors, 88 Ill. 100; People *v.* School Trustees, 42 Ill. App. 650.

Indiana.— Bannister *v.* Allen, 1 Blackf. (Ind.) 414.

Iowa.— Woodworth *v.* Gibbs, 61 Iowa 398, 16 N. W. 287.

Kentucky.— Freeman *v.* Oldham, 4 T. B. Mon. (Ky.) 419.

Louisiana.— Brown Shoe Co. *v.* Hill, 51 La. Ann. 920, 25 So. 634; West *v.* De Moss, 50 La. Ann. 1349, 24 So. 325; Williams *v.* Judge Eighteenth Judicial Dist. Ct., 45 La. Ann. 1295, 14 So. 57.

Maine.— White *v.* Lincoln County, 70 Me. 317; Levant *v.* Penobscot County, 67 Me. 429; Furbush *v.* Cunningham, 56 Me. 184; Oxford *v.* Oxford County, 43 Me. 257; West Bath, Petitioners, 36 Me. 74; Cornville *v.* Somerset County, 33 Me. 237; Rand *v.* Tobie, 32 Me. 450; Waterville, Petitioners, 31 Me. 506; North Berwick *v.* York County, 25 Me. 69; Parsonfield *v.* Lord, 23 Me. 511; Cushing *v.* Gay, 23 Me. 9; Bath Bridge, etc., Co. *v.* Magoun, 8 Me. 292.

Massachusetts.— Mendon *v.* Worcester County, 2 Allen (Mass.) 463; Barnard *v.* Fitch, 7 Metc. (Mass.) 605; Stone *v.* Boston, 2 Metc. (Mass.) 220; Whately *v.* Franklin County, 1 Metc. (Mass.) 336; Hancock *v.* Boston, 1 Metc. (Mass.) 122; Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Rutland *v.* Worcester County, 20 Pick. (Mass.) 71; New Salem, Petitioners, 6 Pick. (Mass.) 470; Lees *v.* Childs, 17 Mass. 351; Drowne *v.* Stimpson, 2 Mass. 441.

Michigan.— Meads *v.* Belt Copper Mines, 125 Mich. 456, 84 N. W. 615; Kimball *v.* Homan, 74 Mich. 699, 42 N. W. 167; People *v.* Drain Com'r, 40 Mich. 745; Adams *v.* Abram, 38 Mich. 302; Rowe *v.* Rowe, 28 Mich. 353; Smith *v.* Reed, 24 Mich. 240; Specht *v.* Detroit, 20 Mich. 168; Farrell *v.* Taylor, 12 Mich. 113; Matter of Lantis, 9 Mich. 324, 80 Am. Dec. 85.

Minnesota.— Libby *v.* West St. Paul, 14 Minn. 248.

Mississippi.— Duggen *v.* McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527.

Missouri.— State *v.* Henderson, 160 Mo. 190, 60 S. W. 1093.

New Hampshire.— Landaff's Petition, 34 N. H. 163; Huse *v.* Grimes, 2 N. H. 208.

New Jersey.— State *v.* Bayonne, 63 N. J. L. 176, 43 Atl. 442; State *v.* Blauvelt, 34 N. J. L. 261; State *v.* Hudson City, 29 N. J. L. 115; State *v.* Passaic County, 25 N. J. L. 354; State *v.* Wood, 23 N. J. L. 560; State *v.* Bentley, 23 N. J. L. 532; State *v.* Green, 18 N. J. L. 179; Haines *v.* Campion, 18 N. J. L. 49; State *v.* Woodward, 9 N. J. L. 21; Harrison *v.* Sloan, 6 N. J. L. 410; Ludlow *v.* Ludlow, 4 N. J. L. 451; Matter of Highway, 3 N. J. L. 579; State *v.* Newark, etc., Turnpike Co., 2 N. J. L. 318; State *v.* New Brunswick, 1 N. J. L. 450; State *v.* Anderson, 1 N. J. L. 366, 1 Am. Dec. 207.

New York.— People *v.* Board of Police

2. **Magnitude of Error.** If the error is manifest and substantial injury has been sustained, the writ should be allowed;[47] but the court will not award the writ, where the errors complained of are merely informal and technical, or where, although there is error in fact, substantial justice has been done, and no appreciable injury has resulted to the complaining party.[48]

Com'rs, 82 N. Y. 506; Pelton *v.* Westchester F. Ins. Co., 77 N. Y. 605; People *v.* Hill, 53 N. Y. 547 [*affirming* 65 Barb. (N. Y.) 435]; Chemung Nat. Bank *v.* Elmira, 53 N. Y. 49; People *v.* Andrews, 52 N. Y. 445; People *v.* Stilwell, 19 N. Y. 531; People *v.* Wayne County, 49 Hun (N. Y.) 476, 2 N. Y. Suppl. 555, 18 N. Y. St. 898; People *v.* New York, 19 Hun (N. Y.) 441; People *v.* Perry, 16 Hun (N. Y.) 461; People *v.* Brooklyn, 8 Hun (N. Y.) 56; People *v.* Albany, 2 Hun (N. Y.) 583; People *v.* Utica, 65 Barb. (N. Y.) 9, 45 How. Pr. (N. Y.) 289; People *v.* Board of Health, 33 Barb. (N. Y.) 344, 12 Abb. Pr. (N. Y.) 88, 20 How. Pr. (N. Y.) 458; People *v.* Peabody, 26 Barb. (N. Y.) 437, 5 Abb. Pr. (N. Y.) 194; People *v.* Rochester, 21 Barb. (N. Y.) 656; People *v.* Mayer, 16 Barb. (N. Y.) 362; People *v.* New York, 5 Barb. (N. Y.) 43; Matter of Bruni, 1 Barb. (N. Y.) 187; *Ex p.* Brandlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; Matter of Mt. Morris Square, 2 Hill (N. Y.) 14; People *v.* New York, 2 Hill (N. Y.) 9; People *v.* Queens County, 1 Hill (N. Y.) 195; People *v.* Allegany County, 15 Wend. (N. Y.) 198; Munro *v.* Baker, 6 Cow. (N. Y.) 396; People *v.* Comptroller, 10 N. Y. Wkly. Dig. 104.

Ohio.— Bliss *v.* Enslow, 3 Ohio 269.

Oregon.— Burnett *v.* Douglas County, 4 Oreg. 388.

Pennsylvania.—McGinnis *v.* Vernon, 67 Pa. St. 149; Truesdell's Appeal, 58 Pa. St. 148; Ewing *v.* Thompson, 43 Pa. St. 372; Mauch Chunk *v.* Nescopeck, 21 Pa. St. 46.

Rhode Island.— McAloon *v.* Pawtucket, 22 R. I. 191, 46 Atl. 1047.

South Carolina.— State *v.* Moore, 54 S. C. 556, 32 S. E. 700; State *v.* Senft, 2 Hill (S. C.) 367.

Tennessee.— State *v.* Shelby County Taxing Dist., 16 Lea (Tenn.) 240; May *v.* Campbell, 1 Overt. (Tenn.) 61.

Texas.— Fitzwilliams *v.* Davie, 18 Tex. Civ. App. 81, 43 S. W. 840.

Utah.— Crosby *v.* Probate Ct., 3 Utah 51, 5 Pac. 552.

Vermont.— Sowles *v.* Bailey, 69 Vt. 277, 38 Atl. 237; French *v.* Barre, 58 Vt. 567, 5 Atl. 568; Gray *v.* Middletown, 56 Vt. 53; Chase *v.* Rutland, 47 Vt. 393; Walbridge *v.* Walbridge, 46 Vt. 617; Londonderry *v.* Peru, 45 Vt. 424; Pomfret *v.* Hartford, 42 Vt. 134; Rockingham *v.* Westminster, 24 Vt. 288; Royalton *v.* Fox, 5 Vt. 458.

West Virginia.— Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

England.— Reg. *v.* Justices Surrey, L. R. 5 Q. B. 466, 39 L. J. M. C. 145; *In re* Mansergh, 1 B. & S. 400, 30 L. J. Q. B. 296, 101 E. C. L. 400; Rex *v.* Bass, Nolan 227, 5 T. R. 251.

Canada.—Reg. *v.* Galbraith, 6 Manitoba 14; Reg. *v.* Calhoun, 20 Nova Scotia 395, 9 Can. L. T. 62; *In re* Rice, 20 Nova Scotia 294, 8 Can. L. T. 448; *In re* Wallace, 5 Nova Scotia 525; Reg. *v.* Adams, 8 Ont. Pr. 462.

See 9 Cent. Dig. tit. "Certiorari," § 15.

The discretion of the court is exhausted after granting the writ and the cause must be adjudicated on the merits. Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947.

47. Spofford *v.* Bucksport, etc., R. Co., 66 Me. 26; Hopkins *v.* Fogler, 60 Me. 266; Cushing *v.* Gay, 23 Me. 9.

In Louisiana the writ will lie to the supreme court in non-appealable cases, only where the objections are of such a character as to work a wrong or injury or to call for the exercise of supervisory powers of the court where in its opinion a resort thereto is justified. Brown Shoe Co. *v.* Hill, 51 La. Ann. 920, 25 So. 634; State *v.* Judge Criminal Dist. Ct., 49 La. Ann. 231, 21 So. 690.

48. *Alabama.*—*Ex p.* Strobach, 49 Ala. 443.

California.— Hagar *v.* Yolo County, 47 Cal. 222.

Georgia.— Roach *v.* Sulter, 54 Ga. 458.

Iowa.— Woodworth *v.* Gibbs, 61 Iowa 398, 16 N. W. 287.

Maine.— Levant *v.* Penobscot County, 67 Me. 429; McPheters *v.* Morrill, 66 Me. 123; Hopkins *v.* Fogler, 60 Me. 266; Furbush *v.* Cunningham, 56 Me. 184; Smith *v.* Cumberland County, 42 Me. 395; West Bath, Petitioners, 36 Me. 74; Rand *v.* Tobie, 32 Me. 450; North Berwick *v.* York County, 25 Me. 69; Cushing *v.* Gay, 23 Me. 9.

Massachusetts.— Lowell *v.* Middlesex County, 146 Mass. 403, 16 N. E. 8; Granville *v.* Hampden County, 97 Mass. 193; Carlton *v.* Choate, 5 Allen (Mass.) 577; Mendon *v.* Worcester County, 5 Allen (Mass.) 13; Barnard *v.* Fitch, 7 Metc. (Mass.) 605; Stone *v.* Boston, 2 Metc. (Mass.) 220; Whately *v.* Franklin County, 1 Metc. (Mass.) 336; Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Rutland *v.* Worcester County, 20 Pick. (Mass.) 71; Cobb *v.* Lucas, 15 Pick. Mass.) 1; Wilbraham *v.* Hampden County, 11 Pick. (Mass.) 322; Freetown *v.* Bristol County, 9 Pick. (Mass.) 46; Adams, Petitioner, 4 Pick. (Mass.) 25; *Ex p.* Weston, 11 Mass. 417.

Michigan.— Meads *v.* Belt Copper Mines, 125 Mich. 456, 84 N. W. 615; Antiau *v.* Nadeau, 53 Mich. 460, 19 N. W. 145; People *v.* Wayne County, 40 Mich. 745.

New Hampshire.— Landaff's Petition, 34 N. H. 163.

New Jersey.—Journeay *v.* Brown, 26 N. J. L. 111.

New York.— People *v.* New York, 5 Barb. (N. Y.) 43.

Rhode Island.— McAloon *v.* Pawtucket, 22 R. I. 191, 46 Atl. 1047; Keenan *v.* Goodwin, 17 R. I. 649, 24 Atl. 148.

3. UNITED STATES SUPREME COURT. Under the act of congress establishing the circuit court of appeals, and empowering the supreme court of the United States to award certiorari to require the former to certify cases for review and determination, the supreme court will not grant the writ except in matters of gravity and importance, and only to prevent extraordinary inconvenience and embarrassment in the conduct of the cause;[49] and it is left to the discretion of the supreme court to determine at what stage of the proceedings it will exercise the power conferred.[50]

D. Successive Writs. While it has been held that an alias certiorari is unknown to the law,[51] and that a second writ cannot be allowed for the same purpose,[52] it has also been held that after the writ has been dismissed for informality, another may be awarded on timely application,[53] although the time has elapsed within which the original certiorari could issue;[54] that a second writ may issue to bring in new parties;[55] and that as many writs may issue as are necessary to bring up the whole record.[56] However, a second or alias writ will not be issued where the petitioner has failed to exercise due diligence in procuring the first to be issued and heard,[57] or unless some extraordinary circumstance is shown, which will warrant its allowance.[58]

II. DETERMINATIONS REVIEWABLE.

A. In General — 1. NECESSITY OF EXERCISE OF JUDICIAL FUNCTION — a. Generally. The office of a writ of certiorari is to bring to a superior court for review

Vermont.— Rockingham *v.* Westminster, 24 Vt. 288; Lyman *v.* Burlington, 22 Vt. 131; Paine *v.* Leicester, 22 Vt. 44; West River Bridge Co. *v.* Dix, 16 Vt. 446; Royalton *v.* Fox, 5 Vt. 458.

Wisconsin.— Knapp *v.* Heller, 32 Wis. 467.

See also *supra*, I, B, 3.

See 9 Cent. Dig. tit. "Certiorari," § 16.

Injury to a party who makes no complaint will not change the rule. Cushing *v.* Gay, 23 Me. 9.

49. American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486; *Ex p.* Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. ed. 125. And see U. S. *v.* The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897.

Review of admiralty proceedings see ADMIRALTY, 1 Cyc. 907.

Review of bankruptcy proceedings see BANKRUPTCY, 5 Cyc. 267, note 52.

The writ was awarded where it was a question whether a member of the circuit court of appeals was disqualified because having made the order appealed from (American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486), and whether a returning Chinaman must present to the collector the certificate required by the Chinese exclusion act (*Ex p.* Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 43, 35 L. ed. 868, 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340).

The writ was refused when sought to review the action of the circuit court of appeals in modifying an injunction enjoining the disposition of the property of a railroad company, discharging a receiver, and restoring the property to the company (American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486), and where the only questions were whether, in an action for personal injuries, a judgment of dismissal at the conclusion of plaintiff's evidence is a bar, under a state statute, to another suit on the same cause of action, or whether, in such action, the law in respect to the recovery by a servant against his master was properly applied to the facts disclosed by the evidence (*Ex p.* Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. ed. 125).

50. American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486.

51. Slaght *v.* Robbins, 13 N. J. L. 340.

52. Williams *v.* Williams, 34 Miss. 143; State *v.* Jones, 59 N. J. L. 367, 35 Atl. 788.

53. Mercer *v.* Davidson, 80 Ga. 495, 6 S. E. 175; Grimes *v.* Jones, 48 Ga. 362; Hendrix *v.* Kellogg, 32 Ga. 435; Harlow *v.* Rosser, 28 Ga. 219.

54. Mercer *v.* Davidson, 80 Ga. 495, 6 S. E. 175.

55. Citizens' Gas Light Co. *v.* State, 44 N. J. L. 648; State *v.* Newark, 40 N. J. L. 92.

56. People *v.* Hill, 65 Barb. (N. Y.) 170; Fitch *v.* Highway Com'rs, 22 Wend. (N. Y.) 132; Starr *v.* Rochester, 6 Wend. (N. Y.) 564; Matter of Woodbine St., 17 Abb. Pr. (N. Y.) 112. And see State *v.* Reid, 18 N. C. 377, 28 Am. Dec. 572.

57. Bannister *v.* Allen, 1 Blackf. (Ind.) 414.

A new writ will not issue after a considerable lapse of time, where the first writ was dismissed for non-compliance with statutory provisions respecting notice to the adverse party. Bonds *v.* Pearce, 74 Ga. 837.

Imperfect record on first writ.— Where the return of a certiorari substituted for an appeal shows an imperfect record, and no statement of the case, a new writ of certiorari will not be granted, but the appeal will be dismissed. Skinner *v.* Badham, 80 N. C. 10.

58. Williams *v.* Greer, 4 Hayw. (Tenn.) 235, further holding it to be insufficient to

the record and proceedings of an inferior court, an officer, or a tribunal exercising judicial functions, to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained, and errors, if any, corrected.[59] It is not

show new facts which might have been presented on the first application.

59. *Alabama.*— McAlilley *v.* Horton, 75 Ala. 491; Camden *v.* Bloch, 65 Ala. 236; Lamar *v.* Marshall County, 21 Ala. 772; Barnett *v.* State, 15 Ala. 829; Talladega County *v.* Thompson, 15 Ala. 134.

Arkansas.— Auditor *v.* Davies, 2 Ark. 494.

California.— Quinchard *v.* Alameda, 113 Cal. 664, 45 Pac. 856; Townsend *v.* Copeland, 56 Cal. 612; Fraser *v.* Freelon, 53 Cal. 644; Spring Valley Water Works *v.* Bryant, 52 Cal. 132; Central Pac. R. Co. *v.* Board of Equalization, 43 Cal. 365; Bennett *v.* Wallace, 43 Cal. 25; Keys *v.* Marin County, 42 Cal. 252; People *v.* Bush, 40 Cal. 344; Miller *v.* Sacramento County, 25 Cal. 93; Fall *v.* Paine, 23 Cal. 302; California Northern R. Co. *v.* Butte County, 18 Cal. 671; Hastings *v.* San Francisco, 18 Cal. 49; Robinson *v.* Sacramento, 16 Cal. 208; People *v.* Marin County, 10 Cal. 344; People *v.* El Dorado County, 8 Cal. 58; People *v.* Hester, 6 Cal. 679.

Colorado.— Ellis *v.* People, (Colo. App. 1900) 62 Pac. 232.

Dakota.— Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

District of Columbia.— U. S. *v.* Mills, 11 App. Cas. (D. C.) 500; Bradshaw *v.* Earnshaw, 11 App. Cas. (D. C.) 495; Hendley *v.* Clark, 8 App. Cas. (D. C.) 165.

Georgia.— Freeman *v.* Eatonton, 114 Ga. 528, 40 S. E. 698; Justices Inferior Ct. *v.* Hunt, 29 Ga. 155; Pilotage Com'rs *v.* Low, R. M. Charlt. (Ga.) 298; *Ex p.* Simpson, R. M. Charlt. (Ga.) 111.

Illinois.— Mason, etc., Special Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Donahue *v.* Will County, 100 Ill. 94; Hyslop *v.* Finch, 99 Ill. 171; Chicago, etc., R. Co. *v.* Fell, 22 Ill. 333; Doolittle *v.* Galena, etc., R. Co., 14 Ill. 381; Harvey *v.* Dean, 62 Ill. App. 41; Randolph *v.* Pope County, 19 Ill. App. 100.

Iowa.—Way *v.* Fox, 109 Iowa 340, 80 N. W. 405; Richman *v.* Muscatine County, 70 Iowa 627, 26 N. W. 24; Jordon *v.* Hayne, 36 Iowa 9; Smith *v.* Jones County, 30 Iowa 531; Edgar *v.* Greer, 14 Iowa 211.

Louisiana.— State *v.* Ellis, 43 La. Ann. 825, 9 So. 639; State *v.* Judge Civil Dist. Ct., 40 La. Ann. 434, 4 So. 131; State *v.* Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532.

Maine.— Gay *v.* Bradstreet, 49 Me. 580, 77 Am. Dec. 272; Dow *v.* True, 19 Me. 46; Baker *v.* Runnels, 12 Me. 235.

Maryland.— Swann *v.* Cumberland, 8 Gill (Md.) 150; Williamson *v.* Carnan, 1 Gill & J. (Md.) 184.

Massachusetts.— Cambridge *v.* Board of R. Com'rs, 153 Mass. 161, 26 N. E. 241; Locke *v.* Lexington, 122 Mass. 290; Farmington River Water Power Co. *v.* Berkshire County, 112 Mass. 206; Alger *v.* Fay, 15 Pick. (Mass.) 322; Parks *v.* Boston, 8 Pick. (Mass.) 218, 19 Am. Dec. 322.

Michigan.— Merrick *v.* Arbela, 41 Mich. 630, 2 N. W. 922; McGregor *v.* Gladwin County, 37 Mich. 388. See also Wedel *v.* Green, 70 Mich. 642, 38 N. W. 638.

Minnesota.—Christlieb *v.* Hennepin County, 41 Minn. 142, 42 N. W. 930; Lemont *v.* Dodge County, 39 Minn. 385, 40 N. W. 359; State *v.* St. Paul, 34 Minn. 250, 25 N. W. 449; *In re* Wilson, 32 Minn. 145, 19 N. W. 723.

Missouri.— State *v.* Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867; State *v.* Slover, 113 Mo. 202, 20 S. W. 788; State *v.* Dowling, 50 Mo. 134; Owens *v.* Andrew County Ct., 49 Mo. 372; State *v.* St. Louis County Ct., 47 Mo. 594; Matter of Saline County Subscription, 45 Mo. 52, 100 Am. Dec. 337; State *v.* Moniteau County Ct., 45 Mo. App. 387.

Nevada.— State *v.* Washoe County, 23 Nev. 247, 45 Pac. 529; Esmeralda County *v.* Third Judicial Dist. Ct., 18 Nev. 438, 5 Pac. 64; Matter of Wixom, 12 Nev. 219; Phillips *v.* Welch, 12 Nev. 158.

New Hampshire.— See Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794.

New Jersey.— State *v.* Shafer, 63 N. J. L. 182, 42 Atl. 770; State *v.* Essex County, 58 N. J. L. 319, 33 Atl. 739; State *v.* Hudson, 32 N. J. L. 365.

New York.— People *v.* Hoffman, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597 [*reversing* People *v.* Doyle, 55 N. Y. App. Div. 260, 66 N. Y. Suppl. 884]; People *v.* Martin, 142 N. Y. 228, 36 N. E. 885, 58 N. Y. St. 761, 40 Am. St. Rep. 592 [*affirming* 72 Hun (N. Y.) 354, 25 N. Y. Suppl. 775, 55 N. Y. St. 442]; People *v.* Myers, 135 N. Y. 465, 32 N. E. 241, 48 N. Y. St. 467; People *v.* Land Office Com'rs, (N. Y. 1885) 1 N. E. 764; People *v.* Betts, 55 N. Y. 600; People *v.* Highway Com'rs, 30 N. Y. 72; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, 53 Am. Dec. 316; People *v.* Phisterer, 66 N. Y. App. Div. 52, 73 N. Y. Suppl. 124; People *v.* Flood, 64 N. Y. App. Div. 209, 71 N. Y. Suppl. 1067; People *v.* Board of R. Com'rs, 40 N. Y. App. Div. 559, 58 N. Y. Suppl. 94 [*affirmed* in 160 N. Y. 202, 54 N. E. 697]; People *v.* Shaw, 34 N. Y. App. Div. 61, 54 N. Y. Suppl. 218; People *v.* Board of R. Com'rs, 32 N. Y. App. Div. 179, 52 N. Y. Suppl. 908 [*affirmed* in 158 N. Y. 711, 53 N. E. 1129]; People *v.* Board of R. Com'rs, 32 N. Y. App. Div. 158, 52 N. Y. Suppl. 901 [*affirmed* in 158 N. Y. 421, 53 N. E. 163]; People *v.* McGuire, 27 N. Y. App. Div. 593, 50 N. Y. Suppl. 520; People *v.* New Rochelle, 17 N. Y. App. Div. 603, 45 N. Y. Suppl. 836; People *v.* Haverstraw, 11 N. Y. App. Div. 108, 43 N. Y. Suppl. 135; People *v.* Lauterbach, 7 N. Y. App. Div. 293, 39 N. Y. Suppl. 1117; People *v.* Board of Health, 58 Hun (N. Y.) 595, 12 N. Y. Suppl. 561, 35 N. Y. St. 411; People *v.* Jones, 49 Hun (N. Y.) 365, 2 N. Y. Suppl. 148, 17 N. Y. St. 586; People *v.* Cha-

essential, however, that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice, but it is sufficient if they are quasi judicial. It is enough if they act judicially in making their decision, whatever may be their public character.[60]

pin, 42 Hun (N. Y.) 239; People *v.* St. Lawrence County, 25 Hun (N. Y.) 131; People *v.* Morgan, 65 Barb. (N. Y.) 473; People *v.* Lawrence, 54 Barb. (N. Y.) 589; People *v.* Livingston County, 43 Barb. (N. Y.) 298; People *v.* Board of Health, 33 Barb. (N. Y.) 344, 12 Abb. Pr. (N. Y.) 88, 20 How. Pr. (N. Y.) 458; People *v.* Brooklyn, 9 Barb. (N. Y.) 535; People *v.* New York, 5 Barb. (N. Y.) 43; Reynolds *v.* Schultz, 4 Rob. (N. Y.) 282, 34 How. Pr. (N. Y.) 147; Matter of Mt. Morris Square, 2 Hill (N. Y.) 14; People *v.* New York, 2 Hill (N. Y.) 9; Stone *v.* New York, 25 Wend. (N. Y.) 157.

North Carolina.— Raleigh *v.* Kane, 47 N. C. 288.

Ohio.— Dixon *v.* Cincinnati, 14 Ohio 240; Walpole *v.* Ink, 9 Ohio 142.

Oregon.— Crossen *v.* Wasco County, 10 Oreg. 111; Burnett *v.* Douglas County, 4 Oreg. 388; Thompson *v.* Multnomah County, 2 Oreg. 34.

Rhode Island.— State *v.* Newport, 18 R. I. 381, 28 Atl. 347.

South Carolina.— State *v.* Marshall, 24 S. C. 507; *Ex p.* Schmidt, 24 S. C. 363; State *v.* Stuart, 5 Strobh. (S. C.) 29; State *v.* Senft, 2 Hill (S. C.) 367.

South Dakota.— State *v.* State Board, 3 S. D. 338, 53 N. W. 192.

Tennessee.— Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182; Tomlinson *v.* Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207; State *v.* Shelby County Taxing Dist., 16 Lea (Tenn.) 240; Louisville, etc., R. Co. *v.* Bate, 12 Lea (Tenn.) 573; Wilson *v.* Lowe, 7 Coldw. (Tenn.) 153; Dodd *v.* Weaver, 2 Sneed (Tenn.) 669; Linebaugh *v.* Rinker, Peck (Tenn.) 362; Durham *v.* U. S., 4 Hayw. (Tenn.) 54, 69.

Washington.— Browne *v.* Gear, 21 Wash. 147, 57 Pac. 359; Lewis *v.* Bishop, 19 Wash. 312, 53 Pac. 165; Spooner *v.* Seattle, 6 Wash. 370, 33 Pac. 963.

West Virginia.— Poe *v.* Marion Mach. Works, 24 W. Va. 517; Swinburn *v.* Smith, 15 W. Va. 483.

Wisconsin.— State *v.* Timme, 70 Wis. 627, 36 N. W. 325.

United States.— U. S. *v.* Young, 94 U. S. 258, 24 L. ed. 153.

England.— Reg. *v.* Salford Tp., 18 Q. B. 687, 16 Jur. 907, 21 L. J. M. C. 223, 83 E. C. L. 687; Reg. *v.* Aberdare Canal Co., 14 Q. B. 854, 14 Jur. 735, 19 L. J. Q. B. 251, 68 E. C. L. 854; Reg. *v.* Churchwardens, 14 Q. B. 298, 68 E. C. L. 298; Reg. *v.* Mann, L. R. 8 Q. B. 235, 42 L. J. M. C. 35, 27 L. T. Rep. N. S. 847, 21 Wkly. Rep. 329; Rex *v.* Trustees Norwich, etc., Road, 5 A. & E. 563, 2 Harr. & W. 385, 6 L. J. K. B. 41, 1 N. & P. 32, 32 E. C. L. 732; Rex *v.* Somersetshire, 5 B. & C. 816, 3 D. & R. 733, 6 D. & R. 469, 5 L. J. M. C. O. S. 35, 11 E. C. L. 694; Edwards *v.* Bowen, 5 B. & C. 206, 4 D. & R. 709, 2 Russ. 153, 2 Sim. & St. 514, 11 E. C. L. 431; Rex *v.* Lloyd, Cald. Cas. 309; *In re* Hipperholme, 5 D. & L. 81; Rex *v.* Great Marlow, 2 East 244, 6 Rev. Rep. 420; Rex *v.* Glamorganshire, 1 Ld. Raym. 580; Rex *v.* Standard Hill, 4 M. & S. 378, 16 Rev. Rep. 490; Portland *v.* Wynne, 7 Mod. 385; Rex *v.* Lediard, Say. 6; Rex *v.* Bagshaw, 7 T. R. 363.

Canada.— Valois *v.* Muir, 6 Montreal Super. Ct. 212; *Ex p.* Jacob, 10 N. Brunsw. 153; *Ex p.* Jocelyn, 7 N. Brunsw. 637; *In re* New Glasgow Town Council, 30 Nova Scotia 107; *In re* Cameron, 14 Nova Scotia 177.

See 9 Cent. Dig. tit. "Certiorari," § 1.

Refusal to dismiss appeal.— Where a defective bond was given in a case in which it was apparent that no appeal lay, because no basis for damages in an amount permitting an appeal was shown, the court issued the writ to review an order overruling a motion to dismiss the appeal taken. Territory *v.* Doan, (Ariz. 1900) 60 Pac. 893.

60. Robinson *v.* Sacramento, 16 Cal. 208; Mason, etc., Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995.

Action with respect to the audit of claims has been permitted in some cases. State *v.* Washoe County, 14 Nev. 66; State *v.* Paterson, 39 N. J. L. 489; People *v.* Madison County, 51 N. Y. 442; People *v.* Barnes, 44 Hun (N. Y.) 574; People *v.* Highland, 8 N. Y. St. 531; Clermont County *v.* Robb, Wright (Ohio) 48.

Courts.— The writ will lie: to a city court empowered to grant new trials (Archie *v.* State, 99 Ga. 23, 25 S. E. 612); to a common pleas court to review an award of damages, made by such court under a statute permitting an assessment in favor of one whose building has been destroyed by a municipality to prevent the spread of a fire (Stone *v.* New York, 25 Wend. (N. Y.) 157); to a county court to review its action in directing an examination of the accounts of a county collector, and entering judgment against him for uncollected penalties (Snoddy *v.* Pettis County, 45 Mo. 361); to a district court to review its action in refusing to appoint inspectors on a contested election (State *v.* Searle, 59 Minn. 489, 61 N. W. 553); to probate courts, or courts acting as such (*Ex p.* Roanoke, 117 Ala. 547, 23 So. 524; Malone *v.* Cornelius, 34 Oreg. 192, 55 Pac. 536; Garnsey *v.* Klamath County Ct., 33 Oreg. 201, 54 Pac. 539, 1089; Kirkwood *v.* Washington County, 32 Oreg. 568, 52 Pac. 568. *Contra*, Peters *v.* Peters, 8 Cush. (Mass.) 529, for the reason that it was an ecclesiastical court); but not to a military tribunal (Matter of Vidal, 179 U. S. 126, 21 S. Ct. 48, 45 L. ed. 118. See also ARMY AND NAVY, 3 Cyc. 861, note 2).

b. Ministerial, Executive, or Legislative Acts. It necessarily follows that the writ will not lie to review acts which were not done in the exercise of judicial power or authority, but were merely ministerial, executive, or legislative in their character.[61]

Military board of examination.— The decision of a military board of examination is reviewable by certiorari. People *v.* Hoffman, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597.

Municipal boards and officers.— The writ will lie to review the action of a town board in removing an assessor (Merrick *v.* Arbela, 41 Mich. 630, 2 N. W. 922); of a health board in refusing to register births as required by statute (Matter of Lauterjung, 48 N. Y. Super. Ct. 308); of a board of supervisors in directing an election to relocate a county seat (Herrick *v.* Carpenter, 54 Iowa 340, 6 N. W. 574); in creating an office and increasing the salaries fixed by statute (Robinson *v.* Sacramento, 16 Cal. 208); or to set aside any wrongful, illegal, or fraudulent appropriation of public moneys (Shields *v.* Paterson, 55 N. J. L. 495, 27 Atl. 803 [*followed* in Shields *v.* Grear, 55 N. J. L. 503, 27 Atl. 807]); of a city council in removing a city officer (Macon *v.* Shaw, 16 Ga. 172), granting a ferry license (Fay, Petitioner, 15 Pick. (Mass.) 243), or to test the lawfulness of a municipal ordinance providing for the payment of an official salary (Christie *v.* Bayonne, 64 N. J. L. 191, 44 Atl. 887); and of school trustees in uniting and dividing school districts (Miller *v.* School Trustees, 88 Ill. 26; State *v.* Whitford, 54 Wis. 150, 11 N. W. 424); but it has been refused to boards of election (*Ex p.* Carson, 5 S. C. 117), and of road commissioners (Nobles *v.* Piollet, 16 Pa. Super. Ct. 386), because they were not inferior courts.

Proceedings purely ecclesiastical are not "civil proceedings" which may be reviewed by certiorari. Peters *v.* Peters, 8 Cush. (Mass.) 529; *Ex p.* Gray, 2 L. C. Rep. 292, 3 Quebec Q. B. 191. But see *Ex p.* Little, 33 N. Brunsw. 210, holding that the writ will lie to remove the finding of an ecclesiastical court made without evidence.

Temporary court.— It has been held that a constitutional provision empowering a superior court to correct errors in inferior judicatories of a permanent nature by writ of certiorari has no application to the proceedings of a court called together for a temporary purpose, and existing only for the time of the trial. Heard *v.* Heard, 18 Ga. 739.

61. *Arkansas.*— Pine Bluff, etc., Co. *v.* Pine Bluff, 62 Ark. 196, 35 S. W. 227; Auditor *v.* Davies, 2 Ark. 494.

California.— Brown *v.* San Francisco, 124 Cal. 274, 57 Pac. 82; Frasher *v.* Rader, 124 Cal. 132, 56 Pac. 797; People *v.* Contra Costa County, 122 Cal. 421, 55 Pac. 131; Wulzen *v.* San Francisco, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; Myers *v.* Hamilton, 60 Cal. 289; Spring Valley Water Works *v.* Bryant, 52 Cal. 132; People *v.* Bush, 40 Cal. 344; Robinson *v.* Sacramento, 16 Cal. 208; People *v.* Hester, 6 Cal. 679.

Colorado.— State Bd. of Land Com'rs *v.* Carpenter, (Colo. App. 1901) 66 Pac. 165.

Delaware.— Hartman *v.* Wilmington, 1 Marv. (Del.) 215, 41 Atl. 74.

District of Columbia.— McIntosh *v.* Johnson, 3 MacArthur (D. C.) 586; Fitzgerald *v.* Leisman, 3 MacArthur (D. C.) 6, which hold that certiorari will not lie to review a judgment entered by a justice of the peace on a verdict, since the jury decides both law and fact as a substitute for the magistrate and the latter acts ministerially in entering the judgment.

Georgia.— Carr *v.* State, 98 Ga. 89, 27 S. E. 148; Meadows *v.* Taylor, 82 Ga. 738, 10 S. E. 204, 86 Ga. 804, 13 S. E. 155; Justices Inferior Ct. *v.* Hunt, 29 Ga. 155.

Idaho.— Adleman *v.* Pierce, (Ida. 1898) 55 Pac. 658.

Illinois.— Mason, etc., Special Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Harvey *v.* Dean, 62 Ill. App. 41.

Iowa.— Iske *v.* Newton, 54 Iowa 586, 7 N. W. 13.

Maryland.—Emmitt *v.* Young, 3 Harr. & M. (Md.) 122.

Massachusetts.— Devlin *v.* Dalton, 171 Mass. 338, 50 N. E. 632, 41 L. R. A. 379; Morse *v.* Norfolk County, 170 Mass. 555, 49 N. E. 925; Atty.-Gen. *v.* Northampton, 143 Mass. 589, 10 N. E. 450; Locke *v.* Lexington, 122 Mass. 290 [*citing* Hooper *v.* Bridgewater, 102 Mass. 512; Young *v.* Yarmouth, 9 Gray (Mass.) 386; Robbins *v.* Lexington, 8 Cush. (Mass.) 292]; Baxter *v.* Taber, 4 Mass. 361.

Michigan.— Root *v.* Barnes, 1 Mich. 37.

Minnesota.— State *v.* St. Paul, 34 Minn. 250, 25 N. W. 449; *In re* Wilson, 32 Minn. 145, 19 N. W. 723.

Missouri.— State *v.* Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867; State *v.* Slover, 113 Mo. 202, 20 S. W. 788; Matter of Saline County Subscription, 45 Mo. 52, 100 Am. Dec. 337; Vitt *v.* Owens, 42 Mo. 512; State *v.* Lafayette County Ct., 41 Mo. 221.

Nevada.— Southern Development Co. *v.* Douglass, (Nev. 1900) 63 Pac. 38; State *v.* Osburn, 24 Nev. 187, 51 Pac. 837; Esmeralda County *v.* Third Judicial Dist. Ct., 18 Nev. 438, 5 Pac. 64.

New York.— People *v.* Brady, 166 N. Y. 44, 59 N. E. 701 [*reversing* 53 N. Y. App. Div. 279, 65 N. Y. Suppl. 844]; People *v.* Queens County, 153 N. Y. 370, 47 N. E. 790 [*affirming* 14 N. Y. App. Div. 608, 43 N. Y. Suppl. 1121]; People *v.* Queens County, 131 N. Y. 468, 30 N. E. 488, 43 N. Y. St. 665; People *v.* Land Office Com'rs, (N. Y. 1885) 1 N. E. 764; People *v.* Walter, 68 N. Y. 403; Walker *v.* Maxwell, 68 N. Y. App. Div. 196, 74 N. Y. Suppl. 94; People *v.* Simonson, 66 N. Y. App. Div. 18, 72 N. Y. Suppl. 957; People *v.* Guilfoyle, 65 N. Y. App. Div. 498, 72 N. Y. Suppl. 891; People *v.* Burt, 65 N. Y. App. Div. 157,

2. NECESSITY OF FINAL DETERMINATION. By the English practice, in civil actions, the writ must, as a rule, be sued out before, and not after, verdict[62] or judg-

72 N. Y. Suppl. 567; Armstrong *v.* Murphy, 65 N. Y. App. Div. 126, 72 N. Y. Suppl. 475; People v. Conway, 59 N. Y. App. Div. 329, 69 N. Y. Suppl. 837; People *v.* Woodruff, 54 N. Y. App. Div. 1, 66 N. Y. Suppl. 209, 8 N. Y. Annot. Cas. 124; People *v.* Van Alstyne, 53 N. Y. App. Div. 1, 626, 65 N. Y. Suppl. 451, 516; People *v.* Feeney, 43 N. Y. App. Div. 376, 60 N. Y. Suppl. 103; People *v.* Queens County, 14 N. Y. App. Div. 608, 43 N. Y. Suppl. 1121; People *v.* New York, 5 Barb. (N. Y.) 43; People *v.* Queens County, 1 Hill (N. Y.) 195.

Ohio.— Dixon *v.* Cincinnati, 14 Ohio 240.

Pennsylvania.— Com. *v.* Justice, 34 Pa. St. 165; s. c. *sub nom.* Lawrence County Bank *v.* Lawrence County, 2 Pittsb. (Pa.) 81.

Tennessee.— Bouldin *v.* Lockhart, 3 Baxt. (Tenn.) 262; Wade *v.* Murry, 2 Sneed (Tenn.) 49.

Wisconsin.— State *v.* Timme, 70 Wis. 627, 36 N. W. 325.

England.— Reg. *v.* Lucey, [1897] 1 Q. B. 659, 66 L. J. Q. B. 308, 61 J. P. 388.

Canada.— Reg. *v.* Simpson, 20 N. Brunsw. 472; *In re* New Glasgow Town Council, 30 Nova Scotia 107; *Ex p.* Lecour, 3 Quebec Q. B. 462, 3 L. C. Rep. 123; Samoisette *v.* Les Commissaires, 20 Rev. Lég. 631; Fabrique de Montréal *v.* Hudon, 4 Rev. Lég. 271; *Ex p.* Boucher, 6 L. C. Jur. 333, 15 Rev. Lég. 368.

Action of county medical society in expulsion of member is not reviewable by certiorari. People *v.* Dutchess County Medical Soc., 84 Hun (N. Y.) 448, 32 N. Y. Suppl. 415, 65 N. Y. St. 544.

Action of political association, taken without statutory authority therefor, will not be reviewed. People *v.* Lauterbach, 7 N. Y. App. Div. 293, 39 N. Y. Suppl. 1117.

Action of public boards or officers in acting as civil service examiners (People *v.* Roosevelt, 19 N. Y. App. Div. 431, 46 N. Y. Suppl. 517), adoption of particular school books (People *v.* Board of Education, 54 Cal. 375), advertising for and considering proposals for publication of state reports, and contracting in relation thereto (People *v.* Carr, 5 Silv. Supreme (N. Y.) 302, 23 N. Y. Suppl. 112), allowance of illegal claims (Burr *v.* Sacramento County, 96 Cal. 210, 31 Pac. 38; Andrews *v.* Pratt, 44 Cal. 309 [*compare* El Dorado County *v.* Elstner, 18 Cal. 144; People *v.* El Dorado County, 8 Cal. 58]; Phelps County *v.* Bishop, 46 Mo. 68; Sumner *v.* Oxford County, 37 Me. 112; Yalabusha County *v.* Carbry, 3 Sm. & M. (Miss.) 529; People *v.* Gilroy, 25 N. Y. Suppl. 878, 56 N. Y. St. 881 [*following* Lanigan *v.* New York, 70 N. Y. 454]; People *v.* Allegany County, 15 Wend. (N. Y.) 198), borrowing money to improve highways, and issuing bonds therefor (People *v.* Queens County, 131 N. Y. 468, 30 N. E. 488, 43 N. Y. St. 665 [*reversing* 62 Hun (N. Y.) 619, 16 N. Y. Suppl. 705, 43 N. Y. St. 33]), consenting to and contracting for a bridge (People *v.* Public Park Com'rs, 97 N. Y. 37), declaration of a nuisance (People *v.* Board of Health, 33 Barb. (N. Y.) 344, 12 Abb. Pr. (N. Y.) 88, 20 How. Pr. (N. Y.) 458), delegation of power to locate and purchase a site, and to incur an indebtedness for the erection of a building thereon (People *v.* St. Lawrence County, 25 Hun (N. Y.) 131), disbandment of militia company (People *v.* Hill, 126 N. Y. 497, 27 N. E. 789, 37 N. Y. St. 792 [*affirming* 13 N. Y. Suppl. 637, 37 N. Y. St. 112]), employing an attorney (State *v.* Washoe County, 23 Nev. 247, 45 Pac. 529), formation of school districts (Moede *v.* Stearns County, 43 Minn. 312, 45 N. W. 435; Lemont *v.* Dodge County, 39 Minn. 385, 40 N. W. 359), organization of new town out of part of old one (Christlieb *v.* Hennepin County, 41 Minn. 142, 42 N. W. 930), promulgation of rules respecting admission to insane asylum (People *v.* Manhattan State Hospital, 5 N. Y. App. Div. 249, 39 N. Y. Suppl. 158), refusal to reconsider dismissal of school-teacher (Jordan *v.* Board of Education, 14 Misc. (N. Y.) 119, 35 N. Y. Suppl. 247, 25 N. Y. Civ. Proc. 89, 2 N. Y. Annot. Cas. 244), rejecting a bid for county printing (Townsend *v.* Copeland, 56 Cal. 612), removal of county officer for malfeasance (Gager *v.* Chippewa County, 47 Mich. 167, 10 N. W. 186), selection of newspapers for advertising purposes (People *v.* Martin, 72 Hun (N. Y.) 354, 25 N. Y. Suppl. 775, 55 N. Y. St. 442), unlawful and fraudulent sale of schoolhouse (State *v.* Kemen, 61 Wis. 494, 21 N. W. 520) will not be reviewed by certiorari.

Acts of persons assuming to act as officers will not be reviewed. People *v.* Covert, 1 Hill (N. Y.) 674.

Acts of subordinate officer acting by direction of a public board will not be reviewed. Jaquith *v.* Hale, 31 Mich. 430.

Election officers.— The action of justices of the peace acting as election inspectors (People *v.* Bush, 22 N. Y. App. Div. 363, 48 N. Y. Suppl. 13) or of an election board in receiving and canvassing votes and announcing the result (People *v.* Austin, 20 N. Y. App. Div. 1, 46 N. Y. Suppl. 526; People *v.* Van Slyck, 4 Cow. (N. Y.) 297) will not be reviewed by certiorari.

That a public agent exercises judgment and discretion in the performance of his duties does not make his action or powers judicial in their character. Quinchard *v.* Alameda, 113 Cal. 664, 45 Pac. 856 [*citing In re* Wilson, 32 Minn. 145, 19 N. W. 723; People *v.* Public Park Com'rs, 97 N. Y. 37; People *v.* Walter, 68 N. Y. 403].

62. Tully *v.* Glass, 3 U. C. Q. B. O. S. 149. And see Black *v.* Wesley, 8 Ont. L. J. 277 (holding it to be too late to serve the writ after verdict); Gallagher *v.* Bathie, 2 Ont. L. J. N. S. 73 (a similar holding, where the writ was delivered to the judge who tried the cause without a jury, after the close of the evidence and before judgment which was postponed to another day).

ment,[63] and will lie in all cases where the same justice can be administered,[64] although it seems a cause may be removed after judgment to ascertain whether the inferior court had jurisdiction or proceeded illegally.[65] In the United States it is the general rule that where certiorari is used as a substitute for a writ of error it can only issue to review or correct a final determination;[66] but this rule is confined to cases

63. Kemp *v.* Balne, 1 D. & L. 885, 8 Jur. 619, 13 L. J. Q. B. 149; Walker *v.* Gann, 7 D. & R. 769, 16 E. C. L. 320; Pinsent *v.* Boyd, 1 Newfound. 727.

The writ will not lie after judgment and execution satisfied, although a new trial is subsequently granted. McKenzie *v.* Keene, 5 Ont. L. J. 225.

64. 1 Tidd Pr. 398. See also Beck *v.* Knabb, 1 Overt. (Tenn.) 55; Dryden *v.* Swinburne, 20 W. Va. 89.

65. See Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105.

66. *Arkansas.*— Sanders *v.* Plunkett, 40 Ark. 507.

California.— Gould *v.* San Francisco, 122 Cal. 18, 54 Pac. 272; People *v.* County Judge, 40 Cal. 479; Wilson *v.* Sacramento County, 3 Cal. 386.

Colorado.— People *v.* Garfield County Ct., 26 Colo. 478, 58 Pac. 591; Schwarz *v.* Garfield County Ct., 14 Colo. 44, 23 Pac. 84; People *v.* Lake County Dist. Ct., 6 Colo. 534.

Dakota.— Territory *v.* District Ct., 4 Dak. 308, 30 N. W. 145.

Delaware.— Vaughn *v.* Marshall, 1 Houst. (Del.) 348.

Georgia.— Stewart *v.* State, 98 Ga. 202, 25 S. E. 424.

Idaho.—State *v.* Goode, (Ida. 1896) 44 Pac. 640; People *v.* Lindsay, 1 Ida. 394.

Illinois.— Glennon *v.* Burton, 144 Ill. 551, 33 N. E. 23; People *v.* Cook County Super. Ct., 55 Ill. App. 376.

Iowa.— Lloyd *v.* Spurrier, 103 Iowa 744, 72 N. W. 688.

Louisiana.— State *v.* Guion, 49 La. Ann. 1227, 22 So. 353.

Maine.— West Bath, Petitioners, 36 Me. 74.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Northern Cent. R. Co., 15 Md. 193; State *v.* Duvall, 4 Harr. & M. (Md.) 4.

Michigan.— Meads *v.* Belt Copper Mines, 125 Mich. 456, 84 N. W. 615; Culver *v.* Travis, 108 Mich. 640, 66 N. W. 575; Detroit Western Transit, etc., R. Co. *v.* Backus, 48 Mich. 582, 12 N. W. 861; Palms *v.* Campau, 11 Mich. 109.

Minnesota.—State *v.* St. Louis County Dist. Ct., 58 Minn. 534, 60 N. W. 546; Grinager *v.* Norway, 33 Minn. 127, 22 N. W. 174.

Mississippi.—Lexington *v.* Sargent, 64 Miss. 621, 1 So. 903.

Missouri.— State *v.* Valliant, 123 Mo. 524, 27 S. W. 379, 28 S. W. 586; State *v.* Edwards, 104 Mo. 125, 16 S. W. 117; State *v.* Schneider, 47 Mo. App. 669.

New Jersey.— Potter *v.* Fritz, 54 N. J. L. 436, 24 Atl. 555; Mowery *v.* Camden, 49 N. J. L. 106, 6 Atl. 438; State *v.* Plume, 44 N. J. L. 362; State *v.* Paterson, 39 N. J. L. 489; State *v.* Woodruff, 39 N. J. L. 72; State *v.* New Jersey Medical Soc., 38 N. J. L. 377; Hinchman *v.* Cook, 20 N. J. L. 271; Chandler *v.* Monmouth Bank, 9 N. J. L. 101; Phillips *v.* Phillips, 8 N. J. L. 122.

New York.— People *v.* Board of R. Com'rs, 160 N. Y. 202, 54 N. E. 697 [*affirming* 40 N. Y. App. Div. 559, 58 N. Y. Suppl. 94]; People *v.* Woodruff, 64 N. Y. App. Div. 239, 71 N. Y. Suppl. 1044; People *v.* Schoonover, 43 N. Y. App. Div. 539, 60 N. Y. Suppl. 127; People *v.* Palmyra, 3 Hun (N. Y.) 549, 5 Thomps. & C. (N. Y.) 609; People *v.* Livingston County, 43 Barb. (N. Y.) 232; People *v.* Peabody, 26 Barb. (N. Y.) 437, 5 Abb. Pr. (N. Y.) 194; Husted's Case, 17 Abb. Pr. (N. Y.) 326 note; Devlin *v.* Platt, 11 Abb. Pr. (N. Y.) 398, 20 How. Pr. (N. Y.) 167; Matter of Hamilton, 58 How. Pr. (N. Y.) 290; Lynde *v.* Noble, 20 Johns. (N. Y.) 80.

Ohio.— Herf *v.* Shulze, 10 Ohio 263.

Pennsylvania.— Wallace *v.* Jameson, 179 Pa. St. 94, 36 Atl. 145; Macrum *v.* Jones, (Pa. 1887) 11 Atl. 317; Seabrooke *v.* Swarthmore College, 65 Pa. St. 74; Hall's Appeal, 56 Pa. St. 238; Kiskiminitas Tp. Road, 32 Pa. St. 9; Wallington *v.* Kneass, 15 Pa. St. 313; Bough St. Road Case, 2 Serg. & R. (Pa.) 419; Com. *v.* Craine, 2 Pa. Dist. R. 615, 12 Pa. Co. Ct. 286.

Utah.— *In re* Bates, 1 Utah 213.

Vermont.— Sowles *v.* Bailey, 69 Vt. 277, 38 Atl. 237.

United States.— Patterson *v.* U. S., 2 Wheat. (U. S.) 221, 4 L. ed. 224.

The fact that a question of jurisdiction is involved does not affect this rule. Everidge *v.* Berrys, 93 Ga. 760, 20 S. E. 644.

Effect of ability to resort to another tribunal for review.— There is no final determination where a resort may be had to some other body, tribunal, or officer for a revision, rehearing, or review. People *v.* Board of R. Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861, 74 N. Y. St. 794.

The following have been held to be final determinations, reviewable by certiorari, to wit: Action of a county board on a claim presented for audit where the claim is passed on, and allowed in part and rejected in part. People *v.* Westchester County, 57 N. Y. App. Div. 135, 67 N. Y. Suppl. 981. Confirmation of commissioners' report in partition. Cozens *v.* Dickinson, 3 N. J. L. 99. Confirmation of settlement of sheriff's accounts. Board of Education *v.* Hopkins, 19 W. Va. 84. Decree of orphans' court ordering restatement of an executor's account, allowing exceptions, and referring the account to auditors. Johnson *v.* Eicke, 12 N. J. L. 316. Entry of judgment of fine and imprisonment for contempt. People *v.* Donohue, 22 Hun (N. Y.) 470. Order appointing commissioners to determine necessity of taking land to improve navigation and to ascertain damages, made under Mich.

where the office of the writ is in the nature of that of a writ of error,[67] and the writ will issue under special circumstances, to special and summary tribunals which have not consummated their authority.[68] It will not issue before judgment, however, unless the cause can be continued and completed in the superior court.[69]

B. Errors of Law. In some cases the writ, like a writ of false judgment, will lie to correct errors of law apparent on the face of the record.[70]

C. Incidental Matters. The writ will not lie to remove a proceeding in an action or suit which is but a part of and merely incidental to it.[71]

D. Matters of Discretion. The writ will not lie to review errors or mistakes in matters of discretion, where the court has acted within its jurisdiction[72] and

Comp. Laws, c. 85. Clay *v.* Penoyer Creek Imp. Co., 34 Mich. 204. Order of county court levying a tax after equalization and consideration of the assessment. Coos Bay Nav. Co. *v.* Coos County, 31 Oreg. 594, 47 Pac. 1101; Southern Oregon Co. *v.* Gage, 31 Oreg. 590, 47 Pac. 1101; Southern Oregon Co. *v.* Coos County, 30 Oreg. 250, 47 Pac. 852. Order of orphans' court, directing sale of decedent's land to pay debts. State *v.* Hanford, 11 N. J. L. 71. Partial rejection of claim by town auditors. People *v.* Hannibal, 65 Hun (N. Y.) 414, 20 N. Y. Suppl. 165, 47 N. Y. St. 567.

Certiorari will not lie to review an order refusing a change of venue (State *v.* Goode, (Ida. 1896) 44 Pac. 640); a judgment of the United States circuit court of appeals, reversing a judgment of the circuit court and remanding the cause for further proceedings (Chicago, etc., R. Co. *v.* Osborne, 146 U. S. 354, 13 S. Ct. 281, 36 L. ed. 1002 [*following* Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 12 S. Ct. 876, 36 L. ed. 834; Rice *v.* Sanger, 144 U. S. 197, 12 S. Ct. 664, 36 L. ed. 403; McLish *v.* Roff, 141 U. S. 661, 12 S. Ct. 118, 35 L. ed. 893]; or, until they have acted, an order appointing referees under the provision of a statute (Harrison *v.* Sloan, 6 N. J. L. 410); and certiorari and supersedeas will not lie at the instance of a surety to restrain a sale of his property until exhaustion of remedies against his principal, before the surety's property is levied on (Beeler *v.* Hall, 11 Humphr. (Tenn.) 445).

67. State *v.* Paterson, 39 N. J. L. 489.

68. Hendley *v.* Clark, 8 App. Cas. (D. C.) 165; Drowne *v.* Stimpson, 2 Mass. 441; Mowery *v.* Camden, 49 N. J. L. 106, 6 Atl. 438; State *v.* Paterson, 39 N. J. L. 489; Hinchman *v.* Cook, 20 N. J. L. 271.

An action of ejectment in which common bail was filed and issue joined may be removed before trial or judgment. Jackson *v.* Corley, 14 Johns. (N. Y.) 323.

Proceedings of municipal bodies may be removed before final determination (State *v.* Camden, 47 N. J. L. 64, 54 Am. Rep. 117; State *v* Paterson, 39 N. J. L. 489), or before proceedings have been taken to enforce their action (Shields *v.* Paterson, 55 N. J. L. 495, 27 Atl. 803; State *v.* Jersey City, 34 N. J. L. 390; State *v.* Paterson, 34 N. J. L. 163; State *v.* Jersey City, 34 N. J. L. 31; State *v.* Jersey City, 29 N. J. L. 170; Jackson *v.* Newark, 53 N. J. Eq. 322, 31 Atl. 233); but the validity of a municipal ordinance imposing a license fee or a penalty cannot be reviewed on certiorari, at the instance of a person within its purview, in advance of any action taken against him under its provisions (Kendall Mfg. Co. *v.* Jersey City, 65 N. J. L. 123, 46 Atl. 647; Hamblet *v.* Asbury Park, 61 N. J. L. 502, 39 Atl. 1022 [stating that the contrary decision of State *v.* Orange, 50 N. J. L. 389, 13 Atl. 240, was inadvertently made]; State *v.* Rahway, 58 N. J. L. 510, 34 Atl. 3; State *v.* Jersey City, 47 N. J. L. 286 [*overruling* prior holdings to the contrary as enunciated in State *v.* Washington, 45 N. J. L. 318, 44 N. J. L. 605]).

In New Jersey attachment is for the benefit of all creditors who may come in, and the proceedings may be removed before appearance of defendant. Ayres *v.* Bartlet, 14 N. J. L. 330; Branson *v.* Shinn, 13 N. J. L. 250; Jaffery *v.* Woolley, 10 N. J. L. 123; Peacock *v.* Wildes, 8 N. J. L. 179.

69. State *v.* Plume, 44 N. J. L. 362; State *v.* District Medical Soc., 35 N. J. L. 200; Devlin *v.* Platt, 11 Abb. Pr. (N. Y.) 398, 20 How. Pr. (N. Y.) 167.

70. *Alabama.*—Miller *v.* Jones, 80 Ala. 89; McAllilley *v.* Horton, 75 Ala. 491; Camden *v.* Bloch, 65 Ala. 236.

Georgia.— Bostick *v.* Palmer, 79 Ga. 680, 4 S. E. 319; Small *v.* Sparks, 69 Ga. 745.

Maine.— Lapan *v.* Cumberland County, 65 Me. 160.

Missouri.— State *v.* Smith, 101 Mo. 174, 14 S. W. 108; Hannibal, etc., R. Co. *v.* State Board of Equalization, 64 Mo. 294.

New Jersey.— State *v.* Hudson, 32 N. J. L. 365.

Oregon.— See Kirkwood *v.* Washington County, 32 Oreg. 568, 52 Pac. 568; Oregon City *v.* Clackamas County, 32 Oreg. 491, 52 Pac. 310; Campbell *v.* Snyder, 27 Oreg. 249, 41 Pac. 659.

South Carolina.— *Ex p.* Schmidt, 24 S. C. 363. See also State *v.* Stuart, 5 Strobh. (S. C.) 29; Beckner *v.* Graham, Rice (S. C.) 44.

Virginia.— Wingfield *v.* Crenshaw, 3 Hen. & M. (Va.) 245.

71. Hosmer *v.* Williams, 7 Cow. (N. Y.) 494 (a feigned issue); People *v.* Corey, 19 Wend. (N. Y.) 633 (scire facias to obtain execution).

72. *Alabama.*— Huffaker *v.* Boring, 8 Ala. 87.

Arizona.—Territory *v.* Dunbar, 1 Ariz. 510, 25 Pac. 473.

Arkansas.— Aven *v.* Wilson, 61 Ark. 287,

where there has been no disregard by the court of the procedure prescribed by

32 S. W. 1074; Sumerow *v.* Johnson, 56 Ark. 85, 19 S. W. 114; Carolan *v.* Carolan, 47 Ark. 511, 2 S. W. 105.

California.— Brown *v.* San Francisco, 124 Cal. 274, 57 Pac. 82; San Francisco *v.* Superior Court, (Cal. 1897) 50 Pac. 432; Sherer *v.* Lassen County Super. Ct., 96 Cal. 653, 31 Pac. 565; Buckley *v.* Fresno County Super. Ct., 96 Cal. 119, 31 Pac. 8 [expressly *overruling* Carlson *v.* Alameda County Super. Ct., 70 Cal. 628, 11 Pac. 788, and by implication, Hall *v.* El Dorado Super. Ct., 71 Cal. 550, 12 Pac. 672; Levy *v.* Yolo County Super. Ct., 66 Cal. 292, 5 Pac. 353]; Loaiza *v.* San Francisco Super. Ct., 85 Cal. 11, 24 Pac. 707, 20 Am. St. Rep. 197, 9 L. R. A. 376; Ryan *v.* San Francisco Super. Ct., (Cal. 1888) 18 Pac. 598; Tomasini *v.* Del Norte Super. Ct., 75 Cal. 225, 17 Pac. 1; Hirschfield *v.* Tulare County Super. Ct., (Cal. 1885) 8 Pac. 273; Alexander *v.* San Francisco, 66 Cal. 387, 5 Pac. 675, 4 Pac. 961; Ketchum *v.* San Joaquin County Super. Ct., 65 Cal. 494, 4 Pac. 492; Nunan *v.* Superior Ct., (Cal. 1884) 4 Pac. 416; Brown *v.* Superior Ct., (Cal. 1884) 3 Pac. 895; Kitts *v.* Nevada County Super. Ct., 62 Cal. 203; Dezerillo *v.* San Francisco Super. Ct., 59 Cal. 180; Goodale *v.* Fifteenth Dist. Ct., 56 Cal. 26; Reynolds *v.* San Joaquin County Ct., 47 Cal. 604; Monreal *v.* Bush, 46 Cal. 79; Yenawine *v.* Richter, 43 Cal. 312; Barber *v.* San Francisco, 42 Cal. 630; *In re* Hanson, 2 Cal. 262.

District of Columbia.— District of Columbia *v.* Washington Gas Light Co., 3 Mackey (D. C.) 343.

Illinois.— Harvey *v.* Dean, 62 Ill. App. 41; People *v.* Cook County Super. Ct., 55 Ill. App. 376.

Iowa.— Sunberg *v.* Linn County Dist. Ct., 61 Iowa 597, 16 N. W. 724; Asbury Independent School Dist. *v.* Dubuque County Dist. Ct., 48 Iowa 182.

Louisiana.— State *v.* Ellis, 43 La. Ann. 825, 9 So. 639; State *v.* Rightor, 43 La. Ann. 380, 9 So. 114; State *v.* Le Blanc, 42 La. Ann. 1190, 8 So. 441; State *v.* Perrault, 41 La. Ann. 179, 6 So. 18; State *v.* Rightor, 39 La. Ann. 619, 2 So. 385; State *v.* Judges Ct. of App., 37 La. Ann. 120.

Maine.— Levant *v.* Penobscot County, 67 Me. 429; West Bath, Petitioners, 36 Me. 74.

Massachusetts.—New Marlborough *v.* Berkshire County, 9 Metc. (Mass.) 423; Hayward, Petitioner, 10 Pick. (Mass.) 358; *Ex p.* Weston, 11 Mass. 417.

Michigan.— Goss *v.* Stone, 63 Mich. 319, 29 N. W. 735; Horner *v.* Biggam, 36 Mich. 243; Midland County *v.* Auditor Gen., 27 Mich. 165; Campau *v.* Coates, 17 Mich. 235.

Missouri.— Matter of Saline County Subscription, 45 Mo. 52, 100 Am. Dec. 337. See also State *v.* Smith, 101 Mo. 174, 14 S. W. 108 [*following* Hannibal, etc., R. Co. *v.* State Board of Equalization, 64 Mo. 294].

Montana.— State *v.* Second Judicial Dist. Ct., 24 Mont. 494, 62 Pac. 820.

Nevada.— State *v.* Second Judicial Dist. Ct., 23 Nev. 243, 45 Pac. 467; Matter of Wixom, 12 Nev. 219; Phillips *v.* Welch, 12 Nev. 158; Birchfield *v.* Harris, 9 Nev. 382.

New Hampshire.— See Landaff's Petition, 34 N. H. 163.

New Jersey.— State *v.* Trenton Trinity Church, 45 N. J. L. 230; State *v.* Busby, 44 N. J. L. 627; State *v.* Hart, 44 N. J. L. 366; Clifford *v.* Overseers of Poor, 37 N. J. L. 152; Parsell *v.* State, 30 N. J. L. 530; Brush *v.* Young, 28 N. J. L. 237; Engle *v.* Crombie, 21 N. J. L. 614; Stevenson *v.* Phillips, 21 N. J. L. 70; Wright *v.* Green, 11 N. J. L. 334.

New Mexico.— Matter of Watts, 1 N. M. 541.

New York.— People *v.* Land-Office Com'rs, (N. Y. 1885) 1 N. E. 764; People *v.* Board of Fire Com'rs, 82 N. Y. 358; Chemung Nat. Bank *v.* Elmira, 53 N. Y. 49; People *v.* Highway Com'rs, 30 N. Y. 72; People *v.* Kings County, 1 N. Y. App. Div. 3, 36 N. Y. Suppl. 1002, 72 N. Y. St. 104; People *v.* Kling, 6 Barb. (N. Y.) 366; *In re* Jones, 6 N. Y. Civ. Proc. 250; *Ex p.* Hagaman, 2 Hill (N. Y.) 415; Hart *v.* Seixas, 21 Wend. (N. Y.) 40; Wilson *v.* Green, 20 Wend. (N. Y.) 189.

North Carolina.—Raleigh *v.* Kane, 47 N. C. 288; Pratt *v.* Kitterell, 15 N. C. 168.

Ohio.— Bliss *v.* Enslow, 3 Ohio 269.

Oregon.— Garnsey *v.* Klamath County Ct., 33 Oreg. 201, 54 Pac. 539, 1089; Cook *v.* Multnomah County, 8 Oreg. 170.

Pennsylvania.— Hall *v.* Oyster, 168 Pa. St. 399, 31 Atl. 1007; Hoppes *v.* Houtz, 133 Pa. St. 34, 19 Atl. 312; Black *v.* Oblender, (Pa. 1888) 15 Atl. 708; Menner *v.* Nichols, (Pa. 1887) 8 Atl. 647; *In re* Servickley, 36 Pa. St. 80, 2 Grant (Pa.) 135; Breen's License, 13 Pa. Co. Ct. 141; Kern *v.* Com., 1 Pa. Co. Ct. 469.

Texas.— Criswell *v.* Richter, 13 Tex. 18.

Washington.— State *v.* Jefferson County Super. Ct., 6 Wash. 201, 33 Pac. 387.

Wisconsin.— State *v.* Manitowoc County, 59 Wis. 15, 16 N. W. 617.

England.— Reg. *v.* St. Olave, 8 E. & B. 529, 27 L. J. Q. B. 5, 92 E. C. L. 529; *Ex p.* Blewitt, 14 L. T. Rep. N. S. 598.

Canada.— *In re* Melina Trepanier, 12 Can. Supreme Ct. 111; *Ex p.* Simpson, 22 N. Brunsw. 132; Reg. *v.* Walsh, 29 Nova Scotia 521 [*overruling* Reg. *v.* McDonald, 19 Nova Scotia 336]; Reg. *v.* Dunning, 14 Ont. 52; Reg. *v.* Richardson, 8 Ont. 651; *Ex p.* Desharnais, 11 Quebec Super. Ct. 484; Reg. *v.* Denis, 2 Quebec Super. Ct. 175; Gravel *v.* Montreal, 15 Rev. Lég. 367.

See also *infra*, V, Q, 1, b.

Admission of attorneys.— The action of inferior courts vested with discretion as to the admission of persons to practice as attorneys and counselors is not the subject of revision by certiorari. State *v.* Johnston, 2 Harr. & M. (Md.) 160.

An erroneous expression of opinion by the court below furnishes no ground for removal. Holmes *v.* Reeve, 5 Ont. Pr. 58.

The writ will not lie to obtain a judgment

law;[73] but if the record shows non-conformity to legal requirements the writ will lie.[74]

E. Matters Subsequent to Judgment. Matters arising subsequent to judgment, which afford no ground of objection to its correctness at the time of its rendition, furnish no ground for issue of the writ;[75] but it is otherwise where good grounds of objection were unknown until after judgment.[76] However, the writ is sometimes used in connection with the writ of supersedeas, in the place of an audita querela, to give relief to a party against whom a judgment has been rendered, for causes which have originated since the rendition thereof.[77]

F. Right to Office. Unless by statute[78] certiorari will not lie to try title to office, or where the determination of the right to office is the obvious and only object of the writ.[79] There are, however, decisions holding that collateral questions involving the legality of an election to office may be raised and determined in testing the validity of laws or resolutions adverse to the parties' rights.[80]

for costs, in addition to the judgment already obtained, where the extent of such costs is in the discretion of the inferior court. Sumner *v.* Hartland, 25 Vt. 641.

Duty to apply to court below.— Where by statute the proceedings below can only be set aside when absolutely void, the court cannot vacate proceedings which are voidable only, even though the proceedings on their face show that the facts were not such as to justify the action taken. The proper course in such a case is to apply to the court to revise its action. Aldrich *v.* First Judge Cir. Ct., 9 Hawaii 470.

73. State *v.* Martin, 48 La. Ann. 1249, 20 So. 729; State *v.* Houston, 40 La. Ann. 434, 4 So. 131; Sumner *v.* Hartland, 25 Vt. 641.

Refusal of a board to summon witnesses, in a case where such summoning is discretionary with it, is neither illegal action nor excess of jurisdiction. Tomlinson *v.* Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207.

74. *Ex p.* Boothe, 64 Ala. 312.

A strong case of abuse must be shown to warrant the interference of the court. Avery *v.* Ruffin, 4 Ohio 420.

75. Wheelock *v.* Wright, 4 Stew. & P. (Ala.) 163 [*following* Bobo *v.* Thompson, 3 Stew. & P. (Ala.) 385].

76. Ayres *v.* Lawrence, 63 Barb. (N. Y.) 454 (an action to set aside a judgment for want of jurisdiction); Hayden *v.* Pearce, 33 Oreg. 89, 52 Pac. 1049 (where a misjoinder of causes of action does not appear on the record until after judgment, a writ of review is the proper remedy).

77. As issue of an execution on a judgment wholly or partially satisfied. Rogers *v.* Miller, 1 Swan (Tenn.) 22; Rogers *v.* Ferrell, 10 Yerg. (Tenn.) 253; Barnes *v.* State, 4 Yerg. (Tenn.) 186.

78. In Washington a judgment determining the right to an office will be reviewed by the supreme court by a writ of review when the regular appeal is inadequate by reason of the fact that the rights of the petitioner to hold the office will expire before an appeal can be determined. State *v.* Tallman, 24 Wash. 426, 64 Pac. 759.

In West Virginia the constitution permits review by certiorari of decisions of inferior courts or tribunals, in a contest involving title to office. Dryden *v.* Swinburne, 20 W. Va. 89. See also Swinburn *v.* Smith, 15 W. Va. 483; Dryden *v.* Swinburn, 15 W. Va. 234.

In New Brunswick a certiorari will be granted to bring up the proceedings of county authorities removing an officer and appointing another in his stead, for the purpose of quashing them, as well as a quo warranto to try the right of appointment. *Ex p.* Gallagher, 26 N. Brunsw. 73.

79. Britton *v.* Steher, 62 Mo. 370; Miller *v.* Washington, 67 N. J. L. 167, 50 Atl. 341; State *v.* Shafer, 63 N. J. L. 182, 42 Atl. 770; Bilderback *v.* Salem County, 63 N. J. L. 55, 42 Atl. 843; State *v.* Hudson County, 60 N. J. L. 362, 37 Atl. 725; Stites *v.* Cumberland, 58 N. J. L. 340, 33 Atl. 737; State *v.* Bayonne, 58 N. J. L. 325, 33 Atl. 734; State *v.* Millville, 53 N. J. L. 362, 21 Atl. 568; Simon *v.* Hoboken, 52 N. J. L. 367, 19 Atl. 259; State *v.* New Brunswick, 47 N. J. L. 479, 1 Atl. 496, 54 Am. Rep. 182; State *v.* Camden County, 47 N. J. L. 454, 1 Atl. 515; State *v.* Camden, 39 N. J. L. 416; State *v.* Brown, 31 N. J. L. 355; People *v.* Walter, 68 N. Y. 403; People *v.* Phisterer, 66 N. Y. App. Div. 52, 73 N. Y. Suppl. 124; People *v.* Queens County, 1 Hill (N. Y.) 195. See, generally, QUO WARRANTO.

80. In New Jersey certiorari is the proper remedy to remove out of the way of a prosecutor in possession of, and therefore presumptively entitled to, an office, any order, resolution, or other action adverse to his rights which may be unlawfully used to disturb him in the possession and enjoyment of such office. State *v.* Cape May Point, 55 N. J. L. 104, 25 Atl. 259; State *v.* Millville, 53 N. J. L. 362, 21 Atl. 568; Simon *v.* Hoboken, 52 N. J. L. 367, 19 Atl. 259; State *v.* Atlantic City, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697; State *v.* New Brunswick, 47 N. J. L. 479, 1 Atl. 496, 54 Am. Rep. 182; State *v.* Camden County, 47 N. J. L. 454, 1 Atl. 515; State *v.* Camden, 39 N. J. L. 416. But see State *v.* Jersey City, 48 N. J. L. 428, 6 Atl. 23.

Claimant not a party.— The writ will not lie to pass on the validity of an election in proceedings to which the person elected is not

G. Matters in Chancery. The writ is sometimes employed in equity cases to bring up a record to be used as evidence, or to remove causes from inferior courts of equity into the court of chancery;[81] but it is never issued as a means of reviewing, and affirming or reversing, a decree of a court of equity.[82]

III. GROUNDS FOR REVIEW.

A. Want or Excess of Jurisdiction — 1. IN GENERAL. The usual, and in some jurisdictions the only, office of the writ is to inquire into and review determinations made without jurisdiction or in excess of the jurisdiction conferred.[83]

made a party. State *v.* Camden County, 47 N. J. L. 454, 1 Atl. 515.

Where a municipal council is made the sole judge of the election and qualifications of its members, its action in seating a member after investigation of his title is final and conclusive, and a resolution offered in a succeeding council to investigate such title may be removed by certiorari before action thereon. State *v.* Camden, 63 N. J. L. 200, 42 Atl. 837; State *v.* Camden, 63 N. J. L. 186, 42 Atl. 848.

81. 2 Bacon Abr. 166.

82. Gilliland *v.* Sellers, 2 Ohio St. 223; Galloway *v.* Stophlet, 1 Ohio St. 434; Matter of Haney, 14 Wis. 417.

83. *Alabama.*— Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947; McAllilley *v.* Horton, 75 Ala. 491; Camden *v.* Bloch, 65 Ala. 236.

Arizona.— Territory *v.* Doan, (Ariz. 1900) 60 Pac. 893; Reilly *v.* Tyng, 1 Ariz. 510, 25 Pac. 798.

Arkansas.— St. Francis County *v.* Roleson, 66 Ark. 139, 49 S. W. 351; Sumerow *v.* Johnson, 56 Ark. 85, 19 S. W. 114; Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559; Phelps *v.* Buck, 40 Ark. 219; Baskins *v.* Wylds, 39 Ark. 347; Street *v.* Stuart, 38 Ark. 159; State *v.* Hinkle, 37 Ark. 532; Baxter *v.* Brooks, 29 Ark. 173; Flournoy *v.* Payne, 28 Ark. 87; *Ex p.* Buckner, 9 Ark. 73.

California.— Los Angeles Water Co. *v.* Los Angeles County Super. Ct., 124 Cal. 385, 57 Pac. 216; Brown *v.* San Francisco, 124 Cal. 274, 57 Pac. 82; San Francisco *v.* San Francisco Super. Ct., (Cal. 1897) 50 Pac. 432; Buckley *v.* Fresno County Super. Ct., 96 Cal. 119, 31 Pac. 8; Marsh *v.* San Francisco Super. Ct., 88 Cal. 595, 26 Pac. 962; Carpenter *v.* San Joaquin County Super. Ct., 75 Cal. 596, 19 Pac. 174; Brandon *v.* Superior Ct., (Cal. 1886) 11 Pac. 128; Maxwell *v.* Stanislaus County, 53 Cal. 389; California Pac. R. Co. *v.* Central Pac. R. Co., 47 Cal. 528; Central Pac. R. Co. *v.* Board of Equalization, 46 Cal. 667; Central Pac. R. Co. *v.* Board of Equalization, 43 Cal. 365; Bennett *v.* Wallace, 43 Cal. 25; Will *v.* Sinkwitz, 39 Cal. 570; Miller *v.* Sacramento County, 25 Cal. 93; Murray *v.* Mariposa County, 23 Cal. 492; Henshaw *v.* Butte County, 19 Cal. 150; Robinson *v.* Sacramento, 16 Cal. 208; People *v.* San Francisco Fire Dept., 14 Cal. 479; People *v.* Hester, 6 Cal. 679; Clary *v.* Hoagland, 5 Cal. 476.

District of Columbia.— U. S. *v.* Mills, 11 App. Cas. (D. C.) 500; Bradshaw *v.* Earnshaw, 11 App. Cas. (D. C.) 495; Hendley *v.* Clark, 8 App. Cas. (D. C.) 165; District of Columbia *v.* Washington Gas Light Co., 3 Mackey (D. C.) 343; Bates *v.* District of Columbia, 1 MacArthur (D. C.) 433.

Florida.— Mernaugh *v.* Orlando, 41 Fla. 433, 27 So. 34; Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214; Jacksonville, etc., R. Co. *v.* Boy, 34 Fla. 389, 16 So. 290.

Georgia.— Barrett *v.* Jackson, 38 Ga. 181; Chipman *v.* Barrow, 2 Kelly (Ga.) 220.

Idaho.— Nordyke, etc., Co. *v.* McConkey, (Ida. 1901) 64 Pac. 893; Cummings *v.* Steele, (Ida. 1899) 59 Pac. 15; Sweeny *v.* Mayhew, (Ida. 1899) 56 Pac. 85; Levan *v.* Third Dist. Ct., (Ida. 1896) 43 Pac. 574; People *v.* Lindsay, 1 Ida. 394.

Illinois.— People *v.* Lindblom, 182 Ill. 241, 55 N. E. 358; Behrens *v.* Highway Com'rs, 169 Ill. 558, 48 N. E. 578; Smith *v.* Highway Com'rs, 150 Ill. 385, 36 N. E. 967; Whittaker *v.* Venice, 150 Ill. 195, 37 N. E. 240; Mason, etc., Special Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Hamilton *v.* Harwood, 113 Ill. 154; Gerdes *v.* Champion, 108 Ill. 137; Donahue *v.* Will County, 100 Ill. 94; Hyslop *v.* Finch, 99 Ill. 171; Highway Com'rs *v.* Harper, 38 Ill. 103; Chicago, etc., R. Co. *v.* Fell, 22 Ill. 333; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105; Doolittle *v.* Galena, etc., R. Co., 14 Ill. 381; People *v.* Wilkinson, 13 Ill. 660; White *v.* Wagar, 83 Ill. App. 592; Durham *v.* Field, 30 Ill. App. 121; Savage *v.* Cass County, 10 Ill. App. 204.

Iowa.— Bardes *v.* Hutchinson, 113 Iowa 610, 85 N. W. 797; Butterfield *v.* Treichler, 113 Iowa 328, 85 N. W. 19; Hamman *v.* Van Wagenen, 94 Iowa 399, 62 N. W. 795; Le Grand *v.* Fairall, 86 Iowa 211, 53 N. W. 115; Ransom *v.* Cummins, 66 Iowa 137, 23 N. W. 301; Smith *v.* Powell, 55 Iowa 215, 7 N. W. 602; State *v.* Roney, 37 Iowa 30; Runner *v.* Keokuk, 11 Iowa 543; Coburn *v.* Mahaska County, 4 Greene (Iowa) 242.

Louisiana.— State *v.* Rost, 52 La. Ann. 984, 27 So. 365; State *v.* Voorhies, 50 La. Ann. 671, 23 So. 871; State *v.* Monroe, 50 La. Ann. 642, 23 So. 608; State *v.* Taylor, 50 La. Ann. 459, 23 So. 509; State *v.* Reed, 50 La. Ann. 170, 23 So. 333; State *v.* Fowler, 47 La. Ann. 27, 16 So. 565; State *v.* Ellis, 43 La. Ann. 825, 9 So. 639; State *v.* Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532; State *v.* Judge Civil Dist. Ct., 34 La. Ann. 741.

Maine.— White *v.* Lincoln County, 70 Me. 317; Levant *v.* Penobscot County, 67 Me.

In such a case the writ is granted because of the wrongful assumption and

429; Goodwin *v.* Sagadahoc County, 60 Me. 328; West Bath, Petitioners, 36 Me. 74; County Com'rs *v.* Spofford, 30 Me. 456; Bangor *v.* Penobscot County, 30 Me. 270; Banks, Appellant, 29 Me. 288; Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525; Goodwin *v.* Hallowell, 12 Me. 271.

Maryland.— Gaither *v.* Watkins, 66 Md. 576, 8 Atl. 464; Williamson *v.* Carnan, 1 Gill & J. (Md.) 184.

Massachusetts.— Old Colony R. Co. *v.* Fall River, 147 Mass. 455, 18 N. E. 425; Locke *v.* Lexington, 122 Mass. 290; Fay, Petitioner, 15 Pick. (Mass.) 243.

Michigan.— Fillmore *v.* Van Horn, (Mich. 1901) 88 N. W. 69; White *v.* Boyce, 88 Mich. 349, 353, 50 N. W. 302, 303; North *v.* Joslin, 59 Mich. 624, 26 N. W. 810; Curran *v.* Norris, 58 Mich. 512, 25 N. W. 500; Whiteford Tp. *v.* Phinney, 53 Mich. 130, 18 N. W. 593; Null *v.* Zierle, 52 Mich. 540, 18 N. W. 348; Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 9 N. W. 249; People *v.* Gladwin County, 41 Mich. 647, 2 N. W. 904; Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491.

Mississippi.— Tabler *v.* Bryant, 62 Miss. 350.

Missouri.— State *v.* Moniteau County Ct., 45 Mo. App. 387.

Montana.— State *v.* Second Judicial Dist. Ct., 24 Mont. 494, 62 Pac. 820; State *v.* Sixth Judicial Dist. Ct., 22 Mont. 449, 57 Pac. 89, 145, 74 Am. St. Rep. 618; State *v.* Ravalli County, 21 Mont. 469, 54 Pac. 939; State *v.* Second Judicial Dist. Ct., 18 Mont. 481, 46 Pac. 259.

Nevada.— *In re* Wixom, 12 Nev. 219; Phillips *v.* Welch, 12 Nev. 158; Maynard *v.* Railey, 2 Nev. 313.

New Hampshire.— State *v.* Thompson, 2 N. H. 236; Durham *v.* Thompson, 2 N. H. 166.

New Jersey.— State *v.* Hoffmeister, 62 N. J. L. 565, 41 Atl. 722; Mowery *v.* Camden, 49 N. J. L. 106, 6 Atl. 438; State *v.* Camden, 47 N. J. L. 64, 54 Am. Rep. 117; State *v.* Jersey City, 34 N. J. L. 390 [*citing* State *v.* Perth Amboy, 29 N. J. L. 259; Carron *v.* Martin, 26 N. J. L. 594, 69 Am. Dec. 584; Camden *v.* Mulford, 26 N. J. L. 49]; Stevenson *v.* Phillips, 21 N. J. L. 70; Griscom *v.* Gilmore, 15 N. J. L. 475; Pierson *v.* Pierson, 7 N. J. L. 125; Jackson *v.* Newark, 53 N. J. Eq. 322, 31 Atl. 233. And see State *v.* Elizabeth, 50 N. J. L. 347, 13 Atl. 5.

New Mexico.— *In re* Lewisohn, 9 N. M. 101, 49 Pac. 909; Territory *v.* Valdez, 1 N. M. 533.

New York.— *In re* Fitch, 147 N. Y. 334, 41 N. E. 699; People *v.* Jones, 112 N. Y. 597, 20 N. E. 577, 21 N. Y. St. 820; People *v.* Harris, 63 N. Y. 391; People *v.* Betts, 55 N. Y. 600; People *v.* Highway Com'rs, 30 N. Y. 72; People *v.* Wheeler, 21 N. Y. 82; People *v.* Kingston, 53 N. Y. App. Div. 58, 65 N. Y. Suppl. 590; People *v.* Daly, 67 Barb. (N. Y.) 325; People *v.* New York, 5 Barb. (N. Y.) 43; People *v.* Nash, 15 N. Y. Suppl. 29, 38 N. Y. St. 730; Handley *v.* New York, 7 Abb. Pr. (N. Y.) 11, 16 How. Pr. (N. Y.) 228; People *v.* Judges Suffolk County, 24 Wend. (N. Y.) 249; *Ex p.* Albany, 23 Wend. (N. Y.) 277; Fitch *v.* Highway Com'rs, 22 Wend. (N. Y.) 132; Highway Com'rs *v.* Judges Orange County, 13 Wend. (N. Y.) 432; Starr *v.* Rochester, 6 Wend. (N. Y.) 564; Anonymous, 1 Wend. (N. Y.) 90; Wildy *v.* Washburn, 16 Johns. (N. Y.) 49; Lawton *v.* Highway Com'rs, 2 Cai. (N. Y.) 179. See also Storm *v.* Odell, 2 Wend. (N. Y.) 287.

Ohio.— Frazer *v.* Fulcher, 17 Ohio 260; Nichol *v.* Patterson, 4 Ohio 200; Jones *v.* Temple, Tapp. (Ohio) 74. See Hartshorn *v.* Wilson, 2 Ohio 27.

Oregon.— Garnsey *v.* Klamath County Ct., 33 Oreg. 201, 54 Pac. 539, 1089; Hill *v.* State, 23 Oreg. 446, 32 Pac. 160; Union County *v.* Slocum, 16 Oreg. 237, 17 Pac. 876; Selby *v.* Portland, 14 Oreg. 243, 12 Pac. 377, 58 Am. Rep. 307; Prickett *v.* Cleek, 13 Oreg. 415, 11 Pac. 49; Pruden *v.* Grant County, 12 Oreg. 309, 7 Pac. 308; Poppleton *v.* Yamhill County, 8 Oreg. 337; Long *v.* Sharp, 5 Oreg. 438.

Pennsylvania.— Hagerty's Case, 4 Watts (Pa.) 305; Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393; Herrigas *v.* McGill, 1 Ashm. (Pa.) 152; Eavenson *v.* Zollers, 6 Pa. Co. Ct. 138; Spidle *v.* Robison, 2 Pa. Co. Ct. 642; Pagett *v.* Truby, 1 Pa. Co. Ct. 596. See also Fowler *v.* Lindsey, 3 Dall. (Pa.) 411, 1 L. ed. 658.

South Carolina.— *Ex p.* Schmidt, 24 S. C. 363.

Tennessee.— Hayden *v.* Memphis, 100 Tenn. 582, 47 S. W. 182; Tomlinson *v.* Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207; State *v.* Shelby County Taxing Dist., 16 Lea (Tenn.) 240; Louisville, etc., R. Co. *v.* Bate, 12 Lea (Tenn.) 573; Cooper *v.* Summers, 1 Sneed (Tenn.) 452; Cowan's Case, 1 Overt. (Tenn.) 310.

Texas.— Flanagan *v.* Pierce, 27 Tex. 78.

Utah.— Hansen *v.* Anderson, 21 Utah 286, 61 Pac. 219.

Vermont.— Pomfret *v.* Hartford, 42 Vt. 134.

Washington.— State *v.* Snohomish County Super. Ct., 11 Wash. 366, 39 Pac. 644; Woodbury *v.* Henningsen, 11 Wash. 12, 39 Pac. 243; Taylor *v.* Ringer, 3 Wash. Terr. 539, 19 Pac. 147. And see Seattle *v.* Pearson, 15 Wash. 575, 46 Pac. 1053.

Wisconsin.— State *v.* Forest County, 74 Wis. 610, 43 N. W. 551; Gaertner *v.* Fond du Lac, 34 Wis. 497; Stokes *v.* Knarr, 11 Wis. 389.

United States.— Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697; Ewing *v.* St. Louis, 5 Wall. (U. S.) 413, 18 L. ed. 657.

England.— Reg. *v.* Farmer, [1892] 1 Q. B. 637, 17 Cox C. C. 413, 56 J. P. 341, 61 L. J. M. C. 65, 65 L. T. Rep. N. S. 736, 40 Wkly. Rep. 228; Rex *v.* Somersetshire, 5 B. & C. 816, 3 D. & R. 733, 6 D. & R. 469, 5 L. J. M. C. O. S. 35, 11 E. C. L. 694; Rex *v.* Lloyd, Cald. Cas. 309; Reg. *v.* King, 14 Cox C. C. 434; Matter of Penny, etc., R. Co., 7 E. & B. 660, 3 Jur. N. S. 957, 26 L. J. Q. B. 225, 5

exercise of an unlawful authority, even though no actual injustice has been done.[84]

2. Proceedings Absolutely Void. As a rule[85] the writ will not lie where the proceedings or determination below are absolutely null and void.[86]

B. Anticipated Wrong. Certiorari and supersedeas cannot be used as a proceeding, *quia timet*, to prevent anticipated wrong or injury.[87]

C. Errors and Irregularities — 1. In General. The writ may issue to

Wkly. Rep. 612, 90 E. C. L. 660; Reg. *v.* Wood, 5 E. & B. 49, 3 Wkly. Rep. 419, 85 E. C. L. 49; Reg. *v.* Rose, 1 Jur. N. S. 802, 24 L. J. M. C. 130; Reg. *v.* Justices St. Albans, 17 Jur. 531, 22 L. J. M. C. 142; Reg. *v.* Justices Staffordshire, 16 L. T. Rep. N. S. 430; Reg. *v.* Westham, 10 Mod. 159.

Canada.— Rex *v.* Guigras, Stuart K. B. (L. C.) 561, 1 Quebec Q. B. 43; Hespeler *v.* Shaw, 16 U. C. Q. B. 104; Reg. *v.* Taylor, 8 U. C. Q. B. 257; Valois *v.* Muir, 6 Montreal Super. Ct. 212; *Ex p.* Senecal, 5 Montreal Super. Ct. 412; Reg. *v.* Starkey, 7 Manitoba 43; Reg. *v.* Galbraith, 6 Manitoba 14; *Ex p.* Nugent, 33 N. Brunsw. 22; *Ex p.* Levesque, 32 N. Brunsw. 174; *Ex p.* McCully, 32 N. Brunsw. 126; *Ex p.* Hill, 31 N. Brunsw. 84; *Ex p.* Legere, 27 N. Brunsw. 292; *Ex p.* Goodine, 25 N. Brunsw. 151; *Ex p.* Turner, 22 N. Brunsw. 634; *Ex p.* Hackett, 21 N. Brunsw. 513; *Ex p.* Fahey, 21 N. Brunsw. 392; Reg. *v.* Porter, 20 Nova Scotia, 352, 9 Can. L. T. 57; Reg. *v.* Salter, 20 Nova Scotia, 206, 8 Can. L. T. 380; Reg. *v.* Ward, 20 Nova Scotia 108; Hawes *v.* Hart, 18 Nova Scotia 42, 6 Can. L. T. 140; Tupper *v.* Murphy, 15 Nova Scotia 173; Reg. *v.* Coulson, 27 Ont. 59; *In re* Sullivan, 8 Ont. L. J. 276; Heaton *v.* Cornwall, 4 Ont. Pr. 148; Nadeau *v.* Levis, 16 Quebec 210; Mathieu *v.* Wentworth, 15 Quebec Super. Ct. 504; *Ex p.* Thompson, 2 Quebec 115; *Ex p.* Matthews, 1 Quebec 353; *Ex p.* Duncan, 16 L. C. Jur. 194; *Ex p.* Lalonde, 15 L. C. Jur. 251, 3 Rev. Lég. 450; *Ex p.* Morrison, 13 L. C. Jur. 295, 1 Rev. Lég. 437; *Ex p.* Church, 14 L. C. Rep. 318; *Ex p.* Saltry, 6 L. C. Rep. 476; *Ex p.* Gauthier, 3 L. C. Rep. 498, 4 Quebec Q. B. 44; *Ex p.* Gibeault, 3 L. C. Rep. 111, 3 Quebec Q. B. 454; *Ex p.* Narbonne, 3 Leg. N. 14.

See 9 Cent. Dig. tit. "Certiorari," § 41.

Where the jurisdiction of the lower court is exclusive there is no authority for the writ except for want of jurisdiction. Simon *v.* Portland, 9 Oreg. 437; Poe *v.* Marion Mach. Works, 24 W. Va. 517. That by statute the decision of a school officer on appeals "shall be final" will not preclude a review of his decision by certiorari, the meaning of the phrase being that his determination shall be final until set aside. State *v.* Graham, 60 Wis. 395, 19 N. W. 359.

Lack of jurisdiction is not shown by erroneous views, incorrect reasonings, or the erroneous admission of evidence. Central Pac. R. Co. *v.* Board of Equalization, 43 Cal. 365. And the writ will not lie to review the action of a judge in appointing himself referee. Woodin *v.* Phoenix, 41 Mich. 655, 2 N. W. 923, 32 Am. Rep. 172.

Judgment in a case colorably within the general jurisdiction of the court cannot be collaterally attacked — as where the court has jurisdiction of the subject-matter, although presented on defective pleadings. St. Louis, etc., R. Co. *v.* State, 55 Ark. 200, 17 S. W. 806.

Partial jurisdiction.— The court may decline to grant the relief sought where it is unable to distinguish the matters as to which the court below had jurisdiction from that in which it had not, but will leave the petitioner to his legal remedy. Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559.

84. White *v.* Lincoln County, 70 Me. 317; Levant *v.* Penobscot County, 67 Me. 429; Fairfield *v.* County Com'rs, 66 Me. 385; State *v.* Madison, 63 Me. 546; Goodwin *v.* Sagadahoc County, 60 Me. 328; Bangor *v.* Penobscot County, 30 Me. 270.

85. In Louisiana the provisions of La. Const. art. 90, and La. Code Pr. arts. 855, 857, are intended to authorize the review of sentences or judgments of the lower court in non-appealable cases only when the proceedings are absolutely void. State *v.* Circuit Ct. of App., 49 La. Ann. 1221, 22 So. 368; State *v.* Recorder, 48 La. Ann. 1375, 20 So. 908; State *v.* Riley, 43 La. Ann. 177, 8 So. 598; State *v.* Koenig, 39 La. Ann. 776, 2 So. 559; State *v.* Judge Criminal Dist. Ct., 32 La. Ann. 1222. *Compare* State *v.* Rost, 52 La. Ann. 984, 27 So. 365.

In Pennsylvania the writ has been allowed to set aside a judgment which cannot be enforced. Eavenson *v.* Zollers, 6 Pa. Co. Ct. 138.

86. *Georgia.*— Stroup *v.* Pruden, 104 Ga. 721, 30 S. E. 948; Brown *v.* Brown, 99 Ga. 168, 25 S. E. 95.

New Jersey.—State *v.* Newark, (N. J. 1901) 48 Atl. 1020 (holding that a resolution of a municipal council, ineffective although not invalid, will not be removed); Gouldey *v.* Atlantic City, 63 N. J. L. 537, 42 Atl. 852.

New York.—People *v.* Moore, 1 N. Y. Suppl. 405, 16 N. Y. St. 469. *Contra*, Matter of Bracket, 27 Hun (N. Y.) 605; People *v.* Judges Suffolk County, 24 Wend. (N. Y.) 249; Fitch *v.* Highway Com'rs, 22 Wend. (N. Y.) 132.

Ohio.— Dixon *v.* Cincinnati, 14 Ohio 240.

Canada.— O'Brien *v.* Welsh, 28 U. C. Q. B. 394. *Contra*, Reg. *v.* Foster, 30 Nova Scotia 1. And see Reg. *v.* Simpson, 20 N. Brunsw. 472.

87. State *v.* County Judge, 40 Cal. 479; McCorkle *v.* Brooks, 6 Heisk. (Tenn.) 601; Beeler *v.* Hall, 11 Humphr. (Tenn.) 445.

determine whether or not the court failed to perform its duty[88] or was guilty of misconduct.[89] The writ may also be granted on the ground that a fair and impartial trial cannot be had in the inferior tribunal,[90] and by statute the writ will lie to remove a judgment in some cases, where the judgment is complained of as unjust, with a view to try the cause again on the merits.[91]

2. IN ALLOWING OR REFUSING APPEAL. Certiorari may be allowed for the refusal to allow or approve an appeal,[92] for irregularity in sustaining an appeal and proceeding to a hearing and determination,[93] to review the action of the court below in fixing the amount of a supersedeas bond in a sum in excess of that fixed by statute,[94] where an appeal has been improperly dismissed,[95] a special appeal overruled,[96] or where an appeal lawfully dismissed has been improperly reinstated.[97]

D. Loss of Appeal or Other Remedy — 1. IN GENERAL. Under some circumstances a party entitled to appeal or to pursue some other remedy, who has

88. State *v.* Judge Civil Dist. Ct., 45 La. Ann. 532, 12 So. 941.

Ignorance of the law applicable will authorize the removal of a cause. Rex *v.* Lewis, W. W. & D. 60.

Refusal to set off property exempted from forced sale may be examined. Connell *v.* Chandler, 11 Tex. 249.

89. Glavecke *v.* Tijirina, 24 Tex. 663.

Arbitrary refusal to hear a party is ground for review (La. Rev. Code Pr. art. 857), but the rejection of testimony as inadmissible is not such a refusal (State *v.* Judges Ct. of App., 36 La. Ann. 481).

Fraud in the proceedings will authorize the supervisory court to interfere by certiorari. People *v.* Brooks, 40 How. Pr. (N. Y.) 165; Reg. *v.* Gillyard, 12 Jur. 655, 17 L. J. M. C. 153, 3 N. Sess. Cas. 207.

90. New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; Reg. *v.* Bell, 8 Cox C. C. 287; Reg. *v.* Grover, 8 Dowl. P. C. 325; Rex *v.* Palmer, 5 E. & B. 1024, 2 Jur. N. S. 235, 85 E. C. L. 1024; Reg. *v.* Heywood, 4 Jur. 413; Reban *v.* Trevor, 4 Jur. 292; Reg. *v.* Lever, 1 W. W. & H. 35; Reg. *v.* Boughton, [1895] 2 Ir. R. 386. But see *Ex p.* Lynes, 1 B. C. Rep. 31, 1 Cox C. C. 262; Reg. *v.* Reynolds, 12 L. T. Rep. N. S. 580, 13 Wkly. Rep. 925; Reg. *v.* Whittaker, 59 J. P. 197, where the grounds were held insufficient.

The writ may issue as original process to remove a cause and change the venue, when the superior court is satisfied that a fair and impartial trial will not otherwise be obtained. Fowler *v.* Lindsey, 3 Dall. (U. S.) 411, 1 L. ed. 658. And see Reg. *v.* Castro, L. R. 9 Q. B. 350, 12 Cox C. C. 454, 43 L. J. Q. B. 105, 30 L. T. Rep. N. S. 320, 22 Wkly. Rep. 187.

A mere allegation of bias on the part of the judge is insufficient. Rex *v.* Fellowes, 4 Dowl. P. C. 607, 1 Harr. & W. 648; Reg. *v.* Jacobs, 3 Jur. 999. *Contra*, Fowler *v.* Lindsey, 3 Dall. (Pa.) 411, 1 L. ed. 658.

Where the trial judge or members of the inferior tribunal are interested in the subject-matter of the dispute the writ may lie. Reg. *v.* Aberdare Canal Co., 14 Q. B. 854, 19 L. J. Q. B. 251, 14 Jur. 735, 68 E. C. L. 854; Reg. *v.* Cheltenham Com'rs, 1 Q. B. 467, 1 G. & D. 167, 10 L. J. M. C. 99, 41 E. C. L. 628; Matter of Hopkins, E. B. & E. 100, 4 Jur. N. S. 529, 96 E. C. L. 100; Rex *v.* Jones, 2 Harr. & W. 293; Reg. *v.* Hammond, 9 L. T. Rep. N. S. 423, 12 Wkly. Rep. 208. But it is not sufficient ground for removal that defendant is a member of the bench of magistrates before whom the trial is to be had (Rex *v.* Fellowes, 4 Dowl. P. C. 607, 1 Harr. & W. 648) or that the chairman of the court is intimate with the prosecutor's father (Reg. *v.* Renshaw, 5 Jur. 801).

91. See Ewing *v.* Burton, 5 How. (Miss.) 660.

Such a statute is inapplicable where the only ground of complaint is the execution of the judgment after its discharge. Ewing *v.* Burton, 5 How. (Miss.) 660.

92. *Ex p.* Grant, 53 Ala. 16; *Ex p.* George, T. U. P. Charlt. (Ga.) 80; Rector *v.* Price, 1 Mo. 198; Skinner *v.* Maxwell, 67 N. C. 257; Brooks *v.* Morgan, 27 N. C. 481; Anonymous, 2 N. C. 349; Street *v.* Clark, 1 N. C. 11. But see Breunecke *v.* Denyse, 62 N. J. L. 148, 40 Atl. 634, holding that for the refusal of a justice of the peace to grant defendants in attachment an appeal to the common pleas upon presentation of a bond in due form the remedy is by mandamus and not by certiorari.

If the judge prevents an appeal by his departure the party may have certiorari. Reade *v.* Hamlin, 62 N. C. 128.

93. Jones *v.* Allen, 13 N. J. L. 97.

94. State *v.* Snohomish County Super. Ct., 11 Wash. 366, 39 Pac. 644.

95. State *v.* Tinsman, 38 N. J. L. 210; Lamberson *v.* Owen, 14 N. J. L. 504; Philhower *v.* Voorhees, 12 N. J. L. 69; Obert *v.* Whithead, 9 N. J. L. 244. But see Buckley *v.* Fresno County Super. Ct., 96 Cal. 119, 31 Pac. 8, holding that the statutory writ of review does contemplate the revision of the action of an inferior court in dismissing an appeal and overruling prior decisions to the contrary.

The writ cannot be employed as a substitute for a motion to dismiss an appeal. State *v.* Ferguson, 48 La. Ann. 787, 19 So. 947. See also State *v.* Ellis, 43 La. Ann. 825, 9 So. 639.

96. Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10.

97. Howell *v.* Van Ness, 31 N. J. L. 443.

lost the right through inadvertence, accident, or mistake, may have a remedy by certiorari,[98] on a showing of probable merits and freedom from fault.[99] If, however, the party has negligently suffered the time to elapse within which an appeal might have been taken or a writ of error sued out, or has disregarded any other remedy to which he was entitled, and such neglect is not sufficiently excused,[1] has

98. *Alabama.*— Boynton *v.* Nelson, 46 Ala. 501.

Arkansas.— Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559; Carolan *v.* Carolan, 47 Ark. 511, 2 S. W. 105; Phelps *v.* Buck, 40 Ark. 219; Payne *v.* McCabe, 37 Ark. 318; Flournoy *v.* Payne, 28 Ark. 87; Roberts *v.* Williams, 15 Ark. 43.

District of Columbia.— Hendley *v.* Clark, 8 App. Cas. (D. C.) 165; District of Columbia *v.* Washington Gas Light Co., 3 Mackey (D. C.) 343.

Mississippi.— See Duggen *v.* McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527.

North Carolina.— Collins *v.* Faribault, 92 N. C. 310; Nichols *v.* Dunning, 91 N. C. 4; Roulhac *v.* Miller, 89 N. C. 190; Holmes *v.* Holmes, 84 N. C. 833; Sanders *v.* Norris, 82 N. C. 4; *Ex p.* Barton, 70 N. C. 134; McLeran *v.* Melvin, 56 N. C. 195; Baker *v.* Halstead, 44 N. C. 41; Dougan *v.* Arnold, 15 N. C. 99; State *v.* Williams, 9 N. C. 100; Hood *v.* Orr, 4 N. C. 584. See also APPEAL AND ERROR, 2 Cyc. 802, note 82.

Oregon.— Evans *v.* Christian, 4 Oreg. 375; Schirott *v.* Phillippi, 3 Oreg. 484. But see Ramsey *v.* Pettengill, 14 Oreg. 207, 12 Pac. 439.

Tennessee.— Angelly *v.* Donoho, 3 Humphr. (Tenn.) 144; Rogers *v.* Ferrell, 10 Yerg. (Tenn.) 253; Trigg *v.* Boyce, 4 Hayw. (Tenn.) 100.

Canada.— *In re* Rice, 20 Nova Scotia 294, 8 Can. L. T. 448.

See 9 Cent. Dig. tit. "Certiorari," § 7.

Amendment nunc pro tunc.— Certiorari will lie to review the action of a county court in amending a judgment entry by a *nunc pro tunc* order after expiration of the time for an appeal or proceedings in error from the judgment. People *v.* Arapahoe County Ct., 9 Colo. App. 41, 47 Pac. 469.

99. Dowell *v.* Jacks, 53 N. C. 387; O'Sullivan *v.* Larry, 2 Head (Tenn.) 54; May *v.* Campbell, 1 Overt. (Tenn.) 61; *Ex p.* Ellis, 8 N. Brunsw. 601.

If appeal and certiorari are concurrent remedies it is unnecessary to assign any excuse for not taking an appeal. Ray *v.* Parsons, 14 Tex. 370.

If in settling the case on appeal the judge omitted nothing by mistake certiorari will not lie as a substitute for appeal. Cheek *v.* Watson, 90 N. C. 302; Currie *v.* Clark, 90 N. C. 17.

1. *Arkansas.*—Gates *v.* Hayes, 69 Ark. 518, 64 S. W. 271; Carolan *v.* Carolan, 47 Ark. 511, 2 S. W. 105; Phelps *v.* Buck, 40 Ark. 219; St. Louis, etc., R. Co. *v.* Barnes, 35 Ark. 95.

California.— McCue *v.* Marin County Super. Ct., 71 Cal. 545, 12 Pac. 615; Stuttmeister *v.* San Francisco Super. Ct., 71 Cal. 322, 12 Pac. 270; Reynolds *v.* Los Angeles County Super. Ct., 64 Cal. 372, 28 Pac. 121; Bennett *v.* Wallace, 43 Cal. 25; Keys *v.* Marin County, 42 Cal. 252; Miliken *v.* Huber, 21 Cal. 166.

Colorado — People *v.* Lake County Dist. Ct., 28 Colo. 218, 64 Pac. 194; Austin *v.* Bush, 11 Colo. 198, 17 Pac. 501; Tilton *v.* Larimer County Agricultural, etc., Assoc., 6 Colo. 288.

Illinois.— Dye *v.* Noel, 85 Ill. 290; Lord *v.* Burke, 9 Ill. 363; Callahan *v.* Haas, 55 Ill. App. 448.

Iowa.— Sunberg *v.* Linn County Dist. Ct., 61 Iowa 597, 16 N. W. 724.

Minnesota.— State *v.* Milner, 16 Minn. 55; Wood *v.* Myrick, 9 Minn. 149.

Missouri.— State *v.* St. Louis, 4 Mo. App. 577.

North Carolina.— Cox *v.* Pruett, 109 N. C. 487, 13 S. E. 917; Matter of Brittain, 93 N. C. 587; Suiter *v.* Brittle, 92 N. C. 53; Badger *v.* Daniel, 82 N. C. 468; Rule *v.* Council, 48 N. C. 33; Baker *v.* Halstead, 44 N. C. 41; Staples *v.* Mooring, 26 N. C. 215; McMillan *v.* Smith, 4 N. C. 173.

Oregon.— Kearns *v.* Follansby, 15 Oreg. 596, 16 Pac. 478; Summers *v.* Harrington, 14 Oreg. 480, 13 Pac. 300; Ramsey *v.* Pettengill, 14 Oreg. 207, 12 Pac. 439.

Pennsylvania — Roddy's Appeal, 99 Pa. St. 9.

Tennessee.— McDowell *v.* Keller, 1 Heisk. (Tenn.) 449; Adair *v.* Davis, 3 Humphr. (Tenn.) 137. And see Moss *v.* Collins, 3 Humphr. (Tenn.) 148; May *v.* Campbell, 1 Overt. (Tenn.) 61.

Texas.— Wallerath *v.* Kapp, 31 Tex. 359.

West Virginia.—Beasley *v.* Beckley, 28 W. Va. 81; Poe *v.* Marion Mach. Works, 24 W. Va. 517.

See 9 Cent. Dig. tit. "Certiorari," § 7.

Expiration of time pending motion to vacate judgment.— The writ will not be granted, although the time to appeal from a judgment expired before the decision of a motion to vacate it. Lewis *v.* Gilbert, 5 Wash. 534, 32 Pac. 459.

Insufficient excuse.— That petitioner was served with the warrant in a county other than that of his residence, where he was on business, that he left a sick family at home and was hurrying back to them when the warrant was served, and that it was impossible for him to return in time to appeal from the judgment does not present a sufficient excuse. Copeland *v.* Cox, 5 Heisk. (Tenn.) 171. So it is not a sufficient excuse that applicant failed to appeal because informed by his attorney that the case was compromised and that the judgment against him was to be released, and it was not released. Stocking *v.* Knight, 19 Ill. App. 501.

inexcusably failed to seasonably perfect an appeal taken,[2] as by neglecting to furnish the security required by statute,[3] or has relied on another, who abused his confidence, to do that which he should have done himself,[4] he will not be permitted to resort to certiorari as a remedy.

2. Through Act of Judge or Clerk. Where an appellant is deprived of the benefits of an appeal duly taken, because of delay on the part of the judge in settling the case on appeal[5] or because of his omission so to do,[6] because of his retirement from office before such settlement,[7] or because the case as made up by him does not correctly set forth the ground of exceptions,[8] he is entitled to proceed by certiorari as a substitute for the lost right; and, except where the clerk has acted as the agent of appellant in the premises,[9] will have the like right where he has sustained the loss of his remedy by appeal by reason of the negligence of the clerk in the performance of his official duties.[10]

Although a valid excuse is presented the writ will not issue where the court below proceeded regularly within its jurisdiction, and the aggrieved party might resort to another remedy. Haynes *v.* Semmes, 39 Ark. 399.

Agreements of parties and counsel.— The writ will not issue where there is evidence of a compromise and settlement, although it was agreed that the right of appeal should not be lost if no compromise was made (Williamson *v.* Boykin, 99 N. C. 238, 5 S. E. 378) or an alleged agreement between counsel is denied (Hutchinson *v.* Rumfelt, 83 N. C. 441).

2. Andrews *v.* Whisnant, 83 N. C. 446.

Certiorari has issued as a substitute for appeal where the papers taken from the clerk's office for the purpose of making a statement on appeal were not returned in time to make a transcript (Seay *v.* Yarborough, 94 N. C. 291) or where the attorney's reasons for the appeal were not filed (Garrett *v.* Perryman, 2 Overt. (Tenn.) 108).

Delay in bringing up transcript cannot be corrected when not applied for by appellant or his attorney. Crafts *v.* Stockton, 8 Yerg. (Tenn.) 163.

Delay in docketing transcript does not entitle a party to the writ. Pittman *v.* Kimberly, 92 N. C. 562.

Delay in settling case on appeal.—An application for a certiorari to a judge to settle a case on appeal, made seven months after the appeal was taken, will be denied in the absence of an affidavit to negative laches. Peebles *v.* Braswell, 107 N. C. 68, 12 S. E. 44. And a "liberal practice among the members of the bar" is not a sufficient excuse for delay in making up a statement of the case on appeal until after the time limited by statute. Wilson *v.* Hutchinson, 74 N. C. 432.

Failure to pay clerks' fees for making transcript is fatal. Smith *v.* Lynn, 84 N. C. 837; Andrews *v.* Whisnant, 83 N. C. 446.

Illness of one of firm of attorneys.—Where defendant's attorneys agree that one of them shall perfect the appeal, the fact that the one selected to attend to the matter was taken sick after notice of appeal was filed, the other being in perfect health, although absent from the county on business, is not sufficient excuse for defendant's failure to perfect the appeal, so as to entitle him to a review of the judgment by certiorari. Boyer *v.* Garner, 116 N. C. 125, 21 S. E. 180. But the illness of two of petitioner's counsel, the appointment to an important office of the third, the refusal of the court to hear the appeal, and the insolvency of the counsel is sufficient to excuse the delay. Bayer *v.* Raleigh, etc., Air Line R. Co., 125 N. C. 17, 34 S. E. 100.

3. Waverly *v.* Kemper, 88 Ill. 579; Dye *v.* Noel, 85 Ill. 290; Murray *v.* Murphy, 16 Ill. 275; Bowen *v.* Fox, 99 N. C. 127, 5 S. E. 437; Churchill *v.* Brooklyn L. Ins. Co., 92 N. C. 485; Winborn *v.* Byrd, 92 N. C. 7.

Threats and statements made whereby the party aggrieved was prevented from procuring an appeal-bond will excuse the failure to perfect an appeal. Melton *v.* Edwards, 6 Heisk. (Tenn.) 250.

4. State *v.* Williams, 9 N. C. 100.

Fault of attorney.— Ignorance of the practice or inadvertence on the part of the attorney for the complaining party in preparing, securing the execution of, or filing the bond or undertaking on, appeal, whereby the benefits of an appeal are lost, furnish no reason for granting relief by certiorari. Turner *v.* Powell, 93 N. C. 341; Turner *v.* Quinn, 92 N. C. 501; Winborn *v.* Byrd, 92 N. C. 7; Smith *v.* Abrams, 90 N. C. 21; Elliott *v.* Holliday, 14 N. C. 377.

5. Hodges *v.* Lassiter, 94 N. C. 294; Sparks *v.* Sparks, 92 N. C. 359.

If the error is that of the court and not of the prevailing party the failure to appeal may be excusable, in which case certiorari will lie. Simmons *v.* Dowd, 77 N. C. 155.

6. Where the judge omitted making up a case during the term, and the attorneys took the papers from the clerk's office for the purpose of preparing the case, but did not return them until too late for the clerk to prepare a transcript in time, certiorari will be allowed as a substitute for an appeal. Murray *v.* Shanklin, 20 N. C. 345.

7. Nicholls *v.* Dunning, 99 N. C. 82, 5 S. E. 409. If the parties can agree on a statement of the case. Shelton *v.* Shelton, 89 N. C. 185.

8. McDaniel *v.* King, 89 N. C. 29.

9. Muzzell *v.* Lee, 23 N. C. 411; Cotten *v.* Clark, 23 N. C. 353; Davis *v.* Marshall, 9 N. C. 59.

10. McConnell *v.* Caldwell, 51 N. C. 469; Mera *v.* Scales, 9 N. C. 364; Steele *v.* Harris,

3. Through Illness or Death. Illness of the appellant of such a character as to incapacitate him from taking a timely appeal,[11] or from procuring others so to do,[12] or from perfecting an appeal taken by him,[13] or his death intermediate the judgment and the expiration of the time within which an appeal might have been taken [14] will ordinarily excuse the failure to pursue that remedy and entitle the party to the writ.

4. Through Inability to Furnish Security. Inability to procure or furnish security, accidental [15] or otherwise,[16] or misapprehension, caused by the action of the adverse party,[17] has been held sufficient to excuse the omission in this respect.

5. Through Misconduct of Adverse Party. The writ will ordinarily lie if the right has been lost through the fraud, contrivance, or culpable conduct of the adverse party, or where the applicant has been misled by such party.[18]

E. Matters of Public Concern. The writ has been granted to review mat-

4 N. C. 440; Perkins *v.* Bullinger, 2 N. C. 422; Chambers *v.* Smith, 2 N. C. 420; Kearney *v.* Jackson, 1 Yerg. (Tenn.) 293.

Effect of remedy against clerk.— Certiorari will not be granted if the aggrieved party may have his remedy against the clerk. Brickell *v.* Bass, 2 N. C. 157.

11. Hoare *v.* Harris, 14 Ill. 35; Howerton *v.* Henderson, 86 N. C. 718; Dyer *v.* Rich, 4 N. C. 413. See also Newson *v.* Chrisman, 9 Tex. 113, where the writ was granted on a showing by an administrator that he was necessarily absent from the county on important business of the estate, had employed an attorney to represent him on settlement of his accounts in which he claimed large credits, and had been kept away by severe illness in his family.

Absence from the trial by reason of old age, feeble health, and remote residence, and the miscarriage of a letter from counsel advising of the judgment will excuse the failure to appeal in time. Wright *v.* Haley, 34 Tex. 48.

Failure to ask for continuance.— Sureties on a capias ad satisfaciendum bond, against whom a judgment was rendered because of the failure to produce their principal, he being ill, are not entitled to a certiorari, as they might have procured a continuance, for which they failed to ask. Buis *v.* Arnold, 53 N. C. 233 [*following* Betts *v.* Franklin, 20 N. C. 496].

12. Horrell *v.* Horrell, 52 Ill. App. 477.

13. Sharpe *v.* McElwee, 53 N. C. 115.

14. In Napier *v.* Person, 7 Yerg. (Tenn.) 299, the writ was granted to an executor, it appearing that his testator was fatally ill at the time judgment was rendered, and died shortly thereafter, and that his agent was ignorant as to the available evidence.

15. Collins *v.* Nall, 14 N. C. 224.

16. As illness (Sharpe *v.* McElwee, 53 N. C. 115), poverty (Hale *v.* Landrum, 2 Humphr. (Tenn.) 33. And see Lindsay *v.* Moore, 83 N. C. 444, holding that the petition must show that an appeal *in forma pauperis* was refused), or a lack of acquaintance with eligible sureties (Trice *v.* Yarborough, 26 N. C. 11; Roberts *v.* Cantrell, 3 Hayw. (Tenn.) 219).

Inadvertence.—After a motion to dismiss an appeal for the failure to file an appeal-bond in time, the failure being caused by inadvertence and after filing the bond, a certiorari may be granted as a substitute for the ineffectual appeal. Stickney *v.* Cox, 61 N. C. 495.

Where the errors were committed within the court's jurisdiction certiorari will not lie, although relator avers inability to furnish an appeal-bond. State *v.* Second Judicial Dist. Ct., 24 Mont. 238, 61 Pac. 309.

17. Graves *v.* Hines, 106 N. C. 323, 11 S. E. 362.

18. Kern *v.* Davis, 7 Ill. App. 407; Graves *v.* Hines, 106 N. C. 323, 11 S. E. 362; Briggs *v.* Jervis, 98 N. C. 454, 4 S. E. 631; Mott *v.* Ramsay, 91 N. C. 249; Wiley *v.* Lineberry, 88 N. C. 68; Parker *v.* Wilmington, etc., R. Co., 84 N. C. 118; Syme *v.* Broughton, 84 N. C. 114; Walton *v.* Pearson, 83 N. C. 309; Dowell *v.* Jacks, 53 N. C. 387; Lunceford *v.* McPherson, 48 N. C. 174; Baker *v.* Halstead, 44 N. C. 41; Collins *v.* Nall, 14 N. C. 224.

A certiorari will not be granted merely because the petitioner was not notified of the time and place of trial, or that a claim in offset would be filed (Porter *v.* Wheaton, 5 Yerg. (Tenn.) 108), or where, relying on an assurance that the case would be dismissed, he fails to exercise due diligence (Austin *v.* Bush, 11 Colo. 198, 17 Pac. 501). Nor will he be entitled to the writ because of the loss of a good defense, by the fault of the adverse party. Watts *v.* Boyle, 26 N. C. 331.

An agreement entered into with an infant plaintiff, after the rendition of a judgment by which defendant is defrauded of his right of appeal, is sufficient to sustain defendant's petition for certiorari. Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

Fraud of principal against sureties.—Where the parties to a capias ad satisfaciendum bond, conditioned to appear in the county court to take the benefit of the act for the relief of insolvent debtors, were called, and failing to appear judgment was entered against them and their sureties, it was held that the sureties were not, on the allegation of having been prevented by the fraud of plaintiff's agent from making a surrender of their principals in discharge of themselves, entitled to the writ of certiorari to enable them to make it in the superior court. Betts *v.* Franklin, 20 N. C. 496.

ters of important public concern.[19] It will not lie for such a purpose, however, where delay will result, unless the proceeding was without jurisdiction or in gross violation of law.[20]

F. New or Difficult Questions. While in some cases the court has declined to grant the writ on the ground that new or difficult questions of law are involved,[21] in others it has issued for those reasons;[22] but even though this may be a ground for the writ, its issue is a matter of discretion[23] which can only be exercised when some specific difficulty in point of law is shown.[24]

IV. RIGHT TO WRIT.

A. Parties Entitled — 1. Test of Right. The test of the right to certiorari is whether the person seeking the writ was a party in form or substance so as to be concluded by the determination below,[25] and it will not, in general, issue in behalf of a stranger to the proceedings below or of one who was not a party thereto.[26]

19. State *v.* Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867, holding that the appointment of a board that has charge of institutes where teachers for the public schools are trained and licensed is a matter of such public concern as to be cognizable by certiorari on the relation of the attorney-general. *Contra*, Hager *v.* Yolo County, 50 Cal. 473.

20. Curran *v.* Norris, 58 Mich. 512, 25 N. W. 500, a proceeding to compel a public officer to surrender books and papers to his successor.

21. Hager *v.* Yolo County, 50 Cal. 473 (holding that it is no ground for the issue of the writ that the questions involved are new, of great public interest, and affect the property of many persons, and that a decision on the writ will furnish a guide for other officers smilarly situated as the respondent); Munday *v.* Thames Ironworks, etc., 10 Q. B. D. 59, 52 L. J. Q. B. 119, 47 L. T. Rep. N. S. 351; Rex *v.* Joule, 5 A. & E. 539, 5 Dowl. P. C. 435, 2 Harr. & W. 375, 1 N. & P. 28, 31 E. C. L. 722; Reg. *v.* Morton, 1 Dowl. N. S. 543; Clark *v.* Wellington, 7 Jur. 44; Staples *v.* Accidental Death Ins. Co., 10 Wkly. Rep. 59; Soloman *v.* London, etc., R. Co., 10 Wkly. Rep. 59.

22. Nugent *v.* Chambers, 3 Ont. L. J. 108; Cataraqui Cemetery Co. *v.* Burrowes, 3 Ont. L. J. 47.

In Louisiana, where the decision of a cause in the court of appeals turns on a point at issue with reference to which the presiding jurisprudence of the supreme court, as established by the adjudicated cases, is clearly conflicting, the writ will be granted. Meramon *v.* New Orleans, 52 La. Ann. 1623, 28 So. 107.

The judgment or decree of the United States circuit court of appeals may be reviewed by the supreme court, in a case of importance. Lau Ow Bew *v.* U. S., 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340. See also Admiralty, 1 Cyc. 907.

23. Reg. *v.* Morton, 1 Dowl. N. S. 543; Reg. *v.* Bird, 2 D. & L. 939, 9 Jur. 492, 14 L. J. M. C. 179; Clark *v.* Willington, 7 Jur. 44. *Contra*, Rex *v.* Wartnaby, 2 A. & E. 435, 29 E. C. L. 210.

24. Rex *v.* Joule, 5 A. & E. 539, 5 Dowl. P. C. 435, 2 Harr. & W. 375, 1 N. & P. 28, 31 E. C. L. 722; Reg. *v.* Hodges, 1 Cox C. C. 194, 9 Jur. 665; Reg. *v.* Josephs, 8 Dowl. P. C. 128, 1 W. W. & H. 419.

25. Starkweather *v.* Seeley, 45 Barb. (N. Y.) 164; Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280; Burnett *v.* Douglas County, 4 Oreg. 388.

Substantial party.— While it has been held immaterial that plaintiff in the writ does not appear by the record technically and formally as an original party, when it is apparent he has rights which were affected by the proceedings, and that he was treated and recognized throughout as a substantial party (Campau *v.* Button, 33 Mich. 525), it has also been held that the writ should be granted only to one who is a party in the legal sense of the term (Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280; Burnett *v.* Douglas County, 4 Oreg. 388).

26. *Alabama.*— Watson *v.* May, 6 Ala. 133.

Arkansas.— Sumerow *v.* Johnson, 56 Ark. 85, 19 S. W. 114; Black *v.* Brinkley, 54 Ark. 372, 15 S. W. 1030; Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559.

Idaho.— Madison *v.* Piper, (Ida. 1898) 53 Pac. 395.

Iowa.—Wilson *v.* Remley, (Iowa 1899) 80 N. W. 542; Wilson *v.* Remley, 106 Iowa 583, 76 N. W. 843; Davis County *v.* Horn, 4 Greene (Iowa) 94. And see Iske *v.* Newton, 54 Iowa 586, 7 N. W. 13.

Michigan.— Hewitt *v.* Oakland County Probate Judge, 67 Mich. 1, 34 N. W. 248.

Mississippi.— Lexington *v.* Sargent, 64 Miss. 621, 1 So. 903; McCreary *v.* O'Flinn, 63 Miss. 204.

New Jersey.— State *v.* Camden County, 47 N. J. L. 454, 1 Atl. 515.

New York.— Starkweather *v.* Seeley, 45 Barb. (N. Y.) 164; People *v.* Overseers of Poor, 44 Barb. (N. Y.) 467. And see People *v.* Land Office Com'rs, (N. Y. 1885) 1 N. E. 764.

Oregon.— Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280.

2. PARTIES BELOW. The writ will lie at the instance of one who deems himself aggrieved,[27] because specifically and injuriously affected, and who was a party or substantially a party to the proceedings below.[28]

3. PERSONS INTERESTED. Under some circumstances, however, persons who

Virginia.— Wingfield *v.* Crenshaw, 3 Hen. & M. (Va.) 245.

West Virginia.— Wood County Ct. *v.* Boreman, 34 W. Va. 87, 11 S. E. 747.

See 9 Cent. Dig. tit. "Certiorari," § 44.

Necessity of appearance.— Where certiorari can only be sued out by a defendant who has "duly appeared," it will not lie at the instance of one whose attorney merely served a notice of retainer. *Ex p.* Isaacs, 12 Wend. (N. Y.) 193.

Inheritors of the community property of one spouse are not parties to proceedings had on the administration of the property of the other, subsequently dying, so as to enable them to question an order of sale made on such administration. Roy *v.* Whitaker, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367.

Right to writ presumed.—After the allowance of a writ, the right to it will be presumed in the absence of proof to the contrary. Biddle *v.* Riverton, 58 N. J. L. 289, 33 Atl. 279; State *v.* Neptune City, 57 N. J. L. 362, 30 Atl. 529, 57 N. J. L. 701, 32 Atl. 220; Rutgers College Athletic Assoc. *v.* New Brunswick, 55 N. J. L. 279, 26 Atl. 87.

27. **One in whose favor the error is made** is not entitled to the writ. Reg. *v.* Derbyshire, 1 C. L. R. 239.

Where the right to a certiorari is given by statute to either party, each may have the writ in his own favor in the same cause, and the pendency of the first writ sued out is no ground for dismissing the second. Cunningham *v.* Elliott, 92 Ga. 159, 18 S. E. 365.

28. Clarke *v.* Jack, 60 Ala. 271; Mitchell *v.* Harrison, 32 Tex. 331; Russell *v.* Wheeler, Hempst. (U. S.) 3, 21 Fed. Cas. No. 12,164*a*; Reg. *v.* Willats, 7 Q. B. 516, 9 Jur. 509, 14 L. J. M. C. 157, 2 N. Sess. Cas. 5, 53 E. C. L. 516; 1 Tidd Pr. 397.

An intervenor has the same right to the writ as the original parties. Gold Hunter Min., etc., Co. *v.* Holleman, 2 Ida. 839, 27 Pac. 413.

A petitioner to bond a town may sue out the writ to review the proceedings of the county judge. People *v.* Wagner, 7 Lans. (N. Y.) 467, 1 Thomps. & C. (N. Y.) 221.

Judge of court.— When an inferior court, acting within what it claims to be its exclusive jurisdiction in the enforcement and ascertainment of rights of litigants before it, is through its judge made sole defendant in writs of certiorari or prohibition from a superior court, based on a claim of the latter that it has appellate jurisdiction over it touching the matters before it, the judge of such inferior court is authorized to apply to the supreme court for writs of certiorari against the appellate court. State *v.* Voorhies, 49 La. Ann. 1717, 23 So. 107.

Municipality.— If not inhibited by statute a town may bring certiorari to review proceedings to bond it. People *v.* Wagner, 7 Lans. (N. Y.) 467, 1 Thomps. & C. (N. Y.) 221. But a writ sued out on behalf of a municipality will be quashed, where it appears that the application was not made on authority as required by law. State *v.* Manitowoc County, 59 Wis. 15, 16 N. W. 617.

One of several defendants cannot bring certiorari without summons and severance. Cox *v.* Haines, 3 N. J. L. 261.

Persons aggrieved.— N. Y. Code Civ. Proc. § 2127, conferring the right to the writ on a "person aggrieved" contemplates a state forest commission. People *v.* Campbell, 152 N. Y. 51, 46 N. E. 176 [*reversing* 82 Hun (N. Y.) 338, 31 N. Y. Suppl. 499, 64 N. Y. St. 98]. But one unaffected by an inclusive and extrajudicial determination of property rights is not "aggrieved" thereby so as to permit him to take out the writ. People *v.* Woodruff, 64 N. Y. App. Div. 239, 71 N. Y. Suppl. 1044.

Persons beneficially interested.—An insolvent, against whom an order is made to account for certain property (Madison *v.* Piper, (Ida. 1898) 53 Pac. 395), a special administrator illegally directed to pay out moneys of the estate (State *v.* Second Judicial Dist. Ct., 18 Mont. 481, 46 Pac. 259), or a widow (Hefflefinger *v.* George, 14 Tex. 569) is "beneficially interested" within a statute authorizing the issue of the writ to persons so interested; but an agent or attorney of a party beneficially interested has not himself such an interest as will enable him to apply for the writ (State *v.* Napton, 24 Mont. 450, 62 Pac. 686), and one who has transferred his entire interest in gambling devices is not a party beneficially interested so as to entitle him to review an order directing their destruction (Sanderson *v.* Winchester, 10 N. D. 85, 85 N. W. 988). Certiorari brought by one beneficially interested in an estate to review the settlement of the administrator's account is for the benefit of all others similarly interested. Hefflefinger *v.* George, 14 Tex. 569.

Plaintiff may have a judgment in his own favor reviewed and reversed, if injustice has been done, as where nominal damages were awarded instead of the substantial damages to which he showed himself entitled. Sarles *v.* Hyatt, 1 Cow. (N. Y.) 253.

The lowest bidder on a municipal contract awarded to another is so specifically and injuriously affected as to entitle him to question the validity of the award made. State *v.* Trenton, 60 N. J. L. 402, 38 Atl. 636 [*citing* Jersey City *v.* State, 53 N. J. L. 434, 22 Atl. 190].

Where an attachment is erroneously issued no one but defendant can resort to the writ. Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330. But the principal defendant in an attachment execution may sue out certiorari

were not parties below may procure the writ, provided they have such an interest in the proceeding as to make it proper to grant it.[29]

4. Persons Sustaining Injury In Common With Others. It is a general rule that the writ is not available to an individual who has no direct or particular interest in the proceeding sought to be revised and who does not show that he will suffer a special injury beyond that which will affect him in common with the public or others similarly situated,[30] and this rule is especially applicable where another

without the garnishee's assent. Bloom *v.* Alexander, 5 Pa. Co. Ct. 554.

29. *Alabama.*—Stout *v.* Ward, 10 Ala. 628 (a creditor who is not a party to the final decree); Earle *v.* Juzan, 7 Ala. 474 (one aggrieved by an *ex parte* order).

California.—Clary *v.* Hoagland, 5 Cal. 476, one against whom a judgment is sought to be enforced.

Dakota.— See Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

Florida.— Deans *v.* Wilcoxon, 18 Fla. 531, an heir dissatisfied with proceedings for the sale of his ancestor's estate for the payment of debts, although not a necessary party below.

Maine.— Dyer *v.* Lowell, 30 Me. 217, a tenant in common injured by the erroneous action of commissioners in partition.

North Carolina.— Perry *v.* Perry, 4 N. C. 617, a distributee aggrieved by an undue allowance to the widow.

North Dakota.— State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593, a plaintiff in attachment, where the attached property has been taken from the custody of the sheriff by an unauthorized order made without notice or hearing.

Texas.— Flanagan *v.* Pierce, 27 Tex. 78 (any person interested in an estate which has been disposed of by the administrator under an unauthorized and void order); Norris *v.* Duncan, 21 Tex. 594 (heirs, aggrieved by an order requiring the administrator to make title to land to one claiming as purchaser).

See 9 Cent. Dig. tit. "Certiorari," § 44.

A judge has such an interest in upholding the jurisdiction of his court over questions which the law has intrusted him with that he may resort to certiorari to maintain it. State *v.* Judge Fifth Dist. Ct., 32 La. Ann. 315; State *v.* Judge Parish Ct., 32 La. Ann. 217.

The writ will not lie to review a sale of land by an executor, at the instance of one who had no interest in the land. Hewitt *v.* Oakland County Probate Judge, 67 Mich. 1, 34 N. W. 248.

30. *Alabama.*—Miller *v.* Jones, 80 Ala. 89; Benton *v.* Taylor, 46 Ala. 388; Parnell *v.* Dallas County, 34 Ala. 278; Lamar *v.* Marshall County, 21 Ala. 772; *Ex p.* Keenan, 21 Ala. 558; Talladega County *v.* Thompson, 15 Ala. 134.

Arkansas.— Perkins *v.* Holman, 43 Ark. 219.

California.— Brown *v.* San Francisco, 124 Cal. 274, 57 Pac. 82; Ashe *v.* Colusa County, 71 Cal. 236, 16 Pac. 783; Fraser *v.* Freelon, 53 Cal. 644.

Georgia.— Summerville Macadamized Road Co. *v.* Deutscher Scheutzen Club, 57 Ga. 495.

Iowa.— Darling *v.* Boesch, 67 Iowa 702, 25 N. W. 887; Iowa News Co. *v.* Harris, 62 Iowa 501, 17 N. W. 745; Smith *v.* Yoram, 37 Iowa 89; Welsh *v.* Mahaska County, 23 Iowa 199.

Maine.— Detroit *v.* Somerset County, 52 Me. 210; Cushing *v.* Gay, 23 Me. 9.

Michigan.—Wolpert *v.* Newcomb, 106 Mich. 357, 64 N. W. 326; Vanderstolph *v.* Boylan, 50 Mich. 330, 15 N. W. 495; Davison *v.* Otis, 24 Mich. 23.

Minnesota.— State *v.* Lamberton, 37 Minn. 362, 34 N. W. 454; Conklin *v.* Fillmore County, 13 Minn. 454.

New Jersey.— State *v.* Board of Education, 63 N. J. L. 201, 42 Atl. 748; McGovern *v.* Trenton, 60 N. J. L. 402, 38 Atl. 636; Tallon *v.* Hoboken, 60 N. J. L. 212, 37 Atl. 895; Jersey City *v.* State, 53 N. J. L. 434, 22 Atl. 190 [*reversing* 52 N. J. L. 65, 18 Atl. 586, 696]; State *v.* Orange, 50 N. J. L. 389, 13 Atl. 240; State *v.* Newark, 49 N. J. L. 344, 8 Atl. 128; State *v.* Atlantic City, 48 N. J. L. 118, 3 Atl. 65; State *v.* Hollinshead, 47 N. J. L. 439, 2 Atl. 244; State *v.* Jersey City, 46 N. J. L. 297; State *v.* Washington, 44 N. J. L. 605, 43 Am. Rep. 402; State *v.* Gloucester City, 43 N. J. L. 544; State *v.* Williams, 41 N. J. L. 332, 32 Am. Rep. 219; State *v.* Trenton, 36 N. J. L. 79; State *v.* Bronson, 35 N. J. L. 468; State *v.* Paterson, 34 N. J. L. 163. See also State *v.* Jersey City, 34 N. J. L. 31, where the prosecutors were owners of property which would sustain injury if the objectionable action was effectuated.

New York.— People *v.* Land Office Com'rs, 135 N. Y. 447, 32 N. E. 139, 48 N. Y. St. 432; People *v.* Land Office Com'rs, (N. Y. 1885) 1 N. E. 764; People *v.* Schell, 5 Lans. (N. Y.) 352; People *v.* Morgan, 65 Barb. (N. Y.) 473; People *v.* Stryker, 24 Barb. (N. Y.) 649; Fifty-First Street's Case, 3 Abb. Pr. (N. Y.) 232; Matter of Mt. Morris Square, 2 Hill (N. Y.) 14; Colden *v.* Botts, 12 Wend. (N. Y.) 234.

North Carolina.— Petty *v.* Jones, 23 N. C. 408; Cotten *v.* Clark, 23 N. C. 353.

Pennsylvania.— See Allen *v.* Brown, 30 Pittsb. Leg. J. N. S. 409.

West Virginia.— Wood County Ct. *v.* Boreman, 34 W. Va. 87, 11 S. E. 747.

See 9 Cent. Dig. tit. "Certiorari," § 44.

One reason for this rule is the inconvenience, confusion, and delay which might result from permitting so large a number of persons to become parties. Parnell *v.* Dallas County, 34 Ala. 278.

An individual stock-holder cannot bring certiorari in the name of the corporation

sufficient remedy through public instrumentalities is available.[31] This general rule has been modified, however, in many jurisdictions, so as to permit the suing out of the writ by persons whose interests are not distinguishable from the interest of the mass of the community, where the matter sought to be reviewed affects the public generally,[32] or where private rights are invaded by persons clothed with authority to act, to prevent or redress public wrongs, especially if the enjoyment of public rights is threatened and public interests will be thereby subserved.[33]

B. Estoppel. A party may be estopped to avail himself of the writ, where he has invoked the jurisdiction,[34] has submitted himself thereto without objection,[35]

without the consent of the legal majority of the stock-holders. Silk Mfg. Co. *v.* Campbell, 27 N. J. L. 539.

If a tax is erroneous as to one individual he may have certiorari. People *v.* Westchester County, 57 Barb. (N. Y.) 377, 8 Abb. Pr. N. S. (N. Y.) 277.

In England the crown need not show any interest in the subject-matter. Matter of Culley, 5 B. & A. 230, 2 L. J. M. C. 102, 2 N. & M. 61, 27 E. C. L. 104.

31. Jersey City *v.* State, 53 N. J. L. 434, 22 Atl. 190 [*reversing* 52 N. J. L. 65, 18 Atl. 586, 696]; State *v.* Hollinshead, 47 N. J. L. 439, 2 Atl. 244; State *v.* Holmdel Tp., 36 N. J. L. 79.

If a municipal ordinance is ultra vires, so that work to be done thereunder will be a tort or a public nuisance, the writ will be denied for the reason that resort may be had to an indictment or a civil action. Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782; Jersey City *v.* State, 53 N. J. L. 434, 22 Atl. 190; State *v.* Trenton, 36 N. J. L. 79. See also H. B. Anthony Shoe Co. *v.* West Jersey R. Co., 57 N. J. Eq. 607, 42 Atl. 279. So too public interests only being represented by the prosecutors in certiorari, and the work complained of as being illegally undertaken having so far progressed when the writ was applied for that such interests will not be subserved by interference the writ will be dismissed. Ralph *v.* Atlantic Highlands, 64 N. J. L. 721, 47 Atl. 223, 1132. But a property-owner in a city may prosecute a writ of certiorari to review an ordinance granting certain powers to a railroad company, although no special injury beyond that falling on other property-owners will accrue to him, where the ordinance is not *ultra vires,* so as to authorize an indictment against the company for a nuisance. Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782.

32. *California.*— Maxwell *v.* Stanislaus County, 53 Cal. 389.

Idaho.— Dunn *v.* Sharp, (Ida. 1894) 35 Pac. 842; Orr *v.* State Bd. of Equalization, 2 Ida. 923, 28 Pac. 416.

Iowa.— Collins *v.* Davis, 57 Iowa 256, 10 N. W. 643.

Montana.— State *v.* Ravalli County, 21 Mont. 469, 54 Pac. 939.

New Jersey.— State *v.* Hoffmeister, 62 N. J. L. 565, 41 Atl. 722; Biddle *v.* Riverton, 58 N. J. L. 289, 33 Atl. 279; State *v.* Consumers' Water Co., 56 N. J. L. 422, 28 Atl. 578; State *v.* Robbins, 54 N. J. L. 566, 25 Atl. 471; State *v.* Williams, 41 N. J. L. 332, 32 Am. Rep. 219; State *v.* Trenton, 36 N. J. L. 79; State *v.* Jersey City, 34 N. J. L. 390; State *v.* Paterson, 34 N. J. L. 163; Mitchell *v.* Tolan, 33 N. J. L. 195; State *v.* Rahway, 33 N. J. L. 110; State *v.* Snedeker, 30 N. J. L. 80 [*approved* in Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782; State *v.* Jersey City, 34 N. J. L. 390; State *v.* Stout, 33 N. J. L. 42]; State *v.* Holliday, 8 N. J. L. 205; State *v.* Griscom, 8 N. J. L. 136; State *v.* New Brunswick, 1 N. J. L. 450; State *v.* Middlesex County, 1 N. J. L. 283.

An abutting owner is entitled to the writ where a municipality unlawfully attempts to encroach upon a fee in the highway. Tallon *v.* Hoboken, 60 N. J. L. 212, 37 Atl. 895; Thompson *v.* Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087.

33. Oliver *v.* Jersey City, 63 N. J. L. 96, 42 Atl. 782; South Orange *v.* Whittingham, 58 N. J. L. 655, 35 Atl. 407; State *v.* Lambertville, 46 N. J. L. 59; State *v.* Washington, 44 N. J. L. 605, 43 Am. Rep. 402; State *v.* Williams, 41 N. J. L. 332, 32 Am. Rep. 219; State *v.* Hudson Tunnel R. Co., 38 N. J. L. 548; State *v.* Jersey City, 34 N. J. L. 390; Mitchell *v.* Tolan, 33 N. J. L. 195; Camden *v.* Mulford, 26 N. J. L. 49; State *v.* Middlesex County, 1 N. J. L. 283; Bloomfield Tp. *v.* Glen Ridge, 55 N. J. Eq. 505, 37 Atl. 63; Tucker *v.* Burlington County, 1 N. J. Eq. 282; Wildy *v.* Washburn, 16 Johns. (N. Y.) 49; Lawton *v.* Highway Com'rs, 2 Cai. (N. Y.) 179; Le Roy *v.* New York, 4 Johns. Ch. (N. Y.) 352.

In Nova Scotia, where the scope of the writ is wider than in England, the writ will lie to review assessments. *In re* Nova Scotia Bank, 12 Nova Scotia 32.

34. Prudhomme *v.* Lazure, 3 Ont. Pr. 355; Meyers *v.* Baker, 26 U. C. Q. B. 16.

35. Sumerow *v.* Johnson, 56 Ark. 85, 19 S. W. 114; Mastick *v.* San Francisco Super. Ct., 94 Cal. 347, 29 Pac. 869; Brody *v.* Penn Tp. Bd., 32 Mich. 272.

After a submission to arbitrators and an award by them pursuant thereto, a party deeming himself aggrieved cannot procure a review. Whitehead *v.* Gray, 12 N. J. L. 36.

After affirmation of an appeal in a cause removed to the United States court and remanded, the jurisdiction of the state court cannot for the first time be questioned by certiorari, on the ground of the impropriety of the remand. Cœur D'Alene R., etc., Co. *v.* Spalding, (Ida. 1898) 53 Pac. 107.

has acquiesced in,[36] or expressly consented to or sanctioned, the course of the proceedings.[37]

V. PROCEEDINGS AND DETERMINATION.

A. Jurisdiction — 1. In General — a. Rule Stated. Under their supervisory powers, courts of general jurisdiction exercise, by the writ of certiorari, control over all inferior jurisdictions, however constituted, which are vested with power to decide on personal or property rights, and whatever their course of proceeding;[38] but a court vested with common-law and chancery jurisdiction has no power, where exercising the latter jurisdiction to award the writ;[39] and unless the authority is inherent, or the jurisdiction is expressly or impliedly conferred

One who, after suing out the writ, moves to quash the array of jurors, thereby submits himself to the jurisdiction of the trial court, and cannot on the denial of his motion file the writ and claim that it operates as a supersedeas. Wallace *v.* Jameson, 179 Pa. St. 94, 36 Atl. 145.

36. Jo Daviess County *v.* Magoon, 109 Ill. 142; Starr *v.* Heales, 16 Nova Scotia 84.

Where addressed to proceedings preliminary to a public improvement the writ is not available to one who stands by until completion of the work. State *v.* Rutherford, 52 N. J. L. 501, 20 Atl. 60. See also State *v.* Rutherford, 55 N. J. L. 450, 26 Atl. 933.

Where the parties had actual notice of the proceedings, attended and were heard concerning them, and have acquiesced in them for many years, a writ of certiorari to remove those proceedings will not be granted merely because it does not appear that they had the official notice prescribed by law or because one of them was *non compos* and had no guardian. Hancock *v.* Boston, 1 Metc. (Mass.) 122.

37. State *v.* Judge First City Ct., 33 La. Ann. 15; People *v.* Weld, 6 N. Y. St. 173.

By consenting to bond a town in accordance with the statute, a party is not precluded from reviewing the action of a judge in proceedings in furtherance thereof. People *v.* Wagner, 7 Lans. (N. Y.) 467, 1 Thomps. & C. (N. Y.) 221.

Consent of guardian.— The writ will not lie on the application of a minor, whose guardian *ad litem* assented to the proceedings sought to be quashed. Peters *v.* Peters, 8 Cush. (Mass.) 529.

Consent to dismiss a bill of injunction will not preclude a resort to certiorari. Smith *v.* Trenton Delaware Falls Co., 17 N. J. L. 5.

38. *Alabama.*—Talladega County *v.* Thompson, 15 Ala. 134; Marion *v.* Chandler, 6 Ala. 899.

Arkansas.— Baxter *v.* Brooks, 29 Ark. 173; Hudson *v.* Jefferson County Ct., 28 Ark. 359; Price *v.* Page, 25 Ark. 527; Carnall *v.* Crawford County, 11 Ark. 604; Ashley *v.* Brasil, 1 Ark. 144.

California.— Keys *v.* Marin County, 42 Cal. 252; Miller *v.* Sacramento County, 25 Cal. 93.

Colorado.— *In re* Rogers, 14 Colo. 18, 22 Pac. 1053.

Florida.—Mernaugh *v.* Orlando, 41 Fla. 433, 27 So. 34; Deans *v.* Wilcoxon, 18 Fla. 531.

Illinois.— Mason, etc., Special Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Miller *v.* School Trustees, 88 Ill. 26.

Iowa.— Helmich *v.* Johnson, Morr. (Iowa) 89.

Maine.— West Bath, Petitioners, 36 Me. 74.

Michigan.— McGregor *v.* Gladwin County, 37 Mich. 388; People *v.* St. Clair Cir. Judge, 32 Mich. 95; Crawford *v.* Scio, etc., Tp. Bd., 22 Mich. 405; People *v.* Brighton, 20 Mich. 57.

Mississippi.— Holberg *v.* Macon, 55 Miss. 112.

New Jersey.— New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25.

New York.—Le Roy *v.* New York, 20 Johns. (N. Y.) 430, 11 Am. Dec. 289; Lawton *v.* Highway Com'rs, 2 Cai. (N. Y.) 179.

North Carolina.— Brooks *v.* Morgan, 27 N. C. 481; Reardon *v.* Guy, 3 N. C. 433.

Ohio.— Clermont County *v.* Robb, Wright (Ohio) 48.

Pennsylvania.— Com. *v.* Betts, 76 Pa. St. 465; Chase *v.* Miller, 41 Pa. St. 403; Mauch Chunk *v.* Nescopeck, 21 Pa. St. 46; *In re* Quakertown, 3 Grant (Pa.) 203.

South Dakota.— State *v.* Hughes County, 1 S. D. 292, 46 N. W. 1127, 10 L. R. A. 588.

Tennessee.— Cooper *v.* Summers, 1 Sneed (Tenn.) 452; Nashville *v.* Pearl, 11 Humphr. (Tenn.) 249; May *v.* Campbell, 1 Overt. (Tenn.) 61; Murfree *v.* Leeper, 1 Overt. (Tenn.) 1.

Texas.— Hamman *v.* Lewie, 34 Tex. 474; Titus *v.* Latimer, 5 Tex. 433.

West Virginia.— Cunningham *v.* Squires, 2 W. Va. 422, 98 Am. Dec. 770.

Wisconsin.— State *v.* Forest County, 74 Wis. 610, 43 N. W. 551; Matter of Booth, 3 Wis. 1.

England.— Rex *v.* Reeve, 2 Burr. 1040, 1 W. Bl. 231; Rex *v.* Jukes, 8 T. R. 542, 5 Rev. Rep. 445; 2 Bacon Abr. 167.

Canada.— See Winaker *v.* Pringle, 1 Ont. Pr. 357.

See 9 Cent. Dig. tit. "Certiorari," §§ 46, 47.

Anciently, it seems, no other court but the chancery could grant a certiorari on a suggestion where there was nothing before them, but later it became the settled practice to remove the record into the king's bench or common pleas as well by certiorari out of those courts as by certiorari and mittimus out of chancery. 1 Tidd Pr. 398. See also Bacon Abr. tit. Certiorari (A), note *a*.

39. Berry *v.* Hardin, 28 Ark. 458.

by constitutional or statutory provision,[40] there is no power to issue the writ.[41] A constitutional provision empowering designated courts to correct the errors of inferior tribunals by certiorari does not require legislation to give it effect.[42]

b. Constitutional or Statutory Control — (i) *In General.* In the absence of constitutional provision the right to the writ may be taken away expressly[43] or by

40. Statutes construed liberally.—A liberal construction should be given to statutes relied on as conferring the right. Ferris *v.* Bramble, 5 Ohio St. 109. A provision that the writ may be granted by "any court," etc., means any court of original jurisdiction. Miliken *v.* Huber, 21 Cal. 166. A constitutional provision conferring "appellate jurisdiction in all cases, both in law and equity," authorizes the issue of the writ where no other mode of review is specified. Brown County of Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949. An act of congress conferring chancery and common-law jurisdiction on designated territorial courts empowers them to issue writs of certiorari. Territory *v.* Valdez, 1 N. M. 533.

In California, under Cal. Civ. Prac. Act, § 456, the writ could only issue out of a court of original jurisdiction. Miller *v.* Sacramento County, 25 Cal. 93; Miliken *v.* Huber, 21 Cal. 166.

In Michigan circuit courts are empowered to grant the writ by article VI, section 8, of the state constitution. Zook *v.* Blough, 42 Mich. 487, 4 N. W. 219; Merrick *v.* Arbela, 41 Mich. 630, 2 N. W. 922; Thompson *v.* Crockery School Dist. No. 6, 25 Mich. 483. See also McBride *v.* Grand Rapids, 32 Mich. 360; People *v.* St. Clair Cir. Judge, 32 Mich. 95.

City court of New York.—A provision that a writ of certiorari "may be made returnable to and the cause heard by a city court" confers no power on the city court of New York to grant or issue the writ. Matter of Semken, 13 Misc. (N. Y.) 488, 35 N. Y. Suppl. 471, 70 N. Y. St. 168.

41. *Alabama.*— Wilson *v.* Scott, 42 Ala. 348.

Arkansas.—Sawyer *v.* Crawford, 9 Ark. 32; Levy *v.* Lychinski, 8 Ark. 113; *Ex p.* Anthony, 5 Ark. 358; Auditor *v.* Davies, 2 Ark. 494.

California.— White *v.* Lighthall, 1 Cal. 347; Warner *v.* Hall, 1 Cal. 90.

Colorado.— Loveland *v.* Sears, 1 Colo. 194.

Georgia.— Laffitte *v.* State, 105 Ga. 595, 31 S. E. 540; Almand *v.* Maxwell, 100 Ga. 318, 27 S. E. 176.

Iowa.— Ainsworth *v.* House, 31 Iowa 504; Hunt *v.* Free, 29 Iowa 156; State *v.* Knouse, 29 Iowa 118; Thompson *v.* Reed, 29 Iowa 117.

Louisiana.— State *v.* Recorder First Recorder's Ct., 30 La. Ann. 450.

Michigan.— Church *v.* Anti-Kalsomine Co., 119 Mich. 437, 78 N. W. 478.

Minnesota.— Schultz *v.* Talty, 71 Minn. 16, 73 N. W. 521.

New Jersey.— State *v.* Decue, 31 N. J. L. 302; Perth Amboy *v.* Holton, 5 N. J. L. J. 56.

New York.— People *v.* Gleason, 63 N. Y. App. Div. 435, 71 N. Y. Suppl. 700; People *v.* Kellogg, 22 N. Y. App. Div. 176, 47 N. Y. Suppl. 1023; Matter of Semken, 13 Misc. (N. Y.) 488, 35 N. Y. Suppl. 471, 70 N. Y. St. 168; People *v.* Judges Suffolk County, 24 Wend. (N. Y.) 249.

Pennsylvania.— Nobles *v.* Piollet, 16 Pa. Super. Ct. 386; Evans *v.* Com., 5 Pa. Co. Ct. 362. See also Quay's Petition, 189 Pa. St. 517, 42 Atl. 199.

South Carolina.— *Ex p.* Carson, 5 S. C. 117.

Texas.— Miers *v.* Betterton, 18 Tex. Civ. App. 430, 45 S. W. 430.

Wisconsin.— Judson *v.* Hindman, 1 Pinn. (Wis.) 94.

United States.—*Ex p.* Van Orden, 3 Blatchf. (U. S.) 166, 28 Fed. Cas. No. 16,870, 12 N. Y. Leg. Obs. 161; Carr *v.* Tweedy, Hempst. (U. S.) 287, 5 Fed. Cas. No. 2,440*a*.

Canada.— Ross *v.* Blake, 28 Nova Scotia 543; Reg. *v.* Rood, 28 Nova Scotia 159; Corbett *v.* O'Dell, 16 Nova Scotia 144; Reg. *v.* Lynch, 12 Ont. 372; *Re* McQuillan, 12 Ont. Pr. 294; Russell *v.* Williams, 8 Ont. L. J. 277; Jones *v.* Harris, 6 Ont. L. J. 16.

In Ontario, unless on special grounds, a judgment and execution cannot be removed from the district court (Douglass *v.* Hutchinson, 5 U. C. Q. B. O. S. 341); nor can a judgment for defendant be removed into the king's bench from such court under 19 Geo. III, c. 70 (Gregory *v.* Flannegan, 2 U. C. Q. B. O. S. 552. But see Baldwin *v.* Roddy, 3 U. C. Q. B. O. S. 166).

42. Smith *v.* Joiner, 27 Ga. 65. Hence their jurisdiction in a particular case will not be affected by the failure of the legislature to authorize its issue in such a case. Livingston *v.* Livingston, 24 Ga. 379.

43. Reg. *v.* Judge London Ct., 14 Q. B. D. 905, 54 L. J. Q. B. 330, 52 L. T. Rep. N. S. 537, 33 Wkly. Rep. 700; Munday *v.* Thames Ironworks, etc., Co., 10 Q. B. D. 59, 52 L. J. Q. B. 119, 47 L. T. Rep. N. S. 351 (where the evident object of the statute was to provide a particular tribunal for the determination of particular questions); Reg. *v.* Chantrell, L. R. 10 Q. B. 587, 44 L. J. M. C. 94, 33 L. T. Rep. N. S. 305, 23 Wkly. Rep. 707.

Retrospective effect.—A statute precluding a remedy by certiorari to review an ordinance after the award of a contract thereunder is inapplicable where the award was made before the ordinance providing for the contract went into effect. State *v.* Wildwood, 60 N. J. L. 365, 38 Atl. 22.

Statement of case.— In England, in certain cases where the right is taken away, provision is made for the stating of a case for the opinion of the high court. See Overseers of Poor *v.* London, etc., R. Co., 4 App. Cas. 30, 48 L. J. Q. B. 65, 39 L. T. Rep. N. S. 453, 27 Wkly. Rep. 189.

necessary implication,[44] so that it cannot be granted in any case where the inferior court has jurisdiction;[45] but the intent to abrogate the right must clearly appear from the legislative enactment and cannot be inferred from language of doubtful import.[46] The legislature may also reasonably regulate the use of the writ,[47] but cannot divest the court of its constitutional power to employ it,[48] or deprive it of any of its attributes as a prerogative writ;[49] but a statute dispensing with the necessity of granting the writ to designated tribunals is not violative of constitutional provisions permitting the allowance of the writ to such jurisdictions,[50] and the legislature may provide an exclusive mode of review in a particular class of cases, notwithstanding a constitutional provision authorizing certiorari generally.[51]

(II) *Effect of Abrogation.* Although the right is abrogated by statute, the writ may still issue, with due precaution, in special cases of manifest want of jurisdiction, or where the procedure is manifestly in excess of, or under mere

44. Rex *v.* Justices Yorkshire, 1 A. & E. 563, 3 L. J. M. C. 117, 3 N. & M. 802, 28 E. C. L. 269.

45. *Ex p.* Edgar, 31 N. Brunsw. 128; *Ex p.* McDonald, 27 N. Brunsw. 169; *Ex p.* Daley, 27 N. Brunsw. 129; *Ex p.* Orr, 20 N. Brunsw. 67.

46. Ritter *v.* Kunkle, 39 N. J. L. 259; New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; State *v.* Falkinburge, 15 N. J. L. 320; Kingsland *v.* Gould, 6 N. J. L. 161; Chase *v.* Miller, 41 Pa. St. 403; Com. *v.* McGinnis, 2 Whart. (Pa.) 113; Com. *v.* Beaumont, 4 Rawle (Pa.) 366; Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393; Overseer of Poor *v.* Smith, 2 Serg. & R. (Pa.) 363; Burginhofen *v.* Martin, 3 Yeates (Pa.) 479; Rex *v.* Reeve, 2 Burr. 1040, 1 W. Bl. 231; *In re* Royal Liver Friendly Soc., 35 Ch. D. 332, 56 L. J. Ch. 821, 56 L. T. Rep. N. S. 817, 36 Wkly. Rep. 7; Rex *v.* Cashiobury, 3 D. & R. 35, 26 Rev. Rep. 604; Brookman *v.* Wenham, 20 L. J. Q. B. 278, 2 L. M. & P. 233; Rex *v.* Jukes, 8 T. R. 542, 5 Rev. Rep. 445; Rex *v.* Terret, 2 T. R. 735; Reg. *v.* Dowling, 17 Ont. 698; Reg. *v.* Richardson, 8 Ont. 651; McLellan *v.* McKinnon, 1 Ont. 219.

An act merely giving a right of appeal will not preclude the right to a certiorari. Rex *v.* Jukes, 8 T. R. 542, 5 Rev. Rep. 445.

A trial by a police justice on a charge of abandonment is a special proceeding of a criminal nature, and not a criminal action, within a statute abolishing certiorari in such actions, and no other mode of review being available certiorari will lie. People *v.* Walsh, 67 How. Pr. (N. Y.) 482.

Proceedings under "Apprentice Act."—An inhibition of the writ in any proceedings had in pursuance of the "Apprentice Act" does not preclude the issue of the writ to review an action for a penalty under the act, which, although prescribing the form of the suit, gives no exclusive jurisdiction thereof and does not prescribe the mode of proceeding, since such an action is not "in pursuance" of the act. Tallman *v.* Woodward, 2 N. J. L. 242.

Proclamation of governor.—A determination of a state commission to ascertain the result of a vote on proposed constitutional amendments, followed by the proclamation of the result by the governor, as provided by the statute authorizing the vote, commission, and proclamation, is the subject of review by certiorari, and the court is not divested of its jurisdiction by the proclamation. Bott *v.* Wurts, 63 N. J. L. 289, 43 Atl. 744, 881, 45 L. R. A. 251 [*affirming* 62 N. J. L. 107, 40 Atl. 740].

In Pennsylvania the jurisdiction of the Pennsylvania supreme court to remove causes from the quarter sessions is not taken away by the act of March 18, 1875, relative to change of venue, but the power should be exercised with extreme caution and only in a clear case. It must also be exercised in aid of the administration of justice and not to defeat or needlessly embarrass it. Quay's Petition, 189 Pa. St. 517, 42 Atl. 199.

In Nova Scotia the Dominion act of 1873, c. 129, §§ 53, 116, did not take away the jurisdiction of the supreme court. Hawes *v.* Hart, 14 Nova Scotia 427, 2 Can. L. T. 312.

In Ontario Rev. Stat. (1877), c. 74, did not abrogate the right to the writ to review a conviction for breach of a by-law. Reg. *v.* Washington, 46 U. C. Q. B. 221 [*following* Matter of Bates, 40 U. C. Q. B. 284].

Quebec — Contradictory statutes.— If the French version of the statute abrogating the right is restrictive and contradictory of the English version the restrictive portion may be disregarded. Nadeau *v.* Lévis, 16 Quebec 210.

47. It may confer on certain officers appointed by it authority to grant the writ in specified cases as a ministerial act. Smith *v.* Odell, 1 Pinn. (Wis.) 449.

Statute not retroactive.— The jurisdiction attaches on the filing of the allowance of the writ and is not affected by subsequent legislation respecting the procedure. Mahan *v.* Lester, 20 Ala. 162.

48. State *v.* Jersey City, 42 N. J. L. 118; Traphagen *v.* West Hoboken Tp., 39 N. J. L. 232.

49. State *v.* Jersey City, 42 N. J. L. 118. *Compare* Thomas *v.* State, 9 Tex. 324.

50. McGinnis *v.* Vernon, 67 Pa. St. 149.

51. Louisville, etc., R. Co. *v.* State, 8

color of, jurisdiction, which could not have been intended to be protected,[52] even though the decision or judgment of the inferior court or tribunal is final and conclusive and no appeal lies;[53] where some fact appears which, if established, would oust the jurisdiction;[54] or for improper conduct preventing an impartial trial.[55] So if the inferior tribunal was without jurisdiction but proceeded under color of a statute the writ may issue, although the statute inhibits the removal of proceedings had under it;[56] but otherwise where the proceedings are under the statute.[57]

2. How Limited — a. In General. If the jurisdiction of the court is restricted to civil matters or proceedings it is limited thereto.[58] So where a court has appellate jurisdiction only,[59] or can grant the writ only in aid of such jurisdiction, or of its supervisory powers, it may only issue in that behalf.[60]

b. Amount Involved. A court restricted to the consideration of cases where the amount in controversy shall equal or exceed a specified sum has no jurisdic-

Heisk. (Tenn.) 663. See also People *v.* Wayne County, 49 Hun (N. Y.) 476, 2 N. Y. Suppl. 555, 18 N. Y. St. 898.

52. Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491; *Ex p.* Bradlaugh, 3 Q. B. D. 509, 47 L. J. M. C. 105, 38 L. T. Rep. N. S. 680, 26 Wkly. Rep. 758; Colonial Bank *v.* Willan, L. R. 5 P. C. 417, 43 L. J. P. C. 39, 30 L. T. Rep. N. S. 237, 22 Wkly. Rep. 516; *Ex p.* Hill, 31 N. Brunsw. 84; *Ex p.* Goodwine, 25 N. Brunsw. 151; *Ex p.* Hackett, 21 N. Brunsw. 513; Nadeau *v.* Lévis, 16 Quebec 210; *Ex p.* Matthews, 1 Quebec 353; *Ex p.* Duncan, 16 L. C. Jur. 194; *Ex p.* Lalonde, 15 L. C. Jur. 251, 3 Rev. Lég. 450; *Ex p.* Morrison, 13 L. C. Jur. 295, 1 Rev. Lég. 437; *Ex p.* Church, 14 L. C. Rep. 318. See also Reg. *v.* Lancashire Justices, 11 A. & E. 144, 9 L. J. Q. B. 9, 3 P. & D. 86, 39 E. C. L. 99; Reg. *v.* Gosse, 6 Jur. N. S. 1369, 30 L. J. M. C. 41, 3 L. T. Rep. N. S. 404.

Examination of evidence.— If the inferior court has jurisdiction and the right to certiorari is taken away and another remedy given, the writ will not issue to examine the evidence for the purpose of ascertaining whether the jurisdiction existed. Reg. *v.* Scott, 10 Ont. Pr. 517.

53. People *v.* Kingston, 53 N. Y. App. Div. 58, 65 N. Y. Suppl. 590; Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663; Murfree *v.* Leeper, 1 Overt. (Tenn.) 1; *Ex p.* Turner, 22 N. Brunsw. 634; Hawes *v.* Hart, 18 Nova Scotia 42, 6 Can. L. T. 140; Barnaby *v.* Gardiner, 2 Nova Scotia 306. But see Lehigh Coal, etc., Co.'s Appeal, 112 Pa. St. 360, 5 Atl. 231 (holding that under the Pennsylvania act of March 31, 1864, the decree of a court of quarter sessions in proceedings to compel levy and collection of taxes to pay incidental indebtedness incurred by a municipal corporation is executionary and final, and cannot be reviewed by certiorari or otherwise). Com. *v.* Justice, 34 Pa. St. 165; s. c. *sub. nom.* Lawrence County Bank *v.* Lawrence County, 2 Pittsb. (Pa.) 81.

54. Colonial Bank *v.* Willan, L. R. 5 P. C. 417, 43 L. J. P. C. 39, 30 L. T. Rep. N. S. 237, 22 Wkly. Rep. 516; Reg. *v.* Stimpson, 4 B. & S. 307, 9 Cox C. C. 356, 10 Jur. N. S. 41, 32 L. J. M. C. 208, 8 L. T. Rep. N. S. 536, 116 E. C. L. 301; Bunbury *v.* Fuller, 1 C. L. R. 893, 9 Exch. 111, 23 L. J. Exch. 29.

55. *Re* Sing Kee, 8 Brit. Col. 20.

Accounting.—An enactment that a final account in the orphans' court shall be final and conclusive, except where fraud or mistake can be shown, will authorize the review and vacation of a decree on final account, on proof of fraud or mistake. Crombie *v.* Engle, 19 N. J. L. 82.

56. Morris Canal, etc., Co. *v.* Mitchell, 31 N. J. L. 99; Schuyler *v.* Tufren, 26 N. J. L. 213; Fowler *v.* Roe, 25 N. J. L. 549; Ackerman *v.* Taylor, 9 N. J. L. 65; Ackerman *v.* Taylor, 8 N. J. L. 305; Vunck *v.* Whorl, 2 N. J. L. 315.

57. Morris Canal, etc., Co. *v.* Mitchell, 31 N. J. L. 99; Stanley *v.* Horner, 24 N. J. L. 511.

58. Keniston *v.* Hewitt, 48 Iowa 679.

Action for penalty.—An inhibition of the review of civil proceedings had in a justice's court will preclude certiorari in an action to recover a penalty. Spicer *v.* Rees, 5 Rawle (Pa.) 119, 28 Am. Dec. 648.

Proceeding to require a state board to recognize petitioner as a medical college in good standing is a civil matter. Keokuk Physicians, etc., College *v.* Guilbert, 100 Iowa 213, 69 N. W. 453.

59. Miliken *v.* Huber, 21 Cal. 166.

A statutory court exempted from the supervision of a constitutional court as to part of its jurisdiction may yet be inferior to the latter in so far as its jurisdiction is unequal, so as to authorize the issue of a writ of certiorari from the latter to the former. Swift *v.* Judges Wayne Cir. Ct., 64 Mich. 479, 31 N. W. 434.

60. Walker *v.* Wantland, 2 Indian Terr. 32, 47 S. W. 354.

Habeas corpus.— Under Ark. Const. art. 7, § 4, providing that the supreme court shall have power, in aid of its appellate jurisdiction, to issue certiorari, habeas corpus, etc., and to hear and determine the same, it has appellate jurisdiction, by habeas corpus and certiorari, to review the refusal of the chancery court to grant the writ of habeas corpus. Arkansas Industrial Co. *v.* Neel, 48 Ark. 283, 3 S. W. 631.

tion where the amount involved is less;[61] but unless so restricted, the jurisdiction does not depend on the amount in controversy, where the review does not embrace the merits of the cause, and the court is confined to questions of jurisdiction, and the existence of other adequate remedies.[62]

3. CONFLICT OF JURISDICTION. If exclusive jurisdiction is vested in a particular court, it can only be exercised by that court,[63] but constitutional authority to inferior courts to remove causes from lesser jurisdictions will not exclude the authority of the superior courts to issue the writ.[64] As a rule the supreme court of the state will not take jurisdiction where the application can be made to a superior court,[65] unless the case is of more than ordinary magnitude and importance, to prevent a denial of justice,[66] in cases where the superior court cannot entertain the application because of the amount involved,[67] or where no application can be made to the superior court in time to prevent the consummation of the alleged wrong.[68] Under the English practice the writ issued out of the king's bench to draw to it jurisdiction over cases which properly belonged to it or with which it had concurrent jurisdiction.[69]

B. Parties —1. PLAINTIFF — a. In General. In matters of individual controversy the party seeking relief should be named as plaintiff,[70] and the state is prop-

61. Taenzer *v.* Judge Third Dist. Ct., 15 La. Ann. 120; Quimby *v.* Hopping, 52 N. J. L. 117, 19 Atl. 123; Hay *v.* Pistor, 2 Leigh (Va.) 707; Warner *v.* Cowie, 15 Wash. 696, 45 Pac. 752; State *v.* Jefferson County Super. Ct., 8 Wash. 271, 36 Pac. 27. *Contra*, State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827.

The jurisdiction is to be tested by the value of the thing demanded, and not by reference to extraneous matters, used by way of proof. Taenzer *v.* Judge Third Dist. Ct., 15 La. Ann. 120.

The "Ontario County Courts Act" does not authorize the removal of a cause to chancery, because of the existence of a subsequent mortgage exceeding the jurisdiction of the county court. Mitchell *v.* Martin, 2 Ont. L. J. N. S. 249.

62. Winter *v.* Fitzpatrick, 35 Cal. 269.

63. Keniston *v.* Hewitt, 48 Iowa 679; West Bath, Petitioners, 36 Me. 74; Landaff's Petition, 34 N. H. 163.

Under the Missouri constitution the supreme court has appellate jurisdiction in proceedings by certiorari only where they involve the construction of the revenue laws of the state or some other question within the classes enumerated in said section. As to such cases its jurisdiction by appeal is exclusive. State *v.* Springer, 134 Mo. 212, 35 S. W. 589.

Consent to confer jurisdiction.—Where the jurisdiction of one branch of a court is exclusive it cannot be deprived thereof and jurisdiction conferred on another branch by special waiver and consent of the defendant. People *v.* Westchester County, 53 N. Y. App. Div. 339, 65 N. Y. Suppl. 707.

64. May *v.* Campbell, 1 Overt. (Tenn.) 61.

65. Resort may be had directly to the supreme court where the proceedings complained of are in a court from which an appeal can be taken to the supreme court, or before a judge or court equal in authority and jurisdiction to any other inferior tribunal. *Ex p.* Boynton, 44 Ala. 261.

66. *Florida.* — Halliday *v.* Jacksonville, etc., Plank Road Co., 6 Fla. 304.

Michigan.—Adams *v.* Abram, 38 Mich. 302; Withington *v.* Southworth, 26 Mich. 381.

Missouri. — State *v.* Walbridge, 116 Mo. 656, 22 S. W. 893; Owens *v.* Andrew County Ct., 49 Mo. 372.

Ohio.— Burrows *v.* Vandevier, 3 Ohio 383; Barnes *v.* Decker, Wright (Ohio) 207.

Wisconsin.— May *v.* Keep, 2 Pinn. (Wis.) 301, 1 Chandl. (Wis.) 285.

See 9 Cent. Dig. tit. "Certiorari," § 48.

Constitutional and judicial writs.—In *Ex p.* Simpson, R. M. Charlt. (Ga.) 111, it is said that the judicial or legislative writ of certiorari was exclusively for the correction of errors of inferior courts — i. e., those next in dignity to the superior court, while the constitutional writ was available only to correct the errors of inferior jurisdictions other than inferior courts.

67. State *v.* Judges Sixth Judicial Dist. Ct., 9 La. Ann. 522.

68. May *v.* Keep, 2 Pinn. (Wis.) 301, 1 Chandl. (Wis.) 285.

69. Auditor *v.* Davies, 2 Ark. 494; Cross *v.* Smith, 2 Ld. Raym. 836, 7 Mod. 138, 1 Salk. 148.

In the District of Columbia the court in Hendley *v.* Clark, 8 App. Cas. (D. C.) 165, explained the case of Cross *v.* Smith, 2 Ld. Raym. 836, 7 Mod. 138, 1 Salk. 148, *supra*, and repudiated the doctrine laid down in Coleman *v.* Freedman, 1 MacArthur (D. C.) 160, to wit, that a cause could be removed on the sole ground of concurrent jurisdiction over the subject-matter of the action, and the practice founded thereon and declared the doctrine to be unsound.

70. Clarke *v.* Londrigan, 40 N. J. L. 310; Griscom *v.* Gilmon, 15 N. J. L. 475; Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; State *v.* Giberson, 14 N. J. L. 388; State *v.* Hanford, 11 N. J. L. 71.

Writs to remove decrees of the orphans' courts on the settlement of accounts may be styled between the persons seeking redress

erly plaintiff only in those cases in which the individual for whose benefit the writ is sued out cannot, upon legal principles, be himself the plaintiff, or where the state or the whole community have some rights or interest in the subject-matter, not speculative or political, but direct and positive rights and interests which are to be affected one way or the other.[71]

b. Joinder — (I) *Where Parties Severally Affected.* Parties severally affected by the proceedings below must sue out separate writs, although there is but one act to be reviewed[72] and but one record,[73] but in such a case the writ will not be quashed because issued on the application of more than one.[74] So two or more who are not in privity cannot unite in one writ to review separate judgments against them;[75] nor can they unite where they seek similar, but not the same, relief.[76] If the determination is against several defendants, only one of whom appeared, the others may sue out the writ, but upon its return should take a rule on the one who appeared to show cause why they may not prosecute without him.[77]

(II) *Where Parties Jointly Affected.* Persons jointly affected by the determination below must prosecute jointly,[78] unless there is a severance;[79] but one may prosecute on showing that his co-defendant is incapable of consenting or is absent from the state,[80] and on a release of errors by one the proceeding may continue in the name of the other.[81]

2. Defendants — a. In General. All persons interested and whose rights are directly affected, or who were proper parties to the record sought to be annulled, must be made defendants;[82] but whether or not persons who have acquired or

and the personal representatives. Burrough *v.* Mickle, 3 N. J. L. 472; Wood *v.* Tallman, 1 N. J. L. 177.

71. Moore *v.* Hancock, 11 Ala. 245; Fraser *v.* Freelon, 53 Cal. 644; State *v.* Justice, 24 N. J. L. 413; Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; State *v.* Giberson, 14 N. J. L. 388; State *v.* Hanford, 11 N. J. L. 71; State *v.* Kirby, 5 N. J. L. 982.

Entitling writ see *infra*, V, K, 3, a.

Indorsement of writ with name of prosecutor see *infra*, V, K, 3, f.

Appointment of town officer.—A certiorari to three justices to bring before the court their appointment of a town officer must be prosecuted in the name of the people. Wildy *v.* Washburn, 16 Johns. (N. Y.) 49.

A writ to review a warrant transferring a vagrant to another township should be brought in the name of the state. Overseers of Poor *v.* Overseers of Poor, 13 N. J. L. 289.

If a county is aggrieved it will be more formal to sue out the writ in its name, but commissioners who exercise its corporate powers may act. Northampton County's Appeal, 57 Pa. St. 452.

72. State *v.* Kirby, 5 N. J. L. 982.

One creditor or more of an insolvent may prosecute the writ without making all the other creditors parties thereto. Browning *v.* Cooper, 18 N. J. L. 196.

The fifty-eighth rule of the New Jersey supreme court, that "in matters of taxation not more than four prosecutors shall be joined in one writ of certiorari," is restrictive and does not permit the joinder in one writ of separate and distinct interests. State *v.* Orange, 62 N. J. L. 192, 40 Atl. 647.

73. Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411.

74. State *v.* Kirby, 5 N. J. L. 982. See also Browning *v.* Cooper, 18 N. J. L. 196.

75. Patterson *v.* Hendrix, 72 Ga. 204.

76. Woodworth *v.* Gibbs, 61 Iowa 398, 16 N. W. 287.

A statute authorizing several persons similarly affected by the same illegality in an assessment to unite in reviewing it will not authorize the joinder of several where different issues are involved. People *v.* Feitner, 163 N. Y. 384, 57 N. E. 624 [*affirming* 49 N. Y. App. Div. 385, 63 N. Y. Suppl. 532 (*affirming* 30 Misc. (N. Y.) 247, 63 N. Y. Suppl. 319)].

77. West *v.* Richards, 16 N. J. L. 455.

Failure to join a garnishee is immaterial, where the time within which he might sue out the writ has expired. Bloom *v.* Alexander, 5 Pa. Co. Ct. 554.

78. Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; People *v.* Rensselaer, 11 Wend. (N. Y.) 174; Otey *v.* Rogers, 26 N. C. 534.

Executors against whom judgment has been improperly rendered, but one of whom appeared and made defense, may resort to the writ. Montgomery *v.* Reynolds, 14 N. J. L. 283.

79. Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; Sheppard *v.* Fenton, 9 N. J. L. 8; Cox *v.* Haines, 3 N. J. L. 261.

In an action against the maker and indorser of a note one defendant may sue out the writ without summons and severance. Fayette *v.* Oswego, 18 Wend. (N. Y.) 515.

80. People *v.* Rensselaer, 11 Wend. (N. Y.) 174.

81. Van Houten *v.* Ellison, 2 N. J. L. 220.

82. Com. *v.* Peters, 3 Mass. 229; Connell *v.* Chandler, 11 Tex. 249. See also Heffle-

attempted to acquire rights on the basis of the action under review shall be summoned and heard is discretionary and their presence or absence is not jurisdictional.[83]

b. Inferior Tribunal. The court is the only necessary respondent in a proceeding to review its order,[84] but a judicatory whose judgment is questioned cannot be made defendant merely because it may have erred in judgment.[85]

c. Public Bodies — (I) *In General.* In a proceeding to review the action of a court, the public corporation whose action is complained of should be made defendant.[86] If the office of the writ is limited to an inquiry into the inferior jurisdiction, it is improper to join tribunals or officers exercising separate and distinct jurisdictions, or persons having no voice in the proceedings to be reviewed.[87]

(II) *The State.* It has been held that the state cannot be made defendant in any case,[88] and the writ cannot be issued against the state, when it is in no wise a party to the proceeding below.[89]

3. Objections and Remedies — a. Adding Parties. New[90] or necessary[91] parties may be added.

b. Improper Parties. The real party in interest may be substituted as plaintiff for one who acted in his behalf,[92] and where one or more relators improperly

finger *v.* George, 14 Tex. 569, holding that a statute permitting "any one interested in the estate" to have the account of an administrator reviewed contemplates the joinder of all interested persons in the proceedings.

In New Jersey the party by whom or at whose instance the alleged injurious act was done should be styled the defendant. Clarke *v.* Londrigan, 40 N. J. L. 310; State *v.* Hanford, 11 N. J. L. 71 [*criticizing* the statement in State *v.* Kirby, 5 N. J. L. 982, that the party seeking relief is to be styled the defendant, and stating that it was not the general rule but only applicable to that particular case]. And see Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411, where the same criticism is made.

On proceedings to set aside a municipal contract because awarded before the ordinance providing for it went into effect, the contract cannot be attacked unless the contractors to whom the award was made are brought into court. State *v.* Wildwood, 60 N. J. L. 365, 38 Atl. 22.

Petitioners for the annexation of territory to a town, on certiorari to quash the order of annexation, should be made parties. Black *v.* Brinkley, 54 Ark. 372, 15 S. W. 1030.

Where a certiorari is in aid of an ejectment suit, the present owner should be made a party to it; otherwise he cannot be bound by the adjudication. State *v.* West Hoboken Tp., 39 N. J. L. 421.

83. State *v.* Hudson County, 39 N. J. L. 632.

Purchaser at sale complained of.— To review the proceedings in the probate court where the property of minor children which is exempt from forced sale was improperly sold, it is proper to join the purchaser with the administrator as a party. Connell *v.* Chandler, 11 Tex. 249.

84. Baker *v.* Shasta County Super. Ct., 71 Cal. 583, 12 Pac. 685.

85. State *v.* Kirby, 5 N. J. L. 982.

86. Oregon, etc., Sav. Bank *v.* Catlin, 15 Oreg. 342, 15 Pac. 462; Wood *v.* Riddle, 14 Oreg. 254, 12 Pac. 385; Pruden *v.* Grant County, 12 Oreg. 308, 7 Pac. 308.

Custodian of record.—The persons or bodies whose action is to be reviewed and in whose hands the record remains are the proper parties defendant. Crawford *v.* Scio, etc., Tp. Board, 22 Mich. 405, where the writ was directed to the boards of two townships.

To review the determination of a military board of examination, the members of such board, and the adjutant-general, as the custodian of its records, are the proper parties to the writ; but the governor, whose finding is executive, is not a proper party. People *v.* Hoffman, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597.

87. Quinchard *v.* Alameda, 113 Cal. 664, 45 Pac. 856.

A town is not a proper party to proceedings to bond it in aid of a railroad, where the liability on the bonds is solely that of the taxpayers. People *v.* Morgan, 65 Barb. (N. Y.) 473.

88. State *v.* Kirby, 5 N. J. L. 982.

89. Specht *v.* Com., 24 Pa. St. 103.

90. In the discretion of the court, others standing in the same relation as the original relators to the proceedings sought to be reviewed may be admitted to occupy the same position, although the time limited for suing out the writ has expired. People *v.* Syracuse, 28 Misc. (N. Y.) 95, 59 N. Y. Suppl. 763.

91. Where, pending certiorari against a municipal corporation, it is dissolved by quo warranto, the previous existing corporation should be brought in before the hearing. Bowlby *v.* Dover, 64 N. J. L. 184, 44 Atl. 844.

92. State *v.* Napton, 24 Mont. 450, 62 Pac. 686.

On proceedings to correct an assessment of taxes against stock-holders erroneously brought in the name of the corporation, per-

joined have no interest in the controversy or wrong to be redressed they may be stricken out;[93] but if each has a right to prosecute the certiorari, the remedy is to supersede the writ before the return is filed.[94] The writ will not be dismissed because one of the defendants is improperly made a party[95] or because persons interested are named in the writ, where no command is made to them.[96]

C. Time For Instituting — 1. In General — a. Rule Stated. Timely application for the writ must be made. Unreasonable delay or failure to apply within the time limited by statute or established by the local practice is good ground for refusing the writ, in the absence of exceptional circumstances.[97] Nor can a void

mission to amend by substituting the names of stock-holders who have consented will be refused. State *v.* Cook, 32 N. J. L. 347.

93. People *v.* Cheetham, 45 Hun (N. Y.) 6.

94. People *v.* Feitner, 30 Misc. (N. Y.) 247, 63 N. Y. Suppl. 319.

95. The writ may be retained and quashed as to such improper party only. Champiou *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

96. State *v.* Rowan, 57 N. J. L. 530, 31 Atl. 224.

97. *Alabama.*— Mason *v.* Moore, 12 Ala. 578.

Arkansas.—Black *v.* Brinkley, 54 Ark. 372, 15 S. W. 1030.

California.— Smith *v.* Los Angeles County Super. Ct., 97 Cal. 348, 32 Pac. 322; Kimple *v.* San Francisco Super. Ct., 66 Cal. 136, 4 Pac. 1149; Keys *v.* Marin County, 42 Cal. 252.

Dakota.— Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

Delaware.— Vaughn *v.* Marshall, 1 Houst. (Del.) 348; West *v.* Shockley, 4 Harr. (Del.) 108; Justis *v.* Lindsay, 2 Harr. (Del.) 145; King *v.* Wright, 2 Harr. (Del.) 135.

Georgia.—Hamilton *v.* Phenix Ins. Co., 111 Ga. 875, 36 S. E. 960; Shaw *v.* Griffin, 65 Ga. 304; Robin *v.* Nobles, 36 Ga. 271.

Illinois.— School Trustees *v.* School Directors, 88 Ill. 100; Okerlind *v.* Fyke, 90 Ill. App. 192.

Louisiana.— State *v.* Judges Ct. of App., 47 La. Ann. 180, 16 So. 737.

Massachusetts.—Hancock *v.* Boston, 1 Metc. (Mass.) 122.

Michigan.— Detroit *v.* Murphy, 95 Mich. 531, 55 N. W. 441; Atlee *v.* Wexford County, 94 Mich. 562, 54 N. W. 380; Perrizo *v.* Kesler, 93 Mich. 280, 53 N. W. 391; Bresler *v.* Ellis, 46 Mich. 335, 9 N. W. 439; Fractional School Dist. No. 1 *v.* Board of School Inspectors, 27 Mich. 3; Matter of Lantis, 9 Mich. 324, 80 Am. Dec. 85.

Mississippi.— Ewing *v.* Burton, 5 How. (Miss.) 660.

New Hampshire.— State *v.* Bishop, 3 N. H. 312.

New Jersey.—State *v.* West Hoboken, (N. J. 1897) 37 Atl. 439; State *v.* Rutherford, 52 N. J. L. 501, 20 Atl. 60; State *v.* Union Tp., 44 N. J. L. 599; State *v.* Logan, 43 N. J. L. 421; State *v.* Passaic, 38 N. J. L. 171; State *v.* Passaic, 38 N. J. L. 168; State *v.* Clark, 38 N. J. L. 102; State *v.* Essex Public Road Board, 37 N. J. L. 335; State *v.* Jersey City, 35 N. J. L. 455; State *v.* Newark, 30 N. J. L. 303; State *v.* Jersey City, 30 N. J. L. 250; State *v.* Jersey City, 30 N. J. L. 247; State *v.* Hudson City, 29 N. J. L. 115; Overseers of Poor *v.* Overseers of Poor, 26 N. J. L. 210; Chamberlin *v.* Barclay, 13 N. J. L. 244; Bray *v.* Deare, 11 N. J. L. 89; Cozens *v.* Dickinson, 3 N. J. L. 99.

New York.— People *v.* Hildreth, 126 N. Y. 360, 27 N. E. 558, 37 N. Y. St. 393 [*affirming* 1 Silv. Supreme (N. Y.) 358, 5 N. Y. Suppl. 308, 24 N. Y. St. 458]; People *v.* Board of Police Com'rs, 82 N. Y. 506; People *v.* Queens County, 82 N. Y. 275; People *v.* Westchester F. Ins. Co., 77 N. Y. 605; People *v.* Hill, 53 N. Y. 547; People *v.* Cobleskill, 66 Hun (N. Y.) 628, 20 N. Y. Suppl. 920, 49 N. Y. St. 48; People *v.* Brooklyn, 47 Hun (N. Y.) 407; People *v.* Rensselaer County, 34 Hun (N. Y.) 266; People *v.* Board of Police Com'rs, 24 Hun (N. Y.) 284; People *v.* Walter, 2 Hun (N. Y.) 385; People *v.* Purroy, 19 N. Y. Suppl. 907, 22 N. Y. Civ. Proc. 116; People *v.* Stark, 4 N. Y. Suppl. 820, 22 N. Y. St. 531; Matter of Tompkins Square, 17 Abb. Pr. (N. Y.) 324 note; Ball *v.* Warren, 16 How. Pr. (N. Y.) 379; Kennedy *v.* Newsom, 1 How. Pr. (N. Y.) 121; People *v.* New York, 2 Hill (N. Y.) 9; Elmendorf *v.* New York, 25 Wend. (N. Y.) 693; George *v.* Orcutt, 19 Wend. (N. Y.) 647; Day *v.* Gallup, 18 Wend. (N. Y.) 513.

North Carolina.— Bowman *v.* Foster, 33 N. C. 47; Swaim *v.* Fentress, 15 N. C. 601.

Oregon.— Coos Bay Nav. Co. *v.* Coos County, 31 Oreg. 594, 47 Pac. 1101; Southern Oregon Co. *v.* Gage, 31 Oreg. 590, 47 Pac. 1101; Southern Oregon Co. *v.* Coos County, 30 Oreg. 250, 47 Pac. 852; Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673; Oregon, etc., Sav. Bank *v.* Jordan, 16 Oreg. 113, 17 Pac. 621; Thompson *v.* Multnomah County, 2 Oreg. 34.

Pennsylvania.—Brown *v.* Independent School Dist., (Pa. 1888) 16 Atl. 32; Weil *v.* Frauenthal, 103 Pa. St. 317; Young's Petition, 9 Pa. St. 215; Tamaqua *v.* Morgans, 24 Pa. Co. Ct. 10; Masters *v.* Turner, 10 Phila. (Pa.) 482, 30 Leg. Int. (Pa.) 337; Heft *v.* Hammill, 1 Phila. (Pa.) 394, 9 Leg. Int. (Pa.) 139.

Tennessee.— Gillam *v.* Looney, 1 Heisk. (Tenn.) 319; Tipton *v.* Anderson, 8 Yerg. (Tenn.) 221; Vanleer *v.* Johnston, 8 Yerg. (Tenn.) 162; Love *v.* Hall, 3 Yerg. (Tenn.) 407; Johnston *v.* Dew, 5 Hayw. (Tenn.) 224.

Washington.— Spooner *v.* Seattle, 6 Wash. 370, 33 Pac. 963.

application be renewed within the time limited for the renewal of applications for the writ.[98]

b. Statutory Limitations — (I) *In General.* Where the time for commencing proceedings is limited by statute the right to apply at any time within the statutory period is absolute.[99]

(II) *What Statute Governs.* The limitation is governed by the law in force at the time of the alleged illegal action.[1] Where no limitation is fixed by an act creating a new court, a general act will govern,[2] but a limitation which is made specially applicable to one court has no application to proceedings in another court.[3] So it has been held that a limitation respecting the suing out

Wisconsin.—State *v.* Milwaukee County, 58 Wis. 4, 16 N. W. 21.

United States.— California, etc., Land Co. *v.* Gowen, 48 Fed. 771.

England.— Prim *v.* Smith, 20 Q. B. D. 643, 57 L. J. Q. B. 336, 58 L. T. Rep. N. S. 606, 36 Wkly. Rep. 530; Matter of Daws, 8 A. & E. 936, 35 E. C. L. 917; Rex *v.* Justices Sussex, 1 M. & S. 734; Rex *v.* Justices Sussex, 1 M. & S. 631; Rex *v.* Boughey, 4 T. R. 281, 2 Rev. Rep. 381.

Canada.—*Ex p.* Currie, 28 N. Brunsw. 475; *Ex p.* Forrest, 28 N. Brunsw. 429; *Ex p.* Swim, 28 N. Brunsw. 138; *Ex p.* Lipsett, 25 N. Brunsw. 66; Reg. *v.* Flewelling, 11 N. Brunsw. 419; Reg. *v.* Kennedy, 11 N. Brunsw. 335; *Ex p.* Gerow, 9 N. Brunsw. 269; *Ex p.* O'Regan, 8 N. Brunsw. 261; *Ex p.* Hebert, 8 N. Brunsw. 108; Reg. *v.* McFadden, 18 Nova Scotia 426, 6 Can. L. T. 538; Reg. *v.* Rines, 17 Nova Scotia 87; Doggett *v.* Tremain, 9 Nova Scotia 419; Knight *v.* Medora, etc., Tp., 11 Ont. 138; Matter of Bell Telephone Co., 9 Ont. 339; *Ex p.* Thayer, 3 Quebec Super. Ct. 244; *Ex p.* Boyer, 2 L. C. Jur. 188; Allard *v.* Chillas, 2 Rev. de Lég. 32. See also Reg. *v.* Assessors, 12 N. Brunsw. 528; Robbins *v.* Watts, 11 N. Brunsw. 513; *Ex p.* Fiset, 3 Quebec 102.

See 9 Cent. Dig. tit. "Certiorari," § 58.

In North Carolina an application for the writ as a substitute for a lost appeal must be made before the merits of the case are entered upon (McDaniel *v.* Pollock, 87 N. C. 503), or before the appeal is regularly reached in its order on the docket for argument (State *v.* Harris, 114 N. C. 830, 19 S. E. 154; State *v.* Rhodes, 112 N. C. 857, 17 S. E. 164). If the appeal was not docketed in time the applicant will be precluded, unless he apply at the first term next after the case has been determined in the court below. Causey *v.* Snow, 116 N. C. 497, 21 S. E. 179; State *v.* Freeman, 114 N. C. 872, 19 S. E. 630; Graham *v.* Edwards, 114 N. C. 228, 19 S. E. 150; Norman *v.* Snow, 94 N. C. 431; Suiter *v.* Brittle, 92 N. C. 53; Cross *v.* Cross, 90 N. C. 15; Brown *v.* Williams, 84 N. C. 116; Erwin *v.* Erwin, 14 N. C. 528.

In Tennessee application for the writ must be made to the first term of the court after the rendition of the judgment, or else some sufficient cause for the delay must be shown in the petition. Mason *v.* Hammons, 7 Coldw. (Tenn.) 132; Perkins *v.* Hadley, 4 Hayw. (Tenn.) 143. This rule will not be modified so as to permit a party to apply after the prescribed time, although the judgment sought to be revised was based on a certain measure of damages, and after expiration of the time to apply the measure of damage in such case was changed by a decision of the supreme court. Perkins *v.* Hadley, 4 Hayw. (Tenn.) 143.

In Texas proceedings to review an administrator's account may be instituted within two years from the final action of the court on the matters in respect of which it is sought to have the judgment reviewed. Hefflefinger *v.* George, 14 Tex. 569. See also Flanagan *v.* Pierce, 27 Tex. 78, where it was held that a writ to review an order directing the sale of land was not barred by the lapse of two years from the time of the return of the sale of the property by the administrator, when the petition for certiorari was filed January 4, and the decree of confirmation was entered at the preceding March term.

In Canada the application was granted when made at the first term after the refusal of an appeal (*Ex p.* O'Regan, 8 N. Brunsw. 261; *Ex p.* Hebert, 8 N. Brunsw. 108) and when two terms had elapsed since the issue of a warrant of attachment against an absconding debtor (*Ex p.* Moore, 23 N. Brunsw. 229).

Shortening time.— The fact that it is sought to review proceedings to issue railroad-aid bonds which have been delivered to the company is no ground that the usual time of limitation on the writ of certiorari should be shortened, where the company had notice of all the defects alleged against such bonds. People *v.* Walter, 4 Thomps. & C. (N. Y.) 638.

If a concurrent right of appeal exists, the writ will not issue until the time to appeal has expired. Weill *v.* Light, 98 Cal. 193, 32 Pac. 943.

Laches in prosecution of proceedings see *infra*, V, O, 1, c.

Laches in taking out writ after allowance see *infra*, V, K, 2.

98. Carpenter *v.* Southern R. Co., 112 Ga. 152, 37 S. E. 186; Hamilton *v.* Phenix Ins. Co., 111 Ga. 875, 36 S. E. 960; People *v.* Westchester F. Ins. Co., 77 N. Y. 605.

99. Graff *v.* Smolensky, 35 Ill. App. 264.

1. People *v.* York, 47 N. Y. App. Div. 552, 62 N. Y. Suppl. 662.

2. Patillo *v.* State, 49 Ga. 172.

3. *Ex p.* Jocelyn, 7 N. Brunsw. 637.

of a certiorari to review a judgment is not applicable to proceedings to remove an inquisition.[4]

(III) *RUNNING OF STATUTE.*[5] When the statute begins to run from the determination below, a final determination is intended;[6] from confirmation of the action complained of, legal confirmation;[7] from and after the trial, the day after the trial;[8] before the first day of the term at which the issue might be tried, the first term at which the cause might be regularly noticed for trial;[9] and from the illegal action of a public board, the time the first step is taken which will affect the complaining party injuriously.[10] A certiorari is brought when the petition is filed.[11]

c. In Absence of Limitation — (I) *IN GENERAL.* In the absence of statute or rule prescribing any fixed period within which application for the writ shall be made, the question as to whether or not the application is seasonable is addressed to the discretion of the court,[12] and its exercise of that discretion will not be revised, if not abused.[13]

(II) *APPLICATION OF RULE IN ERROR.* In some jurisdictions, in analogy to the rule of limitation on suing out writs of error and in the absence of special circumstances, that rule has been adopted.[14]

2. AGAINST MUNICIPAL BODIES. The review of the action of a municipal body

4. Wilt *v.* Philadelphia, etc., Turnpike Co., 1 Brewst. (Pa.) 411.

5. Suspension of statute.— The mere pendency of a petition for the writ will not suspend the running of a statute prescribing the time within which certiorari must be brought, where the petitioner has failed to give timely notice of the sanction of the writ or of the time and place of hearing. O'Keefe *v.* Cotton, 102 Ga. 516, 27 S. E. 663. So, the suing out of a writ of certiorari, without complying with the prerequisites to its issue, will not suspend the running of the time limited for the application. Carpenter *v.* Southern R. Co., 112 Ga. 152, 37 S. E. 186.

6. People *v.* Feitner, 51 N. Y. App. Div. 196, 64 N. Y. Suppl. 675; People *v.* Champlain, 33 N. Y. App. Div. 277, 53 N. Y. Suppl. 739.

Adjournment of public board.— N. Y. Code Civ. Proc. § 2125, which requires the writ to be procured and served within a stated time after the determination complained of, is not solely a statute of limitations, but by implication grants the relator the time specified within which to procure the writ in a case where, although the determining body has finally adjourned after making a disposition of the matter in question, it or its successor can subsequently obey any order of the court. People *v.* Sutphin, 166 N. Y. 163, 59 N. E. 770 [*following* People *v.* Champlain, 33 N. Y. App. Div. 277, 53 N. Y. Suppl. 739, and *modifying* 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49].

7. State *v.* Perth Amboy, 57 N. J. L. 106, 29 Atl. 587.

8. Jones *v.* Smith, 28 Ga. 41.

9. McKinney *v.* Stoddard, 1 Den. (N. Y.) 270.

10. Jamison *v.* Louisa County, 47 Iowa 388.

Assessments.— Within a statute limiting the time to review for excess of jurisdiction, the time limited for the annulment of an assessment for a local improvement begins to run from the making of the assessment and not from the time of the resolution authorizing the improvement. Polk *v.* McCartney, 104 Iowa 567, 73 N. W. 1067.

11. By way of analogy to the commencement of a suit a certiorari is not "brought," within the meaning of a statute limiting the time for bringing such proceedings, until the petition is filed with the clerk. Barrett *v.* Devine, 60 Ga. 632.

12. People *v.* Hill, 53 N. Y. 547; People *v.* Cooper, 22 Hun (N. Y.) 515; People *v.* Perry, 16 Hun (N. Y.) 461; People *v.* Walter, 4 Thomps. & C. (N. Y.) 638.

In New Jersey the application of one who retained possession of land sold under an alleged invalid assessment will not be dismissed for laches, although sued out nearly four years after the confirmation of the assessment. State *v.* Passaic, 38 N. J. L. 168.

13. People *v.* Cooper, 22 Hun (N. Y.) 515.

14. Union Drainage Dist. *v.* Volke, 163 Ill. 243, 45 N. E. 415 [*affirming* 59 Ill. App. 283]; Hyslop *v.* Finch, 99 Ill. 171; Peterson *v.* Lawrence, 20 Ill. App. 631; People *v.* Walter, 4 Thomps. & C. (N. Y.) 638; People *v.* New York, 2 Hill (N. Y.) 9; Thompson *v.* Multnomah County, 2 Oreg. 34; Crosby *v.* Probate Ct., 3 Utah 51, 5 Pac. 552. See also People *v.* Cooper, 22 Hun (N. Y.) 515, where it is said by Barrett, J., that the intimations that, in analogy to a writ of error, certiorari will not be granted after two years, are merely a guide to the general limit of discretion and not an inflexible rule.

The New Jersey statute providing that "writs of error shall not be brought but within five years after rendering the judgment complained of" does not apply to writs of certiorari. Carman *v.* Carman, 3 N. J. L. 215, where the court considered the advisability of adopting the like limitation with respect to certiorari. The time was subse-

must be sought while it retains jurisdiction of the proceedings.[15] To test its corporate existence, the writ must be sued out before its organization and assumption of corporate functions.[16]

3. Effect of Laches — a. In General. The writ may be granted after the expiration of the time limited, if the delay is satisfactorily explained,[17] as by a showing of the judge to whom the writ was required to be presented.[18] To bar the right to the writ for laches, it must appear that since the making of the record sought to be reviewed, and upon its assumed validity, something has been done so that great public detriment or inconvenience might result from declaring it invalid.[19]

b. Where There Was Want of Jurisdiction. Notwithstanding the laches of the applicant, he will not be precluded where the determination sought to be reviewed was made without jurisdiction and has not been carried into effect.[20]

4. Objections — a. How Taken. Objection to the proceedings because not instituted within the time limited should be taken by motion to dismiss[21] or to quash[22] the writ.

b. Waiver. Laches in applying for the writ may be waived by appearance and pleading[23] or by making a return.[24]

quently fixed by statute (Rev. L. 691) at eighteen months after judgment.

15. Osterhoudt *v.* Rigney, 98 N. Y. 222; People *v.* Queens County, 82 N. Y. 275; People *v.* Sutphin, 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49; People *v.* Hempstead, 49 N. Y. App. Div. 4, 63 N. Y. Suppl. 114; People *v.* Pelham, 74 Hun (N. Y.) 83, 86, 26 N. Y. Suppl. 122, 56 N. Y. St. 167; People *v.* Hannibal, 65 Hun (N. Y.) 414, 20 N. Y. Suppl. 165, 47 N. Y. St. 567.

The writ will lie against a board which has finally adjourned after disposition of the matter in question, since it or its successor, upon its next authorized meeting, can obey the order. People *v.* Champlain, 33 N. Y. App. Div. 277, 53 N. Y. Suppl. 739. *Contra*, People *v.* Hempstead, 49 N. Y. App. Div. 4, 63 N. Y. Suppl. 114.

16. Fractional School Dist. No. 1 *v.* Board of School Inspectors, 27 Mich. 3.

17. An extraordinary state of facts must be shown to justify the court in granting the writ after the time within which writs of error are permitted to be sued out. Crosby *v.* Probate Ct., 3 Utah 51, 5 Pac. 552.

A non-resident may make an *ex parte* application as soon as may be. State *v.* Judges Orphans Ct., 5 N. J. L. 652.

Awaiting decision in similar case.—A suitor is not guilty of laches when he has forborne to apply until a short time after the apparent determination of the court of last resort in another similar case, of whether or not certiorari would lie. People *v.* Cooper, 22 Hun (N. Y.) 515.

Inability to give security for a supersedeas has been held to furnish no excuse for not applying for a certiorari to review a judgment within the proper time, as a certiorari without a supersedeas may be prosecuted *in forma pauperis*. Gardner *v.* Barger, 4 Heisk. (Tenn.) 668.

Secret determination.— It is a good excuse that the judgment complained of was secretly rendered without notice or means of knowledge. Hoffner *v.* Kottka, 2 Pearson (Pa.) 360.

The explanation may be made by affidavit on a motion to quash. Flanagan *v.* Murphy, 2 Wend. (N. Y.) 291.

18. Kelly *v.* Jackson, 67 Ga. 274.

19. Union Drainage Dist. *v.* Volke, 163 Ill. 243, 45 N. E. 415 [*affirming* 59 Ill. App. 283].

20. Boston, etc., R. Co. *v.* Hampden County, 116 Mass. 73; Overseers of Poor *v.* Overseers of Poor, 26 N. J. L. 210; Graves *v.* Fehr, 89 Pa. St. 460; *Ex p.* Long, 27 N. Brunsw. 495; *Ex p.* Mulhern, 9 N. Brunsw. 259.

21. People *v.* MacLean, 64 Hun (N. Y.) 205, 19 N. Y. Suppl. 56, 46 N. Y. St. 99, also holding that an answer is improper where the statute does not require a defense, but simply that the proceedings below be returned.

22. Lovet *v.* Green, 12 Johns. (N. Y.) 204.

Must be by substantive motion.— Objection that the writ is too late must be taken by a substantive motion to quash it and not in opposition to a motion to quash the proceedings below. Reg. *v.* Porter, 20 Nova Scotia 352, 9 Can. L. T. 57; *In re* Dyke, 20 Nova Scotia 263, 8 Can. L. T. 446.

Consideration on hearing.—Whether the provisions of an act limiting the time within which a writ of certiorari shall be allowed or granted to review an assessment made under such act will prevent the supreme court, after the period so limited, from allowing a certiorari to determine the constitutionality of the act, or the portion of it under which the assessment was made, and the relation of the limitation to such act, may be disposed of on the hearing, if the facts present the question. State *v.* New Brunswick, 38 N. J. L. 320.

23. Bowman *v.* Foster, 33 N. C. 47; Johnston *v.* Dew, 5 Hayw. (Tenn.) 224.

24. Lovet *v.* Green, 12 Johns. (N. Y.) 204.

D. Conditions Precedent — 1. In General. All requirements which are conditions precedent to the issue of the writ must be complied with.[25]

2. Payment of Costs Below. Where it is required that before any writ of certiorari shall issue the applicant shall produce and file with the petition a certificate from the officer,[26] whose decision or judgment is the subject-matter of complaint, that all costs which may have accrued on the trial below have been paid,[27] the failure to produce and file such a certificate will preclude the right to the writ.[28]

E. Application — 1. Necessity of. Except when sued out by the sovereign power,[29] a writ of certiorari will not, as a rule,[30] issue of course, but an application by petition, affidavit, or other mode prescribed, showing *prima facie* a case for relief, is prerequisite to its issue.[31]

2. Who May Make. Ordinarily the affidavit should be made by the party beneficially interested, but under some circumstances it may be made by his

25. Parker *v.* Poole, 12 Tex. 86 (holding that a petition for a writ to review a judgment on confession, which charges usury, must offer to pay the amount justly due); *Ex p.* Doray, 6 Rev. Lég. 507.

26. **Certificate must be signed** by the magistrate within three months from the decision. Fuller *v.* Arnold, 64 Ga. 599.

For form of certificate of payment of costs see Scott *v.* McDaniel, 64 Ga. 780.

27. **Sufficiency.**—A statement in the certificate that all costs have been paid is sufficient (Williams *v.* Shuler, 94 Ga. 660, 19 S. E. 981), but a recital that the petitioner has paid the "court costs in said case" is not a compliance with the statute (Osborn *v.* Osborn, 70 Ga. 716). The failure to state that all costs have been paid is not fatal, where the petitioner shows that he has paid the costs and gives the items. Scott *v.* McDaniel, 64 Ga. 780.

28. Fuller *v.* Arnold, 64 Ga. 599.

Time of filing.— The certificate need not be filed before the writ is sanctioned. Fuller *v.* Arnold, 64 Ga. 599.

On application for a second writ in renewal of the first a new certificate is unnecessary. Williams *v.* Shuler, 94 Ga. 660, 19 S. E. 981.

29. Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

30. **In a novel case of great importance** the court may award the writ in the first instance or grant a rule to show cause. State *v.* Morris Canal, etc., Co., 12 N. J. L. 365, where the latter course was pursued.

In road cases, in Pennsylvania, and in cases of like nature no application is necessary, but the writ is allowed without cause shown. Matter of Pittsburgh, 2 Watts & S. (Pa.) 320.

31. *Alabama.*— *Ex p.* Buckley, 53 Ala. 42.

California.— Hagar *v.* Yolo County, 47 Cal. 222; Matter of Eighth St., 40 Cal. 481.

Delaware.— Newell *v.* Hampton, 1 Marv. (Del.) 1, 40 Atl. 469.

Georgia.—Kehr *v.* Gantier, T. U. P. Charlt. (Ga.) 279.

Idaho.— Madison *v.* Piper, (Ida. 1898) 53 Pac. 395.

Illinois.—Waterman *v.* Raymond, 40 Ill. 63.

Massachusetts.— Com. *v.* Downing, 6 Mass. 72.

Michigan.— People *v.* Judges Cass Cir. Ct., 2 Dougl. (Mich.) 116.

New York.— People *v.* New York County, 57 How. Pr. (N. Y.) 467; Bradner *v.* Superintendent of Poor, 9 Wend. (N. Y.) 433; Comstock *v.* Porter, 5 Wend. (N. Y.) 98; Munro *v.* Baker, 6 Cow. (N. Y.) 396.

North Carolina.— McDaniel *v.* Pollock, 87 N. C. 503; *Ex p.* Barton, 70 N. C. 134.

Tennessee.— Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

Texas.— Givens *v.* Blocker, 23 Tex. 633; Ford *v.* Williams, 6 Tex. 311.

Vermont.— Londonderry *v.* Babbitt, 54 Vt. 455.

Washington.— Leavitt *v.* Chambers, 16 Wash. 353, 47 Pac. 755.

See 9 Cent. Dig. tit. "Certiorari," § 64.

Action as substitute for application.— A prayer for general relief in an action seeking an injunction will not authorize the treatment of the action as an application for a certiorari. Insurance Co. of North America *v.* Bonner, 24 Colo. 220, 49 Pac. 366.

Lost petitions.— An application should not be dismissed on the ground that the court had ordered the same to issue at a previous term, when, by the carelessness of the opposite counsel, the petition had been mislaid and the issuing of the writ so prevented. Hopkins *v.* Suddeth, 18 Ga. 518.

Not waived by appearance.— The necessity of an application is not waived by appearance. Newell *v.* Hampton, 1 Marv. (Del.) 1, 40 Atl. 469.

Original affidavit on new application.— After an affidavit has been once indorsed with an allowance of the writ and filed with the clerk as required by statute, and the writ has issued, the same affidavit cannot serve as the basis for a second writ of certiorari in the same case. Sherwood *v.* Arnold, 80 Mich. 270, 45 N. W. 134.

Separate applications — When necessary.— Separate applications are necessary on behalf of a defendant who seeks the review of two cases against him by different plaintiffs not in privity, although by consent the cases were tried together. Haralson County *v.* Pittman, 105 Ga. 513, 31 S. E. 183. See also Davis *v.* Calhoun, 24 Ala. 437; Kennedy *v.* Farnsworth, 3 Humphr. (Tenn.) 242.

agent or attorney,[32] whether or not he represented the applicant in the proceeding below.[33]

3. Form[34] — a. In General. The application must conform to statutory requirements or rules of practice,[35] and particular allegations of wrong or injustice which are required by statute must be made,[36] unless in a case where such averments are clearly inapplicable.[37] The application must also set out with reasonable certainty[38] facts[39] showing illegal action below and consequent injury;[40] but if

32. Madison *v.* Piper, (Ida. 1898) 53 Pac. 395; State *v.* Napton, 24 Mont. 450, 62 Pac. 686; People *v.* Coleman, 41 Hun (N. Y.) 307.

The clerk of county commissioners who seek the writ on behalf of the county is within a statute authorizing the affidavit therefor to be made by the agent or attorney of the party. Lehigh County *v.* Yingling, 6 Pa. Co. Ct. 594.

Stranger.—A statute authorizing the oath to be made by the applicant or his agent does not permit the application to be made by a stranger to the judgment sought to be reviewed, although he describes himself as agent. Okerlind *v.* Fyke, 90 Ill. App. 192.

An affidavit by an attorney should show why it was not made by the party; but this omission may be supplied on motion to quash. Flanagan *v.* Murphy, 2 Wend. (N. Y.) 291. Such an affidavit, when made by the attorney who had charge of the proceedings, is sufficient, although it fail to state that affiant made it as the agent or attorney of plaintiff in certiorari. Scofield *v.* Cahoon, 31 Mich. 206.

An agent need not produce a power of attorney, or authority, for the purpose of obtaining a certiorari for his principal. Foster *v.* Blount, 1 Overt. (Tenn.) 343.

33. Ware *v.* Fambro, 67 Ga. 515.

34. For forms of petitions and affidavits for writ see the following cases:

Alabama.— Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947; *Ex p.* Boothe, 64 Ala. 312.

Arkansas.— McCoy *v.* Jackson County Ct., 21 Ark. 475.

California.— Ryan *v.* San Francisco Super. Ct., (Cal. 1888) 18 Pac. 598.

Georgia.— Macon *v.* Shaw, 16 Ga. 172.

Illinois.— Hermann *v.* Butler, 59 Ill. 225.

Louisiana. — Donaldsonville Ice Co. *v.* Schlitz Brewing Co., 104 La. 360, 29 So. 114.

Maine.— Levant *v.* Penobscot County, 67 Me. 429.

New York.— Matter of Mt. Morris Square, 2 Hill (N. Y.) 14.

North Carolina.— Lunceford *v.* McPherson, 48 N. C. 174.

Texas.— Bodman *v.* Harris, 20 Tex. 31; Martin *v.* Nix, 19 Tex. 93.

Vermont.— Sumner *v.* Hartland, 25 Vt. 641.

35. Order of presenting rulings.— In Michigan an affidavit asking a review of rulings should present them as they actually occurred, as in a bill of exceptions. It should not combine in one recital a series of detached rulings on points that were not connectedly presented. Knapp *v.* Gamsby, 47 Mich. 375, 11 N. W. 204.

Numbered paragraphs.— Certiorari is not a suit within the Georgia pleading act of 1893, requiring the allegations of pleadings to be set forth in numbered paragraphs. Royal *v.* McPhail, 97 Ga. 457, 25 S. E. 512.

36. Thus in Nova Scotia, an application to review a conviction under a liquor license act must state that the applicant did not violate the act. Reg. *v.* Power, 28 Nova Scotia 373; Reg. *v.* McDonald, 26 Nova Scotia 402.

Obligation to pay or receive more or less than due.— Where it is provided that no writ of certiorari shall be allowed unless the applicant shall make affidavit that the proceedings proposed to be removed are unjust and illegal, "and if not removed, will oblige the said applicant to pay more money to, or receive less from his opponent, than is justly due," an affidavit which merely alleges that the proceedings proposed to be removed are unjust and illegal is fatally defective. Benner *v.* Ducoing, 1 Browne (Pa.) 217.

37. Thus in a proceeding against road commissioners for neglect to repair, the affidavit need not contain the allegation prescribed by statute, i. e., that the proceeding would compel defendants "to pay more money than is justly due," when no money is to be paid by defendants in any event. Wilt *v.* Philadelphia, etc., Turnpike Co., 1 Brewst. (Pa.) 411.

38. Certainty required.— Where the denial of liability in the petition is in the nature of a plea *non est factum*, it must have such certainty that if false an indictment for perjury will lie. Wade *v.* Pratt, 12 Heisk. (Tenn.) 231. A general allegation that county commissioners were actuated by motives of gross partiality is too uncertain and indefinite. Minot *v.* Cumberland County, 28 Me. 121.

Description of order.— A petition for a writ of review to an order of the county court which recites that the order directed the county clerk to issue a warrant for the collection of delinquent taxes sufficiently described the order, although the date recited was not the true date of the order. Coos Bay Nav. Co. *v.* Coos County, 31 Oreg. 594, 47 Pac. 1101; Southern Oregon Co. *v.* Gage, 31 Oreg. 590, 47 Pac. 1101; Southern Oregon Co. *v.* Coos County, 30 Oreg. 250, 47 Pac. 852.

39. It is unnecessary to allege legal conclusions in addition to the facts. Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

40. *Alabama.*— *Ex p.* Buckley, 53 Ala. 42.

the application, although loosely drawn or somewhat obscure, discloses merits and that injustice has probably been suffered, the lack of precision may be disregarded.[41]

b. Entitling. The affidavit in support of the application must be properly entitled,[42] but dismissal of an application because it is improperly entitled will not preclude a renewal thereof on affidavits amended in that respect.[43]

c. Particular Averments — (I) *Party's Right to Prosecute* — (A) *In General.* The applicant must show that he occupies such a relation to the controversy as to entitle him to sue out the writ,[44] or that he has interests which will be injuriously affected by the proceedings sought to be reviewed;[45] and, where the writ only issues in such case, the petition must show on its face that the petitioner has no other mode of review.[46]

(B) *Excusing Failure to Pursue Other Remedy.* The application must present some sufficient reason for not resorting to appeal or some other appropriate and available remedy,[47] and must state facts showing the inability to take or per-

California.— Simon *v.* Superior Ct., (Cal. 1887) 13 Pac. 474.

Massachusetts.— Lees *v.* Childs, 17 Mass. 351.

Oregon.— Coos Bay Nav. Co. *v.* Coos County, 31 Oreg. 594, 47 Pac. 1101; Southern Oregon Co. *v.* Gage, 31 Oreg. 590, 47 Pac. 1101; Southern Oregon Co. *v.* Coos County, 30 Oreg. 250, 47 Pac. 852.

Tennessee.— Harris *v.* Gleghorn, 12 Lea (Tenn.) 381.

Texas.—Riley *v.* Runkle, 29 Tex. 92; Robinson *v.* Lakey, 19 Tex. 139; Johnson *v.* Lane, 12 Tex. 179; Ford *v.* Williams, 6 Tex. 311; Mays *v.* Lewis, 4 Tex. 1; Nelson *v.* Hart, (Tex. Civ. App. 1893) 23 S. W. 831; Wilson *v.* Griffin, 1 Tex. App. Civ. Cas. § 1313; Doughty *v.* Hale, 1 Tex. App. Civ. Cas. § 1251.

The petition should be complete in itself. — Omissions cannot be supplied by reference to the transcript. Coos Bay Nav. Co. *v.* Coos County, 31 Oreg. 594, 47 Pac. 1101; Southern Oregon Co. *v.* Gage, 31 Oreg. 590, 47 Pac. 1101; Southern Oregon Co. *v.* Coos County, 30 Oreg. 250, 47 Pac. 852. And in determining the sufficiency of a petition for certiorari it is improper to consider the facts contained in the transcript in opposition to the statements of the petition for certiorari. Richers *v.* Helmcamp, 1 Tex. App. Civ. Cas. § 682.

41. Murray *v.* Mariposa County, 23 Cal. 492; Jones *v.* Nold, 22 Tex. 379; Rollison *v.* Hope, 18 Tex. 446.

While there should be a reasonable degree of certainty in the petition, the degree required is not that extreme degree which is described as certainty to a certain intent, which rebuts every conclusion to the contrary. Jones *v.* Nold, 22 Tex. 379; McKensie *v.* Pitner, 19 Tex. 135.

42. *Ex p.* Bustin, 7 N. Brunsw. 211.

Entitling affidavit for certiorari to justice's court see AFFIDAVITS, 2 Cyc. 18, note 79.

Original caption.— In Louisiana the application is not considered a suit to be brought in the name of the state on the relation of the applicant, but should be presented in the name of the applicant, preserving the original caption of the suit. Donaldsonville Ice Co. *v.* Schlitz Brewing Co., 104 La. 360, 29 So. 114. And on an application to review forfeiture proceedings the affidavits may employ the same title as that used on such proceedings. Reg. *v.* Tobin, 14 Nova Scotia 305.

43. *Ex p.* Bustin, 7 N. Brunsw. 211.

44. Morse *v.* Williams, 92 Mich. 250, 52 N. W. 629.

Where a corporation is a party, an affidavit by its treasurer that, "I verily believe that I have good cause," etc., will be taken to have been made by him in his official capacity. Pioneer Co-operative Co. *v.* Eagle, etc., Mfg. Co., 67 Ga. 38.

45. Collins *v.* Keokuk, 108 Iowa 28, 78 N. W. 799; Iske *v.* Newton, 54 Iowa 586, 7 N. W. 13; Morse *v.* Williams, 92 Mich. 250, 52 N. W. 629; Fleming *v.* Kanawha County, 32 W. Va. 637, 9 S. E. 867.

A general allegation of injury is insufficient. State *v.* Lockhart, 18 Wash. 531, 52 Pac. 315.

Sufficient showing.— In an application for a writ of certiorari to review the action of a county board in calling an election under the local option law, averments that applicant was a retail liquor dealer at the time complained of; that he had large property which would greatly deteriorate in value should an election result in prohibiting the sale of liquors; and that the city council had refused him license on the sole ground that the election resulted in such prohibition, sufficiently show an injury peculiar to applicant to entitle him to a writ of certiorari to test the legality of the call for the election. Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

46. State *v.* Olson, 56 Minn. 210, 57 N. W. 477.

47. *Colorado.*— Small *v.* Bischelberger, 7 Colo. 563, 4 Pac. 1195; Wood *v.* Lake, 3 Colo. App. 284, 33 Pac. 80.

Illinois.— Doan *v.* Sibbit, 61 Ill. 485.

Michigan.— Detroit, etc., R. Co. *v.* Graham, 46 Mich. 642.

North Carolina.— *Ex p.* Barton, 70 N. C. 134; Bledsoe *v.* Snow, 48 N. C. 99; McMillan *v.* Smith, 4 N. C. 173.

fect an appeal in time,[48] except where appeal is a concurrent remedy.[49] Likewise some sufficient reason must be shown why the application is not made to a superior court of concurrent jurisdiction.[50]

(II) *Grounds For Issue*—(A) *In General.* General allegations of error are ordinarily insufficient, and the particular errors complained of and relied on should be distinctly set forth.[51] If, however, the petition clearly states the grounds of complaint, the fact that it sets forth other immaterial grounds is unimportant.[52]

(B) *Want of Jurisdiction.* If the application is based on want or excess of jurisdiction, such facts must be set out that the court may see that there is just ground of complaint.[53]

Tennessee.— Harris *v.* Gleghorn, 12 Lea (Tenn.) 381; Trigg *v.* Boyce, 4 Hayw. (Tenn.) 100; Henderson *v.* Lackey, 2 Overt. (Tenn.) 109.

See 9 Cent. Dig. tit. "Certiorari," § 72.

The presentation of inconsistent reasons will not excuse the omission to take an appeal. O'Hara *v.* O'Brien, 4 Ill. App. 154, where the petitioner alleged that he did not know that a judgment had been rendered against him until too late to take an appeal; and that the judgment creditor, by false representations, led petitioner to believe that the judgment would not be enforced.

48. Wood *v.* Lake, 3 Colo. App. 284, 33 Pac. 80; Copeland *v.* Cox, 5 Heisk. (Tenn.) 171.

An allegation that the execution was the first reliable knowledge that defendant had of the judgment is insufficient. Gillam *v.* Looney, 1 Heisk. (Tenn.) 319.

That "petitioner lived too far in the country, and could not be notified in time of the result of the trial" is insufficient. Wallerath *v.* Kapp, 31 Tex. 359.

49. Poag *v.* Rowe, 16 Tex. 590.

50. Gallardo *v.* Hannah, 49 Cal. 136; Edwards *v.* Ryan, 45 Cal. 243.

51. *Colorado.*— Small *v.* Bischelberger, 7 Colo. 563, 4 Pac. 1195; Wood *v.* Lake, 3 Colo. App. 284, 33 Pac. 80.

Georgia.— Taft Co. *v.* Smith, 112 Ga. 196, 37 S. E. 424; Papworth *v.* Fitzgerald, 111 Ga. 54, 36 S. E. 311.

Iowa.— Chambers *v.* Lewis, 9 Iowa 583.

Michigan.— Witherspoon *v.* Clegg, 42 Mich. 484, 4 N. W. 209; Case *v.* Frey, 24 Mich. 251; Davison *v.* Otis, 24 Mich. 23; Welch *v.* Bagg, 12 Mich. 41; Fowler *v.* Detroit, etc., R. Co., 7 Mich. 79. And see Hinkley *v.* Weatherwax, 35 Mich. 510; Parsons *v.* Dickinson, 23 Mich. 56.

New Jersey.—Holmes *v.* Williams, 3 N. J. L. 518; Baker *v.* Moore, 3 N. J. L. 517.

New York.— People *v.* Scannell, 56 N. Y. App. Div. 51, 67 N. Y. Suppl. 433.

North Carolina.— McDaniel *v.* Pollock, 87 N. C. 503.

Oregon.— School Dist. No. 116 *v.* Irwin, 34 Oreg. 431, 56 Pac. 413; Coos Bay Nav. Co. *v.* Coos County, 31 Oreg. 594, 47 Pac. 1101; Southern Oregon Co. *v.* Gage, 31 Oreg. 590, 47 Pac. 1101; Southern Oregon Co. *v.* Coos County, 30 Oreg. 250, 47 Pac. 852.

Tennessee.— Lyles *v.* Cox, 10 Lea (Tenn.) 738.

Texas.— Haley *v.* Villeneuve, 11 Tex. 617; Clay *v.* Clay, 7 Tex. 25; Carroll *v.* Booth, 2 Tex. Unrep. Cas. 326.

Wisconsin.— Woodle *v.* Houghton, 1 Pinn. (Wis.) 549.

See 9 Cent. Dig. tit. "Certiorari," § 70.

A statement of all the points relied on for error is not necessary, when the errors relied on sufficiently appear from the proceedings set forth in the affidavit. People *v.* Columbia, 6 Wend. (N. Y.) 544.

In Illinois, where an application for a writ of certiorari is made in due form, and an interpolation of the record is alleged, the practice is to grant the writ without regard to the materiality of the grounds on which it is asked. Reed *v.* Curry, 40 Ill. 73.

In Louisiana an application to the supreme court to review the decision of a court of appeals must not only assign the particular grounds of complaint, but must also specify where, in the applicant's view, the decision complained of departs from the jurisdiction. Henkle *v.* Bussey, 50 La. Ann. 1135, 24 So. 240.

In Maine it is necessary that the petition should allege that the irregularities and errors specified appear by the record which it is sought to quash. Emery *v.* Brann, 67 Me. 39.

52. People *v.* McComber, 7 N. Y. Suppl. 71, 24 N. Y. St. 902.

Facts dehors the record cannot be shown. Ross *v.* Ellsworth, 49 Me. 417.

53. *California.*— Marsh *v.* San Francisco Super. Ct., 88 Cal. 595, 26 Pac. 962; Merrick *v.* San Francisco Super. Ct., (Cal. 1887) 15 Pac. 47; Brandon *v.* Superior Ct., (Cal. 1886) 11 Pac. 128; Johnson *v.* San Francisco Super. Ct., 60 Cal. 578; Cunningham *v.* Santa Cruz County Super. Ct., 60 Cal. 576; Wratten *v.* Wilson, 22 Cal. 465.

Georgia.— Cowart *v.* Revere, 47 Ga. 9.

Iowa.— Yeomans *v.* Riddle, 84 Iowa 147, 50 N. W. 886.

Maine.— Sumner *v.* Oxford County, 37 Me. 112.

Maryland.— Weed *v.* Lewis, 80 Md. 126, 30 Atl. 610.

Tennessee.— O'Sullivan *v.* Larry, 2 Head (Tenn.) 54.

Texas.— Perry *v.* Lovett, 24 Tex. 359.

See 9 Cent. Dig. tit. "Certiorari," § 71.

(III) *Rendition of Judgment.* A petition for a certiorari as a writ of false judgment must show that a judgment was rendered.[54]

(IV) *Setting Out Evidence.* If it is complained that the determination was contrary to the evidence, all[55] the evidence introduced below should be substantially set out,[56] and the petition should allege that the facts recited as proved on the trial were all the facts proved.[57]

d. Merits — Good Faith. The applicant must show a *prima facie* case of merits,[58] and his means of establishing them on another trial, so that it may appear that the determination complained of will be probably changed.[59] He is ordinarily required, moreover, to present an affidavit of good faith or of merits,[60] and in such a case the failure to present a sufficient affidavit of this nature will warrant the refusal of the application.[61] It will be sufficient, however, if the affidavit substantially conforms to the requirements of the statute.[62]

A statement that the inferior court was without jurisdiction is a mere legal conclusion. Coos Bay Nav. Co. *v.* Coos County, 31 Oreg. 594, 47 Pac. 1101; Southern Oregon Co. *v.* Gage, 31 Oreg. 590, 47 Pac. 1101; Southern Oregon Co. *v.* Coos County, 30 Oreg. 250, 47 Pac. 852.

Disqualification of judge.— An original application for a writ of certiorari to bring up the proceedings of a justice of the peace on the ground that the circuit judge was disqualified by relationship to the petitioner should show how he was related. *Ex p.* Allston, 17 Ark. 580.

54. *Ex p.* Barton, 70 N. C. 134.

The nature and amount of the judgment and against whom it was rendered should be stated. Boyd *v.* Clark, 21 Tex. 426.

55. The petition must state all the facts in evidence on the trial. A statement of the material facts proved is insufficient. Doughty *v.* Hale, 1 Tex. App. Civ. Cas. § 1251.

56. Hayes *v.* Lithonia, 94 Ga. 552, 20 S. E. 426; Perry *v.* Lovett, 24 Tex. 359; Jones *v.* Nold, 22 Tex. 379; Woodle *v.* Houghton, 1 Pinn. (Wis.) 549.

Stating facts expected to be proved.— The rejection of evidence can be no ground for a certiorari, on error, unless the petition sets forth the facts expected to be proved, so that the materiality of the rejected evidence can appear. Bodman *v.* Harris, 20 Tex. 31.

57. Givens *v.* Blocker, 23 Tex. 633.

Sufficiency.— Where the petition for certiorari purports to report the evidence introduced by either party at the trial, and states that there is no proof to support the account sued on, it is sufficient, although it omit to state that there was no other evidence. Rollison *v.* Hope, 18 Tex. 446. And an allegation "and there was no other evidence before the court on the trial of said cause" clearly imports that the petition purports to, and does, set out all the evidence adduced on the trial. Stuart *v.* Mau, 2 Tex. App. Civ. Cas. § 784. So a petition setting out the facts proved by plaintiff and averring that defendant offered no evidence controverting such facts is sufficient, although it does not purport to state all the testimony that was introduced. Hagood *v.* Grimes, 24 Tex. 15.

58. March *v.* Thomas, 63 N. C. 249; Jones *v.* Nold, 22 Tex. 379; King *v.* Longcope, 7 Tex. 236; State *v.* Lockhart, 18 Wash. 531, 52 Pac. 315.

Merits need not be shown where the review is sought for want of jurisdiction. Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947.

59. Bodman *v.* Harris, 20 Tex. 31.

60. In New Jersey the affidavit is not required. Penny *v.* Harrison, 14 N. J. L. 24.

Where defendant is not able to give security for an appeal, he is entitled to a certiorari, without showing any merits in fact, where the case discloses that there were questions of law which he had a right to have decided by the superior court. Britt *v.* Patterson, 31 N. C. 197.

61. *Arkansas.*— Gates *v.* Hayes, 69 Ark. 518, 64 S. W. 271.

Georgia.— Dorsey *v.* Black, 55 Ga. 315.

Minnesota.—Cunningham *v.* La Crosse, etc., Packet Co., 10 Minn. 299.

North Carolina.—Bledsoe *v.* Snow, 48 N. C. 99; Kelsey *v.* Jervis, 30 N. C. 451; Dougan *v.* Arnold, 15 N. C. 99.

Tennessee.— O'Sullivan *v.* Larry, 2 Head (Tenn.) 54; Henderson *v.* Lackey, 2 Overt. (Tenn.) 109.

See 9 Cent. Dig. tit. "Certiorari," § 76.

For form of affidavit of good faith see Velvin *v.* Austin, 109 Ga. 200, 34 S. E. 335.

Where there are several petitioners an affidavit of good faith stating merits made by one will not relieve the others from making affidavits of a similar character. Velvin *v.* Austin, 109 Ga. 200, 34 S. E. 335.

62. Ethridge *v.* Forsyth, 109 Ga. 156, 34 S. E. 308 (holding that averments, in an affidavit attached to a petition for certiorari, that the same is not filed for delay, and that affiant believes he has good cause for certiorari, are sufficient, although not stating that the petition is not filed for delay "only," and that affiant "verily" believes his petition is meritorious, in the language of the form prescribed by Ga. Civ. Code, § 4638); Howerton *v.* Henderson, 86 N. C. 718 (holding that the petition for certiorari as a substitute for appeal sufficiently states the merits of the case, where it is accompanied by a statement of the case presented to the court and was allowed to be read without objection); Day *v.* Southwell, 3 Wis. 657 (holding that an affidavit that in affiant's opinion "there is reasonable

e. Prayer. A general prayer for such remedy as the court shall deem meet and proper is sufficient.[63]

f. Signature and Verification. The application must be properly signed[64] and, if required to be verified, a proper verification is essential to authorize the issue of the writ;[65] but this may be made by any person who is conversant with the facts, as an agent[66] or attorney for the party,[67] or by a minor of sufficient discretion;[68] and while it has been held that a joint application should be verified by all,[69] the weight of authority is to the effect that in such a case a verification by one, on behalf of all the persons on whose behalf the petition is presented, will be sufficient.[70]

g. Exhibits. If a transcript of the record sought to be reviewed or a copy of the opinion or other papers or documents which are material to enable the court to judge of the propriety of issuing the writ is required to accompany or be made a part of the application, non-compliance with such requirement will invalidate the application.[71]

4. Presentation and Filing. The application for certiorari must be presented by the party seeking the writ or by his counsel,[72] and if so required, the petition, affidavit, and accompanying papers must be filed with the clerk or

ground," etc., is a substantial compliance with a requirement that the affidavit shall state that in affiant's "belief, there is reasonable cause," etc.).

63. Woodstock *v.* Gallup, 28 Vt. 587.

64. The petition is "signed" if the signature is to the affidavit. Neal *v.* Fox, 114 Ga. 164, 39 S. E. 860.

Subscription to affidavit.— Unless so required by statute the affidavit to the petition need not be subscribed by the affiant, but it will be sufficient if certified by the officer. Crist *v.* Parks, 19 Tex. 234.

65. Stebbins *v.* Butler, Minor (Ala.) 121; Paulk *v.* Hawkins, 106 Ga. 206, 32 S. E. 122; Outlaw *v.* Christy, 43 Ga. 269; Kaufman *v.* Elder, (Ind. App. 1899) 54 N. E. 766; Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

The statement of facts in the petition need not be verified. Ware *v.* Craven, 30 Ga. 35.

The oath may be administered by the clerk of the court. Jones *v.* Tomlinson, 8 Ala. 565; Rollison *v.* Hope, 18 Tex. 446.

Sufficient verification.—An affidavit to a petition for certiorari "that the material facts as set forth in the foregoing petition are true as they have come to his own knowledge; and the information of others concerning the facts, which has come to his knowledge, he believes to be true in like manner" was held to be sufficient. Rollison *v.* Hope, 18 Tex. 446.

66. Spinks *v.* Mathews, 80 Tex. 373, 15 S. W. 1101.

Statutory provisions requiring application to be made on affidavit by the party beneficially interested, and permitting the verification of all complaints by the agent of such a party, contemplate that the application should be made by the party beneficially interested, but that the affidavit in support thereof might be made by any one conversant with the facts. State *v.* Napton, 24 Mont. 450, 62 Pac. 686.

67. Madison *v.* Piper, (Ida. 1898) 53 Pac. 395.

An attorney or agent must state his knowledge of the facts. Madison *v.* Piper, (Ida. 1898) 53 Pac. 395. A verification by an agent to the effect that the allegations "are true and correct to the best of his knowledge and belief" is insufficient. Spinks *v.* Mathews, 80 Tex. 373, 15 S. W. 1101.

68. Bowers *v.* Kanaday, 94 Ga. 209, 21 S. E. 458.

69. Velvin *v.* Austin, 109 Ga. 200, 34 S. E. 335.

70. People *v.* Coleman, 41 Hun (N. Y.) 307; Dwiggins *v.* Robertson, 1 Overt. (Tenn.) 81. And see People *v.* Cheetham, 45 Hun (N. Y.) 6.

71. *Arkansas.*— Hornor *v.* O'Shields, 33 Ark. 117; *Ex p.* Good, 19 Ark. 410.

Colorado.— Ingersoll *v.* Court of Appeals, 27 Colo. 410, 61 Pac. 594.

Louisiana.— Brown Shoe Co. *v.* Hill, 51 La. Ann. 920, 25 So. 634.

Montana.— State *v.* Second Judicial Dist. Ct., (Mont. 1902) 67 Pac. 114.

Virginia.— Triplett *v.* Tyler, 4 Hen. & M. (Va.) 413.

Canada.— *Ex p.* Emmerson, 33 N. Brunsw. 425.

See 9 Cent. Dig. tit. "Certiorari," § 81.

All record evidence relied on should be brought before the court as exhibits in the shape of certified or authenticated copies, and not by mere recitals of its existence. Hewitt *v.* Oakland County Probate Judge, 67 Mich. 1, 34 N. W. 248; Cronin *v.* Kalkaska County, 58 Mich. 448, 25 N. W. 393.

Statement as substitute for copy.—A statement that defendant was "served with the paper writing or minute, . . . of the conviction or judgment made by the said stipendiary magistrate," etc., is not a substitute for a copy of the opinion. Reg. *v.* Wells, 28 Nova Scotia 547.

72. State *v.* Second Judicial Dist. Ct., 24 Mont. 238, 61 Pac. 309, where it was stated to be improper for the clerk to present the application at the request of the relator.

other designated officer,[73] before the hearing,[74] or within the time prescribed therefor by law.[75]

5. Objections — a. In General. Objections to the application are too late when made after the writ has issued and return thereon,[76] and irregularities in suing out the writ or defects in the petition will not authorize a dismissal, where a trial *de novo* is to be had.[77] A demurrer to the petition can be predicated only upon matters appearing therein.[78] In some jurisdictions by rule of court, on overruling a demurrer to the petition, the writ will issue without leave to answer.[79]

b. Waiver. Defects or irregularities may be waived by failure to object seasonably[80] or to specifically point out the defect;[81] or by filing an answer.[82]

6. Amendments — a. In General. Amendments to a petition for a certiorari should be granted with caution,[83] but they have been permitted so as to include an allegation of facts sufficient to raise the question of inequality in an assessment[84] and the addition of a seal to the jurat by the officer who administered the oath to the petitioner;[85] and a supplemental affidavit has been permitted to be filed for the purpose of explaining why the original was made by the attorney of the party, instead of by the party himself.[86] The applicant will not be precluded because of delay in moving to amend, where the respondent delayed the filing of the return, at which time the petitioner was first apprised of the insufficiency of his petition, and the respondent was not injured by the delay.[87] On the other hand amendments have been refused to supply omissions or cure defects,[88] and an amendment will not be granted if it will not render the petition sufficient to justify the writ,[89] or to add new grounds on final judgment after all the evidence on the issues raised has been taken.[90]

b. New Application. A new application for a writ of certiorari may be entertained by the court where an affidavit defective in form has been amended;[91]

73. People *v.* Judges Cass County Cir. Ct., 2 Dougl. (Mich.) 116; *Ex p.* Ryan, 24 N. Brunsw. 528; Reg. *v.* Tobin, 14 Nova Scotia 305.

In Ontario, on removal of a cause to the superior court at Toronto, the papers must be filed in the crown office at that place. Chambers *v.* Chambers, 3 Ont. L. J. 205.

The absence of a file-mark from a petition which has been filed in fact may be disregarded. Harlow *v.* Rosser, 28 Ga. 219.

74. Reg. *v.* Tobin, 14 Nova Scotia 305. In Erwin *v.* Erwin, 14 N. C. 528, the applicant within seven days after the term at which judgment was entered mailed his application to the clerk, who failed to receive it, owing to miscarriage in the mails, and it was held that inquiries made three terms after that at which judgment was rendered were not sufficient to entitle applicant to the writ at the third term.

75. In Georgia the petition may be filed at any time within three months from the date of the judgment. Carson *v.* Forsyth, 97 Ga. 258, 22 S. E. 955.

76. Highway Com'rs *v.* Hoblit, 19 Ill. App. 259; Reg. *v.* Major, 29 Nova Scotia 373.

77. Wright *v.* Hurt, 92 Ala. 591, 9 So. 386; Van Eppes *v.* Smith, 21 Ala. 317. And see Casey *v.* Briant, 1 Stew. & P. (Ala.) 51.

78. Collins *v.* Davis, 57 Iowa 256, 10 N. W. 643.

79. Stewart *v.* San Diego County Super. Ct., 101 Cal. 594, 36 Pac. 100.

80. Omission to raise objections until after the return-term is a tacit admission of the sufficiency of the petition to remove the cause. Hodge *v.* Dillon, Cooke (Tenn.) 278.

81. Hail *v.* Magale, 1 Tex. App. Civ. Cas. § 852.

82. Taylor *v.* Gay, 20 Ga. 77.

83. Steel *v.* West, 7 Humphr. (Tenn.) 108.

84. People *v.* Feitner, 58 N. Y. App. Div. 343, 68 N. Y. Suppl. 1058.

85. Hail *v.* Magale, 1 Tex. App. Civ. Cas. § 852.

86. Although the time within which an original affidavit might have been filed had expired. Dickson *v.* Seelye, 6 Johns. (N. Y.) 327.

87. People *v.* Feitner, 58 N. Y. App. Div. 343, 68 N. Y. Suppl. 1058.

88. Western, etc., R. Co. *v.* Jackson, 81 Ga. 478, 8 S. E. 209 (failure to set forth grounds of error); Norris *v.* Rhodes, 25 Tex. 625; Gunter *v.* Jarvis, 25 Tex. 581.

89. Oldham *v.* Sparks, 28 Tex. 425.

Where judgment was rendered against a wife alone and her husband applied for certiorari in his own name, the fact that the wife filed a new petition after the expiration of six months, within which the writ could have been granted, in which she appeared as petitioner, will not cure the defect in the first petition, since the second was a new petition by a new petitioner, and was filed too late. Okerlind *v.* Fyke, 90 Ill. App. 192.

90. People *v.* Barker, 14 Misc. (N. Y.) 586, 36 N. Y. Suppl. 725, 71 N. Y. St. 736.

91. *Ex p.* Bustin, 7 N. Brunsw. 211.

but a second application cannot be entertained where the first application has been heard and refused.[92]

F. Notice of Application or Hearing — 1. NECESSITY OF. As a rule, except in those cases where the writ may issue *ex parte*, the adverse party and others entitled to be heard should be given sufficient notice of the making or filing of the application or of the hearing[93] within the time prescribed,[94] especially where the effect of the writ is to stay proceedings;[95] but the right to notice may be waived[96] by appearance and going to a hearing on the merits.[97] There are holdings, however, to the effect that no notice is necessary,[98] but that in its discretion the court may grant the writ in the first instance, or require notice or a rule to show cause.[99]

2. SERVICE OF. Service of the notice may be made by any person,[1] and it seems, upon the attorney who represented the adverse party in the proceedings sought to be reviewed.[2]

G. Answer — 1. Necessity of. No answer is necessary, if no provision therefor exists,[3] and an answer filed to an original petition will suffice as an answer to an amended petition which is substantially the same.[4]

2. SUFFICIENCY OF. The answer should state the facts proven, and the rulings

92. *Ex p.* Abell, 19 N. Brunsw. 2.

93. *Alabama.*— *Ex p.* Buckley, 53 Ala. 42.

California.— Pollock *v.* Cummings, 38 Cal. 683.

Massachusetts.— Worcester, etc., R. Co. *v.* Railroad Com'rs, 118 Mass. 561; Com. *v.* Downing, 6 Mass. 72.

Mississippi.— Copeland *v.* Pate, 6 How. (Miss.) 275.

New York.— People *v.* Highway Com'rs, 2 Code Rep. (N. Y.) 54.

North Carolina.— Keerans *v.* Keerans, 109 N. C. 101, 13 S. E. 895.

South Carolina.— State *v.* Senft, 2 Hill (S. C.) 367.

Tennessee.— McDowell *v.* Keller, 1 Heisk. (Tenn.) 449.

Washington.— Leavitt *v.* Chambers, 16 Wash. 353, 47 Pac. 755.

Canada.— *Ex p.* Howell, 6 N. Brunsw. 584; McDonald *v.* Ronan, 19 Nova Scotia 25; Reg. *v.* McAllan, 45 U. C. Q. B. 402; Reg. *v.* Ellis, 25 U. C. Q. B. 324; Reg. *v.* Peterman, 23 U. C. Q. B. 516. See also *Ex p.* Leighton, 33 N. Brunsw. 606; *Ex p.* Doherty, 26 N. Brunsw. 390.

See 9 Cent. Dig. tit. "Certiorari," § 85.

Sufficiency of notice.— The grounds of the application should be stated in the summons. Reg. *v.* Beale, 11 Manitoba 448. But the notice need not be accompanied with a copy of the petition or of the record below. Johnson *v.* Martin, 25 Ga. 268. The entitling of a rule *nisi* sufficiently shows the court in which the motion was made. Matter of Barnett, 28 U. C. Q. B. 559. The court has no power to amend an insufficient notice. Reg. *v.* Starkey, 6 Manitoba 588.

94. Sanders *v.* Thompson, 114 N. C. 282, 19 S. E. 225; *Re* Plunkett, 3 Brit. Col. 484. See also *Ex p.* Gates, 23 L. C. Jur. 62, 9 Rev. Lég. 628, to the effect that there must be one clear day's notice.

The provision of the Georgia code, that twenty days' notice shall be given, applies only to proceedings to review the determination of the county court. Macon *v.* Shaw, 16 Ga. 172.

95. Albany Water Works *v.* Albany Mayor's Ct., 12 Wend. (N. Y.) 292.

96. Reg. *v.* Whitaker, 24 Ont. 437.

97. Smith *v.* Parker, 25 Ark. 518; Dew *v.* True, 19 Me. 46; Legate *v.* Ward, 5 Coldw. (Tenn.) 451. *Contra,* Granade *v.* Wood, 34 Ga. 120.

Where defendant's appearance is the only evidence of service of notice of the filing and pendency of the petition, the motion to dismiss the petition for certiorari may be made at the term at which defendant appears. McDowell *v.* Keller, 1 Heisk. (Tenn.) 449.

98. State *v.* New Brunswick, 1 N. J. L. 450; Matter of Woodbine St., 17 Abb. Pr. (N. Y.) 112; Gardner *v.* Highway Com'rs, 10 How. Pr. (N. Y.) 181.

If the application is made by the prosecutor in a crown case no notice to the convicting tribunal is necessary. Reg. *v.* Caswell, 33 U. C. Q. B. 303; Reg. *v.* Murray, 27 U. C. Q. B. 134; Marcotte *v.* St. Casimir, 11 Quebec Super. Ct. 282.

One reason assigned for dispensing with notice is that the improvident issue of the writ is a matter of defense which can be availed of on the return. State *v.* New Brunswick, 1 N. J. L. 450.

99. State *v.* Morris Canal, etc., Co., 12 N. J. L. 365; State *v.* Moore, 23 Wash. 276, 62 Pac. 769.

For form of order to show cause see State *v.* Moore, 54 S. C. 556, 32 S. E. 700.

1. Lyman *v.* Burlington, 22 Vt. 131.

Bailiff must prove service under oath. *Ex p.* Adams, 10 L. C. Jur. 176. *Contra,* *Ex p.* Roy, 7 L. C. Jur. 109.

2. Even though such attorney has actually settled with his client and received his discharge. Barfield *v.* McCombs, 89 Ga. 799, 15 S. E. 666.

3. Hastings *v.* Parker, 168 Mass. 445, 47 N. E. 194, where an application which was made to compel respondent to file an answer or suffer a default was refused on the ground that there was no statute or rule of court requiring an answer.

4. Brown *v.* Ellis, 26 Iowa 85.

made thereon so far as may be necessary to present the question of law sought to be revised,[5] and is insufficient where it raises issues of fact only,[6] or merely sets forth such matters as are deemed available as a defense.[7] Members of a board having custody and control of the record must answer jointly and not separately.[8]

H. Hearing — 1. In General — a. Matters Considered — (I) *In General.* The court may hear the merits of the case on the petition and answer, may examine the record and evidence below to determine the propriety of the proceedings below,[9] or may await the return of the proceedings below, before taking any action on the merits,[10] as where the petition is *ex parte* and presents a *prima facie* case;[11] but it has been held that questions of fact on which the jurisdiction depends will not be reviewed.[12]

(II) *Matters Dehors the Record.* While there are decisions that affidavits may be read, or other evidence received *dehors* the record,[13] and that where the ground of the application is the loss of a right to appeal, the court may consider an oral and disputed agreement to waive the provisions of the statute,[14] it is also held that where the whole case is before the court evidence extrinsic to the record cannot be heard,[15] unless on the question of whether or

5. Levant *v.* Penobscot County, 67 Me. 429; Fairbanks *v.* Fitchburg, 132 Mass. 42; Tewksbury *v.* Middlesex County, 117 Mass. 563.

An answer is sufficient, which alleges that the respondent has in good faith transferred the record to the proper custodian. State *v.* Moore, 54 S. C. 556, 32 S. E. 700.

It is irregular to state matters which may occur; but irregular averments in this respect may be stricken out. Fairbanks *v.* Fitchburg, 132 Mass. 42.

6. Chase *v.* Springfield, 119 Mass. 556; Tewksbury *v.* Middlesex County, 117 Mass. 563.

Immaterial questions.— Where it has been decided in the cause that the appointment of a guardian *ad litem* for minors is not necessary, an answer that defendant court set aside such judgment for the reason that no guardian had been appointed presents no material question of fact. Carpenter *v.* San Joaquin County Super. Ct., 77 Cal. 291, 19 Pac. 500.

7. Haven *v.* Essex County, 155 Mass. 467, 29 N. E. 1083.

8. Plymouth *v.* Plymouth County, 16 Gray (Mass.) 341.

Answer by successors in office.— If a petition to review the action of a board sets forth the record and alleges extrinsic facts, respondents may, in their answer, controvert such facts, or allege others which avoid their effect, although the persons composing the board at the time the order was passed, and when the answer is made, are not the same, if such facts must have been passed upon in passing the order and are within the knowledge of the persons making the answer. Fairbanks *v.* Fitchburg, 132 Mass. 42.

9. McClatchy *v.* Sacramento County Super. Ct., 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; Salt Lake Water, etc., Power Co. *v.* Salt Lake City, 24 Utah 282, 67 Pac. 791; Walbridge *v.* Walbridge, 46 Vt. 617.

The court will always look into the record before granting a certiorari, and even into the circumstances attending the process; because, when the record is actually returned in obedience to the writ of certiorari, they are bound to quash the whole proceedings if error should appear. *Ex p.* Weston, 11 Mass. 417.

10. *Ex p.* Dugan, 2 Wall. (U. S.) 134, 17 L. ed. 871.

11. Scroggins *v.* State, 55 Ga. 380; Ruff *v.* Phillips, 50 Ga. 130.

12. At least where the alleged error does not clearly appear. State *v.* Watkins, 49 La. Ann. 1056, 22 So. 326.

13. *Arkansas.*— By statute. Sumerow *v.* Johnson, 56 Ark. 85, 19 S. W. 114; Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559; Hickey *v.* Matthews, 43 Ark. 341.

Maine.— White *v.* Lincoln County, 70 Me. 317; Dresden *v.* Lincoln County, 62 Me. 365.

Massachusetts.— Noyes *v.* Springfield, 116 Mass. 87; Cobb *v.* Lucas, 15 Pick. (Mass.) 1.

New Hampshire.— Landaff's Petition, 34 N. H. 163.

New York.— Saratoga, etc., R. Co. *v.* McCoy, 5 How. Pr. (N. Y.) 378; People *v.* Queens County, 1 Hill (N. Y.) 195.

North Carolina.— Boing *v.* Raleigh, etc., R. Co., 88 N. C. 62; Holmes *v.* Holmes, 84 N. C. 833.

Amended and original petition.— The court may consider the amended as well as the original petition. Steel *v.* West, 7 Humphr. (Tenn.) 108.

14. Walton *v.* Pearson, 82 N. C. 464. But see Short *v.* Sparrow, 96 N. C. 348, 2 S. E. 233, holding that the court would not decide between conflicting affidavits assigning reasons why the appeal was not properly taken, or consider any agreement of counsel not reduced to writing or appearing in the record, as required by rule.

15. Levant *v.* Penobscot County, 67 Me. 429.

Contradiction of petition.— The court will not receive affidavits or parol evidence for the purpose of contradicting the petition, or consider an issue raised thereon. Citizens' St. R. Co. *v.* Heath, 154 Ind. 363, 55 N. E. 744.

not substantial justice was done below, or to show that the errors complained of were formal and technical.[16]

b. Admissions and Presumptions. All material facts which are well alleged in the petition, and not denied or put in issue by the answer, and all material facts alleged in the answer must be taken to be true.[17] It will not be presumed that the inferior court will exceed its jurisdiction.[18]

c. Reference. In its discretion the court may order a reference to ascertain disputed facts.[19]

2. Rehearing. A judgment refusing certiorari as a substitute for an appeal will not be vacated so as to enable petitioner to present additional affidavits which by due diligence he might have procured before the case was heard.[20]

I. Security — 1. In General — a. Necessity of. In the absence of statute, no bond or recognizance is necessary, or at least the requirement of security is discretionary,[21] and is insisted on only when the insolvency of the party or his departure from the jurisdiction is apprehended;[22] but a bond, undertaking, or other security required by law is a prerequisite to the issue of the writ,[23] and a

16. Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Rutland *v.* Worcester County, 20 Pick. (Mass.) 71; Cobb *v.* Lucas, 15 Pick. (Mass.) 1; Freitown *v.* Bristol County, 9 Pick. (Mass.) 46; Landaff's Petition, 34 N. H. 163. But see Emery *v.* Brann, 67 Me. 39, holding that on hearing of a petition for a writ to review proceedings in taking the disclosure of a debtor the petitioner cannot introduce evidence *dehors* the record to show error, fraud, or injustice.

17. Weed *v.* Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642.

The statements in an official answer are to be taken as true, not only in those parts which set out the record, and the acts of the board, within its jurisdiction, which do not appear in the record, but also those which allege extraneous facts which might have been traversed and perhaps controlled by evidence. Collins *v.* Holyoke, 146 Mass. 298, 15 N. E. 908; Dickinson *v.* Worcester, 138 Mass. 555.

18. Sayers *v.* San Francisco Super. Ct., 84 Cal. 642, 24 Pac. 296.

19. People *v.* Cholwell, 6 Abb. Pr. (N. Y.) 151.

20. Williamson *v.* Boykin, 104 N. C. 100, 10 S. E. 87.

21. Childress *v.* McGehee, Minor (Ala.) 131 (in cases of forcible entry and detainer); Overseers of Poor *v.* Overseers of Poor, 31 N. J. L. 366 (suit between townships to determine liability for pauper); Martin *v.* Hillyer, 11 N. J. L. 22 (holding that the New Jersey statute requiring a recognizance does not apply to forcible entry and detainer); Brittain *v.* Mull, 93 N. C. 490 (holding that certiorari as a substitute for an appeal may be allowed by the supreme court without an undertaking for costs); State *v.* Moore, 23 Wash. 276, 62 Pac. 769.

22. Hunter *v.* Hunter, T. U. P. Charlt. (Ga.) 303.

Security may be dispensed with although applicant will be unable to pay the costs if unsuccessful. Smith *v.* Williamson, 11 N. J. L. 315.

A non-resident applicant may be required to give security for costs and the proceedings may be stayed until the security is given. Scull *v.* Carhart, 15 N. J. L. 430.

One who leaves the state after obtaining a writ may be required to give security for prosecuting the case and for costs. Waller *v.* Broddie, 2 N. C. 38.

For form of order for security to prosecute writ see Roe *v.* Savannah, T. U. P. Charlt. (Ga.) 36.

23. *Georgia.*— Baker *v.* McDaniel, 87 Ga. 18, 13 S. E. 130.

New Jersey.— Sutton *v.* Overseers of Poor, 32 N. J. L. 295.

New York.— Gardner *v.* Kelly, 2 Sandf. (N. Y.) 632, 1 Code Rep. (N. Y.) 120.

North Carolina.—Weber *v.* Taylor, 66 N. C. 412; Estes *v.* Hairston, 12 N. C. 354.

Tennessee.— Love *v.* Hall, 3 Yerg. (Tenn.) 407.

Texas.— Buchanan *v.* Bilger, 64 Tex. 589; Holmes *v.* Holloway, 21 Tex. 658; Johnson *v.* McKissack, 20 Tex. 160; Mays *v.* Lewis, 4 Tex. 1.

Canada.— Halifax *v.* Leake, 14 Nova Scotia 142; *Ex p.* Doray, 6 Rev. Lég. 507; Thivierge *v.* Desilets, 5 Rev. de Jur. 176.

See 9 Cent. Dig. tit. "Certiorari," § 91.

A recognizance or bond of record will answer a statutory requirement of a bond. Kincaid *v.* Sharp, 3 Head (Tenn.) 150.

Future costs and damages.— The provision of the Georgia constitution permitting a certiorari to issue in the discretion of the court does not obviate the necessity for a bond for future costs and for the eventual condemnation money as required by the code. Outlaw *v.* Christy, 43 Ga. 269. Where there is no eventual condemnation money except the costs, the statute is substantially complied with if plaintiff in certiorari pays the accrued costs and gives bonds for all future costs. Holton *v.* Hendley, 75 Ga. 847.

Personal representative.— Hart Dig. Tex. art. 804, dispensing with security on appeals by personal representatives of decedents, does not exempt them from giving bond on certiorari. Reese *v.* Hamilton, 20 Tex. 668; Ledbetter *v.* Swing, 19 Tex. 242.

writ issued in the absence of the bond, undertaking, or other security required by statute is void.[24]

b. Who May Take. The security cannot be taken by an officer who has no authority.[25]

c. Form and Requisites[26]—(I) *In General.* The bond should describe the judgment sought to be reviewed,[27] recite from what court the writ was obtained, and be conditioned to perform the judgment of the reviewing court.[28] Where executed by an attorney in fact, his authority should appear in the record.[29]

(II) *Amount.* A requirement of a bond in double the amount in controversy is satisfied by a bond in double the amount of the judgment sought to revised,[30] and it has been held that the writ should not be dismissed because the penalty of the bond is less than that prescribed by the order for the writ.[31]

(III) *Seal.* A seal is essential,[32] unless its use has been dispensed with by statute.[33]

d. Approval. Failure of the inferior tribunal to accept or approve a certiorari bond will render void the issue of the writ,[34] and the judge of the superior court has no power to approve the bond by way of amendment.[35] It will be sufficient, however, if the bond duly executed and approved is incorporated in the record,[36] or if, although not formally approved, it is returned by the judge below in response to the writ.[37]

e. Filing. Unless the bond is filed within the time prescribed by statute, the writ cannot legally issue.[38]

f. Defects and Objections—(I) *In General.* A recognizance will not be

Where the certiorari is a substitute for appeal it is allowable only on the same security and justification as an appeal. Chastain *v.* Chastain, 87 N. C. 283.

24. Stover *v.* Doyle, 114 Ga. 85, 39 S. E. 939; Carpenter *v.* Southern R. Co., 112 Ga. 152, 37 S. E. 186; Wingard *v.* Southern R. Co., 109 Ga. 177, 34 S. E. 275; Hamilton *v.* Phenix Ins. Co., 107 Ga. 728, 33 S. E. 705.

25. **Delegation of authority.**— The judge who grants the writ has no power to authorize a commissioner to indorse on it the amount for which bail is filed, the name of the bail, and the date on which the same is allowed. Dennison *v.* Jack, 14 Nova Scotia 170, 1 Can. L. T. 663.

Clerk of inferior court.— Under a statute which requires that, when a certiorari is directed to the county court, the clerk of the court shall take security, as in cases of appeals, it is not the duty of the clerk of the court above to take such security before he issues the writ, but of the clerk of the county court, before he obeys the writ. Judges *v.* Washington, 12 N. C. 152.

The prothonotary of the common pleas has authority to take a recognizance of bail on certiorari. Clark *v.* McCormack, 2 Phila. (Pa.) 68, 13 Leg. Int. (Pa.) 52.

26. **For forms** of bond see Griffin *v.* Mortimer, 8 Wend. (N. Y.) 538; Molton *v.* Hooks, 10 N. C. 342; Dennison *v.* Jack, 14 Nova Scotia 172, 1 Can. L. T. 663.

27. **This may be done by reference** to the petition where the judgment is properly described. Seeligson *v.* Wilson, 58 Tex. 369.

A slight inaccuracy as to the amount of the judgment will not invalidate a bond which states the court where the judgment was rendered and its date and is otherwise correct. Hail *v.* Magale, 1 Tex. App. Civ. Cas. § 852.

28. **A condition to abide by and stand to the judgment** of the court is equivalent to a condition to perform the judgment. Molton *v.* Hooks, 10 N. C. 342.

Perform the judgment of the "district."— A bond reciting the procurement of the writ from the judge of a specified district and conditioned to perform the judgment of the "district" is sufficient in this respect. Harris *v.* Parker, (Tex. Civ. App. 1898) 46 S. W. 844.

29. Southern Express Co. *v.* Wheeler, 72 Ga. 210.

30. Davis *v.* Pinckney, 20 Tex. 340; King *v.* Longcope, 7 Tex. 236.

The costs of the litigation constitute no part of the amount in controversy. Davis *v.* Pinckney, 20 Tex. 340.

31. McClellan *v.* Allison, 19 Ala. 671.

32. Skinner *v.* McCarty, 2 Port. (Ala.) 19.

33. Courand *v.* Vollmer, 31 Tex. 397. See, generally, SEALS.

34. Stover *v.* Doyle, 114 Ga. 85, 39 S. E. 939; Wingard *v.* Southern R. Co., 109 Ga. 177, 34 S. E. 275; Hamilton *v.* Phenix Ins. Co., 107 Ga. 728, 33 S. E. 705; Lowe *v.* Wallace, 74 Ga. 402; Hester *v.* Keller, 74 Ga. 369; Hendrix *v.* Mason, 70 Ga. 523.

The record must show the acceptance and approval of the bond. Hester *v.* Keller, 74 Ga. 369.

35. Hamilton *v.* Phenix Ins. Co., 107 Ga. 728, 33 S. E. 705.

36. Kelly *v.* Jackson, 67 Ga. 274.

37. Watson *v.* State, 85 Ga. 237, 11 S. E. 610.

38. Baker *v.* McDaniel, 87 Ga. 18, 13 S. E. 130.

invalidated by mere irregularities[39] which may be supplied by intendment;[40] and unless timely objection is taken the defect will be deemed waived.[41]

(11) *AMENDMENT.* A bond or the like which is defective because of irregularities is amendable,[42] or the defects may be cured by the substitution of a new bond;[43] but if the defect is substantial, there can be no amendment[44] or new bond,[45] in the absence of statutory authority therefor. Under some circumstances, and where the applicant is not at fault, the omission of a bond may be supplied in the reviewing court.[46]

2. WHERE SEVERAL CAUSES REMOVED. While it has been held that it is improper to give but one bond to remove two cases tried at the same time,[47] or cases between different parties on a writ sued out by one who was a defendant in each case,[48] it has also been held that where the same defense exists to judgments obtained in a number of cases a single bond is unobjectionable.[49]

3. APPLICATION IN FORMA PAUPERIS. If the applicant is unable from poverty to furnish the required security, the writ may be sued out *in forma pauperis;*[50] but the application for leave to sue out the writ must contain sufficient information as to the applicant's poverty and the nature and extent of the claim to enable the court to exercise a sound discretion in the matter.[51]

J. Allowance of Writ — 1. NECESSITY OF. Except where the writ may issue, of course,[52] the writ must be issued by the court or, when issued by the clerk or

Presumption from record.— If the bond properly executed is incorporated in the record, it will be taken to have been filed in time. Kelly *v.* Jackson, 67 Ga. 274.

39. Attorney as surety.— Although it is irregular for an attorney to become surety on a recognizance without leave of the court as required by rule, a writ issued on a recognizance in which an attorney who had not obtained leave is sole surety will not be quashed. McLaughlin *v.* Sentman, 2 Pennew. (Del.) 565, 47 Atl. 1014.

40. Kincaid *v.* Sharp, 3 Head (Tenn.) 150, where the recognizance was to pay and satisfy whatever judgment the court might render in the case.

41. Cooper *v.* Maddan, 6 Ala. 431.

Must be taken at the first term to which the writ is returnable. Smith *v.* Hearne, 2 Stew. & P. (Ala.) 81; Howth *v.* Shumard, (Tex. Civ. App. 1897) 40 S. W. 1079.

On a motion to quash a bond for irregularity, an objection that bail should have been given and not a bond is untenable. Tupper *v.* Murphy, 15 Nova Scotia 173.

42. Hoare *v.* Harris, 14 Ill. 35; Lima *v.* Pinkston, 1 Overt. (Tenn.) 344; Berry *v.* Martin, 6 Tex. 264.

43. Davis *v.* Calhoun, 24 Ala. 437; McClellan *v.* Allison, 19 Ala. 671; Jennings *v.* Pray, 8 Yerg. (Tenn.) 84; Edmiston *v.* Edwards, 31 Tex. 172.

If the party unreasonably neglect to furnish a new bond after being required to do so by the court, the certiorari may be dismissed. Johnson *v.* McKissack, 20 Tex. 160. And see Davis *v.* Calhoun, 24 Ala. 437; McClellan *v.* Allison, 19 Ala. 671.

44. Perry *v.* Benner, Morr. (Iowa) 340.

45. Harris *v.* Parker, (Tex. Civ. App. 1898) 46 S. W. 844.

46. Rosseau *v.* Thornberry, 4 N. C. 326.

47. Smith *v.* Hearne, 2 Stew. & P. (Ala.) 81.

48. Davis *v.* Calhoun, 24 Ala. 437.

49. Cooper *v.* Maddan, 6 Ala. 431.

50. Gardner *v.* Barger, 4 Heisk. (Tenn.) 668. *Contra,* Holmes *v.* Holloway, 21 Tex. 658.

Affidavit by attorney.— Ga. Code, § 3984, does not permit the affidavit in an application for leave to sue out the writ to be made for a party by an attorney at law. Selma, etc., R. Co. *v.* Tyson, 48 Ga. 351.

51. Sears *v.* Tindall, 15 N. J. L. 399.

By guardian.— An affidavit by a deponent, whose name is followed by the word "guardian," without stating for whom she is such guardian, which deposes that "she is advised and believes that she has good cause for certioraring the proceedings to the superior court, and that, owing to her poverty, as guardian, etc., she is unable to pay the costs or give the security as required by law," is not a sufficient "pauper affidavit" to support a petition for certiorari sued out by affiant as guardian for named persons against a named defendant. Reese *v.* Ryals, 112 Ga. 910, 38 S. E. 345.

By partnership.— Where an affidavit to a petition for certiorari, sued out by a partnership, was made by one member of the firm, who deposed "that he is advised and believes that he has good cause for 'certioraring' the proceedings to the superior court, and that, owing to his poverty he is unable to pay the costs and give security as required by law," there was no error in dismissing the certiorari, on the ground that the affidavit did not show that the firm was unable to pay the costs and give the bond required by law. Marlow *v.* Hughes Lumber Co., 92 Ga. 554, 17 S. E. 922.

52. Ludlow *v.* Ludlow, 4 N. J. L. 451.

In Pennsylvania with the exception of a special class of cases the necessity of a special allocatur is dispensed with by statute. McGinnis *v.* Vernon, 67 Pa. St. 149; West Phil-

other duly authorized officer,[53] must be allowed by the proper court or judge;[54] but the court may refuse to quash the proceedings for the want of allowance of the writ, if upon examination it is apparent that it would have been allowed, or will be allowed, on a new application.[55]

2. Who May Allow — a. In General. The writ can be allowed only by the court in which the proceedings are to be brought, or by a judge, or an officer thereof, acting within his jurisdiction.[56]

adelphia's Case, 5 Watts & S. (Pa.) 281; Matter of Pittsburgh, 2 Watts & S. (Pa.) 320; West Pittston *v.* Dymond, 8 Kulp (Pa.) 12; Edwardsville *v.* Rice, 7 Kulp (Pa.) 432; *In re* Delaware County Turnpike Road, 4 Pa. Co. Ct. 101. A special allocatur is required in road cases removed from the Philadelphia quarter sessions, by the act of March 23, 1829, which was not repealed by the general road law of June 13, 1836, so as to permit the issue of the writ of course under the act of June 16, 1836. *In re* Thirty-fourth St., 81 Pa. St. 27; Philadelphia County Road Case, 3 Whart. (Pa.) 11.

53. In Kansas the act of 1850 empowers the clerk of the Kansas City court of common pleas to issue writs of certiorari. Hopkins *v.* Seiger, 53 Mo. 232.

In Massachusetts, by Mass. Stat. (1873), c. 355, the writ may issue from the clerk's office in any county. Boston, etc., R. Co. *v.* Hampden County, 116 Mass. 73.

54. *California.*— Matter of Eighth St., 40 Cal. 481.

Delaware.— Newell *v.* Hampton, 1 Marv. (Del.) 1, 40 Atl. 469.

Maryland.— Gaither *v.* Watkins, 66 Md. 576, 8 Atl. 464.

Michigan.— Young *v.* Kelsey, 46 Mich. 414, 9 N. W. 453; People *v.* Judges Cass Cir. Ct., 2 Dougl. (Mich.) 116.

New Hampshire.— State *v.* Bishop, 3 N. H. 312.

New Jersey.— State *v.* Newark, etc., Turnpike Co., 2 N. J. L. 318.

New York.— Comstock *v.* Porter, 5 Wend. (N. Y.) 98.

Pennsylvania.— Wallace *v.* Jameson, 179 Pa. St. 94, 36 Atl. 145; Freeman *v.* Franklin Tp. School Directors, 37 Pa. St. 385; Benner *v.* Ducoing, 1 Browne (Pa.) 217.

Tennessee.— McDowell *v.* Keller, 1 Heisk. (Tenn.) 449.

Texas.— Gaston *v.* Parker, 1 Tex. App. Civ. Cas. § 106.

Wisconsin.—Talbot *v.* White, 1 Wis. 444.

See 9 Cent. Dig. tit. "Certiorari," § 99.

A writ improperly allowed may be adopted by the proper court. Caledonian Co. *v.* Hoosick Falls, 7 Wend. (N. Y.) 508.

A writ issued by authority of a judge is of the same effect as if issued by the judge himself. Thorn *v.* Reed, 1 Ark. 480.

Where the sanction has been filed, but by neglect of the clerk the writ is not issued returnable to the next term, an order for its issue may be made at that term. Mitchell *v.* Simmons, 58 Ga. 166.

Time of allowance.— The writ may be allowed after rendition of the judgment but before it is enrolled. Mairs *v.* Sparks, 4 N. J. L. 429.

55. *In re* Thirty-fourth St., 81 Pa. St. 27.

56. *Alabama.*— Corner *v.* Corner, 3 Ala. 524.

Georgia.— Buchanan *v.* Jones, 12 Ga. '612.

Iowa.—State *v.* Buchanan County Dist. Ct., 84 Iowa 167, 50 N. W. 677.

New York.— Thompson *v.* Rockwood, 2 How. Pr. (N. Y.) 136; Starr *v.* Rochester, 6 Wend. (N. Y.) 564; People *v.* Seneca, 6 Wend. (N. Y.) 517.

South Carolina.— State *v.* Black, 34 S. C. 194, 13 S. E. 361.

In Maine the hearing and determination must be at *nisi prius*. Oxford *v.* Oxford County, 43 Me. 257.

In Massachusetts, Stat. (1873), c. 355, provides that the petition may be presented, heard, and determined in any county in term time or vacation. Boston, etc., R. Co. *v.* Hampden County, 116 Mass. 73.

In Tennessee the act of 1833 permitted two justices of the peace to grant a certiorari to remove a justice's judgment into the circuit court (Earl *v.* Rice, 10 Yerg. (Tenn.) 233), but not if the petition was addressed to a judge of that court (Vanleer *v.* Johnston, 8 Yerg. (Tenn.) 162; Duggan *v.* McKinney, 7 Yerg. (Tenn.) 21; Turner *v.* Farley, 3 Yerg. (Tenn.) 299; Taul *v.* Collinsworth, 2 Yerg. (Tenn.) 579).

Allowance by a judge disqualified by relationship is a nullity. Fellrath *v.* Gilder, 1 Tex. App. Civ. Cas. § 1060.

Allowance without authority.— The signing of a writ by a judge who has no authority to issue it, but only to "grant" it, is operative as his fiat. Hatter *v.* Eastland, 22 Ala. 688.

Constitutionality of special act.— An act authorizing a judge of an inferior court to sanction the writ is violative of a constitutional provision conferring exclusive power in that respect on the superior court; consequently the allowance of the writ by the former is a nullity. Kieve *v.* Ford, 111 Ga. 30, 36 S. E. 293.

Petition to another circuit.— Where a petition presented to the judge of another circuit failed to show that the judge to whom application should have been made was absent, the latter, on denying a motion made to dismiss on that ground, may certify his absence. Prescott *v.* Carter, 76 Ga. 103.

Presumption of jurisdiction.— An indorsement on the writ "allowed, security having been first given and filed," is sufficient to show jurisdiction to issue it. Corbett *v.* O'Dell, 16 Nova Scotia 144.

b. Court or Judge. Unless by statute,[57] a common-law writ of certiorari cannot be allowed or issued by a judge at chambers, but must be applied for and granted in open court;[58] but now as a rule the writ may be allowed or granted in vacation or at chambers or by an officer with authority to act as a judge at chambers.[59]

3. Order of Allowance[60]— a. In General. The rule or order must properly designate the parties,[61] and must show facts necessary to confer jurisdiction on the officer who granted it.[62]

b. Imposing Conditions. In granting the writ the court has no authority to extend its operations,[63] direct the course of procedure after removal,[64] change or alter the determination which is to be reviewed,[65] or change the venue,[66] and an order imposing improper conditions may be rescinded.[67] The court may, however, as a condition of granting the writ in matters of public importance, require prompt preparation and argument;[68] and where it entertains no doubt as to the

A statute authorizing the supreme court or any justice thereof to issue all writs necessary or proper to the complete exercise of the powers conferred empowers any justice of the court to issue a writ of certiorari. Territory *v.* Forrest, 1 Ariz. 49, 25 Pac. 527.

A statute limiting the powers of commissioners to matters within their county permits the allowance of a certiorari only by an officer residing within the county in which the judgment was rendered. People *v.* Seneca, 6 Wend. (N. Y.) 517.

57. By 5 Wm. & M. c. 11, the writ issued by rule of court during the term, and by any judge of the court during vacation. *In re* Dupas, 12 Manitoba 653. See also 2 Bacon Abr. tit. Certiorari (E).

58. People *v.* McDonald, 2 Hun (N. Y.) 70; People *v.* Cheritree, 4 Thomps. & C. (N. Y.) 289; People *v.* New York County, 57 How. Pr. (N. Y.) 467; Gardner *v.* Highway Com'rs, 10 How. Pr. (N. Y.) 181; Daget *v.* Alms House Com'rs, 2 How. Pr. (N. Y.) 256; Thompson *v.* Rockwood, 2 How. Pr. (N. Y.) 136; People *v.* Allegany County, 15 Wend. (N. Y.) 198; Bradner *v.* Superintendent of Poor, 9 Wend. (N. Y.) 433; Starr *v.* Rochester, 6 Wend. (N. Y.) 564; Rodman *v.* Austin, 7 N. C. 252; State *v.* Senft, 2 Hill (S. C.) 367.

In New Jersey it is said that this is the rule where it is sought to review the determination of special and extraordinary inferior jurisdictions, which affect the general public (State *v.* Hanford, 11 N. J. L. 71; State *v.* Vanderveer, 7 N. J. L. 38; Ludlow *v.* Ludlow, 4 N. J. L. 451), but that in matters touching private rights the writ might be issued by a judge at chambers to review the judgment of an ordinary tribunal (Sutton *v.* Overseers of Poor, 32 N. J. L. 295; State *v.* Hanford, 11 N. J. L. 71; Ludlow *v.* Ludlow, 4 N. J. L. 451).

Objection —When available.—An objection that the writ was improperly granted at chambers is available after an amendment to the return. People *v.* Cheritree, 4 Thomps. & C. (N. Y.) 289.

59. *Arizona.*— Territory *v.* Forrest, 1 Ariz. 49, 25 Pac. 527.

Massachusetts.— Boston, etc., R. Co. *v.* Hampden County, 116 Mass. 73.

Michigan.— Loder *v.* Littlefield, 39 Mich. 374.

New Jersey.— Overseers of Poor *v.* Overseers of Poor, 31 N. J. L. 366.

Ohio.— Gilliland *v.* Sellers, 2 Ohio St. 223.

Virginia.— Mackaboy *v.* Com., 2 Va. Cas. 268.

Wisconsin.—Smith *v.* Odell, 1 Pinn. (Wis.) 449.

United States.— Holmead *v.* Smith, 5 Cranch C. C. (U. S.) 343, 12 Fed. Cas. No. 6,630; U. S. *v.* Browning, 1 Cranch C. C. (U. S.) 500, 24 Fed. Cas. No. 14,674.

Canada.— *Ex p.* McNeil, 8 N. Brunsw. 493. *Contra, Ex p.* Irvine, 7 N. Brunsw. 516.

See 9 Cent. Dig. tit. "Certiorari," § 101.

By consent, in controversies involving small amounts, the motion may be made and the writ allowed at chambers. *In re* Dupas, 12 Manitoba 653.

Review of decision at chambers of same court.— A supreme court justice may allow a writ to review proceedings of the same court at chambers. People *v.* Kelly, 35 Barb. (N. Y.) 444, 13 Abb. Pr. (N. Y.) 405.

60. For form of allowance of writ see *Ex p.* Boothe, 64 Ala. 312; People *v.* Kelly, 35 Barb. (N. Y.) 444, 13 Abb. Pr. (N. Y.) 405.

61. A rule for a writ at the instance of overseers of the poor must name them individually. Overseers of Poor *v.* Bishop, 2 How. Pr. (N. Y.) 195.

62. Wallace *v.* King, 20 Nova Scotia 283, 8 Can. L. T. 449.

63. As by directing the restoration of one who sues out the writ to review his removal from office. Macon *v.* Shaw, 14 Ga. 162.

64. Copping *v.* McDonell, 5 U. C. Q. B. O. S. 311.

65. Gurr *v.* Gurr, 95 Ga. 559, 22 S. E. 304; Burke County *v.* Wimberly, 55 Ga. 570; Conover *v.* Devlin, 24 Barb. (N. Y.) 636, 26 Barb. (N. Y.) 429, 5 Abb. Pr. (N. Y.) 182, 14 How. Pr. (N. Y.) 182.

66. Patterson *v.* Smith, 14 U. C. C. P. 525.

67. As where the order improperly imposes costs for imposing the order. *Re* Rice, 20 Nova Scotia 437, 9 Can. L. T. 198.

68. State *v.* Citizens' Telephone Co., (N. J.

correctness of the proceedings below may annex as a condition that the writ shall not operate as a stay.[69]

4. Notice of Allowance — a. Necessity of. If notice of the sanction of the writ is required to be given by statute,[70] the writ may be dismissed for non-compliance therewith,[71] before the expiration of the time prescribed,[72] unless such notice is waived in writing.[73]

b. Sufficiency of. The notice must affirmatively show that the writ has been sanctioned;[74] but a substantial compliance with the requirements of the statute will be sufficient.[75]

K. The Writ — 1. Necessity of — a. In General. It is a rule of general application that the reviewing court has no jurisdiction to review the proceedings below, unless a writ has duly issued whereby the record of the proceedings is to be removed.[76] There are decisions, however, holding that a writ may be waived by voluntary appearance and submission of the questions at issue on an agreed statement of facts[77] or by filing the statements required by law and procuring a continuance.[78] It has also been held that, where a certiorari has been granted by a court without jurisdiction, the parties may agree to transfer the proceeding to

1886) 5 Atl. 274; Ewing *v.* Thompson, 43 Pa. St. 372.

69. Patchin *v.* Brooklyn, 13 Wend. (N. Y.) 664. But see Conover *v.* Devlin, 24 Barb. (N. Y.) 636, 26 Barb. (N. Y.) 429, 5 Abb. Pr. (N. Y.) 182, 14 How. Pr. (N. Y.) 348, denying the power to annex such a condition, or that it has any effect when made, especially when made after the allowance and service of the writ.

Effect of writ as supersedeas see *infra*, V, L.

70. Notice to sheriff.— Where defendant to an action in a city court traverses the sheriff's entry of service, and the issue is found against the traverse, and thereupon defendant sues out a writ of certiorari, designating as the adverse parties thereto the plaintiff in the original action and the sheriff, it is necessary that notice of the sanction of the writ of certiorari and of the time and place of hearing the same be given to the sheriff, and, in default of such notice to him, the certiorari will be dismissed, upon motion of the other defendant therein. Georgia, etc., R. Co. *v.* McElroy, 110 Ga. 316, 35 S. E. 297.

71. Bunn *v.* Henderson, 113 Ga. 609, 39 S. E. 78; O'Keefe *v.* Cotton, 102 Ga. 516, 27 S. E. 663; Franke *v.* May, 86 Ga. 659, 12 S. E. 1068; Bryans *v.* Mabry, 72 Ga. 208; Ayer *v.* Kirkland, 65 Ga. 303; Glenn *v.* Shearer, 44 Ga. 16; Price *v.* Munroe, 36 Ga. 523.

Insufficient substitutes.— Notice of the filing of the writ (Price *v.* Munroe, 36 Ga. 523), of the application therefor and its issue (Bryans *v.* Mabry, 72 Ga. 208; Ayer *v.* Kirkland, 65 Ga. 303), or the delivery of the original papers to the opposing council (Franke *v.* May, 86 Ga. 659, 12 S. E. 1068) is not a substitute for the notice required.

Merely mailing notice to an attorney for defendant in certiorari, without proof that the notice was actually received by him, is not sufficient evidence to show service of such notice. Butler *v.* Farley, 99 Ga. 631, 25 S. E. 853.

A copy of the order of allowance should be served with the writ, or at least the writ should have the allowance indorsed thereon. Mott *v.* Highway Com'rs, 19 Wend. (N. Y.) 640.

72. Bunn *v.* Henderson, 113 Ga. 609, 39 S. E. 78; O'Keefe *v.* Cotton, 102 Ga. 516, 27 S. E. 663.

73. Southern Express Co. *v.* Wheeler, 72 Ga. 210; New *v.* Le Hardy, 46 Ga. 616.

Sufficient waiver.— Acknowledgment of due or legal service is a sufficient waiver. Asher *v.* Cape, 95 Ga. 31, 22 S. E. 41. But a stipulation by defendant's attorney that "Written notice of the sanction of the writ of certiorari as prayed in this petition, and of the time and place of hearing, is waived, with the right reserved to move to dismiss," is not a waiver of the right of defendant to move to dismiss for want of such notice. Industrial Aid Assoc. *v.* Carlyle, 112 Ga. 689, 37 S. E. 990. In Carey *v.* Montgomery County, 19 Ohio 245, the court refused to strike the cause from the docket, although notice of the allowance of the writ and its issue was acknowledged the same day by defendant's attorneys, but no citation was served until the following day.

74. Bunn *v.* Henderson, 113 Ga. 609, 39 S. E. 78.

75. Ware *v.* Fambro, 67 Ga. 515; Milam *v.* Sproull, 36 Ga. 393.

76. McKay *v.* Jones, 30 Ark. 148; Dicus *v.* Bright, 23 Ark. 107; Derton *v.* Boyd, 21 Ark. 264; Deans *v.* Wilcoxon, 18 Fla. 531; Stemble *v.* Hewling, 2 Ohio St. 228; Brownell *v.* Skinner, Wright (Ohio) 682; Vance *v.* Goudy, Wright (Ohio) 307.

Consent to submit a case on the record presented with the petition will not supply the place of a proper writ. Rightor *v.* Gray, 23 Ark. 228.

If it is doubtful whether a writ issued, and an order for a further return has been taken without objection, the proceedings will not be dismissed, when the time within which a new writ could be procured has expired. Spencer *v.* Gill, 23 Ga. 8.

77. Groves *v.* Richmond, 56 Iowa 69, 8 N. W. 752.

78. Hatter *v.* Eastland, 22 Ala. 688.

the proper tribunal with the like effect as if it had been commenced in the latter court originally.[79]

b. Several Writs. A writ is not multifarious for bringing up different parts of the same proceedings,[80] but distinct determinations,[81] involving different rights and interests, or in which the parties to the record are not the same,[82] so that one judgment cannot be rendered, cannot be brought up by the same writ.[83]

2. Effect of Failure to Take Out After Allowance. Neglect to take out the writ within a reasonable time after its allowance will preclude the right to it.[84]

3. Form and Requisites[85] — a. Entitling. The writ should be properly entitled and should accurately designate the parties to the proceedings.[86]

b. To Whom Directed — (i) *In General.* The writ should be directed to the person or persons whose acts are the subject of review[87] or whose return is necessary to enable the court to determine the validity or regularity of the proceedings below;[88] and must be directed to the tribunal, officer, person, or body who in legal contemplation has the custody or control of the record of the proceedings to be certified.[89]

79. Groves *v.* Richmond, 56 Iowa 69, 8 N. W. 752.

80. As an order relating to the sale of decedents' lands and one relating to the restatement of an administrator's final account. Crombie *v.* Engle, 19 N. J. L. 82.

81. Creswell *v.* Greene County, 24 Ala. 282; Smith *v.* Hearne, 2 Stew. (Ala.) 169; Dickinson *v.* Van Wormer, 39 Mich. 141.

Conflicting determinations.— Where separate proceedings were taken before two circuit court commissioners to remove the same cause to another county for trial, resulting in conflicting orders, a writ of certiorari to both commissioners was proper to enable the supreme court to deal intelligently with the question. Comfort *v.* Stockbridge, 37 Mich. 472.

82. Davis *v.* Calhoun, 24 Ala. 437.

83. Davis *v.* Calhoun, 24 Ala. 437.

84. Brockway *v.* Tillotson, 6 Pa. Co. Ct. 31; *Ex p.* Price, 23 N. Brunsw. 85; Reg. *v.* Golding, 15 N. Brunsw. 385; Hough *v.* Quebec, 5 Quebec 314; *Ex p.* Palmer, 16 L. C. Jur. 253; Chagnon *v.* Lareau, 2 L. C. Jur. 189; Allard *v.* Chillas, 2 Rev. de Lég. 32.

85. For forms of writ see the following cases:

Dakota.— Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

Illinois.— Miller *v.* School Trustees, 88 Ill. 26.

New Jersey.— Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411.

New York.— People *v.* Cholwell, 6 Abb. Pr. (N. Y.) 151; Overseers of Poor *v.* Overseers of Poor, 2 Cow. (N. Y.) 575.

West Virginia.— Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10.

United States.— *Ex p.* Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 43, 35 L. ed. 868, 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340.

Canada.— Reg. *v.* Wehlan, 45 U. C. Q. B. 396.

86. State *v.* Stout, 33 N. J. L. 42; State *v.* Justice, 24 N. J. L. 413; Readington Tp. *v.* Dilley, 24 N. J. L. 209; Griscom *v.* Gilmore, 15 N. J. L. 475; Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; State *v.* Giberson, 14 N. J. L. 388; Overseers of Poor *v.* Overseers of Poor, 13 N. J. L. 289; State *v.* Hanford, 11 N. J. L. 71; State *v.* Kirby, 5 N. J. L. 982; Wildy *v.* Washburn, 16 Johns. (N. Y.) 49; Reg. *v.* Watters, 11 N. Brunsw. 409.

Effect of omitting title.— A writ running in the name of the state, directed to the proper parties, and reciting the presentation of the affidavit on which it was granted is not invalidated by the omission of the title. Van den Bos *v.* Douglas County, 11 S. D. 190, 76 N. W. 935.

Parties entitled to writ see *supra*, IV, A.

Parties to proceeding see *supra*, V, B.

87. Lamb *v.* Schottler, 54 Cal. 319; Reg. *v.* Barbeau, 3 Quebec Q. B. 20, 1 L. C. Rep. 320; Grant *v.* Lockhead, 10 L. C. Jur. 183, 16 L. C. Rep. 308.

Effect of enumerating unnecessary parties. — Where no command is made as to them, the writ is not invalidated by the insertion in the body thereof of the names of interested persons. State *v.* Rowan, 57 N. J. L. 530, 31 Atl. 224 [*distinguishing* State *v.* New Brunswick, 42 N. J. L. 510, where a writ addressed to two municipal boards was sustained as to the body which had the custody of the record, and quashed as to the other].

88. People *v.* Hill, 65 Barb. (N. Y.) 170.

89. *Arkansas.*— Derton *v.* Boyd, 21 Ark. 264.

California.— Quan Chick *v.* Coffey, 75 Cal. 371, 17 Pac. 427.

Massachusetts.— Com. *v.* Winthrop, 10 Mass. 177.

Michigan.— Roberts *v.* Highway Com'rs, 24 Mich. 182; Crawford *v.* Scio, etc., Tp. Bd., 22 Mich. 405; Goodrich *v.* Highway Com'rs, 1 Mich. 385.

Missouri.— Ward *v.* Board of Equalization, 135 Mo. 309, 36 S. W. 648; State *v.* Souders, 69 Mo. App. 472; State *v.* Walbridge, 62 Mo. App. 162; State *v.* Schneider, 47 Mo. App. 669; State *v.* Moniteau County Ct., 45 Mo. App. 387.

New Jersey.—State *v.* Harrison, 46 N. J. L. 79; State *v.* New Brunswick, 42 N. J. L. 510; State *v.* Browning, 28 N. J. L. 556; State *v.* Howell, 24 N. J. L. 519; State *v.* Thomas, 17

(II) *Inferior Courts* — (A) *In General.* A writ to review the proceedings of an inferior court should be addressed to the court and not to a judge thereof,[90] but if the proceeding was had before the judge as an officer it is properly directed to him.[91] If it is sought not only to revise the proceedings of inferior tribunals, but also to assail rights acquired by their action, the writ may be directed to persons claiming such rights.[92]

(B) *Court Martial.* A certiorari to review the determination of a court martial should be directed to the president of the court.[93]

(III) *Municipal Boards and Officers* — (A) *In General.* Where the writ is sought to review the action of a municipal body or of municipal officers, it should be directed to the body or officers and not to a mere subordinate officer, although he may be in actual possession of the record,[94] or to the municipality.[95] The writ should be directed to an official body, in the individual names of its members, adding the name of their office;[96] or it may be directed to an official by name, adding his title, or by the name of the office alone.[97] If the direction states the corporate name of a public body with such sufficient accuracy as to leave no doubt of its identity, misnomer will not invalidate the writ.[98]

(B) *Where Officers Act Independently.* A writ cannot be directed to several officers who perform several acts for a common purpose,[99] or to officers having no joint or common duties, but acting independently of each other.[1]

(C) *Where Term Has Expired.* The writ should not be directed or issued to

N. J. L. 160; Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411.

New York.— Matter of New York, 80 Hun (N. Y.) 486, 30 N. Y. Suppl. 494, 62 N. Y. St. 394; People *v.* Brooklyn, 49 Barb. (N. Y.) 136.

Pennsylvania.—Com. *v.* McAllister, 1 Watts (Pa.) 307, 26 Am. Dec. 70.

Wisconsin.— State *v.* Manitowoc, 92 Wis. 546, 66 N. W. 702; Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444, 9 Am. Rep. 591.

England.— Daniel *v.* Phillips, 4 T. R. 499.

Canada.— Reg. *v.* Starkey, 6 Manitoba 588; Reg. *v.* Frawley, 45 U. C. Q. B. 227. And see Fraser *v.* New Glasgow, 13 Nova Scotia 250.

See 9 Cent. Dig. tit. "Certiorari," § 110.

A public officer with whom a paper has been left for record is not the custodian thereof. State *v.* Browning, 28 N. J. L. 556.

Custodian of prisoner.— On certiorari by a person in custody for contempt, in which the statutory form of the writ is only to return the day and cause of imprisonment, the writ should be directed to the officer having custody of the prisoner, and not to the judge who made the order. People *v.* New York, 29 Barb. (N. Y.) 622.

90. Fraser *v.* Freelon, 53 Cal. 644. See also 1 Tidd Pr. 403.

If there is but a single judge a misdirection to him is a mere formal error which may be disregarded. Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949.

Trial court.— In order to review a judgment rendered in the court for the trial of small causes, which has been docketed in the court of common pleas, on the ground of illegality in the proceedings, the writ of certiorari, when allowable, should be directed to the trial court, not to the court of common pleas. State *v.* Osborne, 51 N. J. L. 101, 16 Atl. 156.

Substitution of court.— Where the court in which the proceedings were had has been abolished and its jurisdiction vested in a new court, and the original court is thereafter reëstablished the writ should go to it. Com. *v.* Winthrop, 10 Mass. 177.

91. People *v.* Kelly, 35 Barb. (N. Y.) 444, 13 Abb. Pr. (N. Y.) 405.

92. State *v.* New Brunswick, 42 N. J. L. 510 [*citing* State *v.* Jersey City, 40 N. J. L. 483; Siedler *v.* Hudson County, 39 N. J. L. 632; State *v.* West Hoboken Tp., 39 N. J. L. 421].

93. Matter of Leary, 30 Hun (N. Y.) 394.

94. State *v.* Harrison, 46 N. J. L. 79; State *v.* New Brunswick, 42 N. J. L. 510; State *v.* Browning, 28 N. J. L. 556; People *v.* Dansville, 4 Thomps. & C. (N. Y.) 87; State *v.* Everett, 103 Wis. 269, 79 N. W. 421; State *v.* McGovern, 100 Wis. 666, 76 N. W. 593; State *v.* Manitowoc, 92 Wis. 546, 66 N. W. 702; State *v.* Milwaukee, 86 Wis. 376, 57 N. W. 45; State *v.* Fond du Lac, 42 Wis. 287. See also Roberts *v.* Highway Com'rs, 24 Mich. 182.

95. State *v.* Milwaukee, 86 Wis. 376, 57 N. W. 45. See also Bogert *v.* New York, 7 Cow. (N. Y.) 158.

96. People *v.* Herkimer, etc., R. Co., 6 N. Y. Civ. Proc. 297; People *v.* Cholwell, 6 Abb. Pr. (N. Y.) 151.

97. Lunn *v.* Winnepeg, 2 Manitoba 225.

98. People *v.* Trustees New York, etc., Bridge, 1 N. Y. App. Div. 186, 37 N. Y. Suppl. 168, 72 N. Y. St. 628.

99. People *v.* Hill, 65 Barb. (N. Y.) 170. And see Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

1. Quinchard *v.* Alameda, 113 Cal. 664, 45

an ex-official who has parted with the record or has no control over it and from whom no personal return is required.[2] There are decisions, however, which hold that the writ is properly addressed to an officer whose term has expired, but who is able to make a valid return.[3]

c. Errors Complained of. The writ should set forth the cause of complaint,[4] unless the statute prescribing its form does not so require;[5] but unless so required the writ need not contain the recitals of the application.[6]

d. Commands. In the absence of statute or expressed rule on the subject,[7] the writ should be made returnable to the judicial district or department in which the proceeding to be reviewed was had,[8] and to the branch or part of the court designated by rule of court.[9] It must state the time within which it is to be returned,[10] but failure to command a certification of the facts required will not be prejudicial, if the material facts are certified,[11] and vagueness in the command may be disregarded if the recitals of the writ express the desire of the court to be certified of matters specified.[12]

e. Seal and Teste. The writ should be sealed [13] and properly attested.[14]

f. Indorsement.[15] When brought and prosecuted in the name of the state the

Pac. 856; People *v.* Walter, 68 N. Y. 403; Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

2. *California.*— Quan Chick *v.* Coffey, 75 Cal. 371, 17 Pac. 427.

Michigan.— Whistler *v.* Wilson, 39 Mich. 121.

Missouri.— State *v.* Souders, 69 Mo. App. 472.

New Jersey.— State *v.* New Brunswick, 42 N. J. L. 510; State *v.* Morris Canal, etc., Co., 14 N. J. L. 411.

New York.— See Peck *v.* Foote, 4 How. Pr. (N. Y.) 425.

North Dakota.— Matter of Evingson, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768.

South Carolina.— State *v.* Moore, 54 S. C. 556, 32 S. E. 700.

This is true notwithstanding a provision that the writ may issue to an officer whose term of office has expired. Matter of New York, 80 Hun (N. Y.) 486, 30 N. Y. Suppl. 494, 62 N. Y. St. 394.

3. Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739; People *v.* Hill, 65 Barb. (N. Y.) 170; Conover *v.* Devlin, 15 How. Pr. (N. Y.) 470; Harris *v.* Whitney, 6 How. Pr. (N. Y.) 175. See also Welsh *v.* Joy, 13 Pick. (Mass.) 477; Matter of Evingson, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768; Rex *v.* Middlesex, 4 East 604; Clerk *v.* Withers, 2 Ld. Raym. 1072, 1 Salk. 322.

Writ to adjourned board.— Under a provision that the writ must be granted and served within four months after the determination to be reviewed becomes final and binding on the relator, it is error to dismiss a writ against a town board for the reason that it had adjourned when the writ was issued. People *v.* Sutphin, 166 N. Y. 163, 59 N. E. 770 [*modifying* 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49].

4. Lapan *v.* Cumberland County, 65 Me. 160; *Ex p.* Albany, 23 Wend. (N. Y.) 277.

5. **Under the Washington statute** the writ need not recite the errors to be reviewed. State *v.* Moore, 23 Wash. 276, 62 Pac. 769.

6. Van den Bos *v.* Douglas County, 11 S. D. 190, 76 N. W. 935.

If the errors were assigned in the petition they need not be again assigned in the writ. Dyer *v.* Lowrie, 33 Me. 260.

7. **If so authorized,** the writ may be made returnable as the court may direct. Boston, etc., R. Co. *v.* Hampden County, 116 Mass. 73.

8. People *v.* Kelly, 35 Barb. (N. Y.) 444, 13 Abb. Pr. (N. Y.) 405 (an ancillary writ); People *v.* New York County, 57 How. Pr. (N. Y.) 467.

English practice.— When the writ issued out of the king's bench or common pleas, it should be returnable in term-time on a day certain, but when issued out of chancery, it might be returned in term-time or vacation, on a general return-day. 1 Tidd Pr. 403.

9. People *v.* Kelly, 35 Barb. (N. Y.) 444, 13 Abb. Pr. (N. Y.) 405; People *v.* Board of Police, 16 Abb. Pr. (N. Y.) 337; People *v.* New York County, 57 How. Pr. (N. Y.) 467. See also People *v.* Perry, 16 Hun (N. Y.) 461.

10. Devers *v.* Gavaza, 16 Nova Scotia 167.

11. Richman *v.* Muscatine County, 70 Iowa 627, 26 N. W. 24.

The command to an inferior court should require it to certify the record, together with all things touching the same. 1 Tidd Pr. 403.

12. State *v.* Paterson, 39 N. J. L. 489.

13. Frisbee *v.* Timanus, 12 Fla. 537; People *v.* Herkimer, etc., R. Co., 6 N. Y. Civ. Proc. 297.

Revenue stamp.—A writ of certiorari was held not to be "original process," within the meaning of the act of congress of 1862 requiring "writs or other original process by which a suit is commenced" to be stamped. Pierce *v.* Huddleston, 10 Minn. 131.

14. Frisbee *v.* Timanus, 12 Fla. 537; Sayres *v.* Ridgway, 8 N. J. L. 373 (where the writ was quashed because it failed to state the date of the teste).

15. **For form** of indorsement see State *v.*

name of the prosecutor in the writ must appear by indorsement upon the writ or otherwise.[16]

4. Defects and Objections — a. In General. A writ may be invalidated by a misdirection,[17] so that nothing can be removed by it;[18] but the objection is available to the adverse party alone[19] and may be waived[20] by making a proper return[21] or submitting to a hearing on the merits.[22]

b. Mode of Objection. Defects in the writ should be taken advantage of by motion[23] or by application to supersede, made before the filing of the return.[24]

c. Amendments. The writ may be amended[25] by supplying an omitted title;[26] by correcting errors in the title or indorsement,[27] in the designation of the parties,[28] in the name of the party to whom the writ is directed,[29] in the designation of the place where the writ is returnable;[30] by striking out that which relates to matters improperly required to be returned;[31] by correctly showing the nature of the action below;[32] by substituting a proper,[33] or supplying an omitted,[34] seal; by adding the sanction of the judge who granted it;[35] and by inserting the date of the teste.[36] An amendment may be permitted, although a term elapse between the teste and return.[37]

5. Service of Writ or Notice of Its Issue — a. In General. The writ or notice of its issue must be served within the time prescribed by law.[38]

Morris Canal, etc., Co., 14 N. J. L. 411; Coddington *v.* Stanton, 7 N. J. L. 84.

16. Scull *v.* Carhart, 15 N. J. L. 430; Overseers of Poor *v.* Overseers of Poor, 13 N. J. L. 289; Coddington *v.* Stanton, 7 N. J. L. 84; State *v.* Newark, etc., Turnpike Co., 3 N. J. L. 126; *Ex p.* Albany, 23 Wend. (N. Y.) 277.

17. State *v.* McGovern, 100 Wis. 666, 76 N. W. 593; State *v.* Manitowoc, 92 Wis. 546, 66 N. W. 702.

The misdirection will not be fatal if the writ is accompanied by an affidavit properly describing the person intended. Wilson *v.* Gifford, 41 Mich. 417, 50 N. W. 392.

18. Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; 1 Bacon Abr. 572, tit. Certiorari (I).

19. Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; Com. *v.* McAllister, 1 Watts (Pa.) 307, 26 Am. Dec. 70; Daniel *v.* Phillips, 4 T. R. 499; Reg. *v.* Smith, 46 U. C. Q. B. 442.

20. Fraser *v.* Freelon, 53 Cal. 644; Daniel *v.* Phillips, 4 T. R. 499.

21. Wilson *v.* Gifford, 41 Mich. 417, 50 N. W. 392; *Ex p.* Albany, 23 Wend. (N. Y.) 277.

22. People *v.* Brooklyn, 49 Barb. (N. Y.) 136.

23. People *v.* Brooklyn, 49 Barb. (N. Y.) 136.

24. Ball *v.* Warren, 16 How. Pr. (N. Y.) 379; Saratoga, etc., R. Co. *v.* McCoy, 5 How. Pr. (N. Y.) 378; Ferguson *v.* Jones, 12 Wend. (N. Y.) 241; 1 Tidd Pr. 403.

25. Amendment nunc pro tunc.—A writ to review a tax assessment may be amended *nunc pro tunc*, so as to state that it was issued on the relation of the relator, to provide when service of the return shall be made on relator's attorney, and by the addition of the subscription of the justice who granted it. People *v.* Webster, 49 N. Y. App. Div. 556, 63 N. Y. Suppl. 574.

26. Van den Bos *v.* Douglas County, 11 S. D. 190, 76 N. W. 935.

27. State *v.* Justice, 24 N. J. L. 413; Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; State *v.* Hanford, 11 N. J. L. 71; State *v.* Kirby, 5 N. J. L. 982.

Striking out.— The title may be amended by striking out the name and title of a town officer so that it may appear that the town alone is the proper party. People *v.* Wagner, 7 Lans. (N. Y.) 467, 1 Thomps. & C. (N. Y.) 221.

28. People *v.* Roe, 25 N. Y. App. Div. 107, 49 N. Y. Suppl. 227.

29. People *v.* Cholwell, 6 Abb. Pr. (N. Y.) 151.

30. People *v.* Cook, 62 Hun (N. Y.) 303, 17 N. Y. Suppl. 546, 42 N. Y. St. 245, holding that such an amendment may be made *nunc pro tunc*, after the time for the issue of a certiorari has expired.

31. People *v.* Feitner, 40 N. Y. App. Div. 620, 57 N. Y. Suppl. 1062.

32. Knapp *v.* Palmer, 1 Cai. (N. Y.) 486, where "debt" was substituted for "trespass on the case."

33. People *v.* Steuben, 5 Wend. (N. Y.) 103.

34. People *v.* Herkimer, etc., R. Co., 6 N. Y. Civ. Proc. 297.

35. McDonald *v.* Cousins, 23 Ga. 227.

36. Brink *v.* Fulton, 1 Cow. (N. Y.) 41.

37. Kissam *v.* Morris, 2 Wend. (N. Y.) 259; Jackson *v.* Crane, 1 Cow. (N. Y.) 38.

38. *New Jersey.*— State *v.* New Brunswick Com'rs, 37 N. J. L. 394.

North Carolina.— Williams *v.* Gormon, 3 N. C. 337.

Ohio.— Carey *v.* Montgomery County, 19 Ohio 245.

Tennessee.— Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

Vermont.— Peacham *v.* Weeks, 48 Vt. 73.

Canada.— *Ex p.* Hamilton, 28 N. Brunsw. 135; *Ex p.* Lyons, 11 N. Brunsw. 409; Barnes *v.* Cox, 16 U. C. C. P. 236.

b. Mode of Service — (I) *In General.* The writ should be served by delivery to the person to whom it is directed,[39] although it has been held that service in any manner whereby the party to whom it is directed may reasonably be made aware of its requirement will be sufficient.[40] Service on Sunday is a nullity.[41] A defective service is waived by appearance and response to the writ.[42]

(II) *How Objected to.* The proper remedy for an improper service is to move to supersede the writ. A motion to quash in the absence of a return is irregular.[43]

c. Appending Other Papers. It is proper to append to the writ and serve therewith the papers on which it was granted, to inform the person served of the nature of the return required of him;[44] but the failure so to do will not excuse a proper return of that for which the writ plainly calls.[45]

L. Supersedeas — 1. Writ as Stay — a. In General. Except where the common-law rule has been changed, a certiorari to a subordinate court or tribunal or an officer operates as a stay of proceedings from the time of its service or of formal notice of its issue,[46] unless the judgment or order complained of has begun to be executed. If they afterward proceed it is a contempt, and the subsequent proceedings are void because *coram non judice.*[47] The proceedings below are not

So the writ must be filed with the clerk of the court below within the time prescribed by statute. Ball *v.* Warren, 16 How. Pr. (N. Y.) 379; Kennedy *v.* Newsom, 1 How. Pr. (N. Y.) 121; George *v.* Orcutt, 19 Wend. (N. Y.) 647.

Extension of time.— Service of a writ after its return-day cannot be cured by a rule extending it *nunc pro tunc,* because the writ is void if not executed before the day of its return. Where a writ cannot be served before its return-day because the court to which it is directed has no term within that time, the proper practice is to apply for an extension while it is *in esse* as a valid process. State *v.* Kennedy, 18 N. J. L. 22.

Service before judgment.— The delivery of a writ lawfully issued, after verdict, but before judgment is entered, will not vitiate it or prevent its subsequent operation. Delancy *v.* Lawrence, 11 N. J. L. 25; Mairs *v.* Sparks, 4 N. J. L. 429, 5 N. J. L. 606.

39. Foster *v.* Foster, 15 Ark. 399.

The original writ and not a copy should be served. State *v.* Fond du Lac, 35 Wis. 37; *Ex p.* Lahaye, 6 L. C. Rep. 486.

40. State *v.* Dwyer, 41 N. J. L. 93.

41. Anderson *v.* Birce, 3 Mich. 280. See, generally, Sunday.

42. *Georgia.*— Crapp *v.* Morris, 108 Ga. 793, 33 S. E. 951.

Iowa.— Remy *v.* Board of Equalization, 80 Iowa 470, 45 N. W. 899.

Pennsylvania.— Baltimore Mut. Aid Soc. *v.* Keely, 2 Pa. Dist. 62.

Wisconsin.— State *v.* Fond du Lac, 35 Wis. 37.

Canada.— Blois *v.* Richards, 13 Nova Scotia 203.

43. State *v.* Fond du Lac, 35 Wis. 37.

44. Parman *v.* Boards of School Inspectors, 49 Mich. 63, 12 N. W. 910; Whistler *v.* Lenawee County, 39 Mich. 303. But see People *v.* Perry, 16 Hun (N. Y.) 461, holding the service of the affidavit on which the writ was granted together with the writ to be unnecessary.

45. Whistler *v.* Lenawee County, 39 Mich. 303.

46. **A magistrate who has no knowledge of a writ** served on the clerk is not in contempt for issuing warrant after conviction. Reg. *v.* Woodyatt, 27 Ont. 113.

Mere notice of application for the writ will not operate as a supersedeas. Adams, Petitioner, 10 Pick. (Mass.) 273.

The mere recital in a supersedeas of a certiorari is insufficient to suspend the proceedings. McWilliams *v.* King, 32 N. J. L. 21.

47. *California.*— California Northern R. Co. *v.* Butte County, 18 Cal. 671.

Georgia.— Burke County *v.* Wimberly, 55 Ga. 570; Taylor *v.* Gay, 20 Ga. 77; Macon *v.* Shaw, 14 Ga. 162. See also State *v.* Noel, T. U. P. Charlt. (Ga.) 43; Roe *v.* Savannah, T. U. P. Charlt. (Ga.) 36.

Illinois.— Highway Com'rs *v.* People, 99 Ill. 587.

Louisiana.— State *v.* St. Paul, 104 La. 203, 28 So. 973.

Massachusetts.— Adams, Petitioner, 10 Pick. (Mass.) 273.

New Jersey.— State *v.* Simon, 53 N. J. L. 550, 22 Atl. 120; Hunt *v.* Lambertville, 46 N. J. L. 59; McQuade *v.* Emmons, 38 N. J. L. 397; Barcklow *v.* Hutchinson, 32 N. J. L. 195; McWilliams *v.* King, 32 N. J. L. 21; Kingsland *v.* Gould, 6 N. J. L. 161; Mairs *v.* Sparks, 5 N. J. L. 606.

New York.— People *v.* Board of Fire Com'rs, 72 N. Y. 445; Conover *v.* Devlin, 26 Barb. (N. Y.) 429, 24 Barb. (N. Y.) 636, 5 Abb. Pr. (N. Y.) 182, 14 How. Pr. (N. Y.) 348; Launitz *v.* Dixon, 5 Sandf. (N. Y.) 249; Payfer *v.* Bissell, 3 Hill (N. Y.) 239; Wilson *v.* Williams, 18 Wend. (N. Y.) 581; Patchin *v.* Brooklyn, 13 Wend. (N. Y.) 664; *Ex p.* Sanders, 4 Cow. (N. Y.) 544; Lynde *v.* Noble, 20 Johns. (N. Y.) 80; Blanchard *v.* Myers, 9

reversed by the stay, but are merely suspended until the further action of the reviewing court;[48] and notwithstanding the supersedeas or stay, the judgment or order may be given in evidence or any other proceedings may be taken not inconsistent with the dormant character of the determination so far as its enforcement is concerned.[49] Furthermore, it has been held that the issue of the writ will not prevent the filing of a supplemental opinion,[50] the issue of a dispossess warrant,[51] giving notice of the entry of judgment or of an order,[52] holding a new election under another law than that under which the determination to be reviewed was had,[53] or action in an independent although incidental proceeding;[54] nor will the writ affect matters outstanding and not removed by it.[55]

b. Security. It has been held that where the writ is in substance a writ of error, it will not operate as a supersedeas, unless bail is given.[56]

Johns. (N. Y.) 66; Case *v.* Shepherd, 2 Johns. Cas. (N. Y.) 27.

Pennsylvania.— Com. *v.* Kistler, 149 Pa. St. 345, 30 Wkly. Notes Cas. (Pa.) 187, 24 Atl. 216; Ewing *v.* Thompson, 43 Pa. St. 372; Schuler *v.* Northern Liberties, etc., R. Co., 3 Whart. (Pa.) 555; Gardiner *v.* Murray, 4 Yeates (Pa.) 560; Walker's Appeal, 2 Dall. (Pa.) 190, 1 L. ed. 344; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 1; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; *In re* Gibbons, 1 Wkly. Notes Cas. (Pa.) 207; Guarantee Co. *v.* De Coursey, 10 Phila. (Pa.) 88, 30 Leg. Int. (Pa.) 368; Shaw's Estate, 9 Phila. (Pa.) 347, 31 Leg. Int. (Pa.) 53; Jackson *v.* Gleason, 6 Phila. (Pa.) 307, 24 Leg. Int. (Pa.) 189.

Wisconsin.—State *v.* Burnell, 102 Wis. 232, 78 N. W. 425; Gaertner *v.* Fond du Lac, 34 Wis. 497.

United States.— Bailey *v.* Lansing, 13 Blatchf. (U. S.) 424, 2 Fed. Cas. No. 738, 2 N. Y. Wkly. Dig. 562.

England.— Prine *v.* Allington, Moore K. B. 677; Rex *v.* Spelman, 1 Keb. 93; Reg. *v.* Nash, 2 Ld. Raym. 989, 1 Salk. 147; Crosse *v.* Smith, 12 Mod. 643; Bacon Abr. tit. Certiorari (G); Comyns Dig. tit. Certiorari (E); 1 Tidd Pr. 404.

Canada.— *Ex p.* Loane, 22 N. Brunsw. 629; Barnes *v.* Cox, 16 U. C. C. P. 236.

See 9 Cent. Dig. tit. "Certiorari," § 122.

United States to state court.— Under the act of congress of March 2, 1833, the issue of a certiorari from the United States circuit court to a state court will stay all proceedings in the latter tribunal. State *v.* Circuit Judge, 33 Wis. 127.

A grant of the writ but a denial of a stay is an intimation that further proceedings below will not be treated as a contempt. Patchin *v.* Brooklyn, 13 Wend. (N. Y.) 664.

A pending trial will not be stayed, but the writ will operate to suspend the proceedings at the end of the trial. Conover *v.* Devlin, 24 Barb. (N. Y.) 636, 26 Barb. (N. Y.) 429, 5 Abb. Pr. (N. Y.) 182, 14 How. Pr. (N. Y.) 348.

Waiver of stay.— It has been held that the stay may be waived by appearing and taking part in proceedings had in the primary court, subsequent to the writ. Rand *v.* Flavin, 8 Nova Scotia 80.

A writ will not be set aside so far as it operates as a supersedeas where the defendant has disregarded it, and the rights of the prosecutor may be impaired. State *v.* Trenton, (N. J. 1894) 28 Atl. 1043.

48. State *v.* St. Paul, 104 La. 203, 28 So. 973; Ewing *v.* Thompson, 43 Pa. St. 372; Reg. *v.* Nash, 2 Ld. Raym. 989, 1 Salk. 147; Crosse *v.* Smith, 12 Mod. 643.

A certiorari and supersedeas to quash an execution levied on land, because of reduction of the judgment by payment, will not discharge the levy and restore the property to the petitioner, but the court may give judgment on the certiorari and supersedeas bond for the amount actually due, and also award an order of sale and sell the land so levied on to satisfy said sum. Littleton *v.* Yost, 3 Lea (Tenn.) 267.

49. State *v.* Burnell, 102 Wis. 232, 78 N. W. 425; Richter *v.* Leiby, 99 Wis. 512, 75 N. W. 82; Neuman *v.* State, 76 Wis. 112, 45 N. W. 30.

50. Leister's Appeal, 20 Wkly. Notes Cas. (Pa.) 224, 11 Atl. 387.

51. Launitz *v.* Dixon, 5 Sandf. (N. Y.) 249.

52. For the purpose of setting in motion the time within which to settle a bill of exceptions. State *v.* Burnell, 102 Wis. 232, 78 N. W. 425.

53. State *v.* Simon, 53 N. J. L. 550, 22 Atl. 120.

54. In Ashworth *v.* Wrigley, 1 Paige (N. Y.) 301, it appeared that defendant had been discharged under the non-imprisonment act, and had been subsequently arrested on a ne exeat, and it was held that the allowance of a certiorari to reverse the discharge which failed to show in what respect the proceedings sought to be reviewed were erroneous, was no answer to a motion to dissolve the ne exeat.

55. Com. *v.* Kistler, 149 Pa. St. 345, 30 Wkly. Notes Cas. 187, 24 Atl. 216; Ewing *v.* Thompson, 43 Pa. St. 372.

56. Leibner *v.* Rupert, 10 Kulp (Pa.) 24; Clark *v.* McCormack, 2 Phila. (Pa.) 68, 13 Leg. Int. (Pa.) 52. See Patton *v.* Miller, 13 Serg. & R. (Pa.) 254.

In Iowa the court or judge granting the writ can require a bond. State *v.* Buchanan County Dist. Ct., 84 Iowa 167, 50 N. W. 677.

In Michigan a certiorari sued out by defendant to review a justice's judgment on

c. Parties Affected. The suspensory power of the writ operates on the court and parties directly connected with the proceedings,[57] and also on those concerned in the matter who have notice of the writ.[58]

d. Effect of Dismissal of Writ. Although the writ is dismissed, the inferior court is without authority to proceed, until the cause is remitted or the supersedeas discharged.[59]

2. Proceedings After Judgment. Proceedings subseqnent to the judgment may be stayed by a writ of supersedeas or by an independent order,[60] as may the enforcement of a municipal resolution, until its validity is determined.[61] The refusal to grant a stay will not change the effect of the writ as a supersedeas.[62] It seems that by the common-law practice, where a warrant or other process issued before the receipt of the writ, it should be superseded at once by the tribunal to which the writ is addressed.[63]

M. Return — 1. Necessity of. A formal legal return is generally a prerequisite to the jurisdiction of the court to review the proceedings or determination below,[64] but it has been held that, to avoid a failure of justice, the cause may be heard without a formal return.[65]

2. Waiver. There are holdings to the effect that a return to a writ of certiorari may be waived by the parties to the writ,[66] but a mere nominal party to

attachment has the effect of dissolving the attachment, provided security is given for the payment of any judgment rendered in the reviewing court. Vanderhoof *v.* Prendergast, 94 Mich. 18, 53 N. W. 792.

57. Com. *v.* Kistler, 149 Pa. St. 345, 30 Wkly. Notes Cas. (Pa.) 187, 24 Atl. 216; Ewing *v.* Thompson, 43 Pa. St. 372.

58. State *v.* Lambertville, 46 N. J. L. 59.

59. State *v.* Adams, 54 N. J. L. 506, 24 Atl. 482.

60. State *v.* St. Paul, 104 La. 203, 28 So. 973; McWilliams *v.* King, 32 N. J. L. 21; Bilderback *v.* Moore, 17 N. J. L. 510; Hull *v.* Larzalere, 16 N. J. L. 355; Allen *v.* Shurts, 16 N. J. L. 221; People *v.* New York, 10 Abb. N. Cas. (N. Y.) 33; Sanders *v.* Norris, 82 N. C. 4. And see Kingsland *v.* Gould, 6 N. J. L. 161; Mairs *v.* Sparks, 5 N. J. L. 606; People *v.* Fitch, 147 N. Y. 355, 41 N. E. 695 (where pending certiorari to review the proceedings of commissioners awarding damages for changes of grade, a mandamus issued to compel a city comptroller to pay the amounts awarded was stayed until a final determination under the writ).

Service of a certiorari and supersedeas on an officer having property in his hands under an attachment has the effect to release the property and authorize the officers to return it to the debtor without a forthcoming bond; and this is so, although the writ is sued out *in forma pauperis*. McCamy *v.* Lawson, 3 Head (Tenn.) 256.

61. Gaertner *v.* Fond du Lac, 34 Wis. 497.

62. Conover *v.* Devlin, 24 Barb. (N. Y.) 636, 26 Barb. (N. Y.) 429, 5 Abb. Pr. (N. Y.) 182, 14 How. Pr. (N. Y.) 348.

63. McWilliams *v.* King, 32 N. J. L. 21 (stating this practice, but denying its existence in New Jersey); Rex *v.* Spelman, 1 Keb. 93. See also Prine *v.* Allington, Moore K. B. 677; Reg. *v.* Nash, 2 Ld. Raym. 989, 1 Salk. 147.

64. *Alabama.*— Perryman *v.* Burgster, 6 Port. (Ala.) 99.

Arkansas.— Hornor *v.* O'Shields, 33 Ark. 117; Derton *v.* Boyd, 21 Ark. 264. And see McKay *v.* Jones, 30 Ark. 148; Dicus *v.* Bright, 23 Ark. 107.

District of Columbia.— Walker *v.* District of Columbia, 6 Mackey (D. C.) 352.

Florida.— See Deans *v.* Wilcoxon, 18 Fla. 531.

Illinois.— McManus *v.* McDonough, 4 Ill. App. 180.

Minnesota.— State *v.* St. John, 47 Minn. 315, 50 N. W. 200.

New Jersey.— Pierson *v.* Klahre, (N. J. 1899) 43 Atl. 569; State *v.* Ocean Grove Camp Meeting Assoc., 58 N. J. L. 123, 32 Atl. 695; Monitor Lodge No. 219 *v.* Goldy, 58 N. J. L. 119, 32 Atl. 689.

New York.— *In re* Marty, 3 Barb. (N. Y.) 229; People *v.* McCraney, 21 How. Pr. (N. Y.) 149; Matter of Gilbert, 7 Wend. (N. Y.) 490.

Ohio.—Stemble *v.* Hewling, 2 Ohio St. 228; Brownell *v.* Skinner, Wright (Ohio) 682; Vance *v.* Goudy, Wright (Ohio) 307.

West Virginia.— Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10.

Wisconsin.— State *v.* Lien, 112 Wis. 282, 87 N. W. 1113.

Canada.— Lord *v.* Turner, 13 N. Brunsw. 13; Mosher *v.* Doran, 12 Nova Scotia 184.

See 9 Cent. Dig. tit. "Certiorari," § 130.

65. As where the justice to whom the writ was directed has died before making a return. Clason *v.* Shotwell, 12 Johns. (N. Y.) 31; Seymour *v.* Webster, 1 Cow. (N. Y.) 168, in which cases the hearing was had on affidavits.

66. McKay *v.* Jones, 30 Ark. 148; Deans *v.* Wilcoxon, 18 Fla. 531; Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10. See also Rightor *v.* Gray, 23 Ark. 228, where the parties were permitted by consent to try the case upon a transcript filed although no writ had issued.

the proceedings who is simply the custodian of the record cannot waive the necessity of a return.[67]

3. WHO MAY MAKE RETURN — a. In General. A legal return can be made only by the officer or persons having the custody or control of the record sought to be removed.[68]

b. Inferior Courts. On certiorari to bring up the record of an inferior court, the return should be made by the court[69] or the judge to whom the writ is directed;[70] but if the object is to correct the record brought up by a writ of error, the writ may be responded to by the clerk, although directed to the court.[71] The return should be made by at least a quorum of the court as constituted at the time the writ was applied for,[72] and when the object is to supply facts not shown by the record, the return should be made by all the magistrates who took part in the trial.[73]

c. Public Boards and Officers — (I) *IN GENERAL.* The board or body whose determination is sought to be reviewed and which retains or controls the record must make the return,[74] which may be authorized by a majority of its members.[75]

(II) *EX-OFFICIALS.* A valid return cannot be required of or made by a public official whose term of office has expired and who does not control, or who has parted with, the record,[76] unless a personal return is desired.[77] He may, however, return that which was done by him while in office,[78] and officers of a continuous body who succeed those whose action is sought to be reviewed may make a return, provided they control the record.[79]

4. WHO MAY PREPARE RETURN. If a return is sanctioned by the court or tribunal to whom the writ is directed, it is immaterial by whose hand it was actually made.[80]

By stipulation the record may be submitted with the same effect as if a return had been made. McAloon *v.* Pawtucket, 22 R. I. 191, 46 Atl. 1047.

67. State *v.* Lien, 112 Wis. 282, 87 N. W. 1113.

68. Whistler *v.* Wilson, 39 Mich. 121; State *v.* Rowan, 57 N. J. L. 530, 31 Atl. 224; State *v.* Howell, 24 N. J. L. 519.

69. Morrel *v.* Fearing, 20 N. J. L. 670; State *v.* Sachs, 3 Wash. 496, 30 Pac. 503.

70. State *v.* Sachs, 3 Wash. 496, 30 Pac. 503.

71. Stewart *v.* Ingle, 9 Wheat. (U. S.) 526, 6 L. ed. 151.

72. State *v.* Souders, 69 Mo. App. 472.

One of two convicting justices may make the return. Reg. *v.* Lacoursiere, 8 Manitoba 302.

73. Marchman *v.* Todd, 15 Ga. 25.

74. Crawford *v.* Scio, etc., Tp. Board, 22 Mich. 405; State *v.* Manitowoc, 92 Wis. 546, 66 N. W. 702.

75. State *v.* Manitowoc, 92 Wis. 546, 66 N. W. 702. And see Nehrling *v.* State, 112 Wis. 637, 88 N. W. 610.

Signature by majority.—A return authorized by the majority of a public board, signed by the chairman and clerk, and filed in the proper office is not vitiated by the fact that it is not signed by the majority. People *v.* Orange County, 21 N. Y. Suppl. 298, 50 N. Y. St. 46.

76. Whistler *v.* Wilson, 39 Mich. 121; State *v.* Souders, 69 Mo. App. 472; State *v.* Morris Canal, etc., Co., 14 N. J. L. 411 (where it appeared that the proceedings had become a matter of public record).

77. Whistler *v.* Wilson, 39 Mich. 121.

78. People *v.* Peabody, 6 Abb. Pr. (N. Y.) 228; Harris *v.* Whitney, 6 How. Pr. (N. Y.) 175 [*overruling* Peck *v.* Foote, 4 How. Pr. (N. Y.) 425].

79. Collins *v.* Holyoke, 146 Mass. 298, 15 N. E. 908.

80. Smick *v.* Opdycke, 12 N. J. L. 347, where the return was in the handwriting of counsel.

Attorney of respondent.—A return is not objectionable, although drawn by the attorney for the respondent, but the rule is stricter where it is drawn by the attorney for the party suing out the writ. Smith *v.* Johnston, 30 How. Pr. (N. Y.) 374; Hunter *v.* Graves, 4 Cow. (N. Y.) 537.

Clerk of court.— The judge to whom the writ is directed may authorize the clerk to prepare the transcript. State *v.* Sachs, 3 Wash. 496, 30 Pac. 503. On a writ to bring up the proceedings of highway commissioners, the township clerk may authenticate the papers attached to the return, but the return should show that it is made by the commissioners, and not by the clerk. Roberts *v.* Highway Com'rs, 24 Mich. 182. But see Flanders *v.* Wood, 113 Ga. 635, 38 S. E. 975, holding that the answer or return to a writ of certiorari cannot be written or dictated by either of the parties to the case, by an attorney therein, or by any other person interested in the case.

5. What May Be Returned[81]**— a. In General.** The return must contain everything commanded by the writ or required by the practice,[82] and must disclose something on which the reviewing court can act.[83] It should contain specific statements of fact, and not conclusions or opinions,[84] and must be sufficient to enable the reviewing court to pass on the legality of the proceedings below.[85]

b. The Record — (1) *What Constitutes.* Where the rules of the common law are adhered to, the writ brings up, and the return can only properly include, the record, or proceedings and orders in the nature of a record upon which the

81. For forms of return see the following cases:

Illinois.— Union Drainage Dist. *v.* Volke, 163 Ill. 243, 45 N. E. 415.

Maine.— Andrews *v.* King, 77 Me. 224.

Michigan.— Roberts *v.* Highway Com'rs, 24 Mich. 182.

New Jersey.— State *v.* Howell, 24 N. J. L. 519; State *v.* Morris Canal, etc., Co., 14 N. J. L. 411.

New Mexico.—Armijo *v.* Bernalillo County, 3 N. M. 297, 7 Pac. 19.

New York.— Nichols *v.* Williams, 8 Cow. (N. Y.) 13.

Wisconsin.— State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; State *v.* Forest County, 74 Wis. 610, 43 N. W. 551.

England.— Tidd Pr. Appendix, c. 16, §§ 2, 4, 15, 17.

82. Rex *v.* Desgagné, 2 Rev. de Lég. 32. The return will be sufficient if it is confined to the matters specified in the writ. People *v.* Dains, 38 Hun (N. Y.) 43.

The rendition of a judgment must be shown. *In re* Germantown Ave., 99 Pa. St. 479.

In England in certain cases and by statute it is sufficient to send up a statement of the case for the opinion of the court. See Overseers of Poor *v.* London, etc., R. Co., 4 App. Cas. 30, 48 L. J. Q. B. 65, 39 L. T. Rep. N. S. 453, 27 Wkly. Rep. 189.

Designation of parties.— It is not essential that the return to a writ to review proceedings to bond a town should name the parties who opposed them. People *v.* Wagner, 7 Lans. (N. Y.) 467, 1 Thomps. & C. (N. Y.) 221.

Fragmentary and disordered sheets which are not characterized are insufficient as a return of evidence. State *v.* St. John, 47 Minn. 315, 50 N. W. 200.

A return by an ex-official that he is out of office and no longer has custody of the papers and records is sufficient. Whistler *v.* Wilson, 39 Mich. 121.

83. State *v.* Williams, 70 Mo. App. 238; Willis *v.* Dun, Wright (Ohio) 130.

84. People *v.* Burnap, 38 Mich. 350; Purdy *v.* Martin, 31 Mich. 455; People *v.* Wurster, 89 Hun (N. Y.) 5, 35 N. Y. Suppl. 89, 69 N. Y. St. 446; O'Sullivan *v.* Larry, 2 Head (Tenn.) 54.

A technical denial of a refusal to hear evidence is sufficient. People *v.* Clinton County, 20 N. Y. Suppl. 273, 48 N. Y. St. 3.

Examination for license.— Where the determination of a board as to the qualification of an applicant, founded on answers to questions relating to the science or art of a profession, trade, or business is challenged by a writ of certiorari, the return of the board should show where the answers are incorrect or defective. People *v.* Scott, 86 Hun (N. Y.) 174, 33 N. Y. Suppl. 229, 66 N. Y. St. 744.

Adjournment.— The return of an order or resolution made at an adjourned meeting of a municipal board need not show that the adjournment was regularly made. Hudson County *v.* State, 24 N. J. L. 718.

A return of the record of a board showing its conclusions is not insufficient because it does not contain the memoranda from which the record was made — such memoranda having been inadvertently destroyed. Nehrling *v.* State, 112 Wis. 637, 88 N. W. 610.

85. State *v.* Pietroniro, (N. J. 1901) 50 Atl. 451; State *v.* Voorhees, (N. J. 1899) 43 Atl. 571.

A return by a school commissioner on a writ to review the action of his predecessor in changing the boundaries of school districts, consisting of a petition, reciting the action of the districts, and requesting the commissioner to act in the premises, presents nothing for the consideration of the reviewing court. State *v.* Williams, 70 Mo. App. 238.

A return to a writ to review the discharge of a municipal employee for physical incapacity, which states that the determination was based in part on the relator's appearance, is insufficient without a description of such appearance. People *v.* Barker, 1 N. Y. App. Div. 532, 37 N. Y. Suppl. 555, 73 N. Y. St. 112.

A certificate based on the sworn statements of former members of a board and not upon recollection or from the records is insufficient. State *v.* Board of Equalization, 7 Nev. 83.

Attachment proceedings.— The affidavit made to procure the garnishment, the summons of the garnishee with the indorsement of service upon it, the answer of the garnishee, and the execution against him with a statement of the judgment against him and of the original judgment against plaintiff's debtor is sufficient, where it does not appear affirmatively that such return is incomplete. Gould *v.* Meyer, 36 Ala. 565.

Adoption of former answer.— An answer to a writ which has been dismissed may be

determination which is the subject of review was made.[86] Where there is technically no record, the written proceedings and orders, or a history of the proceedings and the written orders which are in the nature of records, are to be certified.[87] The record as the same existed at the time when the writ was issued [88]

adopted as a response to a second writ. Harlow *v.* Rosser, 28 Ga. 219.

86. *Delaware.*— Kizer *v.* Downey, 1 Harr. (Del.) 530.

Florida.— Fore *v.* Fore, 44 Fla. 478.

Illinois.— Smith *v.* Highway Com'rs, 150 Ill. 385, 36 N. E. 967; Gerdes *v.* Champion, 108 Ill. 137; Donahue *v.* Will County, 100 Ill. 94; Highway Com'rs *v.* Harper, 38 Ill. 107; Highway Com'rs *v.* Carthage, 27 Ill. 140; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105; Randolph *v.* Pope County, 19 Ill. App. 100; Savage *v.* Cass County, 10 Ill. App. 204; McManus *v.* McDonough, 4 Ill. App. 180.

Maine.— Pike *v.* Herriman, 39 Me. 52.

Mississippi.— Allen *v.* Board of Levee Com'rs, 57 Miss. 163.

Missouri.— Ward *v.* Board of Equalization, 135 Mo. 309, 36 S. W. 648; State *v.* Board of Equalization, 108 Mo. 235, 18 S. W. 782; State *v.* Smith, 101 Mo. 174, 14 S. W. 108; State *v.* Kansas City, 89 Mo. 34, 14 S. W. 515; House *v.* Clinton County Ct., 67 Mo. 522; Hannibal, etc., R. Co. *v.* State Board of Equalization, 64 Mo. 294; Rogers *v.* Clinton County Ct., 60 Mo. 101; State *v.* Neosho, 57 Mo. App. 192; State *v.* Police Com'rs, 14 Mo. App. 297.

New Jersey.— State *v.* Pietroniro, (N. J. 1901) 50 Atl. 451; Lloyd *v.* Richman, 57 N. J. L. 385, 30 Atl. 432; Overseers of Poor *v.* Overseers of Poor, 16 N. J. L. 535.

New York.— People *v.* Lawrence, 54 Barb. (N. Y.) 589; People *v.* Brooklyn, 49 Barb. (N. Y.) 136; Kanouse *v.* Martin, 3 Sandf. (N. Y.) 593, 3 Code Rep. (N. Y.) 124; People *v.* Melville, 7 Misc. (N. Y.) 214, 27 N. Y. Suppl. 1101, 57 N. Y. St. 555; People *v.* Board of Police, 16 Abb. Pr. (N. Y.) 337; Matter of Eightieth St., 16 Abb. Pr. (N. Y.) 169; People *v.* New York, 2 Hill (N. Y.) 9; Stone *v.* New York, 25 Wend. (N. Y.) 157; Simpson *v.* Rhinelanders, 20 Wend. (N. Y.) 103; Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464; Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167; Nichols *v.* Williams, 8 Cow. (N. Y.) 13; Blake *v.* Hall, 5 Cow. (N. Y.) 37; Wolfe *v.* Horton, 3 Cai. (N. Y.) 86; People *v.* Highway Com'rs, 2 Code Rep. (N. Y.) 54.

Oregon.— Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111; Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280.

Pennsylvania.— Wilmington Steamship Co. *v.* Haas, 151 Pa. St. 113, 31 Wkly. Notes Cas. (Pa.) 79, 25 Atl. 85; Rand *v.* King, 134 Pa. St. 641, 26 Wkly. Notes Cas. (Pa.) 81, 19 Atl. 806; Hart *v.* Cooper, 129 Pa. St. 297, 24 Wkly. Notes Cas. (Pa.) 358, 18 Atl. 122; *In re* Carlson, 127 Pa. St. 330, 18 Atl. 8; Holland *v.* White, 120 Pa. St. 228, 13 Atl. 782, 783; *In re* Weaver, 116 Pa. St. 225, 9 Atl. 323; *In re* Germantown Ave., 99 Pa. St. 479; *In re* Upper Dublin, etc., Road, 94 Pa. St. 126; Plunkett's Creek Tp. *v.* Fairfield Tp., 58 Pa. St. 209; Bradford Tp. *v.* Goshen Tp., 57 Pa. St. 495; Matter of Church St., 54 Pa. St. 353; Carlisle *v.* Baker, 1 Yeates (Pa.) 471; Barnes' Appeal, 2 Pennyp. (Pa.) 506; *In re* Upper Macungie Tp. Road, 2 Wkly. Notes Cas. (Pa.) 661, 33 Leg. Int. (Pa.) 281.

Rhode Island.— Smith *v.* Burrillville, 19 R. I. 61, 31 Atl. 578.

South Dakota.— Kirby *v.* McCook County Cir. Ct., 10 S. D. 38, 71 N. W. 140.

West Virginia.— Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10.

England.—Bacon Abr. tit. Certiorari (H); Lofft. 347; Tidd Pr. 407.

See 9 Cent. Dig. tit. "Certiorari," § 131.

For form of record see Levant *v.* Penobscot County, 67 Me. 429.

If plaintiff's paper book fail to contain the record in full as required by a rule of court he cannot ask a determination in his favor. *In re* La Plume, (Pa. 1886) 4 Atl. 455.

The record consists of the process, pleadings, verdict, and judgment. Prindle *v.* Anderson, 19 Wend. (N. Y.) 391.

The facts found by the inferior tribunal constitute the return. Poppleton *v.* Yamhill County, 8 Oreg. 337; Douglas County Road Co. *v.* Douglas County, 6 Oreg. 299; California, etc., Land Co. *v.* Gowen, 48 Fed. 771.

A petition not sanctioned or lawfully filed cannot be made a part of the record. Lake *v.* Kellum, 99 Ga. 130, 24 S. E. 874.

The judgment below must be disclosed. *In re* Germantown Ave., 99 Pa. St. 479.

The early New York cases are collated and discussed in People *v.* Overseers of Poor, 6 How. Pr. (N. Y.) 25, and the true rule stated to be that laid down by Cowen, J., in Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464, and the subsequent case of Simpson *v.* Rhinelanders, 20 Wend. (N. Y.) 103, to wit: That only those parts of the proceedings below which properly enter into the frame of the record are the proper subjects of return.

In England, when the certiorari issued out of chancery, it was returnable in that court, and the record when brought up, if wanted in another court, was sent there by mittimus. 1 Tidd Pr. 398.

The record remains in the reviewing court until remitted. State *v.* Adams, 54 N. J. L. 506, 24 Atl. 482; Citizens' Gas Light Co. *v.* State, 44 N. J. L. 648.

87. Central Pac. R. Co. *v.* Board of Equalization, 34 Cal. 352; Bacon Abr. tit. Certiorari (H).

88. 1 Tidd Pr. 407. See Lowndes County *v.* Hearne, 59 Ala. 371 (where there was returned a record subsequently made, the validity of which was not questioned); Over-

or when the writ was served [89] is the record which must be certified and returned by the person or officer having custody or control of such record.

(11) *Original or Copy.* Where the writ so required,[90] or where the certiorari is in the nature of a writ of error, and the court is to hold plea of the record, the record itself is to be sent up, to the end that the judgment of the court may conclude it.[91] But where the object is not to affect the record itself, or where the court awarding the writ cannot hold plea of the record, only the tenor thereof need be certified.[92] So, unless for some special cause shown, the court will not require the return of the original record,[93] but a transcript thereof will be sufficient.[94]

c. Jurisdictional Facts. A return from an inferior judicatory or depositary of specially delegated and limited powers must affirmatively show jurisdiction. Nothing is intended to be within the jurisdiction that is expressly averred so to be,[95] and the return must present such facts or proof of such facts as will enable the reviewing court to determine its jurisdiction,[96] as where the jurisdiction of an

seers of Poor *v.* Overseers of Poor, 5 N. J. L. 949. It includes everything between the time of the teste and of the return. Cross *v.* Smith, 2 Ld. Raym. 836, 7 Mod. 138, 1 Salk. 148; 1 Tidd Pr. 407. The record must be transcribed without alteration. Stroud *v.* State, 55 Ala. 77.

89. Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10; Bee *v.* Seaman, 36 W. Va. 381, 15 S. E. 173.

90. Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; Matter of Torr, 1 Rawle (Pa.) 76.

If the original record cannot be returned a copy will suffice. *Ex p.* Jocelyn, 7 N. Brunsw. 637.

91. State *v.* Browning, 28 N. J. L. 556; Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; Woodcraft *v.* Kinaston, 2 Atk. 317, Dick. 233, 9 Mod. 305; Palmer *v.* Forsyth, 4 B. & C. 401, 6 D. & R. 497, 3 L. J. K. B. O. S. 260, 10 E. C. L. 633; Fazacharly *v.* Baldo, 6 Mod. 177, 1 Salk. 352; 1 Bacon Abr. tit. Certiorari (H); 1 Tidd Pr. 407; 4 Viner Abr. tit. Certiorari (C).

92. Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411; 1 Bacon Abr. tit. Certiorari (H); 4 Viner Abr. tit. Certiorari (C).

Where copies are returned by the legal custodian of the records, they are received and taken for the record and are not received as copies, unless the tenor only is required by the writ. Morris Canal, etc., Co. *v.* State, 14 N. J. L. 411 [*citing* 1 Bacon Abr. tit. Certiorari (H); Rex *v.* North, 2 Salk. 565, pl. 2].

93. Morrel *v.* Fearing, 20 N. J. L. 670.

94. Dyer *v.* Lowell, 33 Me. 260; Morrel *v.* Fearing, 20 N. J. L. 670; Nicholls *v.* State, 5 N. J. L. 635; Wolfe *v.* Horton, 3 Cai. (N. Y.) 86; Levin *v.* Hanley, Wright (Ohio) 588.

A copy of the record certified by the clerk under his official seal is sufficient. Mann *v.* Drost, 18 N. J. L. 336. Tenn. Code, § 3130, permits a certified copy. O'Sullivan *v.* Larry, 2 Head (Tenn.) 54.

In the supreme court of the United States, a printed copy of the transcript of record from a circuit court, which was printed under the supervision, direction, and control of the clerk of the circuit court of appeals, under and pursuant to the rules of that court, may be used, without being reproduced in manuscript by the clerk, in furnishing a certified copy of the record of the case, as required by rule 37 of the supreme court in case of an application for certiorari under section six of the judiciary act of March 3, 1891. Toledo, etc., R. Co. *v.* New York Continental Trust Co., 176 U. S. 219, 20 S. Ct. 383, 44 L. ed. 442.

95. *Alabama.*—Lowndes County *v.* Hearne, 59 Ala. 371.

Iowa.—Richman *v.* Muscatine County, 70 Iowa 627, 26 N. W. 24.

Michigan.—Wight *v.* Warner, 1 Dougl. (Mich.) 384.

Missouri.—Zimmerman *v.* Snowden, 88 Mo. 218; Jefferson County *v.* Cowan, 54 Mo. 234; Owens *v.* Andrew County Ct., 49 Mo. 372; State *v.* Neosho, 57 Mo. App. 192; State *v.* Schneider, 47 Mo. App. 669; State *v.* Cauthorn, 40 Mo. App. 94; State *v.* Police Com'rs, 14 Mo. App. 297 [*affirmed* in 88 Mo. 144].

New York.—People *v.* Knowles, 47 N. Y. 415; People *v.* Newgass, 12 N. Y. St. 760; People *v.* Cholwell, 6 Abb. Pr. (N. Y.) 151; Prindle *v.* Anderson, 19 Wend. (N. Y.) 391; Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

Oregon.—Johns *v.* Marion County, 4 Oreg. 46.

Pennsylvania.—Com. *v.* Dalliug, 2 Pars. Eq. Cas. (Pa.) 285; Fraily *v.* Sparks, 2 Pars. Eq. Cas. (Pa.) 232; Mulvary *v.* Miller, 1 Browne (Pa.) 339.

South Carolina.—State *v.* Cohen, 13 S. C. 200; Devall *v.* Taylor, 1 Cheves (S. C.) 5.

See 9 Cent. Dig. tit. "Certiorari," § 131 *et seq.*

96. Stumpf *v.* San Louis Obispo County, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; Matter of Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755; Blair *v.* Hamilton, 32 Cal. 49; Lowe *v.* Alexander, 15 Cal. 296; People *v.* San Francisco Fire Dept., 14 Cal. 479; Alexander *v.* Archer, 21 Nev. 22, 24 Pac. 373; People *v.* Goodwin, 5 N. Y. 568; People *v.* Van Alstyne, 32 Barb. (N. Y.) 131; People

inferior tribunal depends upon a fact to be proved before itself,[97] and it has been held that omitted matters necessary to show jurisdiction may be supplied by extrinsic evidence.[98]

d. Specification of Errors. The alleged error must appear affirmatively.[99]

e. Evidence. Unless by statute or under the circumstances hereinafter referred to, the evidence on which the inferior jurisdiction based its determination forms no part of the record and should not be returned.[1] Where the law requires the inferior tribunal to reduce the evidence taken before it to writing,[2] or the writ so commands,[3] or on review of proceedings had before a justice of the peace, the evidence may properly be returned.[4] A common-law writ of certiorari to review a summary conviction under a penal statute brings up not only questions affecting the jurisdiction of the magistrate, but also the question whether there was any evidence to warrant the conviction. In such cases the evidence must appear on the face of the record.[5] And if in addition to the right to ascertain whether the inferior tribunal proceeded regularly and within its jurisdiction,

v. Overseer of Poor, 15 Barb. (N. Y.) 286; Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

On a common-law certiorari to a court-martial no more of the facts or evidence need be returned than is necessary to determine on the point of jurisdiction, or other question of law arising in the course of the proceedings. Rathbun *v.* Sawyer, 15 Wend. (N. Y.) 451.

Stipulation.—This rule does not necessarily apply to a return which had been rendered incomplete by a stipulation expunging evidence therefrom. People *v.* Newgass, 12 N. Y. St. 760.

97. People *v.* Knowles, 47 N. Y. 415; People *v.* Smith, 45 N. Y. 772; People *v.* Goodwin, 5 N. Y. 568; People *v.* Lawrence, 36 Barb. (N. Y.) 177.

98. State *v.* Neosho, 57 Mo. App. 192; Burgan *v.* Miners' Mills, 7 Kulp (Pa.) 561.

99. State *v.* Frech, 51 N. J. L. 501, 18 Atl. 354; Rand *v.* King, 134 Pa. St. 641, 26 Wkly. Notes Cas. (Pa.) 81, 19 Atl. 806; Chase *v.* Miller, 41 Pa. St. 403.

1. *California.*— Central Pac. R. Co. *v.* Board of Equalization, 32 Cal. 582.

Michigan.— Case *v.* Frey, 24 Mich. 251.

New York.— People *v.* Overseers of Poor, 6 How. Pr. (N. Y.) 25; U. S. *v.* Wyngall, 5 Hill (N. Y.) 16; Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464; Rathbun *v.* Sawyer, 15 Wend. (N. Y.) 451; Nichols *v.* Williams, 8 Cow. (N. Y.) 13; People *v.* Vermilyea, 7 Cow. (N. Y.) 108.

Oregon.— Poppleton *v.* Yamhill County, 8 Oreg. 337; Douglas County Road Co. *v.* Douglas County, 6 Oreg. 299; Douglas County Road Co. *v.* Douglas County Ct., 5 Oreg. 406; Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280.

Pennsylvania.— Wilmington Steamship Co. *v.* Haas, 151 Pa. St. 113, 31 Wkly. Notes Cas. (Pa.) 79, 25 Atl. 85; *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260; Westmoreland County *v.* Overseers of Poor, 34 Pa. St. 231; Union Canal Co. *v.* Keiser, 19 Pa. St. 134; *In re* Quakertown, 3 Grant (Pa.) 203; Nobles *v.* Piollet, 16 Pa. Super. Ct. 386; Germantown *v.* Zinck, 1 Ashm. (Pa.) 64.

West Virginia.— Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10.

Wisconsin.— Baizer *v.* Lasch, 28 Wis. 268.

United States.— California, etc., Land Co. *v.* Gowen, 48 Fed. 771.

See 9 Cent. Dig. tit. "Certiorari," § 129 *et seq.*

Ordinary actions.—N. J. Laws (1871), p. 124, requiring the return of evidence in "any tax or assessment, or other order or proceedings," contemplates extraordinary proceedings, and not ordinary actions at law. Craft *v.* Smith, 35 N. J. L. 302.

In a civil action a justice is not bound to return the evidence unless called on so to do. Wilson *v.* Fenner, 3 Johns. (N. Y.) 439.

Evidence not preserved.— Where the inferior tribunal is of statutory origin and no provision is made for preserving the evidence taken before it, such evidence cannot be made a part of the record. State *v.* Madison County Ct., 136 Mo. 323, 37 S. W. 1126.

2. State *v.* Board of Equalization, 7 Nev. 83.

3. Where the writ commands the certification of the evidence "so far as necessary to present any question of law upon any point specified in the affidavit" for the writ, it is not necessary that the stenographer's notes of the testimony should be included in the return. Traverse City, etc., R. Co. *v.* Seymour, 81 Mich. 378, 45 N. W. 826.

4. State *v.* St. John, 47 Minn. 315, 50 N. W. 200; Nichols *v.* Williams, 8 Cow. (N. Y.) 13.

5. Armijo *v.* Bernalillo County, 3 N. M. 297, 7 Pac. 19; Mullins *v.* People, 24 N. Y. 399; People *v.* Sanders, 3 Hun (N. Y.) 16; Reg. *v.* Turk, 10 Q. B. 540, 59 E. C. L. 540; Rex *v.* Killett, 4 Burr. 2063; Rex *v.* Read, 1 Dougl. 469; Rex *v.* Chandler, 14 East 267; Rex *v.* Crisp, 7 East 389, 3 Smith K. B. 377; Rex *v.* Smith, 8 T. R. 588; Rex *v.* Clarke, 8 T. R. 220. In Overseers of Poor *v.* Overseers of Poor, 2 Cow. (N. Y.) 575, the court said that, although the practice was denied in England, yet in New York it was the constant practice to require the sessions to state the evidence and points of law in their return.

the court is also authorized to review errors, in addition to the record in its strict sense there may be returned such rulings and decisions of legal questions together with the facts and evidence relative thereto as may be necessary to enable the reviewing court to see that there was proof and that the proof was sufficient to support the determination and to justify the action below.[6]

f. Exceptions.[7] Bills of exceptions which have been signed, sealed, and made a part of the record should be included in the return.[8]

g. Distinct Determinations. Two or more judgments cannot be returned under one writ,[9] but a return is not objectionable because certifying two distinct final determinations made in the same proceedings.[10]

h. Statements Contained in Application. Matters stated in the petition or affidavit on which the writ was granted are not proper as a part of the return.[11]

i. Statement of Obedience to Writ. The return must show that it is made in obedience to a writ duly issued,[12] which should accompany it;[13] and where so required by the local practice should contain a statement to the effect that all the acts and proceedings below, or those referred to in the writ, are returned.[14]

6. *Georgia.*— Lake *v.* Kellum, 99 Ga. 130, 24 S. E. 874.

Minnesota.— St. Paul *v.* Marvin, 16 Minn. 102; Minnesota Cent. R. Co. *v.* McNamara, 13 Minn. 508; Gervais *v.* Powers, 1 Minn. 45.

Nevada.— State *v.* Board of Equalization, 7 Nev. 83.

New York.— Anderson *v.* Prindle, 23 Wend. (N. Y.) 616; Prindle *v.* Anderson, 19 Wend. (N. Y.) 391.

Oregon.— Johns *v.* Marion County, 4 Oreg. 46.

West Virginia.— Dryden *v.* Swinburne, 20 W. Va. 89.

England.— Parker *v.* Great Western R. Co., 6 Exch. 184, 15 Jur. 109, 20 L. J. Exch. 112, 2 L. M. & P. 137.

A return of attachment proceedings should include an original affidavit claimed to be defective, as well as a new one permitted to be filed in lieu thereof. People *v.* Judges Branch Cir. Ct., 1 Dougl. (Mich.) 319.

Appealed cases.— On certiorari to remove a cause appealed, the proceedings in the primary tribunal are properly returned. Barcklow *v.* Hutchinson, 32 N. J. L. 195.

Arguments or assertions of counsel are improperly included in the return to a writ requiring among other things a certification of the evidence. People *v.* Jones, 49 Hun (N. Y.) 365, 2 N. Y. Suppl. 148, 17 N. Y. St. 586.

The return should show that some proof was made which had a tendency, at least, to establish the material allegations in issue. People *v.* Overseers of Poor, 15 Barb. (N. Y.) 286.

7. **The exceptions taken** should be returned. Minnesota Cent. R. Co. *v.* McNamara, 13 Minn. 508. Exceptions to the record must be signed. Platt *v.* Hook, 5 Harr. (Del.) 352.

In militia cases the return of the justice need not contain a statement of the facts in the form of exceptions made by the defendant, but should state the facts only. Com. *v.* Walker, 4 Mass. 556.

8. Larkin *v.* Hecksher, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137; Dryden *v.* Swinburne, 20 W. Va. 89. And see Stroud *v.* State, 55 Ala. 77.

Evidence is no part of the record unless made so by a proper order or bill of exceptions. Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10. See, generally, APPEAL AND ERROR, 3 Cyc. 26.

Under the Georgia judiciary act a bill of exceptions is not necessary where the error is a matter of record. Davis *v.* Rogers, 23 Ga. 360.

9. Smith *v.* Hearne, 2 Stew. & P. (Ala.) 81.

10. Miller *v.* Jones, 80 Ala. 89.

11. *Illinois.*— Highway Com'rs *v.* Carthage, 27 Ill. 140.

Michigan.— Hewitt *v.* Oakland County Probate Judge, 67 Mich. 1, 34 N. W. 248.

Minnesota.— Taylor *v.* Bissell, 1 Minn. 225.

Missouri.— State *v.* Powers, 68 Mo. 320.

New York.— Starkweather *v.* Seeley, 45 Barb. (N. Y.) 164; Mann *v.* Swift, 3 Cow. (N. Y.) 61.

South Dakota.— Kirby *v.* McCook County Cir. Ct., 10 S. D. 38, 71 N. W. 140.

See 9 Cent. Dig. tit. "Certiorari," § 131 *et seq.*

A petition which has not been sanctioned cannot be made part of the record. Lake *v.* Kellum, 99 Ga. 130, 24 S. E. 874.

A return adopting the statements of the petition and a certification by the officer that such statements fairly represent what occurred so far as he remembers is insufficient. Star Glass Co. *v.* Longley, 64 Ga. 576.

The inferior tribunal may, without suggestion from party, counsel, or other interested person, adopt, either in whole or in part, as his answer, the allegations of fact contained in the petition for certiorari. Flanders *v.* Wood, 113 Ga. 635, 38 S. E. 975.

12. Marshall *v.* Ramsauer, 30 Ark. 532; McKay *v.* Jones, 30 Ark. 148; Dicus *v.* Bright, 23 Ark. 107; Derton *v.* Boyd, 21 Ark. 264.

13. McKay *v.* Jones, 30 Ark. 148; Derton *v.* Boyd, 21 Ark. 264.

14. People *v.* Maclean, 61 N. Y. Super. Ct. 458, 19 N. Y. Suppl. 548, 46 N. Y. St. 876

6. Unauthorized or Irrelevant Matter. The return should not include matters not commanded [15] or not required by the practice,[16] or matter which is neither a part of the record nor of the proceedings to be reviewed.[17] An unofficial or unauthorized return,[18] one made by a person incompetent to accept service,[19] or a voluntary return of a state of facts made without legal authority cannot be received.[20] Its place cannot be supplied by a stipulation by the attorneys of the parties which purports to set forth the facts,[21] or by a paper signed by them and purporting to give a history of the action.[22]

7. Refusal to Make Return — a. Non-Payment of Fees. A board or officer may refuse to make a return until the fees provided by law for making the same are paid.[23]

b. Remedies. A judicial officer or other person who refuses to obey the mandate of the writ, or an order requiring a further return, may be compelled to do so,[24] and may also be punished for the disobedience[25] as for a contempt,[26]

(where a further return to supply the defect was permitted); Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10.

"All the evidence."— To authorize the court to find that the verdict below was not warranted by the evidence, the record must purport to contain all the testimony. Barclay *v.* Brabston, 49 N. J. L. 629, 9 Atl. 769. A statement at the end of the testimony that "the above is all the testimony" is sufficient as a certificate. Payson *v.* Everett, 12 Minn. 216.

15. People *v.* Board of Police, 16 Abb. Pr. (N. Y.) 337; Stone *v.* New York, 25 Wend. (N. Y.) 157.

Notes of testimony and of the proceedings at the trial, sent up with the return but not in response to a rule of court, form no part of the return. State *v.* North Hudson County R. Co., (N. J. 1901) 48 Atl. 790; Stier *v.* Koster, 66 N. J. L. 155, 48 Atl. 790.

In Louisiana, in addition to sending up the record, it is competent for the court below to submit a history of the case. Colomb *v.* Rolling, 106 La. 37, 30 So. 293.

16. Parish *v.* New Domestic Sewing Mach. Co., 66 N. J. L. 159, 48 Atl. 998.

17. State *v.* Board of Equalization, 7 Nev. 83, where it was held improper to include affidavits presented to the clerk of an official board, after the issue of the writ, or his certificate based thereon.

Unauthorized affidavits used in a proceeding constitute no part thereof and need not be returned. *In re* Marty, 3 Barb. (N. Y.) 229.

18. Moore *v.* Hamilton, 24 N. J. L. 532; State *v.* Howell, 24 N. J. L. 519.

The return of a township clerk of the proceedings of highway commissioners, taken and filed by him without authority, is an insufficient return. Roberts *v.* Highway Com'rs, 24 Mich. 182.

No command.—A return made by persons to whom the writ is addressed, but of whom no return is commanded, cannot be noticed. State *v.* Rowan, 57 N. J. L. 530, 31 Atl. 224.

19. State *v.* Everett, 103 Wis. 269, 79 N. W. 421.

20. Moore *v.* Hamilton, 24 N. J. L. 532.

21. Pierson *v.* Klahre, (N. J. 1899) 43 Atl. 569; Monitor Lodge No. 219 *v.* Goldy, 58 N. J. L. 119, 32 Atl. 689.

A certiorari cannot be heard on stipulation of counsel and a transcript of the testimony. Monitor Lodge No. 219 *v.* Goldy, 58 N. J. L. 119, 32 Atl. 689.

The notes of counsel cannot be received as a substitute for the evidence, which by a rule the judges below were required to certify. Roston *v.* Morris, 25 N. J. L. 173.

22. A narrative of the action signed by the attorneys for the parties is not a proper return to a writ addressed to the inferior court. State *v.* Ocean Grove Camp Meeting Assoc., 58 N. J. L. 123, 32 Atl. 695.

23. People *v.* Springwells Tp. Bd., 13 Mich. 246; People *v.* Ouderkirk, 76 Hun (N. Y.) 119, 27 N. Y. Suppl. 821, 51 N. Y. St. 375; People *v.* Fulton County, 64 Hun (N. Y.) 375, 19 N. Y. Suppl. 773, 46 N. Y. St. 470; State *v.* Sachs, 3 Wash. 496, 30 Pac. 503.

On such a refusal the amount of fees demanded should be stated. People *v.* Fulton County, 20 N. Y. Suppl. 280, 47 N. Y. St. 928. But see *Ex p.* Davies, 3 Quebec Q. B. 425, 3 L. C. Rep. 60, denying the right of a magistrate to refuse a return because fees due in the case have not been paid.

24. Overseers of Poor *v.* Overseers of Poor, 2 Cow. (N. Y.) 575; Talbot *v.* White, 1 Wis. 444.

Failure of the inferior court to make a proper record cannot be inquired into on certiorari. The remedy is mandamus. Blair *v.* Sennott, 134 Ill. 78, 24 N. E. 969. See, generally, Mandamus.

Where the parties have proceeded to an issue of in nullo est erratum without a return, the defendant cannot require a return to be made, but his remedy is to *non pros* the plaintiff whose duty it is to procure it. Marsh *v.* Eastman, 3 Cow. (N. Y.) 58.

25. A writ of sequestration should not issue against a corporation which has failed to make a return, until a distringas has issued and been tried. People *v.* Brooklyn, 5 How. Pr. (N. Y.) 314.

26. *Georgia.*— Pittman *v.* Hagins, 91 Ga. 107, 16 S. E. 659.

Illinois.— McManus *v.* McDonough, 4 Ill. App. 180.

or may be mulcted in costs.[27] The application to compel a return must show the delivery of the writ and a refusal to obey it after a reasonable time,[28] but a petition to punish as for a contempt need not aver illegality in the proceedings sought to be reviewed.[29]

8. FALSE RETURN. If a false return is made the remedy is by action against the officer who made it,[30] and not by motion to correct it.[31]

9. OBJECTIONS TO RETURN — a. Mode of Taking. Errors in the return may be corrected on motion[32] or suggestion in the court below,[33] but an immaterial variance may be disregarded.[34]

b. Waiver. The insufficiency of a return in form or substance may be waived by failure to make timely objection[35] or to take steps to correct it.[36]

10. AMENDMENTS — a. In General. Generally a return to a writ of certiorari which is not fatally defective may be amended,[37] and time may be allowed for that

Washington.— State *v.* Sachs, 3 Wash. 496, 30 Pac. 503.

Wisconsin.— Talbot *v.* White, 1 Wis. 444.

Canada.—*In re* Clyde Coal, etc., Co., 8 Nova Scotia 56.

A recital in the writ that it was duly sanctioned cannot be controverted on proceedings to punish for a contempt in refusing to make a return. Pittman *v.* Hagins, 91 Ga. 107, 16 S. E. 659.

The return of service of the writ will justify the issue of an attachment. McManus *v.* McDonough, 4 Ill. App. 180.

27. *Ex p.* Leroux, 10 L. C. Jur. 193.

28. Smith *v.* Somers, 16 N. J. L. 456.

29. Pittman *v.* Hagins, 91 Ga. 107, 16 S. E. 659.

30. Hickey *v.* Matthews, 43 Ark. 341; People *v.* Board of Fire Com'rs, 73 N. Y. 437; People *v.* Syracuse, 6 Hun (N. Y.) 652; People *v.* Ryken, 6 Hun (N. Y.) 625; People *v.* Gillon, 9 N. Y. Suppl. 243, 18 N. Y. Civ. Proc. 109; People *v.* Weld, 6 N. Y. St. 173; Haines *v.* Judges Westchester, 20 Wend. (N. Y.) 625; ——— *v.* Cowper, 6 Mod. 90.

31. People *v.* Gillon, 9 N. Y. Suppl. 243, 18 N. Y. Civ. Proc. 109. And see Smith *v.* Johnston, 30 How. Pr. (N. Y.) 374.

32. Roe *v.* San Francisco Super. Ct., 60 Cal. 93; Washington Market Co. *v.* Summy, 3 MacArthur (D. C.) 59; People *v.* Brooklyn, 49 Barb. (N. Y.) 136.

Affidavit.— Motion to amend must be supported by an affidavit showing incompleteness of the return. Harris *v.* Nichols, 26 Ga. 413.

Notice of motion.— Copies of the return and affidavit need not be served on the adverse party with the notice of motion to amend. Houseworth *v.* Suydam, 7 Cow. (N. Y.) 106.

After joinder in error a clerical misprision may be corrected, where the joinder was a matter of precaution merely, and not in reliance of the correctness of the proceedings. Moore *v.* Bacon, 3 Cai. (N. Y.) 83.

33. Roe *v.* San Francisco Super. Ct., 60 Cal. 93.

Traverse of return.—In Georgia, by statute, a traverse to the return must be filed at the first term, and the issue thereby formed is required to be tried by a jury. Under such a statute the traverse cannot be filed after the first term, although the case has not been reached. Hirt *v.* Linton, 59 Ga. 881. If properly filed, it must be disposed of on demurrer, or by a trial, before a hearing on the certiorari can be proceeded with (Phillips *v.* Atlanta, 78 Ga. 773, 3 S. E. 431); and where the papers and traverse are transmitted in vacation to the next term for trial, the traverse cannot be dismissed, because not verified, and the case withdrawn from the jury, until the order transmitting the cause is set aside (Mundy *v.* Martin, 44 Ga. 195).

34. People *v.* Robertson, 26 How. Pr. (N. Y.) 90, where the variance was between the date of the order returned and the date recited in the writ.

35. State *v.* Ramsey County Probate Ct., 83 Minn. 58, 85 N. W. 917; People *v.* Brooklyn, 49 Barb. (N. Y.) 136; Harris *v.* Whitney, 6 How. Pr. (N. Y.) 175.

Failure to object.— If a return defective because of the absence of a sealed bill of exceptions is not objected to, and the facts and rulings below are certified by the seal of the judge, the cause will be decided on the facts found and the determination made thereon. Larkin *v.* Hecksher, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137.

Time of objection.— Where objection is required to be made before the case is called in its order for hearing, the objectant is not concluded until the cause is regularly reached and called. Star Glass Co. *v.* Longley, 64 Ga. 576.

A party appearing to support a conviction cannot object to the omission of a seal. Reg. *v.* Oulton, 6 N. Brunsw. 269.

36. People *v.* Brady, 50 N. Y. App. Div. 372, 63 N. Y. Suppl. 1089.

Objection must be specific.— Neelis *v.* McKeown, 6 Phila. (Pa.) 310, 24 Leg. Int. (Pa.) 204.

37. Lincoln *v.* Boston, 176 Mass. 210, 57 N. E. 356; State *v.* Newark, etc., Turnpike Co., 3 N. J. L. 126.

Amendment of course.—An amended answer to give petitioners advantage of facts shown by their offer of proof will be allowed at the hearing as of course. Lincoln *v.* Boston, 176 Mass. 210, 57 N. E. 356.

An omitted seal may be added. State *v.* Newark, etc., Turnpike Co., 3 N. J. L. 126.

purpose,[38] or the court of review may suspend its action to permit a proper amendment to be made.[39] But it may not be amended where it purports to be complete [40] and it is attempted to add to the record papers not presented below.[41] Nor can omitted portions of the record be supplied,[42] although it has been held that this might be done informally as a matter of indulgence and to save delay and vexation.[43]

b. Striking Out. Immaterial matter or matter *dehors* the record may be stricken out on application,[44] or on the hearing, as surplusage;[45] but if the court has no authority to strike it out,[46] or it tends to inform the court of the proceedings, irresponsive or irrelevant matter which is returned may be permitted to remain.[47]

11. Certification of New Matter. If the reviewing court desires to be informed of the facts on which the inferior jurisdiction acted, and which are not technically of record, it may require the certification of such facts in its return.[48]

Regarded as made nunc pro tunc.— If there be error in a return which is in conformity to the general practice it will be considered as amended *nunc pro tunc*. Mann *v.* Drost, 18 N. J. L. 336.

In Maine on review of the proceedings of county commissioners, the sworn answer of the commissioners, as far as containing conclusions of fact, is regarded as having the same effect as if their record were amended according to the answer. If, however, the answer is indefinite or equivocal, the court may require an amended answer or the production of an amended record. Chapman *v.* York County, 79 Me. 267, 9 Atl. 728.

Record not in possession.— In Reg. *v.* Vail, 10 N. Brunsw. 165, a return by justices which stated that the order required was not in their possession was permitted to be amended by substituting a statement of its substance, or by stating what became of the original, that a further writ might issue.

Omission of bill of exceptions.—A return cannot be amended so as to enable the reviewing court to hear the cause on the merits, where proper bills of exceptions making the evidence and other papers parts of the record were not prepared and properly authenticated. Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10.

To show conviction.— On showing cause against a rule for the writ, a corrected return showing a conviction cannot be substituted. *Ex p.* Austin, 45 J. P. 302, 50 L. J. M. C. 8, 44 L. T. Rep. N. S. 102.

New issues.—An issue of fact cannot be made up in the revisory court to supply an omission in the record. Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947.

The return cannot be taken from the files for the purpose of amendment. Rivard *v.* Walker, 40 Ill. 120.

38. Mann *v.* Drost, 18 N. J. L. 336; Kirby *v.* Coles, 14 N. J. L. 576.

39. State *v.* Rost, 52 La. Ann. 984, 27 So. 365.

40. State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942, where the application was said to be a mere attempt to traverse the return on affidavits.

Appeal.—An order denying a motion to require an amendment to the return is not appealable. State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942.

41. State *v.* Gallagher, 22 Nev. 80, 35 Pac. 485.

42. Hoffmann *v.* San Francisco Super. Ct., 79 Cal. 475, 21 Pac. 862; State *v.* Springer, 134 Mo. 212, 35 S. W. 589; State *v.* Kansas City, 89 Mo. 34, 14 S. W. 515.

Docket entries of a justice may be put in evidence where the loss of the writ and transcript is proved. Com. *v.* Montgomery, 2 Pa. St. 461.

Ex parte affidavits.—A defective return cannot be supplemented by *ex parte* affidavits. Washington Market Co. *v.* Summy, 3 MacArthur (D. C.) 59.

43. State *v.* Newark, etc., Turnpike Co., 3 N. J. L. 126.

44. Vance *v.* Little Rock, 30 Ark. 435.

An assignment of errors accompanying the return will not be stricken out as an irregularity. People *v.* Willes, 6 N. Y. Leg. Obs. 364.

If papers have been improperly included in the transcript, the remedy is for the clerk to certify as to such improper inclusion. Rivard *v.* Walker, 40 Ill. 120.

45. People *v.* Orange County, 21 N. Y. Suppl. 298, 50 N. Y. St. 46.

46. People *v.* Grant, 58 Hun (N. Y.) 158, 11 N. Y. Suppl. 505, 33 N. Y. St. 810, 19 N. Y. Civ. Proc. 318; People *v.* Melville, 7 Misc. (N. Y.) 214, 27 N. Y. Suppl. 1101, 57 N. Y. St. 555.

47. Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781.

48. Los Angeles *v.* Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234; Sweet *v.* Clinton, 3 Johns. (N. Y.) 23.

Necessity of rule.— The evidence cannot be laid before the supreme court by stipulation of counsel without a prior rule on the court of common pleas to certify it. State *v.* Schulster, 60 N. J. L. 132, 36 Atl. 776.

Requisites of rule.— The rule to take affidavits must specify their purpose. Scott *v.* Beatty, 23 N. J. L. 256.

Time of application.—After argument and decision, an application for a rule to certify

12. Further Return. If the return is incomplete or defective, a further or supplemental return may be ordered;[49] and in a proper case the court may order a further return of its own motion against objection.[50] But a further return will not be required where the record furnished is complete,[51] where sufficient appears therein to show that the application for such a return is without merit,[52] or where no change will be made in the questions presented for review.[53]

N. Assignment of Errors — 1. Necessity of. On a common-law certiorari no assignment of errors is necessary,[54] for the return being conclusive it cannot be contradicted;[55] but if by statute or the local practice assignment of errors is

reasons for the determination comes too late. Overt *v.* Whitehead, 9 N. J. L. 244.

In New Jersey, at an early day, either party, upon an allegation of diminution, might take a rule upon the justice to amend his return in any matter which ought to appear upon his docket or files; and at the same time upon the allegation of extrinsic facts, take a rule to establish those facts, if relevant, and after the amendment, if the record was still incomplete, take a rule for affidavits to supply matters which ought to be but were not returned. State *v.* Overseers of Poor, 52 N. J. L. 298, 19 Atl. 787; Sockwell *v.* Bateman, 4 N. J. L. 423. This rule was relaxed in Townly *v.* Rutan, 20 N. J. L. 604; Anonymous, 16 N. J. L. 355; Smith *v.* Opdycke, 12 N. J. L. 85; Goldsmith *v.* Bane, 8 N. J. L. 87. But subsequently the true rule was formulated in Scott *v.* Beatty, 23 N. J. L. 256, 259, as follows: "If no state of the case be agreed upon, the proper practice is, in the first instance, to call up the court to return what the facts were. Their return is conclusive. . . . If the court below fail to make a return of the facts, then, from the necessity of the case, and then only, can resort be had to affidavits." And see Gennarino *v.* De Gandenzio, 64 N. J. L. 157, 44 Atl. 950; State *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023; State *v.* Bird, 56 N. J. L. 228, 28 Atl. 428; State *v.* Overseers of Poor, 52 N. J. L. 298, 19 Atl. 787; State *v.* Brands, 45 N. J. L. 332; Parsell *v.* State, 30 N. J. L. 530; Boston *v.* Morris, 25 N. J. L. 173; Moore *v.* Hamilton, 24 N. J. L. 532.

If the reviewing court is powerless to compel by rule the return of specific exceptions alleged to have been taken and not shown by the bill of exceptions returned, the proper practice is to call on the inferior court to certify as to the matter alleged to have been omitted from the record. If the alleged diminution of the record is that exceptions duly taken and sealed have not been returned, a rule may issue that the court below certify whether such exceptions were taken, sealed, and filed, and if so that they be sent up. Cohen *v.* Gartner, 52 N. J. L. 110, 18 Atl. 691.

49. *District of Columbia.*— Washington Market Co. *v.* Summy, 3 MacArthur (D. C.) 59.

Maine.— Levant *v.* Penobscot County, 67 Me. 429.

Michigan.— Gordon *v.* Sibley, 59 Mich. 250, 26 N. W. 485; Hitchcock *v.* Sutton, 28 Mich. 86.

New Jersey.— Kirby *v.* Coles, 14 N. J. L. 576.

New York.— People *v.* Board of Fire Com'rs, 73 N. Y. 437; People *v.* Grant, 58 Hun (N. Y.) 158, 11 N. Y. Suppl. 505, 33 N. Y. St. 810, 19 N. Y. Civ. Proc. 318; People *v.* Maclean, 61 N. Y. Super. Ct. 458, 19 N. Y. Suppl. 548, 46 N. Y. St. 876; People *v.* Robb, 9 N. Y. Suppl. 831, 31 N. Y. St. 640; People *v.* Weld, 6 N. Y. St. 173; Caledonian Co. *v.* Hoosick Falls, 7 Wend. (N. Y.) 508.

See 9 Cent. Dig. tit. "Certiorari," § 141.

All acts returned.—A further return showing that all the acts of the inferior tribunal are returned may be directed. People *v.* Maclean, 61 N. Y. Super. Ct. 458, 19 N. Y. Suppl. 548, 46 N. Y. St. 876.

Procedure to obtain.— If the answer does not specifically respond to the allegations of the petition, or fails to certify and send up the whole of the proceedings, the remedy is not by motion to dismiss, but exceptions should be filed, and if they are sustained the inferior tribunal may be required to perfect and send up an answer. Star Glass Co. *v.* Longley, 64 Ga. 576.

Effect of failure to procure.— If a return is obscure as to a particular fact, and no further return is sought, no consideration will be given to the return on that point. De Myer *v.* McGonegal, 32 Mich. 120.

Obviation by modification of command.— The requirement of a further return is superseded by a modification of the command of the writ, to which an original return must be made. People *v.* Feitner, 40 N. Y. App. Div. 620, 57 N. Y. Suppl. 1062.

Number of returns.— Further returns may be directed until neither party can object. State *v.* Reid, 18 N. C. 377, 28 Am. Dec. 572.

50. Gordon *v.* Sibley, 59 Mich. 250, 26 N. W. 485.

51. People *v.* Melville, 7 Misc. (N. Y.) 214, 27 N. Y. Suppl. 1101, 57 N. Y. St. 555.

52. People *v.* Orange County, 21 N. Y. Suppl. 298, 50 N. Y. St. 46.

53. Stumpf *v.* San Luis Obispo County, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350.

54. Com. *v.* Sheldon, 3 Mass. 188; Stokes *v.* Jacobs, 10 Mich. 290. In Calloway *v.* Calloway, 3 Harr. (Del.) 332, defendant in certiorari was permitted to allege error in fact against the record.

An unnecessary assignment of errors will not be stricken out. People *v.* Willes, 6 N. Y. Leg. Obs. 364.

55. People *v.* Powers, 19 Abb. Pr. (N. Y.)

required, failure to make a sufficient assignment will preclude consideration of the alleged error.[56] However, material error which is apparent may be regarded, although not pointed out.[57]

2. TIME OF MAKING. The assignment must be made or filed within the time prescribed therefor.[58]

3. SUFFICIENCY OF. The assignments must specifically point out the particular error or errors relied on,[59] especially where the alleged illegalities are not apparent on the face of the record.[60]

O. Dismissal and Quashing of Writ — 1. GROUNDS — a. In General.[61] The writ will not be dismissed on grounds considered in allowing it,[62] or where the return discloses matter which, if presented, would have induced its issue;[63] but the writ may be dismissed if in the progress of the cause facts appear which would have defeated the application.[64]

b. Writ Improvidently Granted. The writ may be superseded or quashed because improvidently granted,[65] as where it clearly appears that discretion in

99; Haines *v.* Judges Westchester, 20 Wend. (N. Y.) 625.

56. Murray *v.* Williams, 8 Port. (Ala.) 47; State *v.* Kirby, 5 N. J. L. 982; *In re* Germantown Ave., 99 Pa. St. 479.

Petition as assignment.— The petition for the writ of certiorari may be regarded as in the nature of an assignment of errors, in the absence of any more formal assignment, after the record is returned. State *v.* Powers, 68 Mo. 320.

Verification in answer.— In Georgia it is held that assignments upon rulings on questions of law must be verified by the answer to the writ. They are not so verified when the answer is either silent with respect thereto or expressly denies that any such rulings were made. Taft Co. *v.* Smith, 112 Ga. 196, 37 S. E. 424.

57. Hunter *v.* Weidner, 1 Woodw. (Pa.) 6.

58. Shenango Tp. *v.* Wayne Tp., 34 Pa. St. 184.

Dismissal for failure to file in time.— If the plaintiff in certiorari fails to file the causes relied on for reversal within the time allowed by rule of court the writ will be dismissed unless sufficient excuse for the delay is shown. Brown *v.* Peterson, 38 N. J. L. 189.

Time granted.— If the error is apparent on the face of the record, time to file an assignment thereof may be granted. State *v.* Kirby, 5 N. J. L. 982.

59. Deputy *v.* Betts, 4 Harr. (Del.) 352; Tinley *v.* Todd, 2 Harr. (Del.) 290; Morris, etc., Dredging Co. *v.* Jersey City, 64 N. J. L. 587, 46 Atl. 609; State *v.* Passaic, 55 N. J. L. 485, 27 Atl. 909. Allegations that the "petitioners objected to the judgment of said court, still object, and say the same was error and as such assign it" (Papworth *v.* Fitzgerald, 111 Ga. 54, 36 S. E. 311) or that the judgment complained of "was contrary to law, truth, and justice" (Taft Co. *v.* Smith, 112 Ga. 196, 37 S. E. 424) do not comply with a statute requiring the errors complained of to be plainly and distinctly set forth.

Infancy must be specially assigned as error of fact. Hankins *v.* Kingsland, 2 Hall (N. Y.) 425.

Informalities which may be cured by a return or explanation must be specially assigned. Davison *v.* Otis, 24 Mich. 23.

60. State *v.* Passaic County, 56 N. J. L. 459, 29 Atl. 331.

61. Failure to make return in proper time as ground for dismissal see *supra*, V, M, 7.

Failure to serve notice of allowance as ground for dismissal see *supra*, V, J, 4, a.

Irregularities in security as ground for quashing see *supra*, V, I, 1, f, (I).

Penalty of bond less than required by order not ground for dismissal see *supra*, V, I, 1, c, (II).

Want of allowance of writ as ground for quashing see *supra*, V, J, 1.

62. State *v.* New Brunswick, 38 N. J. L. 320. Where the writ is allowed by a probate judge, the circuit court to which the cause is removed will not entertain a motion to dismiss for defects in the petition. Wright *v.* Hurt, 92 Ala. 591, 9 So. 386.

Delay in making application.— The writ will not be dismissed for delay in applying for it, where it has been duly prosecuted, since it will be presumed that the question of delay was considered on the application. State *v.* Manning, 40 N. J. L. 461.

63. State *v.* Newark, etc., Turnpike, 2 N. J. L. 318.

64. State *v.* Jersey City Water Com'rs, 30 N. J. L. 247; State *v.* Ten Eyck, 18 N. J. L. 373; Haines *v.* Campion, 18 N. J. L. 49.

65. *Arkansas.*— Burke *v.* Coolidge, 35 Ark. 180; Randle *v.* Williams, 18 Ark. 380.

Georgia.— Fuller *v.* Arnold, 64 Ga. 599.

Idaho.— People *v.* Lindsay, 1 Ida. 394.

Illinois.— Behrens *v.* Melrose Tp., 169 Ill. 558, 48 N. E. 578; Gerdes *v.* Champion, 108 Ill. 137.

Massachusetts.— Com. *v.* Winthrop, 10 Mass. 177; Com. *v.* New Milford, 4 Mass. 446.

Michigan.— Farrell *v.* Taylor, 12 Mich. 113.

New Jersey.— State *v.* Blauvelt, 34 N. J. L. 261; State *v.* Hudson City, 29 N. J. L. 115; State *v.* New Brunswick, 1 N. J. L. 450.

New Mexico.— *In re* Henriques, 5 N. M. 169, 21 Pac. 80.

New York.— People *v.* Kellogg, 22 N. Y. App. Div. 176, 47 N. Y. Suppl. 1023; People

granting the writ has been improperly exercised,[66] or that the prosecutor had no such interest as entitled him to sue it out.[67]

c. Failure to Prosecute. The writ may be quashed for failure to prosecute it with due diligence.[68]

d. Former Determination. The prior determination of the same question on a former writ is a sufficient reason for dismissal.[69]

e. Acquiescence in Determination Below. The writ will not be dismissed on the ground of the relator's acquiescence in such determination, when that fact is disputed.[70]

f. Compliance With Direction Below. The writ will not be dismissed on the ground that the determination or order sought to be reversed has been complied with, where some measures of relief may be afforded by a reversal,[71] or such compliance was involuntary.[72]

g. Public Policy or Public Inconvenience. The writ may be dismissed in the interest of justice, when public policy so requires, or when public inconvenience will result from a reversal of the determination complained of.[73]

h. Remedy Unavailing. Although properly begun, a writ may be dismissed, if the remedy thereby sought has become unavailing,[74] or if the question involved has become merely a moot one.[75]

i. Improper Parties. That a person has been improperly made a party

v. Utica, 65 Barb. (N. Y.) 9, 45 How. Pr. (N. Y.) 289; People *v.* Queens County, 1 Hill (N. Y.) 195.

Pennsylvania.— Ewing *v.* Filley, 43 Pa. St. 384; Ewing *v.* Thompson, 43 Pa. St. 372.

Texas.— Ellett *v.* Moore, 6 Tex. 243.

Utah.— Crosby *v.* Probate Ct., 3 Utah 51, 5 Pac. 552.

England.— Rex *v.* Wakefield, 1 Burr. 485; Reg. *v.* St. Olave, 8 E. & B. 529, 27 L. J. Q. B. 5, 92 E. C. L. 529.

Canada.— *In re* Antigonish School Rate, 9 Nova Scotia 122; Jones *v.* Harris, 6 Ont. L. J. 16.

See 9 Cent. Dig. tit. "Certiorari," § 153 *et seq.*

An unauthorized writ to review a conviction should not be quashed, but defendant should be discharged. Reg. *v.* Levecque, 30 U. C. Q. B. 509.

66. Flournoy *v.* Payne, 28 Ark. 87; State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942; State *v.* La Crosse, 101 Wis. 208, 77 N. W. 167; State *v.* McGovern, 100 Wis. 666, 76 N. W. 593. A writ granted prior to a rule that certiorari would be sustained in extraordinary cases only will not be dismissed because issued in an ordinary case in which the court was vested with discretion. Burrows *v.* Vandevier, 3 Ohio 383.

67. State *v.* Board of Education, 63 N. J. L. 201, 42 Atl. 748; Tallon *v.* Hoboken, 60 N. J. L. 212, 37 Atl. 895.

68. Parman *v.* Boards of School Inspectors, 49 Mich. 63, 12 N. W. 910; Anonymous, 16 N. J. L. 394; Bell *v.* Overseers of Poor, 14 N. J. L. 131; People *v.* French, 3 Silv. Supreme (N. Y.) 335, 6 N. Y. Suppl. 431, 25 N. Y. St. 30.

A rule to quash for laches will be absolute in the first instance. Halifax *v.* Vibert, 12 Nova Scotia 54.

Delay is not a good cause for dismissal at the hearing. State *v.* Jersey City, 42 N. J. L. 349.

Failure to file assignment of error in time as a ground for dismissal see *supra*, V, M, 14, b.

Failure to return the writ within the prescribed time will authorize its dismissal (Southwestern R. Co. *v.* Baldwin, 57 Ga. 150; Anonymous, 2 N. C. 558), unless such failure is caused by the negligent conduct of the adverse party (Butts *v.* Campbell, 1 How. Pr. (N. Y.) 88); but in a proper case, further time may be granted to make up the proceeding below (State *v.* Clarke, 1 McCord (S. C.) 382).

Compelling plaintiff to proceed.— The respondent cannot by motion compel the plaintiff to proceed, but the proper course is procedendo. Reg. *v.* Carrier, 3 Quebec Q. B. 197, 2 L. C. Rep. 302.

69. State *v.* Jersey City, 30 N. J. L. 247. See, generally, JUDGMENTS.

70. Crawford *v.* Scio, etc., Tp. Board, 22 Mich. 405.

71. State *v.* Moore, 23 Wash. 276, 62 Pac. 769.

72. Com. *v.* Hall, 8 Pick. (Mass.) 440.

73. *Arkansas.*— Sumerow *v.* Johnson, 56 Ark. 85, 19 S. W. 114; Black *v.* Brinkley, 54 Ark. 372, 15 S. W. 1030; Moore *v.* Turner, 43 Ark. 243.

Michigan.—Parman *v.* Boards of School Inspectors, 49 Mich. 63, 12 N. W. 910.

New York.— People *v.* Utica, 65 Barb. (N. Y.) 9, 45 How. Pr. (N. Y.) 289.

Rhode Island.— McAloon *v.* Pawtucket, 22 R. I. 191, 46 Atl. 1047.

Utah.— Crosby *v.* Probate Ct., 3 Utah 51, 5 Pac. 552.

See 9 Cent. Dig. tit. "Certiorari," § 153 *et seq.*

74. State *v.* Reed, 31 N. J. L. 133.

75. Visalia City Water Co. *v.* Tulare County Super. Ct., 120 Cal. 219, 52 Pac. 485.

defendant will not require the dismissal of the writ,[76] but in such a case it may be retained as to the proper party and quashed as to the person improperly joined.[77] Nor will the writ be quashed because directed to an unnecessary party, if no command is made of him.[78]

j. Death of Party. The writ will not be quashed because a party below was dead when it issued.[79]

2. Retention of Writ to Prevent Delay. Where quashing would simply remit the parties to another proceeding and result in useless delay, the writ may be retained for a hearing.[80]

3. Who May Dismiss — a. Plaintiff. As in other proceedings, the plaintiff in certiorari may dismiss or discontinue.[81]

b. Defendant. The defendant in the writ may move to quash, and it is immaterial at whosesoever instance the writ may have been placed on the files of the court.[82]

c. Dismissal by Court. In a proper case the court may dismiss the writ of its own motion.[83]

d. Loss or Waiver of Right. The right to quash or dismiss may be lost by failure to move with diligence[84] or by filing a return,[85] but not by permitting a motion for an amended return.[86] However, a waiver of notice of the sanction of the writ and of the time and place of hearing will not deprive a party of his right to dismiss, if that right has been reserved.[87]

4. Motion — a. Where Made. A motion to dismiss should be made in the district to which the writ is returnable,[88] and, unless otherwise prescribed, at chambers.[89]

b. Time of Making — (I) *To Supersede.* The proper mode of obtaining relief for defects in a writ which is not before the court,[90] or for defective service of a writ, is by motion to supersede it.[91]

(II) *To Quash or Dismiss* — (A) *Before Return.* It has been held that a

76. Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

77. State *v.* New Brunswick, 42 N. J. L. 510.

78. State *v.* Rowan, 57 N. J. L. 530, 31 Atl. 224.

79. Com. *v.* McAllister, 1 Watts (Pa.) 307, 26 Am. Dec. 70. See, generally, Abatement and Revival, 1 Cyc. 47 *et seq.*

80. People *v.* Board of Public Park Com'rs, 66 How. Pr. (N. Y.) 293.

81. Flournoy *v.* Payne, 28 Ark. 87; Randle *v.* Williams, 18 Ark. 380; Joliet, etc., R. Co. *v.* Barrows, 24 Ill. 562; State *v.* Newark, etc., Turnpike Co., 2 N. J. L. 318; Lewis *v.* Lewis, 15 Ohio 715. See, generally, Dismissal and Nonsuit.

For form of petition for leave to appear specially for the purpose of moving to quash see McLaughlin *v.* Sentman, (Del. 1900) 47 Atl. 1014.

For form of order granting leave to appear specially to quash see McLaughlin *v.* Sentman, (Del. 1900) 47 Atl. 1014.

82. Reg. *v.* Wehlan, 45 U. C. Q. B. 396.

83. Flournoy *v.* Payne, 28 Ark. 87; Randle *v.* Williams, 18 Ark. 380; State *v.* Reed, 31 N. J. L. 133; State *v.* Kingsland, 23 N. J. L. 85; State *v.* Ten Eyck, 18 N. J. L. 373; Haines *v.* Campion, 18 N. J. L. 49.

84. Cooke *v.* Reinhart, 1 Rawle (Pa.) 317.

85. See *supra*, V, O, 4, b.

86. People *v.* McDonald, 2 Hun (N. Y.) 70.

87. Industrial Aid Assoc. *v.* Carlyle, 112 Ga. 689, 37 S. E. 990, where counsel signed the following waiver: "Written notice of the sanction of the writ of certiorari as prayed in this petition, and of the time and place of hearing, is waived, with the right reserved to move to dismiss."

88. People *v.* Cooper, 57 How. Pr. (N. Y.) 463.

A stay of proceedings under the writ, to enable a motion to quash to be made in another district, will be refused. People *v.* Cooper, 57 How. Pr. (N. Y.) 463.

To save delay a motion to quash may be directed to be made in another district in which the court is sitting. Ewing *v.* Filley, 43 Pa. St. 384.

89. Maxwell *v.* Creswell, 3 MacArthur (D. C.) 374.

A judge at chambers has no power to make a rule *nisi* to quash a writ returnable at circuit. Smith *v.* McDonald, 12 Nova Scotia 283.

90. Ball *v.* Warren, 16 How. Pr. (N. Y.) 379; Saratoga, etc., R. Co. *v.* McCoy, 5 How. Pr. (N. Y.) 378; State *v.* Milwaukee County, 58 Wis. 4, 16 N. W. 21; Wardsworth *v.* Sibley, 38 Wis. 484; State *v.* Fond du Lac, 35 Wis. 37; 1 Tidd Pr. 403.

Motion for general relief. — Where before the return a party moves to quash and also for other general relief, an order superseding the writ may be granted. Ferguson *v.* Jones, 12 Wend. (N. Y.) 241.

91. State *v.* Fond du Lac, 35 Wis. 37.

motion to quash is in the nature of a demurrer to the petition and must be made before filing the return, which will be treated as a waiver.[92]

(B) *After Return.* The weight of authority, however, seems to be that a motion to quash the writ can only be made on the return-day after the return of the writ to the court,[93] or at the first term to which the writ is returnable,[94] although it is returned before the return-day.[95]

(C) *Any Time.* On the other hand it is held that the writ may be quashed at any time the court is satisfied it should not have issued,[96] as after defendant has appeared and pleaded,[97] after entering upon the merits of the cause,[98] or after a hearing on the merits.[99]

c. Motion Papers. The motion papers should be in the form required.[1]

d. Notice of Motion. Proper notice of the motion should be given to the adverse party.[2]

e. Presentation of Grounds. The grounds relied on for dismissal must be properly presented and specifically stated.[3] If the writ has been obtained improperly or upon an insufficient ground, the party against whom it issued must

92. School Directors *v.* School Trustees, 91 Ill. App. 96; Highway Com'rs *v.* Hoblit, 19 Ill. App. 259. See also Spooner *v.* Seattle, 6 Wash. 370, 33 Pac. 963, holding that the motion may be made before return.

93. People *v.* McDonald, 2 Hun (N. Y.) 70; People *v.* Cooper, 57 How. Pr. (N. Y.) 463; Saratoga, etc., R. Co. *v.* McCoy, 5 How. Pr. (N. Y.) 378; Clark *v.* Lawrence, 1 Cow. (N. Y.) 48; Crosby *v.* Probate Ct., 3 Utah 51, 5 Pac. 552; State *v.* Milwaukee County, 58 Wis. 4, 16 N. W. 21; State *v.* Fond du Lac, 35 Wis. 37; 1 Tidd Pr. 403.

As where the writ is returned, although not returnable. Hauser *v.* State, 33 Wis. 678. But see *contra*, cases cited *infra*, note 95.

94. Smith *v.* Hearne, 2 Stew. (Ala.) 169; Payne *v.* Martin, 1 Stew. (Ala.) 407; Hodge *v.* Dillon, Cooke (Tenn.) 278; Jordan *v.* Slaughter, 10 Tex. 318; Ables *v.* Pearle, 10 Tex. 285; Steinlein *v.* Dial, 10 Tex. 268; Ellett *v.* Moore, 6 Tex. 243; Gulf, etc., R. Co. *v.* Conner, 2 Tex. App. Civ. Cas. § 109.

Supplemental motion.— That a motion was made and overruled at the return-term does not authorize a supplemental motion, embracing additional grounds, to be made and determined at a succeeding term. Gulf, etc., R. Co. *v.* Conner, 2 Tex. App. Civ. Cas. § 109.

Continuance.— Where the motion was not filed at the return-term, an agreement at that term to continue the case, "without prejudice to either party," will not authorize the filing of the motion at the term to which the continuance was had. Burns *v.* Bishop, (Tex. Civ. App. 1895) 29 S. W. 83.

Presumption.— An entry of record that the parties came "by their attorneys, and, upon argument being heard, the motion to dismiss the certiorari was sustained," warrants the inference that the motion to dismiss was duly made at the return-term, although that fact does not appear of record. Rothchilds *v.* Forbes, 2 Heisk. (Tenn.) 13.

95. Hochstrasser *v.* Wolgrove, 2 Hill (N. Y.) 386; Sawyer *v.* Wood, 18 Wend. (N. Y.) 631. But see Hauser *v.* State, 33 Wis. 678.

96. Randle *v.* Williams, 18 Ark. 380; State *v.* New Brunswick, 38 N. J. L. 320; State *v.* Blauvelt, 34 N. J. L. 261; State *v.* Ten Eyck, 18 N. J. L. 373; Haines *v.* Campion, 18 N. J. L. 49.

97. Fitzpatrick *v.* Ray, 4 Sm. & M. (Miss.) 645.

98. Flournoy *v.* Payne, 28 Ark. 87; State *v.* Hudson City, 29 N. J. L. 115; State *v.* Kingsland, 23 N. J. L. 85; People *v.* McDonald, 2 Hun (N. Y.) 70; People *v.* Utica, 65 Barb. (N. Y.) 9, 45 How. Pr. (N. Y.) 289; People *v.* New York, 2 Hill (N. Y.) 9; People *v.* Queens County, 1 Hill (N. Y.) 195; People *v.* Allegany County, 15 Wend. (N. Y.) 198.

99. State *v.* Milwaukee County, 58 Wis. 4, 16 N. W. 21. See *infra*, V, Q, R.

1. See, generally, MOTIONS.

Entitling.— On a motion by defendant in error to set aside a common-law certiorari, addressed to a supreme court commissioner, it was held that the motion papers should be entitled with the name of defendant in error "ads. The People ex rel." the plaintiff in error. Peck *v.* Witbeck, 2 How. Pr. (N. Y.) 70.

Signature — Waiver of absence.— When a motion to dismiss a certiorari is not signed by counsel, but has been recognized and acted on by the court, and no objection has been taken to it because it was not signed, no objection afterward made to it on this ground is tenable. Flanagan *v.* Smith, 21 Tex. 493.

2. State *v.* Applicants, 3 N. J. L. 505.

On showing cause.—A motion based on the irregularity of the writ may be made in showing cause against a rule to quash without a separate application. Rex *v.* Micklethwayte, 4 Burr. 2522; Reg. *v.* Simpson, 20 N. Brunsw. 472; Reg. *v.* McAllan, 45 U. C. Q. B. 402 [*disapproving* Reg. *v.* Hoggard, 30 U. C. Q. B. 152; Reg. *v.* Peterman, 23 U. C. Q. B. 516]; *Ex p.* Marry, 14 L. C. Jur. 101. See also Reg. *v.* Levecque, 30 U. C. Q. B. 509.

A rule to set aside the writ should include a motion to set aside the order for its issue. Doyle *v.* Gallant, 14 Nova Scotia 86, 1 Can. L. T. 567.

3. Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

make timely objection, otherwise he is precluded.[4] Allegations in the application cannot be controverted by the party in whose favor the decision was made. He can only present such questions of law as properly arise.[5]

f. Argument — (I) *Conclusiveness of Petition and Writ.* The allegations of the writ and the petition therefor will be taken to be true[6] and with the return will be considered as conclusively establishing the facts therein,[7] from which it follows that the truth of the statements in the petition cannot be disproved.[8]

(II) *Consideration of Merits.* Consideration of a motion to quash should ordinarily be confined to the record.[9] Hence, reasons proper to be considered on the hearing on the merits furnish no ground for dismissal of the writ and cannot be considered,[10] but the testimony of both parties on an application to quash a writ of attachment which was returned with the writ has been considered, and the facts deducible therefrom determined.[11]

(III) *Admissions.* A motion to dismiss for insufficiency of the petition admits the truth of the allegations therein contained,[12] but a general motion is in the nature of a general demurrer, and no question of imperfection in the form of the petition arises thereon.[13]

(IV) *Matters Dehors the Record.* Under some circumstances the court may consider matters *dehors* the record,[14] to advise it, in the exercise of its discretion, of the propriety of granting or denying the motion.[15]

g. Determination. If it is apparent that the inferior tribunal acted within its jurisdiction and proceeded regularly, the writ will be quashed, especially if a further hearing would necessarily result in an affirmance of the determination

Form of reasons for quashing see Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

Grounds not assigned will not be considered. Tupper *v.* Murphy, 15 Nova Scotia 173.

Indefiniteness.— Assignments in the motion to vacate the writ that "the affidavit and writ wholly fail to show on their face any ease in which such writ ought to issue," and "the writ is in other respects informal, defective, and insufficient" should be disregarded as too indefinite. Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

How made.— Want of jurisdiction disclosed in the order for the writ may be objected to in the notice of motion. Wallace *v.* King, 20 Nova Scotia 283, 8 Can. L. T. 449.

In Tennessee, where the object is to supersede and quash an execution for causes connected with the merits, the grounds pursued in the petition and no others are open for investigation. Hollins *v.* Johnson, 3 Head (Tenn.) 346.

4. Matter of Robinson, 6 Mich. 137; Nicks *v.* Johnson, 3 Sneed (Tenn.) 325; Hamilton *v.* Archer, 1 Overt. (Tenn.) 368; Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

5. Highway Com'rs *v.* Judges Orange County Cts., 9 Wend. (N. Y.) 434.

6. Small *v.* Bischelberger, 7 Colo. 563, 4 Pac. 1195 (writ); Great Falls Ice Co. *v.* District of Columbia, 19 D. C. 327 (petition); Wilson *v.* Moss, 7 Heisk. (Tenn.) 417 (petition); Wilson *v.* Lowe, 7 Coldw. (Tenn.) 153 (petition).

7. State *v.* McGovern, 100 Wis. 666, 76 N. W. 593.

8. Wright *v.* Hurt, 92 Ala. 591, 9 So. 386; Nicks *v.* Johnson, 3 Sneed (Tenn.) 325; Studdurt *v.* Fowlkes, 2 Swan (Tenn.) 537; Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

9. Beck *v.* Knabb, 1 Overt. (Tenn.) 55; O'Docherty *v.* McGloin, 25 Tex. 67; State *v.* Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956; State *v.* McGovern, 100 Wis. 666, 76 N. W. 593.

10. Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739; Loree *v.* Smith, 100 Mich. 252, 58 N. W. 1015; Maybee *v.* Miner, 44 Mich. 207, 58 N. W. 1015; Rowe *v.* Rowe, 28 Mich. 353; People *v.* Kellogg, 22 N. Y. App. Div. 176, 47 N. Y. Suppl. 1023.

11. State *v.* Spring Lake, 58 N. J. L. 136, 32 Atl. 77; Baldwin *v.* Flagg, 43 N. J. L. 495; Leonard *v.* Stout, 36 N. J. L. 370, 37 N. J. L. 492; Walker *v.* Anderson, 18 N. J. L. 217; New York City Bank *v.* Merrit, 13 N. J. L. 131.

N. J. Gen. Stat. p. 370, which authorized the determination of disputed questions of fact, only relates to the extraordinary proceedings of special statutory tribunals outside of regular suits at law. State *v.* Block, 63 N. J. L. 508, 44 Atl. 208; State *v.* Overseers of Poor, 52 N. J. L. 298, 19 Atl. 787.

12. Otten *v.* Lehr, 68 Ill. 64.

13. Schuchman *v.* Highway Com'rs, 52 Ill. App. 497.

14. Ledbetter *v.* Lofton, 5 N. C. 184; Dawsey *v.* Davis, 2 N. C. 323.

Under the early Tennessee practice the affidavits of disinterested persons were admissible (King *v.* Rentfroe, 1 Overt. (Tenn.) 191), but affidavits of the parties were not (Beck *v.* Knabb, 1 Overt. (Tenn.) 55).

15. Crosby *v.* Probate Ct., 3 Utah 51, 5 Pac. 552.

Counter-affidavits of a party to the suit

below.[16] So if the writ fails to show facts which would justify any other action but that taken below, it is properly quashed, when its insufficiency in that respect is brought to the attention of the court;[17] but it should not be dismissed, after proper allowance and issue, unless justice clearly demands that course.[18] On dismissal the court cannot make any determination as to the proceedings sought to be reviewed.[19]

5. Effect of Dismissal. After dismissal of the writ it can have no operation or effect on the original proceedings.[20]

P. Hearing and Rehearing — 1. In General. The determination complained of should not be reviewed without a hearing[21] before a court of competent jurisdiction,[22] the time of which may be fixed by notice,[23] by the local practice,[24] or by the order of the court.[25] It may be had at the time and place the order to show cause is returnable[26] or on the return-day of the writ,[27] but, unless by consent, not before.[28]

2. Notice of Hearing. Timely[29] notice must be given of the time and place of the hearing,[30] but failure to give notice may be cured by an appear-

are inadmissible in support of a motion to dismiss. Beck *v.* Knabb, 1 Overt. (Tenn.) 55.

16. Savage *v.* Cass County, 10 Ill. App. 204; Lancaster *v.* State, 90 Md. 211, 44 Atl. 1039; Kane *v.* State, 70 Md. 546, 17 Atl. 557; State *v.* Daubner, 111 Wis. 671, 87 N. W. 802; State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942.

For form of order vacating writ see Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739.

17. State *v.* Lien, 108 Wis. 316, 84 N. W. 422 [*citing* State *v.* Lawler, 103 Wis. 460, 79 N. W. 777; State *v.* McGovern, 100 Wis. 666, 76 N. W. 593].

An order denying a motion to dismiss a writ may be entered *nunc pro tunc* on renewal of the motion at a subsequent term on the same ground. Fuller *v.* Arnold, 64 Ga. 599.

18. Cooley, J., in Willson *v.* Gifford, 42 Mich. 454, 4 N. W. 170; State *v.* Jersey City, 30 N. J. L. 247; State *v.* Kingsland, 23 N. J. L. 85; People *v.* Comptroller, 10 N. Y. Wkly. Dig. 104.

A writ will not be dismissed on the ground that the facts set forth in the petition therefor are insufficient, if the judge who ordered the writ to be issued deemed them to be sufficient. Casey *v.* Briant, 1 Stew. & P. (Ala.) 51.

19. The court can only grant costs. Hopson *v.* Murphy, 1 Tex. 314. See also Harbert *v.* Monongahela River R. Co., 50 W. Va. 253, 40 S. E. 377, where a judgment sustaining a writ issued without jurisdiction was reversed, and the cause remanded to the intermediate appellate court, with directions to there treat it as an appeal.

20. West *v.* Shockley, 4 Harr. (Del.) 108.

21. When a certiorari is granted on affidavit without a rule to show cause, the adverse party is entitled to a hearing before a decision. Anonymous, 2 N. C. 421; Dawsey *v.* Davis, 2 N. C. 323.

Opening default. — A default will be opened at any time during the term without excuse. Anonymous, 1 Wend. (N. Y.) 75.

22. See People *v.* Westchester County, 53 N. Y. App. Div. 339, 65 N. Y. Suppl. 707; and, generally, Courts.

Waiver of jurisdiction. — Consent to the direction of a reference by one branch of the court and a waiver of jurisdiction to order such reference will not confer jurisdiction on it, where the jurisdiction of another branch is exclusive. People *v.* Westchester County, 53 N. Y. App. Div. 339, 65 N. Y. Suppl. 707.

23. Lanier *v.* Ratcliff, 95 Ga. 549, 22 S. E. 289.

24. In Tennessee a certiorari cannot be tried before the next term after that at which it is granted. Hamilton *v.* Archer, 1 Overt. (Tenn.) 368.

In Canada the parties cannot be heard until the case has been inscribed on the roll in accordance with the prescribed practice. Bombardier *v.* Joly, 12 Rev. Lég. 97.

25. Mundy *v.* Martin, 44 Ga. 195, where, on the filing of a traverse to the return by a county judge, the judge of the superior court decided not to hear the case in vacation, but by a formal order directed it and the traverse to be sent to the next term for trial by the jury, and this was held to import a judicial order assigning the cause to a jury trial.

26. People *v.* Nichols, 79 N. Y. 582, 58 How. Pr. (N. Y.) 200 [*reversing* 18 Hun (N. Y.) 530].

27. Lanier *v.* Ratcliff, 95 Ga. 549, 22 S. E. 289.

28. Brown *v.* Smith, 24 Ga. 418; Ewing *v.* Thompson, 43 Pa. St. 372.

29. In New York rule 44 of the supreme court, as to "the usual notice of argument" on certiorari is controlled by N. Y. Code Civ. Proc. § 780, authorizing a judge to prescribe less than eight days' notice. People *v.* Nichols, 79 N. Y. 582, 58 How. Pr. (N. Y.) 200.

The time of sanctioning the writ is immaterial on the question of whether or not the notice was timely. Gregory *v.* Daniel, 93 Ga. 795, 20 S. E. 656.

30. O'Keefe *v.* Cotton, 102 Ga. 516, 27 S. E. 663; Lanier *v.* Ratcliff, 95 Ga. 549, 22 S. E. 289; Mundy *v.* Martin, 44 Ga. 195.

In Canada, on inscription for hearing, a

ance,[31] or excused because of the action of the adverse party.[32] It has been held that the notice cannot be served until after the return-day mentioned in the writ.[33]

3. BRIEFS. Briefs required by rule of court must be filed within the time therein specified.[34]

4. REHEARING. A rehearing should be granted where the proceeding has been improperly dismissed,[35] but not because of the discovery of new evidence[36] or where the court has no jurisdiction to hear the cause anew.[37] The unsuccessful party cannot complain because the inferior court has complied with the determination above without affording him an opportunity for a rehearing.[38]

Q. Review — 1. MATTERS REVIEWABLE — a. Jurisdiction and Regularity. At common law the reviewing court is limited in its inquiry to the consideration of whether or not the inferior court had jurisdiction of the proceedings below and incidentally the regularity of its proceedings upon which the jurisdiction depends.[39] By statute in some of the states this is the extent of the review permitted, and except where the scope of the review has been enlarged by statute or by the courts it is confined to the examination and determination of these questions.[40]

motion to quash the conviction complained of is necessary (Lanier *v.* Loufret, 6 Rev. Lég. 350), unless the quashing has been prayed for in the petition for the writ (Hébert *v.* Paquet, 11 Quebec 19).

31. Walton *v.* Avery, 2 N. C. 405; People *v.* New York County, 57 How. Pr. (N. Y.) 467; Redick *v.* Patterson, Tapp. (Ohio) 191.

32. **Inability to file return.**— Plaintiff need not give notice for a certain circuit, as stipulated, where, because of defendant's failure to file a plea, a return could not be filed in season. Sergeants *v.* Baker, 1 How. Pr. (N. Y.) 9.

33. Miles *v.* Goffinet, 16 Mich. 280, where the return was filed two days before the writ was made returnable and the notice was served on the day the return was filed.

34. See, generally, APPEAL AND ERROR, 2 Cyc. 502.

In Washington a rule requiring each side to furnish briefs "upon the final hearing" of an application for an original writ applies to the final hearing on the application. On the final hearing on the merits, briefs must be filed as in ordinary appeals. State *v.* Moore, 5 Wash. 205, 31 Pac. 713.

35. As where the statement of facts does not appear to have been approved, but there has been an approval in fact. Gulf, etc., R. Co. *v.* Cannon, 88 Tex. 312, 31 S. W. 498.

36. Marchman *v.* Todd, 15 Ga. 25.

37. *Ex p.* Madison Turnpike Co., 62 Ala. 93.

38. State *v.* St. Paul, 104 La. 103, 28 So. 839.

39. **At common law** in many cases, therefore, the evidence upon which the court acted in determining its jurisdiction was made a part of the record and reviewed under the writ, but the inquiry was always limited to the evidence before the tribunal whose determination was under review. Los Angeles *v.* Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234.

On review of an order for discovery in aid of execution, it is competent to inquire into the existence of the judgment on which the proceedings are founded. Weiland *v.* Krause, 63 N. J. L. 192, 42 Atl. 835.

Final determinations.— If the determination of the tribunal is made final by statute, irregularities which do not affect the jurisdiction cannot be considered. People *v.* New York Canal Bd., 29 Hun (N. Y.) 159.

Consideration of evidence in aid of, or to show want of, jurisdiction, see *infra*, V, Q, 2, b, (II).

40. *Alabama.*— McAllilley *v.* Horton, 75 Ala. 491; Camden *v.* Bloch, 65 Ala. 236; *Ex p.* Madison Turnpike Co., 62 Ala. 93.

California.—Los Angeles *v.* Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234; White *v.* San Francisco Super. Ct., 110 Cal. 60, 42 Pac. 480; De Pedrorena *v.* San Diego County Super. Ct., 80 Cal. 144, 22 Pac. 71; Reynolds *v.* San Joaquin County Ct., 47 Cal. 604; Central Pac. R. Co. *v.* Board of Equalization, 46 Cal. 667; Finch *v.* Tehama County, 29 Cal. 453; People *v.* Burney, 29 Cal. 459; Whitney *v.* San Francisco Fire Dept., 14 Cal. 479; *In re* Hanson, 2 Cal. 262.

Idaho.— Orr *v.* State Board of Equalization, 2 Ida. 923, 28 Pac. 416.

Illinois.— Smith *v.* Highway Com'rs, 150 Ill. 385, 36 N. E. 967; Hamilton *v.* Harwood, 113 Ill. 154; Highway Com'rs *v.* Carthage, 27 Ill. 140; Savage *v.* County Com'rs, 10 Ill. App. 204.

Louisiana.— State *v.* Barksdale, 50 La. Ann. 55, 22 So. 966; State *v.* Judge Civil Dist. Ct., 39 La. Ann. 619, 2 So. 385; State *v.* Robinson, 38 La. Ann. 968.

Maryland.— Kane *v.* State, 70 Md. 546, 17 Atl. 557.

Massachusetts.— Plymouth *v.* Plymouth County, 16 Gray (Mass.) 341.

Michigan.— See Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491; Bromley *v.* People, 7 Mich. 472.

Mississippi.— Allen *v.* Board of Levee Com'rs, 57 Miss. 163.

Missouri.— State *v.* Williams, 70 Mo. App. 238; State *v.* Moniteau County Ct., 45 Mo. App. 387; State *v.* Cauthorn, 40 Mo. App. 94.

b. Discretionary Acts. If the inferior court or tribunal did not transcend its authority, acts done by it in the exercise of its discretion are not the subject of review, unless that discretion was abused.[41]

c. Matters Improperly Returned. Matters not within the scope of the writ[42] or not commanded,[43] or matters contained in an unofficial or unauthorized

Montana.— State *v.* Second Judicial Dist. Ct., 22 Mont. 241, 56 Pac. 281; State *v.* Ninth Judicial Dist. Ct., 17 Mont. 329, 42 Pac. 850; State *v.* Second Judicial Dist. Ct., 15 Mont. 324, 39 Pac. 316, 48 Am. St. Rep. 682, 27 L. R. A. 392; State *v.* Second Judicial Dist. Ct., 10 Mont. 456, 26 Pac. 182; State *v.* Second Judicial Dist. Ct., 10 Mont. 401, 25 Pac. 1053; Carland *v.* Custer County, 5 Mont. 579, 6 Pac. 24.

Nevada.— State *v.* First Judicial Dist., (Nev. 1901) 66 Pac. 743; Matter of Wixom, 12 Nev. 219; Phillips *v.* Welch, 12 Nev. 158; State *v.* Humboldt County, 6 Nev. 100; Maynard *v.* Railey, 2 Nev. 313.

New Hampshire.— Richardson *v.* Smith, 59 N. H. 517.

New Jersey.— See State *v.* Hudson Tunnel R. Co., 38 N. J. L. 548.

New York.— People *v.* Betts, 55 N. Y. 600; People *v.* Board of Assessors, 39 N. Y. 81, 6 Transcr. App. (N. Y.) 116; People *v.* Highway Com'rs, 30 N. Y. 72; Morewood *v.* Hollister, 6 N. Y. 309; People *v.* Board of Contract, 39 N. Y. App. Div. 30, 56 N. Y. Suppl. 334; People *v.* Board of R. Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861, 74 N. Y. St. 794; People *v.* New York Canal Bd., 29 Hun (N. Y.) 159; People *v.* Canal Board, 7 Lans. (N. Y.) 220; People *v.* Tubbs, 59 Barb. (N. Y.) 401; People *v.* Lawrence, 54 Barb. (N. Y.) 589; People *v.* Van Alstyne, 32 Barb. (N. Y.) 131; Haviland *v.* White, 7 How. Pr. (N. Y.) 154; Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464; Tallman *v.* Bigelow, 10 Wend. (N. Y.) 421; Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

North Carolina.— See Dougan *v.* Arnold, 15 N. C. 99.

Oregon.— Smith *v.* Portland, 25 Oreg. 297, 35 Pac. 665.

Pennsylvania.— *In re* Robb, 188 Pa. St. 212, 41 Atl. 477; Darby School Dist.'s Appeal, 160 Pa. St. 79, 28 Atl. 636; Com. *v.* Reiser, 147 Pa. St. 342, 23 Atl. 454; *In re* Germantown Ave., 99 Pa. St. 479; Peet *v.* Pittsburgh, 96 Pa. St. 218; Westmoreland County *v.* Conemaugh Tp., 34 Pa. St. 231; Union Canal Co. *v.* Kaiser, 19 Pa. St. 134; Barnes' Appeal, 2 Pennyp. (Pa.) 506; Miller *v.* Summers, 13 Pa. Super. Ct. 127, 17 Lanc. L. Rev. 345; Young *v.* Trunkley, 22 Pa. Co. Ct. 127, 6 Northampt. Co. Rep. (Pa.) 372.

South Carolina.— State *v.* Fort, 24 S. C. 510; *Ex p.* Childs, 12 S. C. 111.

South Dakota.— Kirby *v.* McCook County Cir. Ct., 10 S. D. 38, 71 N. W. 140; State *v.* State Board of Assessment, 3 S. D. 338, 53 N. W. 192; Sioux Falls Nat. Bank *v.* McKee, 3 S. D. 1, 50 N. W. 1057.

Washington.— State *v.* King County Super. Ct., 14 Wash. 365, 44 Pac. 859.

West Virginia.— Poe *v.* Marion Mach. Works, 24 W. Va. 517; Dryden *v.* Swinburne, 20 W. Va. 89.

Wisconsin.— State *v.* Lawler, 103 Wis. 460, 79 N. W. 777; State *v.* Outagamie County Cir. Ct., 101 Wis. 422, 77 N. W. 745; State *v.* Dodge County, 56 Wis. 79, 13 N. W. 680; State *v.* Whitford, 54 Wis. 150, 11 N. W. 424; Hauser *v.* State, 33 Wis. 678; Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444, 9 Am. Rep. 591; State *v.* Huck, 29 Wis. 202; Frederick *v.* Clark, 5 Wis. 191.

See 9 Cent. Dig. tit. "Certiorari," § 174 *et seq.*

41. *California.*— Hitchcock *v.* San Francisco Super. Ct., 73 Cal. 295, 14 Pac. 872; *In re* Hanson, 2 Cal. 262.

Georgia.— Cox *v.* Snell, 77 Ga. 469.

Illinois.— See White *v.* Frye, 7 Ill. 65.

Massachusetts.— Fay, Petitioner, 15 Pick. (Mass.) 243; Com. *v.* Roxbury, 8 Mass. 457; Com. *v.* Westborough, 3 Mass. 406.

Michigan.— Fellows *v.* Canney, 75 Mich. 445, 42 N. W. 958; Stimson *v.* Michigan Shingle Co., 71 Mich. 374, 39 N. W. 14; Rowe *v.* Kellogg, 54 Mich. 206, 19 N. W. 957; Rowe *v.* Rowe, 28 Mich. 353; Van Renselaer *v.* Whiting, 12 Mich. 449; Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491.

Missouri.— See State *v.* Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787.

Montana.— State *v.* Ellis, 15 Mont. 224, 38 Pac. 1079.

Nevada.— State *v.* First Judicial Dist. Ct., (Nev. 1901) 66 Pac. 743; Matter of Wixom, 12 Nev. 219; Phillips *v.* Welch, 12 Nev. 158.

New Jersey.— Parsell *v.* State, 30 N. J. L. 530; State *v.* Bergen, 24 N. J. L. 548; Philhower *v.* Voorhees, 12 N. J. L. 69.

New York.— People *v.* Board of Police, 39 N. Y. 506; *In re* Lanehart, 32 N. Y. App. Div. 4, 52 N. Y. Suppl. 671; People *v.* Board of Police, 6 Hun (N. Y.) 229; People *v.* Excise Com'rs, 25 N. Y. Suppl. 873.

Pennsylvania.— *In re* Robb, 188 Pa. St. 212, 41 Atl. 477; Menner *v.* Nichols, (Pa. 1887) 8 Atl. 647.

Vermont.— West River Bridge Co. *v.* Dix, 16 Vt. 446. And see Paine *v.* Leicester, 22 Vt. 44.

See 9 Cent. Dig. tit. "Certiorari," § 179.

42. A writ in aid of an application for a mandamus presents no issues other than those raised by such application. State *v.* Monroe, 50 La. Ann. 1168, 24 So. 263.

43. Hewitt *v.* Probate Judge, 67 Mich. 1, 34 N. W. 248; State *v.* Millville, 53 N. J. L. 362, 21 Atl. 568; People *v.* Hannan, 56 Hun (N. Y.) 469, 10 N. Y. Suppl. 71, 31 N. Y. St. 602; People *v.* Melville, 7 Misc. (N. Y.) 214, 27 N. Y. Suppl. 1101, 57 N. Y. St. 555. See also State *v.* Rowan, 57 N. J. L. 530, 31 Atl. 224, where a return by one party as to whom no command was made was ignored.

return,[44] or which are improperly returned and do not constitute a part of the record cannot be considered.[45] But where the command is vague, if the recitals of the writ express the desire of the court to be informed of the matter returned it may be considered, although not specifically commanded.[46]

d. Validity of Existence of Municipal Boards or Officers. On proceedings to review the action of a municipality or of a public board, unless authorized by statute, the court has no power to inquire into or determine its legal existence.[47] But if so empowered, the authority to appoint the board, its own judicial qualification to act as it did, and the manner in which it exercised its functions are open to inquiry.[48]

e. Title to Land. Questions of title to land which may have arisen in the proceeding cannot be tried on certiorari.[49]

f. Questions or Objections Not Raised Below. Questions not raised below, or alleged erroneous action as to which no objection was made, cannot be presented to, or considered by, the reviewing court.[50]

44. Roberts *v.* Highway Com'rs, 24 Mich. 182; State *v.* Howell, 24 N. J. L. 519; State *v.* Everett, 103 Wis. 269, 79 N. W. 421.

45. State *v.* Paterson, 42 N. J. L. 615; People *v.* Wurster, 91 Hun (N. Y.) 233, 36 N. Y. Suppl. 160, 71 N. Y. St. 96; People *v.* Vermilyea, 7 Cow. (N. Y.) 108; Allen *v.* Horton, 7 Johns. (N. Y.) 23; Mosely *v.* Landon, 2 Johns. (N. Y.) 193; Lawton *v.* Highway Com'rs, 2 Cai. (N. Y.) 179; Germantown *v.* Zinck, 1 Ashm. (Pa.) 64; Curran *v.* Atkinson, 1 Ashm. (Pa.) 51.

46. State *v.* Paterson, 39 N. J. L. 489.

47. Scheiwe *v.* Holz, 168 Ill. 432, 48 N. E. 65; State *v.* Osburn, 24 Nev. 187, 51 Pac. 837; People *v.* Board of Health, 71 Hun (N. Y.) 84, 24 N. Y. Suppl. 629, 54 N. Y. St. 317.

48. State *v.* Clinton Tp., 39 N. J. L. 656. A return of a municipality in proceedings to review a street widening which contains the report of the commissioners, and has annexed thereto the proceedings relative to their appointment may be considered. People *v.* Brooklyn, 49 Barb. (N. Y.) 136.

49. Cadmus *v.* Bayonne, 61 N. J. L. 494, 39 Atl. 678; Jersey City *v.* State, 30 N. J. L. 521.

50. *Alabama.*— Gould *v.* Meyer, 36 Ala. 565.

Arkansas.— Hill *v.* Steel, 17 Ark. 440.

Delaware.— Cunningham *v.* Dixon, 1 Marv. (Del.) 163, 41 Atl. 519.

Georgia.— Southern R. Co. *v.* Wells, 103 Ga. 209, 29 S. E. 714; Morris *v.* Morris, 74 Ga. 826; Jack *v.* Watson, Ga. Dec., Pt. I, 168; Chambers *v.* Dickson, Ga. Dec., Pt. I, 164; Dodson *v.* Connally, Ga. Dec., Pt. I, 132. See Leathers *v.* Furr, 62 Ga. 421, holding that a board of commissioners of roads and revenues is such an "inferior judicatory," within section 4052 of the code, that a certiorari may be obtained to correct its decision, without first filing a bill of exceptions.

Illinois.— Chapman *v.* Drainage Com'rs, 28 Ill. App. 17.

Louisiana.— State *v.* Judges Ct. of App., 50 La. Ann. 26, 22 So. 972.

Maine.— Phillips *v.* Franklin County, 83 Me. 541, 22 Atl. 385.

Michigan.— Bigelow *v.* Brooks, 119 Mich. 208, 77 N. W. 810; Witherspoon *v.* Clegg, 42 Mich. 484, 4 N. W. 209; Patterson *v.* Goodrich, 31 Mich. 225.

Minnesota.— State *v.* Second Judicial Dist. Ct., 56 Minn. 56, 57 N. W. 319.

Mississippi.— Delahuff *v.* Reed, Walk. (Miss.) 74.

New Jersey.— State *v.* Ohl, 58 N. J. L. 557, 34 Atl. 755; State *v.* Board of Excise, 46 N. J. L. 312; Butts *v.* French, 42 N. J. L. 397; Race *v.* Dehart, 24 N. J. L. 37; Jaques *v.* Hulit, 16 N. J. L. 38; Gould *v.* Brown, 9 N. J. L. 165. See also Steward *v.* Sears, 36 N. J. L. 173.

New York.— People *v.* Roosevelt, 23 N. Y. App. Div. 578, 48 N. Y. Suppl. 859; People *v.* Carrington, 2 Lans. (N. Y.) 368; People *v.* Carpenter, 46 Barb. (N. Y.) 619; Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167.

Oregon.— Willits *v.* Walter, 32 Oreg. 411, 52 Pac. 24.

Pennsylvania.— South Huntingdon *v.* East Huntingdon, 7 Watts (Pa.) 527; Herrigas *v.* McGill, 1 Ashm. (Pa.) 152; Myers *v.* Stauffer, 5 Pa. Co. Ct. 657, 22 Wkly. Notes Cas. (Pa.) 412.

Tennessee.— Wilson *v.* Frazier, 2 Humphr. (Tenn.) 30.

That the matter complained of did not arise from the exercise of judicial functions should be the subject of a substantive motion. Wiggins *v.* Windsor, 15 Nova Scotia 256.

Time of excepting.— Exceptions should be taken to the determination at the time it is made. Pettingall *v.* Nolan, 16 Ga. 606.

After trial.— It is too late to present exceptions to the individual members of the court after the trial. Low *v.* Goldsmith, R. M. Charlt. (Ga.) 288.

Exceptions irregularly taken may be regarded by the court. Field *v.* Putnam, 22 Ga. 93.

The admission of facts on the proceeding in the inferior court will preclude their denial on the review. Hagar *v.* Yolo County, 47 Cal. 222.

One who secures the conviction of a minor cannot, on a review of the conviction, set up such minority. Hébert *v.* Paquet, 11 Quebec 19.

2. Scope of Review — a. As a Rule Confined to Record — (1) *In General.* Except where otherwise prescribed by statute or authorized by the practice,[51] it is the general rule that in ascertaining whether or not the inferior court or tribunal had jurisdiction, and proceeded regularly in making the determination complained of, the reviewing court is confined to the consideration of the record returned in obedience to the writ, by which the error, if any, must appear.[52]

Proof of change or interlineations.— The court may hear proof that exceptions taken to the decision of the inferior court had been interlined and materially changed after they were signed and certified. Smith *v.* Joiner, 27 Ga. 65.

51. When not confined to the record see *infra*, V, Q, 2, b.

52. *Alabama.*— Moore *v.* Martin, etc., Co., 124 Ala. 291, 27 So. 252; McAllilley *v.* Horton, 75 Ala. 491; Camden *v.* Bloch, 65 Ala. 236; *Ex p.* Madison Turnpike Co., 62 Ala. 93; Fore *v.* Fore, 44 Ala. 478.

Arkansas.— Hornor *v.* O'Shields, 33 Ark. 117; Vance *v.* Gaylor, 25 Ark. 32; Redmond *v.* Anderson, 18 Ark. 449.

California.— Fraser *v.* Freelon, 53 Cal. 644.

Delaware.—Cullen *v.* Lowery, 2 Harr. (Del.) 459.

Illinois.— Behrens *v.* Highway Com'rs, 169 Ill. 558, 48 N. E. 578; Drainage Com'rs *v.* Volke, 163 Ill. 243, 45 N. E. 415 [*affirming* 59 Ill. App. 283]; Smith *v.* Highway Com'rs, 150 Ill. 385, 36 N. E. 967; Whittaker *v.* Venice, 150 Ill. 195, 37 N. E. 240; Blair *v.* Sennott, 134 Ill. 78, 24 N. E. 969; Brown *v.* Robertson, 123 Ill. 631, 15 N. E. 30 [*affirming* 23 Ill. App. 461]; Deer *v.* Highway Com'rs, 109 Ill. 379; Gerdes *v.* Champion, 108 Ill. 137; McManus *v.* McDonough, 107 Ill. 95 [*affirming* 4 Ill. App. 180]; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105; Randecker *v.* Highway Com'rs, 61 Ill. App. 426; Randolph *v.* Pope County, 19 Ill. App. 100.

Iowa.— Everett *v.* Cedar Rapids, etc., R. Co., 28 Iowa 417.

Maine.— White *v.* Lincoln County, 70 Me. 317; Levant *v.* Penobscot County, 67 Me. 429; Emery *v.* Brann, 67 Me. 39; Ross *v.* Ellsworth, 49 Me. 417.

Massachusetts.— Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Rutland *v.* Worcester County, 20 Pick. (Mass.) 71; Pond *v.* Medway, Quincy (Mass.) 193.

Michigan.— People *v.* Hobson, 48 Mich. 27, 11 N. W. 771; Dooley *v.* Eilbert, 47 Mich. 615, 11 N. W. 408; Tomlin *v.* Fisher, 27 Mich. 524; Bench *v.* Otis, 25 Mich. 29; Case *v.* Frey, 24 Mich. 251.

Minnesota.— Taylor *v.* Bissell, 1 Minn. 225.

Mississippi.— Allen *v.* Board of Levee Com'rs, 57 Miss. 163.

Missouri.— Ward *v.* Board of Equalization, 135 Mo. 309, 36 S. W. 648; State *v.* Powers, 68 Mo. 320; House *v.* Clinton County Ct., 67 Mo. 522; Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294; State *v.* Walbridge, 62 Mo. App. 162; State *v.* Neosho, 57 Mo. App. 192; State *v.* Cauthorn, 40 Mo. App. 94.

Nevada.— Alexander *v.* Archer, 21 Nev. 22, 24 Pac. 373; State *v.* Board of Equalization, 7 Nev. 83.

New Jersey.— Barclay *v.* Brabston, 49 N. J. L. 629, 9 Atl. 769; Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 558; Newton *v.* Gloucester, 6 N. J. L. 405; Wood *v.* Tallman, 1 N. J. L. 177.

New York.— People *v.* Wheeler, 21 N. Y. 82; People *v.* Soper, 7 N. Y. 428; Wolfe *v.* Horton, 3 Cai. (N. Y.) 86.

North Carolina.— Hartsfield *v.* Jones, 49 N. C. 309; McMillan *v.* Smith, 4 N. C. 173; Dawsey *v.* Davis, 2 N. C. 323.

North Dakota.— Matter of Evingson, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768.

Oregon.— Venable *v.* Board of Police Com'rs, (Oreg. 1902) 67 Pac. 203; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111; Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280; Schirott *v.* Phillippi, 3 Oreg. 484.

Pennsylvania.—Wilmington Steamship Co. *v.* Haas, 151 Pa. St. 113, 31 Wkly. Notes Cas. (Pa.) 79, 25 Atl. 85; *In re* Conestoga Bridge, 150 Pa. St. 541, 24 Atl. 695; *In re* Hamilton St., 148 Pa. St. 640, 24 Atl. 122; Hart *v.* Cooper, 129 Pa. St. 297, 24 Wkly. Notes Cas. (Pa.) 358, 18 Atl. 122; *In re* Chestnut St., 118 Pa. St. 593, 12 Atl. 585; Darby *v.* Sharon Hill, 112 Pa. St. 66, 4 Atl. 722; *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260; *In re* Thirty-fourth St., 81 Pa. St. 27; Wistar *v.* Ollis, 77 Pa. St. 291; *In re* Election Cases, 65 Pa. St. 20; Bradford Tp. *v.* Goshen Tp., 57 Pa. St. 495; Chase *v.* Miller, 41 Pa. St. 403; Berger *v.* Smull, 39 Pa. St. 302; *In re* Bethlehem Tp. Road, (Pa. 1887) 10 Atl. 122; *In re* Public Road, (Pa. 1886) 6 Atl. 762; *In re* Fifteenth St., (Pa. 1886) 4 Atl. 167; *In re* Quakertown, 3 Grant (Pa.) 203; *In re* Philadelphia, etc., R. Co., 6 Whart. (Pa.) 25, 36 Am. Dec. 202; Barnes' Appeal, 2 Pennyp. (Pa.) 506; Matter of Dennison Tp., 13 Pa. Super. Ct. 227; Miller *v.* Summers, 13 Pa. Super. Ct. 127, 17 Lanc. L. Rev. 345; Luke *v.* Schleger, 3 Kulp (Pa.) 505; Donohue *v.* McGroarty, 1 Kulp (Pa.) 238; Perot *v.* Harley, 1 Brewst. (Pa.) 407; Leis *v.* Yost, 1 Woodw. (Pa.) 15; Com. *v.* Cochran Creamery Co., 4 Pa. Co. Ct. 253; Noel *v.* Brown, 3 Pa. Co. Ct. 204; *In re* Upper Macungie Tp. Public Road, 2 Wkly. Notes Cas. (Pa.) 661, 33 Leg. Int. (Pa.) 281.

Rhode Island.— Wheeler *v.* Westerly Probate Ct., 21 R. I. 49, 41 Atl. 574.

Wisconsin.— State *v.* Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956; State *v.* Kemen, 61 Wis. 494, 21 N. W. 530; Oshkosh *v.* State, 59 Wis. 425, 18 N. W. 324; State *v.* Manitowoc County, 59 Wis. 15, 16 N. W. 617; State *v.* Whitford, 54 Wis. 150, 11 N. W.

(II) *ERRORS CONSIDERED*[53] — (A) *In General.* The reviewing court will only consider such errors as are properly assigned and presented with reasonable certainty,[54] or, where so restricted, the alleged errors set forth in the application or petition for the writ.[55] But this rule is inapplicable on a trial *de novo* in the reviewing court.[56] So, when necessary to the furtherance of justice, the court will notice substantial error, although it was not made the subject of objection or exception,[57] as where it is apparent that the inferior tribunal or officer had no jurisdiction,[58] exceeded its jurisdiction,[59] or that the aggrieved party had no opportunity to object.[60]

(B) *Harmless Error.* Mere technical irregularities or formal errors not affecting the merits of the case and by which the complaining party was not prejudiced, may be disregarded.[61]

(III) *MERITS OF CAUSE.*[62] Except where the scope of the review under the common-law writ has been enlarged, the court cannot, on review of a final determination, consider the merits of the controversy,[63] questions on the merits

424; Baizer *v.* Lasch, 28 Wis. 268; Tallmadge *v.* Potter, 12 Wis. 317.

See 9 Cent. Dig. tit. "Certiorari," § 174.

The record is the primary source of information. Genuario *v.* De Gaudenzio, 64 N. J. L. 157, 44 Atl. 950.

Matter treated as part of record.—A Canadian statute, used in the trial court by consent of counsel and shown by affidavit to have been treated as part of the record, although not formally certified as such, but certified by the clerk to be a true copy of the act as published, in response to a writ of certiorari, reciting that the statute had been introduced in evidence and requiring the clerk to transmit a certified copy thereof to the circuit court of appeals may be considered on a review of the decision by the supreme court of the United States. The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126 [*reversing* 86 Fed. 814, 56 U. S. App. 146, 30 C. C. A. 628, 82 Fed. 819, 54 U. S. App. 248, 27 C. C. A. 154].

Original and amended order.— Where a writ of review is taken to an order of the district court, which afterward amends the order, and the original order and the amendment are both in the record, the several orders may be considered together. State *v.* Second Judicial Dist. Ct., 25 Mont. 33, 63 Pac. 717.

53. See *infra*, V, Q, 2, b, (I).

54. *Alabama.*— Stroud *v.* State, 55 Ala. 77.

Delaware.— Deputy *v.* Betts, 4 Harr. (Del.) 352; Tinley *v.* Todd, 2 Harr. (Del.) 290.

Michigan.—Witherspoon *v.* Clegg, 42 Mich. 484, 4 N. W. 209.

New Jersey.— Griffith *v.* West, 10 N. J. L. 352.

Washington.— State *v.* Lockhart, 18 Wash. 531, 52 Pac. 315.

Objections which appear on the record will not be noticed, unless they are included in the exceptions filed. Curran *v.* Atkinson, 1 Ashm. (Pa.) 51.

Waiver of alleged error.— On certiorari to review a judgment rendered on a complaint under a penal statute it was assigned that the complaint was insufficient, and also that the statute was unconstitutional. The prosecutor of the writ by stipulation confined himself to the second ground, which the court declined to consider, because the complaint did not disclose a case within the statute, and dismissed the writ. Forgerson *v.* Board of Health, 64 N. J. L. 484, 45 Atl. 783.

Where certiorari and supersedeas are resorted to to quash an execution the court can look only to the grounds stated in the petition. Hollins *v.* Johnson, 3 Head (Tenn.) 346.

55. Adams *v.* Fitzgerald, 14 Ga. 36; Witherspoon *v.* Clegg, 42 Mich. 484, 4 N. W. 209; Davison *v.* Otis, 24 Mich. 23; Fowler *v.* Detroit, etc., R. Co., 7 Mich. 79; People *v.* Scannell, 56 N. Y. App. Div. 51, 67 N. Y. Suppl. 433.

In Georgia grounds of error not verified by the answer of the magistrate whose rulings or decisions are complained of cannot be considered. Hargrove *v.* Turner, 108 Ga. 580, 34 S. E. 1. See also Taft Co. *v.* Smith, 112 Ga. 196, 37 S. E. 424, where it was also held that there is no such verification when the answer is silent or denies that any such rulings were made.

56. Linch *v.* Broad, 70 Tex. 92, 6 S. W. 751.

57. Stouffer *v.* Beetem, 18 Pa. Co. Ct. 605.

58. People *v.* Robertson, 26 How. Pr. (N. Y.) 90; Herrigas *v.* McGill, 1 Ashm. (Pa.) 152; Bair *v.* Diller, 18 Pa. Co. Ct. 521.

59. Mastick *v.* San Francisco County Super. Ct., 94 Cal. 347, 29 Pac. 869.

60. Burke *v.* Monroe County, 4 W. Va. 371.

61. Stone *v.* Boston, 2 Metc. (Mass.) 220; Rutland *v.* Worcester County, 20 Pick. (Mass.) 71; Freetown *v.* Bristol County, 9 Pick. (Mass.) 46; Landaff's Petition, 34 N. H. 163; People *v.* Lantry, 44 N. Y. App. Div. 392, 60 N. Y. Suppl. 1009.

62. See also *infra*, V, Q, 2, b, (III).

63. *Alabama.*— *Ex p.* Madison Turnpike Co., 62 Ala. 93.

Arkansas.— Carnall *v.* Crawford County, 11 Ark. 604.

California.— Whitney *v.* San Francisco Fire Dept., 14 Cal. 479.

which are dependent on facts not in the record,[64] or the merits of the primary proceedings out of which the particular determination sought to be reviewed arose,[65] as on review of the decision of an appellate court.[66]

(IV) *EVIDENCE*[67]—(A) *In General.* The correctness of the decision or judgment below must be determined from the ultimate facts appearing in the record, and evidence which is made a part of the record cannot be examined to determine whether or not it justified the findings upon which the decision or judgment was made.[68]

(B) *Weight and Sufficiency.*[69] It is the general rule that the weight or sufficiency of the evidence as to the facts upon which the determination below was based will not be considered, if there was any evidence to support the findings.[70]

Louisiana.— State *v.* Barksdale, 50 La. Ann. 55, 22 So. 966.

Massachusetts.— Plymouth *v.* Plymouth County, 16 Gray (Mass.) 341.

Missouri.— State *v.* Moniteau County Ct., 45 Mo. App. 387; State *v.* Cauthorn, 4 Mo. App. 94.

New Hampshire.— Landaff's Petition, 34 N. H. 163.

New Jersey.— Wait *v.* Krewson, 59 N. J. L. 71, 35 Atl. 742. Errors of law only will be reviewed. Jeffrey *v.* Owen, 41 N. J. L. 260; Beach *v.* Mullin, 34 N. J. L. 343; Brown *v.* Ramsay, 29 N. J. L. 117; Wood *v.* Fithian, 24 N. J. L. 33; Scott *v.* Beatty, 23 N. J. L. 256.

New York.—People *v.* New York Canal Bd., 29 Hun (N. Y.) 159; People *v.* Van Alstyne, 32 Barb. (N. Y.) 131; Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464.

Pennsylvania.—*In re* Robb, 188 Pa. St. 212, 41 Atl. 477; Darby Borough School Dist.'s Appeal, 160 Pa. St. 79, 28 Atl. 636; Rand *v.* King, 134 Pa. St. 641, 26 Wkly. Notes Cas. (Pa.) 81, 19 Atl. 806; *In re* Germantown Ave., 99 Pa. St. 479; Peet *v.* Pittsburgh, 96 Pa. St. 218; *In re* Election Cases, 65 Pa. St. 20; Shippen *v.* Gaines, 17 Pa. St. 38; Overseers of Poor *v.* Overseers of Poor, 13 Pa. St. 389; Barnes' Appeal, 2 Pennyp. (Pa.) 506; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 1.

South Dakota.— State *v.* State Bd. of Assessment, 3 S. D. 338, 53 N. W. 192.

Tennessee.— Ezell *v.* Holloway, 2 Baxt. (Tenn.) 15.

Wisconsin.—State *v.* Outagamie County Cir. Ct., 101 Wis. 422, 77 N. W. 745.

See 9 Cent. Dig. tit. "Certiorari," § 174 *et seq.*

Jurisdiction attacked.— Where the determination is attacked solely on the ground of want of jurisdiction, the merits of the case or the regularity of the proceedings are not called in question. Kane *v.* State, 70 Md. 546, 17 Atl. 557.

64. Doolittle *v.* Galena, etc., R. Co., 14 Ill. 381; Landaff's Petition, 34 N. H. 163; Overseers of Poor *v.* Overseers of Poor, 7 Watts (Pa.) 527; Denzin *v.* Com., 3 Pa. Co. Ct. 654.

65. On certiorari brought to determine the validity of contempt proceedings for disobedience of a writ of ne exeat the court cannot consider the ne exeat proceedings on the merits. Aldrich *v.* Judge First Cir. Ct., 9 Hawaii 470.

66. Obert *v.* Whitehead, 9 N. J. L. 244.

67. See also *infra*, V, Q, 2, b, (III).

68. *Michigan.*— Corrie *v.* Corrie, 42 Mich. 509, 4 N. W. 213.

Missouri.— State *v.* Walbridge, 62 Mo. App. 162.

New Jersey.— State *v.* Block, 63 N. J. L. 508, 44 Atl. 208; Herbert *v.* Curtis, 55 N. J. L. 87, 25 Atl. 386.

New York.— People *v.* New York Soc., etc., 27 Misc. (N. Y.) 457, 58 N. Y. Suppl. 118, 29 N. Y. Civ. Proc. 191; Wilson *v.* Green, 20 Wend. (N. Y.) 189; People *v.* Vermilyea, 7 Cow. (N. Y.) 108.

Oregon.— Oregon Coal, etc., Co. *v.* Coos County, 30 Oreg. 308, 47 Pac. 851; Smith *v.* Portland, 25 Oreg. 297, 35 Pac. 665; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111; Vincent *v.* Umatilla County, 14 Oreg. 375, 12 Pac. 732; Poppleton *v.* Yamhill County, 8 Oreg. 358; Douglas County Road Co. *v.* Douglas County, 6 Oreg. 299.

Pennsylvania.— *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260; Union Canal Co. *v.* Woodside, 11 Pa. St. 176; Gibbons *v.* Sheppard, 2 Brewst. (Pa.) 1.

Wisconsin.— Roberts *v.* Warren, 3 Wis. 736.

United States.— California, etc., Land Co. *v.* Gowen, 48 Fed. 771.

England.— Anonymous, 1 B. & Ad. 382, 20 E. C. L. 527; *Ex p.* Blewitt, 14 L. T. Rep. N. S. 598; Rex *v.* Liston, 5 T. R. 338.

See 9 Cent. Dig. tit. "Certiorari," § 180 *et seq.*

To ascertain cause of action.— Testimony returned will not be examined to ascertain the cause of action, which is not elsewhere disclosed. Com. *v.* Cochran Creamery Co., 4 Pa. Co. Ct. 253.

69. See also *infra*, V, Q, 2, b, (III), (E).

70. *Alabama.*— McAllillcy *v.* Horton, 75 Ala. 491.

California.— Security Sav. Bank, etc., Co. *v.* Los Angeles County, (Cal. 1893) 34 Pac. 437; Farmers', etc., Bank *v.* Board of Equalization, 97 Cal. 318, 32 Pac. 312; Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628.

District of Columbia.— Barber *v.* Harris, 6 Mackey (D. C.) 586.

Georgia.— Shearouse *v.* Morgan, 111 Ga. 858, 36 S. E. 927; Georgia R., etc., Co. *v.* Pounds, 111 Ga. 851, 36 S. E. 687; Cox *v.* Snell, 77 Ga. 469.

Nor will the credibility of witnesses be inquired into by the reviewing court in certiorari proceedings.[71]

Illinois.— Low *v.* Galena, etc., R. Co., 18 Ill. 324.

Iowa.— Smith *v.* Jones County, 30 Iowa 531.

Louisiana.— State *v.* Judge Fifth Dist. Ct., 32 La. Ann. 315; State *v.* Judge Parish Ct., 32 La. Ann. 217.

Massachusetts.— Farmington River Water Power Co. *v.* Berkshire County, 112 Mass. 206; Hayward, Petitioner, 10 Pick. (Mass.) 358.

Michigan.— Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879; Rowe *v.* Kellogg, 54 Mich. 206, 19 N. W. 957; Matthews *v.* Otsego County, 48 Mich. 587, 12 N. W. 863; Hollenburg *v.* Shuffert, 47 Mich. 126, 10 N. W. 137; Schall *v.* Bly, 43 Mich. 401, 5 N. W. 651; Fenton State Bank *v.* Whittle, 41 Mich. 365, 1 N. W. 957; Brown *v.* Blanchard, 39 Mich. 790; Smoke *v.* Jones, 35 Mich. 409; Overpack *v.* Ruggles, 27 Mich. 65; Bullard *v.* Hascall, 25 Mich. 132; McGraw *v.* Schwab, 23 Mich. 13; Linn *v.* Roberts, 15 Mich. 443; Welch *v.* Bagg, 12 Mich. 41; Hyde *v.* Nelson, 11 Mich. 353; Berry *v.* Lowe, 10 Mich. 9; Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491; Cicotte *v.* Morse, 8 Mich. 424; Bromley *v.* People, 7 Mich. 472; Higley *v.* Lant, 3 Mich. 612; Herring *v.* Hock, 1 Mich. 501; Gaines *v.* Betts, 2 Dougl. (Mich.) 98.

Minnesota.— De Rochebrune *v.* Southeimer, 12 Minn. 78.

Montana.— State *v.* Second Judicial Dist. Ct., 22 Mont. 241, 56 Pac. 281; State *v.* Ninth Judicial Dist. Ct., 17 Mont. 329, 42 Pac. 850.

New Hampshire.— Landaff's Petition, 34 N. H. 163.

New Jersey.— State *v.* Block, 63 N. J. L. 508, 44 Atl. 208; State *v.* Ohl, 58 N. J. L. 557, 34 Atl. 755; State *v.* Board of Public Works, 57 N. J. L. 580, 31 Atl. 613; State *v.* Remhoff, 55 N. J. L. 475, 26 Atl. 860; Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243; State *v.* Foster, 44 N. J. L. 378; Jeffrey *v.* Owen, 41 N. J. L. 260; Beach *v.* Mullin, 34 N. J. L. 343; State *v.* Hudson City, 32 N. J. L. 365; Lyons *v.* Davis, 30 N. J. L. 301; Brown *v.* Ramsay, 29 N. J. L. 117; Greenway *v.* Mead, 26 N. J. L. 303; Roston *v.* Morris, 25 N. J. L. 173; Wood *v.* Fithian, 24 N. J. L. 838; Race *v.* Dehart, 24 N. J. L. 37; Wood *v.* Fithian, 24 N. J. L. 33; Scott *v.* Beatty, 23 N. J. L. 256; Berry *v.* Williams, 21 N. J. L. 423; Dilts *v.* Kinney, 15 N. J. L. 130; Vanpelt *v.* Veghte, 14 N. J. L. 207; Andrews *v.* Andrews, 14 N. J. L. 141; Graecen *v.* Allen, 14 N. J. L. 74; Farley *v.* McIntire, 13 N. J. L. 190; Clark *v.* Hall, 11 N. J. L. 78; Baldwin *v.* Simmons, 9 N. J. L. 196; East Windsor *v.* Montgomery, 9 N. J. L. 39; Gibbons *v.* Wade, 8 N. J. L. 255; Wood *v.* Tallman, 1 N. J. L. 177. But see Somers *v.* Wescoat, 66 N. J. L. 551, 49 Atl. 462.

New Mexico.— *In re* Henriques, 5 N. M. 169, 21 Pac. 80.

New York.— People *v.* Board of Fire Com'rs, 100 N. Y. 82, 2 N. E. 613; People *v.* Board of Fire Com'rs, 96 N. Y. 644; People *v.* Board of Police, 11 Hun (N. Y.) 513; People *v.* Overseers of Poor, 15 Barb. (N. Y.) 286; People *v.* French, 3 Silv. Supreme (N. Y.) 28, 6 N. Y. Suppl. 394, 25 N. Y. St. 570; People *v.* Robb, 1 Silv. Supreme (N. Y.) 448, 5 N. Y. Suppl. 869, 23 N. Y. St. 591; Barlow *v.* Canal Bd., 2 Thomps. & C. (N. Y.) 242; People *v.* McLean, 1 Misc. (N. Y.) 463, 21 N. Y. Suppl. 625, 49 N. Y. St. 611; People *v.* Purroy, 20 N. Y. Suppl. 735, 49 N. Y. St. 606; People *v.* French, 18 N. Y. Suppl. 550, 45 N. Y. St. 239; People *v.* Hayden, 16 N. Y. Suppl. 98, 40 N. Y. St. 221; People *v.* McClave, 15 N. Y. Suppl. 221, 244, 39 N. Y. St. 501; People *v.* MacLean, 14 N. Y. Suppl. 578, 38 N. Y. St. 896; People *v.* McClave, 11 N. Y. Suppl. 304, 33 N. Y. St. 833; People *v.* McClave, 10 N. Y. Suppl. 764, 32 N. Y. St. 824 [*affirmed* in 123 N. Y. 512, 25 N. E. 1047, 34 N. Y. St. 274]; People *v.* McClave, 8 N. Y. Suppl. 515, 29 N. Y. St. 368 [*affirmed* in 121 N. Y. 677, 24 N. E. 1095, 30 N. Y. St. 1016]; People *v.* French, 8 N. Y. Suppl. 456, 29 N. Y. St. 304; People *v.* Robb, 8 N. Y. Suppl. 418, 29 N. Y. St. 59; People *v.* French, 7 N. Y. St. 253; People *v.* Keator, 17 Abb. N. Cas. (N. Y.) 369; Brown *v.* Wesson, 1 How. Pr. (N. Y.) 141; U. S. *v.* Wyngall, 5 Hill (N. Y.) 16; Simpson *v.* Rhinelanders, 20 Wend. (N. Y.) 103.

Oregon.— Oregon Coal Co. *v.* Coos County, 30 Oreg. 308, 47 Pac. 851; Smith *v.* Portland, 25 Oreg. 297, 35 Pac. 665; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111; Vincent *v.* Umatilla County, 14 Oreg. 375, 12 Pac. 732; Poppleton *v.* Yamhill County, 8 Oreg. 338.

Pennsylvania.— Shenango Tp. *v.* Wayne Tp., 34 Pa. St. 184; Union Canal Co. *v.* Woodside, 11 Pa. St. 176; South Huntington *v.* East Huntington, 7 Watts (Pa.) 527; Leslie *v.* Doyle, 1 Kulp (Pa.) 272; Leister's Appeal, 20 Wkly. Notes Cas. (Pa.) 224, 11 Atl. 387.

Rhode Island.— Keenan *v.* Goodwin, 17 R. I. 649, 24 Atl. 148.

South Carolina.— State *v.* Fort, 24 S. C. 510.

Utah.— Salt Lake City Water, etc., Power Co. *v.* Salt Lake City, 24 Utah 282, 67 Pac. 791.

Wisconsin.— State *v.* Whitford, 54 Wis. 150, 11 N. W. 424; Frederick *v.* Clark, 5 Wis. 191; Roberts *v.* Warren, 3 Wis. 736.

See 9 Cent. Dig. tit. "Certiorari," § 182.

On certiorari in habeas corpus proceedings on extradition, the court will look into the evidence on which the judgment of the commissioner rested and will pass on its weight as well as on its competency. *In re* Henrich, 5 Blatchf. (U. S.) 414, 11 Fed. Cas. No. 6,369, 10 Cox C. C. 626.

71. Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879; Independence *v.* Pompton, 9 N. J. L. 209.

(c) *Rulings on Evidence.*[72] Unless the rule limiting the inquiry to consideration of the jurisdiction of the inferior court or tribunal has been relaxed, the review of rulings on the admission or rejection of testimony is not permissible.[73] Nor will such rulings be considered if there was competent evidence to support the facts necessary to be proved.[74]

b. When Not Confined to Record — (i) *Errors of Law*[75] — (a) *In General.* Although findings of fact as to which evidence has been adduced may not be examinable, yet, where the inquiry is not limited to jurisdictional questions or the rule of the common law has been extended in practice and by statute, errors of law arising on questions within the jurisdiction and determined in the course of the proceedings may be reviewed,[76] and it has been held that where there is no

72. See also *infra*, V, Q, 2, b, (I), (B).

73. Rickel *v.* Strelinger, 102 Mich. 41, 60 N. W. 307; Lord *v.* Wirt, 96 Mich. 415, 56 N. W. 7; People *v.* Hair, 29 Hun (N. Y.) 125; People *v.* Overseers of Poor, 15 Barb. (N. Y.) 286; Haviland *v.* White, 7 How. Pr. (N. Y.) 154; People *v.* Overseers of Poor, 6 How. Pr. (N. Y.) 25; People *v.* First Judge Columbia, 2 Hill (N. Y.) 398; Birdsall *v.* Phillips, 17 Wend. (N. Y.) 464; Smith *v.* Portland, 25 Oreg. 297, 35 Pac. 665; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111; *In re* Quakertown, 3 Grant (Pa.) 203.

74. People *v.* Ontario County Ct. of Sess., 45 Hun (N. Y.) 54.

75. See also *supra*, V, Q, 2, a.

76. *Alabama.*— McCulley *v.* Cunningham, 96 Ala. 583, 11 So. 694; Miller *v.* Jones, 80 Ala. 89; McAllilley *v.* Horton, 75 Ala. 491; Camden *v.* Bloch, 65 Ala. 236.

Arkansas.— Fowler *v.* McKennon, 45 Ark. 94.

California.— See Security Sav. Bank, etc., Co. *v.* Los Angeles County, (Cal. 1893) 34 Pac. 437; Farmers', etc., Bank *v.* Board of Equalization, 97 Cal. 318, 32 Pac. 312.

Delaware.—Early *v.* Adams, 3 Harr. (Del.) 321.

Georgia.— Georgia R., etc., Co. *v.* Pounds, 111 Ga. 851, 36 S. E. 687.

Illinois.— Mason, etc., Special Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105.

Louisiana.— Henkle *v.* Bussey, 50 La. Ann. 1135, 24 So. 240. And see State *v.* Robinson, 38 La. Ann. 968.

Maine.— Lapan *v.* Cumberland County, 65 Me. 160; Frankfort *v.* Waldo County, 40 Me. 389.

Maryland.—Williamson *v.* Carnan, 1 Gill & J. (Md.) 184.

Massachusetts.— Onset St. R. Co. *v.* Plymouth County, 154 Mass. 395, 28 N. E. 286; Farmington River Water Power Co. *v.* Berkshire County, 112 Mass. 206; Nightingale, Petitioner, 11 Pick. (Mass.) 168; Hayward, Petitioner, 10 Pick. (Mass.) 358.

Michigan.— O'Connor *v.* White, 124 Mich. 22, 82 N. W. 664; Corrie *v.* Corrie, 42 Mich. 509, 4 N. W. 213; Hyde *v.* Nelson, 11 Mich. 353; Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491.

Minnesota.—*In re* Minnetonka Dam, (Minn. 1901) 86 N. W. 455; St. Paul *v.* Marvin, 16 Minn. 102; Minnesota Cent. R. Co. *v.* McNamara, 13 Minn. 508.

New Hampshire. — Landaff's Petition, 34 N. H. 163.

New Jersey.— State *v.* Block, 63 N. J. L. 508, 44 Atl. 208; Stockton *v.* Newark, 58 N. J. L. 116, 32 Atl. 67; State *v.* Essex County, 43 N. J. L. 391; State *v.* Hudson City, 32 N. J. L. 365; Barcklow *v.* Hutchinson, 32 N. J. L. 195; Kirpatrick *v.* Cason, 30 N. J. L. 331; Scott *v.* Beatty, 23 N. J. L. 256; Rogers *v.* Brown, 20 N. J. L. 119; New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; Vanpelt *v.* Veghte, 14 N. J. L. 207; Graecen *v.* Allen, 14 N. J. L. 74; Gibbons *v.* Wade, 8 N. J. L. 255; Wood *v.* Tallman, 1 N. J. L. 177.

New York.— People *v.* Board of Police, 69 N. Y. 408; People *v.* Smith, 45 N. Y. 772; Morewood *v.* Hollester, 6 N. Y. 309; Benjamin *v.* Benjamin, 5 N. Y. 383; People *v.* Board of R. Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861, 74 N. Y. St. 794; People *v.* Lawrence, 54 Barb. (N. Y.) 589; People *v.* Humphreys, 24 Barb. (N. Y.) 521; Flanders *v.* Haines, 3 Thomps. & C. (N. Y.) 224; Carter *v.* Newbold, 7 How. Pr. (N. Y.) 166; Niblo *v.* Post, 25 Wend. (N. Y.) 280; Anderson *v.* Prindle, 23 Wend. (N. Y.) 616; Allyn *v.* Highway Com'rs, 19 Wend. (N. Y.) 342. But see Haviland *v.* White, 7 How. Pr. (N. Y.) 154.

Oregon. — Oregon Coal, etc., Co. *v.* Coos County, 30 Oreg. 308, 47 Pac. 851; Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111; Vincent *v.* Umatilla County, 14 Oreg. 375, 12 Pac. 732; Douglas County Road Co. *v.* Douglas County, 5 Oreg. 406; Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280; Schirott *v.* Phillippi, 3 Oreg. 484.

Pennsylvania. — Nobles *v.* Piollet, 16 Pa. Super. Ct. 386; Matter of Dennison Tp., 13 Pa. Super. Ct. 227. See also Westmoreland County *v.* Conemaugh Tp., 34 Pa. St. 231.

Rhode Island.— Lowrey *v.* Central Falls, (R. I. 1901) 50 Atl. 639; O'Brien *v.* Pawtucket, 20 R. I. 49, 37 Atl. 302, 530; Keenan *v.* Goodwin, 17 R. I. 649, 24 Atl. 148.

South Carolina.— State *v.* Fort, 24 S. C. 510; *Ex p.* Schmidt, 24 S. C. 363; State *v.* Steuart, 5 Strobh. (S. C.) 29.

Vermont.— Paine *v.* Leicester, 22 Vt. 44.

West Virginia.— Dryden *v.* Swinburne, 20 W. Va. 89.

Wisconsin. — State *v.* Whitford, 54 Wis. 150, 11 N. W. 424.

Canada.— Reg. *v.* Urquhart, 4 Can. Crim. Cas. 256; Lord *v.* Turner, 13 N. Brunsw. 13;

other available remedy, any law question may be considered, although not jurisdictional in its character.[77]

(B) *Rulings on Evidence.*[78] Where rulings on the evidence are held to be reviewable on the same principles and under the same circumstances as permit a review of errors other than those affecting the jurisdiction,[79] the alleged admission of incompetent or immaterial testimony, or the rejection of competent evidence which affected, or tended to affect, the merits of the case and the determination of the controversy may be considered, and the proceedings below reversed if such erroneous action was had.[80]

(II) *Examination of Evidence to Determine Jurisdiction.* The evidence may be examined to determine the jurisdiction of the inferior court or tribunal.[81]

(III) *Merits of Cause* — (A) *Examination of Evidence.*[82] If no other remedy is provided to review the proceedings below, or if by statute the court may investigate and decide the questions involved on the merits, it may examine the propriety of the findings, and for that purpose may look into the evidence and ascertain if there was such proof as justified the conclusions upon which the determination is based.[83]

Reg. *v.* Levy, 12 Nova Scotia 51; Girard *v.* Muir, 14 Quebec Super. Ct. 237; Ruckwart *v.* Bagin, 19 Rev. Lég. 655; Lanier *v.* Loupret, 6 Rev. Lég. 350.

See 9 Cent. Dig. tit. "Certiorari," § 174 *et seq.*

The New Jersey statute of 1881 (Pamph. L. 34), imposing the duty of determining disputed questions of fact, does not comprehend proceedings in courts of record having a general jurisdiction, but only includes special statutory tribunals existing for the purposes indicated by the law of their creation. Overseers of Poor *v.* Overseers of Poor, 44 N. J. L. 595.

Under the New York act of 1857, c. 723, the court to which the writ was returned was required to review any question of law arising either in the proceedings or on the trial, and hence might review rulings on challenges to jurors, the admission and rejection of evidence, and the charge on the law of the case to the jury. People *v.* Hamilton, 39 N. Y. 107, 6 Transcr. App. (N. Y.) 219. In People *v.* Carrington, 2 Lans. (N. Y.) 368, a statute providing for the review of any legal or constitutional question and authorizing the court to set aside the proceedings below for want of jurisdiction or for error committed in the determination was held to contemplate the review of legal or constitutional questions only.

77. People *v.* Allen, 52 N. Y. 538; People *v.* Madison County, 51 N. Y. 442; People *v.* Board of Assessors, 40 N. Y. 154.

Constitutional question.— Where by certiorari a resolution of a city council, which would be valid but for a certain act of the legislature with which the resolution conflicts, is brought before the court for review, the court may determine whether such legislative act is valid or inoperative because in conflict with the constitution. McArdle *v.* Jersey City, 66 N. J. L. 590, 49 Atl. 1013.

78. See also *supra*, V, Q, 2, a.

79. Haven *v.* Essex County, 155 Mass. 467, 29 N. E. 1083; Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491; People *v.* Hamilton, 39 N. Y. 107, 6 Transcr. App. (N. Y.) 219; Dryden *v.* Swinburne, 20 W. Va. 89.

80. Little *v.* Cochran, 24 Me. 509; Cousins *v.* Cowing, 23 Pick. (Mass.) 208; Hayward, Petitioner, 10 Pick. (Mass.) 358; Landaff's Petition, 34 N. H. 163.

81. Stumpf *v.* San Luis Obispo County, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; Whitney *v.* San Francisco Fire Dept., 14 Cal. 479; Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781; People *v.* Lawrence, 36 Barb. (N. Y.) 177; People *v.* Board of Metropolitan Police, 15 Abb. Pr. (N. Y.) 167, 24 How. Pr. (N. Y.) 481; Haviland *v.* White, 7 How. Pr. (N. Y.) 154; Rathbun *v.* Sawyer, 15 Wend. (N. Y.) 451; Beyerly *v.* Hunger, 1 Woodw. (Pa.) 354; Merkle *v.* Schwoyer, 1 Woodw. (Pa.) 291; Reg. *v.* McDonald, 19 Nova Scotia 336, 7 Can. L. T. 376; Hawes *v.* Hart, 18 Nova Scotia 42; Reg. *v.* Elze, 16 Nova Scotia 130; Reg. *v.* Coulson, 27 Ont. 59.

If the jurisdiction depended upon a question of fact, the inquiry thereupon is limited to the evidence upon which the inferior tribunal acted. Los Angeles *v.* Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234. If evidence of a fact upon which the jurisdiction depended is disputed the evidence may be examined to see if it supported the finding. Reg. *v.* Green, 12 Ont. Pr. 373.

82. See also *supra*, V, Q, 2, a.

83. *Georgia.*— Royal *v.* McPhail, 97 Ga. 457, 25 S. E. 512; Greenwood *v.* Boyd, etc., Furniture Factory, 86 Ga. 582, 13 S. E. 128.

Michigan.— Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491; Herring *v.* Hock, 1 Mich. 501.

New Jersey.—Somers *v.* Wescoat, 66 N. J. L. 551, 49 Atl. 462; Bellis *v.* Phillips, 28 N. J. L. 125; Brown *v.* Morris Canal, etc., Co., 27 N. J. L. 648.

New York.— People *v.* Board of Fire Com'rs, 100 N. Y. 82, 2 N. E. 613; People *v.* Board of Police, 72 N. Y. 415; People *v.* Board of Police, 69 N. Y. 408; People *v.* Smith, 45 N. Y. 772; People *v.* Board of As-

(B) *Weight and Sufficiency.*[84] But where the court may determine on all the evidence whether there was such a preponderance of proof against the existence of facts required to sustain the findings as to show manifest error, the same rule is applicable as that respecting application for a new trial on the ground that the verdict is against the evidence.[85]

sessors, 40 N. Y. 154; Freeman *v.* Ogden, 40 N. Y. 105; People *v.* Board of Police, 39 N. Y. 506; People *v.* Board of Assessors, 39 N. Y. 81, 6 Transcr. App. (N. Y.) 116; Baldwin *v.* Buffalo, 35 N. Y. 375; People *v.* Board of R. Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861, 74 N. Y. St. 794; People *v.* Carter, 52 Hun (N. Y.) 458, 5 N. Y. Suppl. 507, 24 N. Y. St. 104; People *v.* Cheetham, 45 Hun (N. Y.) 6; People *v.* Weygant, 14 Hun (N. Y.) 546; People *v.* Board of Police, 6 Hun (N. Y.) 229; People *v.* Sanders, 3 Hun (N. Y.) 16; People *v.* Eddy, 57 Barb. (N. Y.) 593; People *v.* Westchester County, 57 Barb. (N. Y.) 377, 8 Abb. Pr. N. S. (N. Y.) 277; People *v.* Board of Pilot Com'rs, 54 Barb. (N. Y.) 145; People *v.* Board of Police, 40 Barb. (N. Y.) 626; People *v.* Overseers of Poor, 15 Barb. (N. Y.) 286; People *v.* Court Spec. Sess., 5 Thomps. & C. (N. Y.) 260; People *v.* French, 15 N. Y. St. 108; People *v.* French, 11 N. Y. St. 577; Buckley *v.* Drake, 9 N. Y. Civ. Proc. 336; People *v.* Board of Police, 52 How. Pr. (N. Y.) 289.

North Carolina.— Cherry *v.* Slade, 9 N. C. 400.

Ohio.— Street *v.* Francis, 3 Ohio 277.

Oregon.— See Poppleton *v.* Yamhill County, 8 Oreg. 338.

Utah.— Gilbert *v.* Board of Police, 11 Utah 378, 40 Pac. 264.

West Virginia.— Alderson *v.* Kanawha County, 32 W. Va. 454, 9 S. E. 863; Dryden *v.* Swinburne, 20 W. Va. 89. See also Poe *v.* Marion Mach. Works, 24 W. Va. 517.

Wisconsin.— Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444, 9 Am. Rep. 591.

England.— Reg. *v.* Turk, 10 Q. B. 540, 11 Jur. 774, 16 L. J. M. C. 114, 59 E. C. L. 539; Reg. *v.* High Bickington, 3 Q. B. 790, note *a*, 43 E. C. L. 976; Reg. *v.* Bolton, 1 Q. B. 66, 4 P. & D. 679, 41 E. C. L. 439; Rex *v.* Great Wishford, 4 A. & E. 216, 5 L. J. M. C. 25, 5 N. & M. 540, 31 E. C. L. 111; Rex *v.* Woolpit, 4 A. & E. 205, 31 E. C. L. 106; Rex *v.* Glossop, 4 B. & Ald. 616, 6 E. C. L. 625; Rex *v.* Dove, 3 B. & Ald. 596, 5 E. C. L. 343; Rex *v.* Daman, 2 B. & Ald. 378, 1 Chit. 147, 18 E. C. L. 91; Rex *v.* Killatt, 4 Burr. 2063; Rex *v.* Taylor, 2 Chit. 578, 18 E. C. L. 795; Rex *v.* Read, 2 Dougl. 486; Rex *v.* Chandler, 14 East 267; Rex *v.* Crisp, 7 East 389, 3 Smith K. B. 377; Rex *v.* Smith, 8 T. R. 588; Rex *v.* Clarke, 8 T. R. 220; Rex *v.* Davis, 6 T. R. 177.

Canada.— Reg. *v.* Lyons, 17 Nova Scotia 201.

See 9 Cent. Dig. tit. "Certiorari," § 180 *et seq.*

Presentation of claim.— On proceedings to review the action of a township in disallowing a claim it cannot be urged that no evidence was adduced, when it appears that a bill for the claim was presented and that no demand for further proof was made. People *v.* Sutphin, 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49.

The principles upon which an assessment was made may be inquired into. Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167.

The Nevada statute permitting a review of the evidence contemplates only such evidence as may be properly returned or certified. State *v.* Board of Equalization, 7 Nev. 83.

84. See also *supra*, V, Q, 2, a.

85. *Michigan.*— Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491.

Missouri.— State *v.* Board of Police, 14 Mo. App. 297 [*affirmed* in 88 Mo. 144].

New Jersey.— State *v.* Block, 63 N. J. L. 508, 44 Atl. 208; State *v.* Spring Lake, 58 N. J. L. 136, 32 Atl. 77; Baldwin *v.* Flagg, 43 N. J. L. 495; State *v.* Essex County, 43 N. J. L. 391; Leonard *v.* Stout, 36 N. J. L. 370, 37 N. J. L. 492; Craft *v.* Smith, 35 N. J. L. 302; Walker *v.* Anderson, 18 N. J. L. 217; New York City Bank *v.* Merrit, 13 N. J. L. 131.

New York.— People *v.* French, 119 N. Y. 502, 23 N. E. 1061, 30 N. Y. St. 72; People *v.* French, 110 N. Y. 494, 18 N. E. 133, 18 N. Y. St. 231; People *v.* Board of Police, 93 N. Y. 97; People *v.* Campbell, 82 N. Y. 247; People *v.* Board of Fire Com'rs, 72 N. Y. 445; People *v.* Board of Police, 39 N. Y. 506; People *v.* Board of R. Com'rs, 54 N. Y. App. Div. 615, 66 N. Y. Suppl. 198; *In re* Lanehart, 32 N. Y. App. Div. 4, 52 N. Y. Suppl. 671; People *v.* Board of R. Com'rs, 4 N. Y. App. Div. 259, 38 N. Y. Suppl. 528, 861, 74 N. Y. St. 794; People *v.* Doolittle, 44 Hun (N. Y.) 293; People *v.* Board of Fire Com'rs, 30 Hun (N. Y.) 376; People *v.* New York, 19 Hun (N. Y.) 441; People *v.* Williams, 20 N. Y. Suppl. 350, 48 N. Y. St. 207; People *v.* Jourdan, 1 N. Y. Civ. Proc. 328, 13 N. Y. Wkly. Dig. 207; People *v.* Williams, 17 Abb. N. Cas. (N. Y.) 366. See also Niblo *v.* Post, 25 Wend. (N. Y.) 280.

United States.— *In re* Henrich, 5 Blatchf. (U. S.) 414, 11 Fed. Cas. No. 6,369, 10 Cox C. C. 626.

See 9 Cent. Dig. tit. "Certiorari," § 182.

Special statute.— Such rule does not apply to proceedings under a special statute. People *v.* Keator, 17 Abb. N. Cas. (N. Y.) 369. See also People *v.* Purroy, 4 N. Y. Suppl. 345, 347, 21 N. Y. St. 340, holding that the determination below will not be disturbed where the evidence was conflicting and the result declared was not palpably against the weight thereof, although exceptions taken might have been fatal if the case had been tried by a jury. The New Jersey certiorari

(IV) *Matters Dehors the Record* — (A) *Conclusiveness of Facts Returned.* With the like exceptions, it is also the rule that the facts found below and returned are to be taken as true and as conclusive.[86]

act authorizing the supreme court to determine disputed questions of fact only relates to the extraordinary proceedings of special statutory tribunals outside of regular suits at law. State *v.* Block, 63 N. J. L. 508, 44 Atl. 208 [*citing* State *v.* Overseers of Poor, 52 N. J. L. 298, 19 Atl. 787].

86. *Alabama.*— Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947; Fore *v.* Fore, 44 Ala. 478.

Arkansas.— Hornor *v.* O'Shields, 33 Ark. 117; Miller *v.* McCullough, 21 Ark. 426; Redmond *v.* Anderson, 18 Ark. 449.

California.—Los Angeles *v.* Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234; Security Sav. Bank, etc., Co. *v.* Los Angeles County, (Cal. 1893) 34 Pac. 437; Farmers', etc., Bank *v.* Board of Equalization, 97 Cal. 318, 32 Pac. 312; De Pedrorena *v.* San Diego County Super. Ct., 80 Cal. 144, 22 Pac. 71; Hoffman *v.* San Francisco Super. Ct., 79 Cal. 475, 21 Pac. 862; Finch *v.* Tehama County, 29 Cal. 454.

Delaware.—Deputy *v.* Betts, 4 Harr. (Del.) 352.

Illinois.— Deer *v.* Highway Com'rs, 109 Ill. 379; McManus *v.* McDonough, 107 Ill. 95 [*affirming* 4 Ill. App. 180].

Iowa.— Schroder *v.* Carey, 11 Iowa 555.

Louisiana.—State *v.* King, 50 La. Ann. 659, 23 So. 882; State *v.* Barksdale, 50 La. Ann. 55, 22 So. 966; State *v.* Judge First City Ct., 36 La. Ann. 977.

Maine.— Levant *v.* Penobscot County, 67 Me. 429; Emery *v.* Brann, 67 Me. 39; Ross *v.* Ellsworth, 49 Me. 417; Pike *v.* Herriman, 39 Me. 52; Goodwin *v.* Hallowell, 12 Me. 271.

Maryland.— Williamson *v.* Carnan, 1 Gill & J. (Md.) 184.

Massachusetts.— Haven *v.* Essex County, 155 Mass. 467, 29 N. E. 1083; Tewksbury *v.* Middlesex County, 117 Mass. 563; Farmington River Water Power Co. *v.* Berkshire County, 112 Mass. 206; Mendon *v.* Worcester County, 5 Allen (Mass.) 13; Gleason *v.* Sloper, 24 Pick. (Mass.) 181; Rutland *v.* Worcester, 20 Pick. (Mass.) 71; Hayward, Petitioner, 10 Pick. (Mass.) 358.

Michigan.— Scholtz *v.* Smith, 119 Mich. 634, 78 N. W. 668; Taylor *v.* Shimmel, 107 Mich. 676, 65 N. W. 548; Ringelberg *v.* Peterson, 76 Mich. 107, 42 N. W. 1080; Weaver *v.* Lammon, 62 Mich. 366, 28 N. W. 904; Kidd *v.* Dougherty, 59 Mich. 240, 26 N. W. 510; Mudge *v.* Yaples, 58 Mich. 307, 25 N. W. 297; Rowe *v.* Kellogg, 54 Mich. 206, 19 N. W. 957; Matthews *v.* Otsego County, 48 Mich. 587, 12 N. W. 863; Sheldon *v.* Stewart, 43 Mich. 574, 5 N. W. 1067; People *v.* Leavitt, 41 Mich. 470, 2 N. W. 812; Marquette, etc., Rolling Mill Co. *v.* Morgan, 41 Mich. 296, 1 N. W. 1045; The Brig City of Erie *v.* Canfield, 27 Mich. 479. And see Galloway *v.* Corbitt, 52 Mich. 460, 18 N. W. 218.

Minnesota.—Gervais *v.* Powers, 1 Minn. 45.

Missouri.— Hannibal, etc., R. Co. *v.* State Board of Equalization, 64 Mo. 294.

Nevada.— Alexander *v.* Archer, 21 Nev. 22, 24 Pac. 373; State *v.* Board of Equalization, 7 Nev. 83.

New Jersey.— Rogers *v.* Kershaw, 64 N. J. L. 213, 44 Atl. 844; State *v.* Block, 63 N. J. L. 508, 44 Atl. 208; State *v.* Schulster, 60 N. J. L. 132, 36 Atl. 776; State *v.* Ohl, 58 N. J. L. 557, 34 Atl. 755; State *v.* Larrabee, 58 N. J. L. 314, 33 Atl. 216; State *v.* Remhoff, 55 N. J. L. 475, 26 Atl. 860; Overseer of Poor *v.* Overseer of Poor, 44 N. J. L. 595; State *v.* Delaware Tp., 41 N. J. L. 55; Bellis *v.* Phillips, 28 N. J. L. 125; Scott *v.* Beatty, 23 N. J. L. 256; Pinkney *v.* Ayres, 21 N. J. L. 694; Prall *v.* Waldron, 2 N. J. L. 135.

New York.—People *v.* Board of Fire Com'rs, 73 N. Y. 437; People *v.* Feitner, 65 N. Y. App. Div. 224, 72 N. Y. Suppl. 437; People *v.* Brady, 50 N. Y. App. Div. 372, 63 N. Y. Suppl. 1089; People *v.* Vanderpoel, 35 N. Y. App. Div. 73, 54 N. Y. Suppl. 436; People *v.* Barnes, 17 N. Y. App. Div. 197, 45 N. Y. Suppl. 356; People *v.* Syracuse, 6 Hun (N. Y.) 652; People *v.* Ryken, 6 Hun (N. Y.) 625; People *v.* Lawrence, 36 Barb. (N. Y.) 177; People *v.* Clinton County, 19 N. Y. Suppl. 642, 46 N. Y. St. 457; People *v.* Lohnas, 8 N. Y. Suppl. 104, 28 N. Y. St. 246; People *v.* Weld, 6 N. Y. St. 173; People *v.* Koch, 2 N. Y. St. 110; People *v.* Powers, 19 Abb. Pr. (N. Y.) 99; Haines *v.* Judges Westchester, 20 Wend. (N. Y.) 625; Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167; Starr *v.* Rochester, 6 Wend. (N. Y.) 564.

North Dakota.—Matter of Evingson, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768.

Oregon.— Oregon Coal, etc., Co. *v.* Coos County, 30 Oreg. 308, 47 Pac. 851.

Pennsylvania.— Wistar *v.* Ollis, 77 Pa. St. 291; *In re* Beron, etc., Tp. Road, (Pa. 1889) 17 Atl. 205; Curran *v.* Atkinson, 1 Ashm. (Pa.) 51; Carle *v.* White Haven Ice Co., 7 Kulp (Pa.) 429, 4 Pa. Dist. 289, 15 Pa. Co. Ct. 546; Luke *v.* Schleger, 3 Kulp (Pa.) 505; Barnett *v.* Fisher, 5 Pa. Dist. 277, 26 Pittsb. Leg. J. N. S. 393; Beyerly *v.* Hunger, 1 Woodw. (Pa.) 354; Saul *v.* Geist, 1 Woodw. (Pa.) 306; Leis *v.* Yost, 1 Woodw. (Pa.) 15.

Rhode Island.— Wheeler *v.* Westerly Probate Ct., 21 R. I. 49, 41 Atl. 574.

Wisconsin.—State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942; State *v.* Kemen, 61 Wis. 494, 21 N. W. 530; Cassidy *v.* Millerick, 52 Wis. 379, 9 N. W. 165; Baizer *v.* Lasch, 28 Wis. 268.

England.— ——— *v.* Cowper, 6 Mod. 90.

Canada.— *In re* Barron, 33 Can. L. J. 297; *Ex p.* Morrison, 13 L. C. Jur. 295, 1 Rev. Lég. 437.

See 9 Cent. Dig. tit. "Certiorari," § 180 *et seq.*

Evidence of want of authority to make

(B) *Return Not Conclusive* — (1) IN GENERAL. If the facts and errors are extrinsic and do not appear by the record they may be shown *aliunde*.[87] Where the writ is allowed *ex parte*, on the return thereto, such matters, other than those properly inquirable into by the writ, may be shown to the court, as would, if shown in the first instance, have induced the court to refuse the writ.[88] This rule has been changed in many jurisdictions by statutes permitting evidence *dehors* the record to be read by either party on the hearing.[89]

(2) JURISDICTIONAL FACTS. The want of jurisdiction, when arising from matters not appearing in any way on the proceedings,[90] or the existence of

return.— Where no claim is made that a return of a public board signed by its president is unauthorized or forged evidence is not permissible to show that in fact it was not the return of the body. Nehrling *v.* State, 112 Wis. 637, 88 N. W. 610.

Additional facts which cannot be shown by a further return cannot be presented or considered. People *v.* Board of Contract, 39 N. Y. App. Div. 30, 56 N. Y. Suppl. 334.

Improper admission of evidence.—An averment in the return that evidence improperly admitted was not considered is not conclusive. Haven *v.* Essex County, 155 Mass. 467, 29 N. E. 1083.

A suggestion that a question not raised below might have induced the action taken cannot be considered. People *v.* Zoll, 97 N. Y. 203.

Statements as to justice's docket.— While the return of a justice must be taken as true as to facts and occurrences not required to be docketed, yet as to such facts the docket entries will prevail. Weaver *v.* Lammon, 62 Mich. 366, 28 N. W. 904; Galloway *v.* Corbitt, 52 Mich. 460, 18 N. W. 218.

Contradiction by predecessor in office.—A return by the legal custodian of the record cannot be contradicted by his predecessor in office who entertained the proceedings. Matter of Evingson, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768.

The deposition of a single judge is insufficient to contradict the recitals of an order made by the whole court. Parsell *v.* State, 30 N. J. L. 530.

Affidavits taken after the granting of the writ are inadmissible. Milam *v.* Sproull, 36 Ga. 393.

A mere voluntary statement of facts made between the parties for the purpose of preparation for argument is not conclusive until filed with the clerk. State *v.* Robinson, 38 N. J. L. 267.

An issue of fact cannot be made up in the revisory court to supply omissions in the record or to control its recitals. Independent Pub. Co. *v.* American Press Assoc., 102 Ala. 475, 15 So. 947.

After a decision on the merits a certiorari cannot be reinstated to permit the defeated party to take fresh proofs. Garretson *v.* Barker, 66 N. J. L. 158, 48 Atl. 514.

The jurisdiction cannot be aided by extrinsic evidence if the record can be perfected. Luke *v.* Schleger, 3 Kulp (Pa.) 505.

A statement of the legal effect of the facts found is not conclusive. Andrews *v.* King, 77 Me. 224.

87. *California.*— Schwarz *v.* San Francisco Super. Ct., 111 Cal. 106, 43 Pac. 580.

Georgia.— Hunter *v.* Hunter, T. U. P. Charlt. (Ga.) 303; Kehr *v.* Gantier, T. U. P. Charlt. (Ga.) 279.

Illinois.— Rue *v.* Chicago, 66 Ill. 256.

Missouri.— Rogers *v.* Clinton County Ct., 60 Mo. 101.

Montana.— State *v.* Ninth Judicial Dist. Ct., 17 Mont. 329, 42 Pac. 850.

New Jersey.— New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; Smick *v.* Opdycke, 12 N. J. L. 347.

North Carolina.— Cherry *v.* Slade, 9 N. C. 400.

Pennsylvania.— Adams *v.* Barnes, 5 Pa. Co. Ct. 537.

See 9 Cent. Dig. tit. "Certiorari," § 177 *et seq.*

Proof dehors the record cannot be taken of course but a motion must be made. Cullen *v.* Lowery, 2 Harr. (Del.) 459.

Damages.— Where the papers in the action give no intimation of damages evidence of such damages is inadmissible, but otherwise if defendant had appealed and amended his pleadings in the reviewing court. Ritter *v.* Daniels, 47 Mich. 617, 11 N. W. 409.

Payment of judgment.— The court will look into evidence as to payment after judgment and before execution. Beyerly *v.* Hunger, 1 Woodw. (Pa.) 354; Merkle *v.* Schwoyer, 1 Woodw. (Pa.) 291.

In Georgia, without cause shown for delay, a traverse of the truth of the return to a certiorari, although filed before the case is reached, is too late if filed after the first term. Hirt *v.* Linton, 59 Ga. 881.

88. State *v.* Woodward, 9 N. J. L. 21.

89. Hickey *v.* Matthews, 43 Ark. 341; Barnett *v.* Fisher, 5 Pa. Dist. 277, 26 Pittsb. Leg. J. N. S. 393.

Depositions taken in a suit then pending between the same parties may be read on a motion to dismiss a certiorari. Ledbetter *v.* Lofton, 5 N. C. 184.

Evidence of alteration of record.— The original record of a justice may be examined and evidence heard as to subsequent alterations and amendments. Hickey *v.* Matthews, 43 Ark. 341.

90. *Maine.*— West Bath Petitioners, 36 Me. 74.

Michigan.— Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491.

facts which if apparent would have ousted the jurisdiction, may be shown *aliunde*.[91]

(3) Evidence to Show Nature of Action. Under some circumstances, as where the jurisdiction is doubtful, the court will hear proof of facts not disclosed by the record, to show the nature of the action, the pleadings, defense, or the like.[92]

(4) Fraud, Partiality, Etc. Evidence *dehors* the record is permissible to show fraud, partiality, corruption, or extortion.[93]

(5) Support of Application. It has been held that the plaintiff may present affidavits to support the application on which the writ was granted as well as to controvert affidavits interposed by the defendant.[94]

(v) *Papers Used on Application.* Where by a provision of the statute[95] the court is permitted to consider the papers on which the writ of certiorari was granted, if the return to the writ meets all the allegations of the writ and of such papers and traverses them, the hearing must be confined to the papers stated in the return.[96] But if the return to the writ admits the facts stated in the writ, or the papers on which the writ was granted, or is silent as to them, such facts become important and must be considered on the hearing,[97]

New York.— Buckley *v.* Drake, 9 N. Y. Civ. Proc. 336.

Pennsylvania.— Wistar *v.* Ollis, 77 Pa. St. 291; Herrigas *v.* McGill, 1 Ashm. (Pa.) 152; Luke *v.* Schleger, 3 Kulp (Pa.) 505; Beyerly *v.* Hunger, 1 Woodw. (Pa.) 354; Merkle *v.* Schwoyer, 1 Woodw. (Pa.) 291; Leis *v.* Yost, 1 Woodw. (Pa.) 15; Light *v.* Ringler, 1 Pa. Co. Ct. 156.

Rhode Island.— State *v.* Newport, 18 R. I. 381, 28 Atl. 347; Lonsdale County *v.* Board of License Com'rs, 18 R. I. 5, 25 Atl. 655; Dexter *v.* Cumberland, 17 R. I. 222, 21 Atl. 347.

England.— Reg. *v.* Farmer, [1892] 1 Q. B. 637, 17 Cox C. C. 413, 56 J. P. 341, 61 L. J. M. C. 65, 65 L. T. Rep. N. S. 736, 40 Wkly. Rep. 228; Matter of Penny, etc., R. Co., 7 E. & B. 660, 26 L. J. Q. B. 225, 90 E. C. L. 660. See also *Ex p.* Blewitt, 14 L. T. Rep. N. S. 598.

Canada.— Reg. *v.* Simmons, 14 N. Brunsw. 158.

See 9 Cent. Dig. tit. "Certiorari," § 175.

Jurisdiction shown by return.—A statute permitting the reading of affidavits on matters relating to the jurisdiction is inapplicable where the return states the facts. People *v.* Vanderpoel, 35 N. Y. App. Div. 73, 54 N. Y. Suppl. 436.

91. As the disqualification of the acting magistrate. Reg. *v.* Justices Hertfordshire, 6 Q. B. 753, 9 Jur. 424, 14 L. J. M. C. 73, 1 N. Sess. Cas. 490, 51 E. C. L. 753; Reg. *v.* Cheltenham, 1 Q. B. 467, 10 L. J. M. C. 99, 1 G. & D. 167, 41 E. C. L. 628; Reg. *v.* Bolton, 1 Q. B. 66, 4 P. & D. 679, 41 E. C. L. 439.

92. Cullen *v.* Lowery, 2 Harr. (Del.) 459. In Castner *v.* Fanning, 3 Kulp (Pa.) 17, after a plea to an action of debt the summons was changed so as to read in trover and the irregularity was permitted to be shown by depositions.

93. Wistar *v.* Ollis, 77 Pa. St. 291; McMullen *v.* Orr, 8 Phila. (Pa.) 342; Luke *v.* Schleger, 3 Kulp (Pa.) 505; Leis *v.* Yost, 1 Woodw. (Pa.) 15; Dunfee *v.* Vargason, 3 Pa. Co. Ct. 207. And see Donohue *v.* McGroarty, 1 Kulp (Pa.) 238; Reg. *v.* Gillyard, 12 Q. B. 527, 12 Jur. 655, 17 L. J. M. C. 153, 64 E. C. L. 527; ——— *v.* Cowper, 6 Mod. 90.

Interest.— Reg. *v.* Aberdare Canal Co., 14 Q. B. 854, 14 Jur. 735, 19 L. J. Q. B. 251, 68 E. C. L. 854; Reg. *v.* Cheltenham, 1 Q. B. 467, 1 G. & D. 167, 10 L. J. M. C. 99, 41 E. C. L. 628.

A conviction, although regular, may be quashed, if it be made to appear that it was fraudulently obtained. Reg. *v.* Gillyard, 12 Q. B. 527, 12 Jur. 655, 17 L. J. M. C. 153, 64 E. C. L. 527.

94. Vervell *v.* Trexler, 5 N. C. 438; Ledbetter *v.* Lofton, 5 N. C. 184.

95. In the absence of statute the papers on which the writ was granted cannot be considered. State *v.* Smith, 30 N. J. L. 449.

96. People *v.* Wurster, 149 N. Y. 549, 44 N. E. 298 [*reversing* 91 Hun (N. Y.) 233, 36 N. Y. Suppl. 160, 71 N. Y. St. 96]; People *v.* Brooklyn, 106 N. Y. 64, 12 N. E. 641; People *v.* Wurster, 89 Hun (N. Y.) 5, 35 N. Y. Suppl. 89, 69 N. Y. St. 446; People *v.* Hayden, 7 Misc. (N. Y.) 292, 27 N. Y. Suppl. 893, 57 N. Y. St. 544. And see People *v.* York, 45 N. Y. App. Div. 503, 61 N. Y. Suppl. 400; People *v.* Murray, 14 Misc. (N. Y.) 177, 35 N. Y. Suppl. 463, 69 N. Y. St. 814.

If the denials in the return consist of conclusions of law the court will consider the petition as well as the return. People *v.* Wurster, 89 Hun (N. Y.) 7, 35 N. Y. Suppl. 86, 69 N. Y. St. 443.

97. People *v.* Wurster, 149 N. Y. 549, 44 N. E. 298; People *v.* Brooklyn, 106 N. Y. 64, 12 N. E. 641; People *v.* York, 45 N. Y. App. Div. 503, 61 N. Y. Suppl. 400; People *v.* Clinton, 28 N. Y. App. Div. 478, 51 N. Y. Suppl. 115.

Allegations in the writ which are not controverted must be taken to be true. People *v.* Scott, 86 Hun (N. Y.) 174, 33 N. Y. Suppl.

but not to impeach or contradict the return.[98] Such a statute will not authorize the consideration of additional affidavits.[99]

(VI) *REFERENCE.* In some jurisdictions a reference may be ordered, when the regularity of the proceedings are doubtful, to ascertain the facts.[1]

c. Presumptions. The court may indulge all natural presumptions and proper conclusions arising the record.[2] If nothing appears to the contrary, it will be presumed that the return is complete.[3] Every lawful intendment will be made in favor of the determination [4] and the regularity of the proceedings below.[5] It will also be presumed that the evidence adduced was competent and sufficient to warrant the determination made.[6] The allowance of the writ furnishes a pre-

229, 66 N. Y. St. 744. Under such a statute, if the return is silent as to material allegations of fact contained in the petition, the presumption is that the officers making the return intended to admit those allegations, but otherwise as to conclusions of law. People *v.* Sutphin, 166 N. Y. 163, 59 N. E. 770 [*modifying* 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49]. The papers on which the writ was granted can only be considered in determining questions as to the jurisdiction of the court to issue the writ, and possibly as establishing as facts such matters as are embraced in the writ and omitted from the return. People *v.* Davis, 38 Hun (N. Y.) 43 [*citing* People *v.* French, 25 Hun (N. Y.) 111]. Where it is charged that the determination was on unsworn testimony and the return denies knowledge as to that fact but admits that it was not customary to require sworn testimony the respondent admits the charge. People *v.* York, 45 N. Y. App. Div. 503, 61 N. Y. Suppl. 400.

98. People *v.* Davis, 38 Hun (N. Y.) 43.

A statute providing for a hearing on the writ, return, and papers on which the writ was granted does not permit the return to be controverted by such papers, but only contemplates that they may be used to establish facts as to which the return is silent. People *v.* French, 25 Hun (N. Y.) 111, 10 Abb. N. Cas. (N. Y.) 418.

99. People *v.* York, 45 N. Y. App. Div. 503, 61 N. Y. Suppl. 400; People *v.* Murray, 14 Misc. (N. Y.) 177, 35 N. Y. Suppl. 463, 69 N. Y. St. 814. And see People *v.* Dains, 38 Hun (N. Y.) 43.

1. N. Y. Laws (1880), c. 269, § 4; People *v.* Cholwell, 6 Abb. Pr. (N. Y.) 151.

Where the relator refuses to testify the case may be sent back to the referee to afford the relator an opportunity of purging himself of contempt. People *v.* Moore, 52 Hun (N. Y.) 13, 4 N. Y. Suppl. 778, 22 N. Y. St. 381.

2. Moore *v.* Martin, etc., Co., 124 Ala. 291, 27 So. 252; McManus *v.* McDonough, 107 Ill. 95 [*affirming* 4 Ill. App. 180].

3. *Alabama.*— Gould *v.* Meyer, 36 Ala. 565.

Illinois.— Blair *v.* Sennott, 134 Ill. 78, 24 N. E. 969.

Michigan.— Hitchcock *v.* Sutton, 28 Mich. 86.

Minnesota.— State *v.* Ramsey County Probate Ct., 83 Minn. 58, 85 N. W. 917; Payson *v.* Everett, 12 Minn. 216.

New Jersey.— State *v.* Jersey City, 44 N. J. L. 136.

New York.— People *v.* Soper, 7 N. Y. 428.

Wisconsin.— State *v.* Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.

See 9 Cent. Dig. tit. "Certiorari," § 178.

4. Lee *v.* Hardgrave, 3 Mich. 77; State *v.* Moore, (N. J. 1899) 42 Atl. 1063; People *v.* Robb, 9 N. Y. Suppl. 831, 31 N. Y. St. 640.

On certiorari to review the removal of a public officer, if the record fails to show any cause for the removal or any adjudication upon evidence, it will be deemed that no such cause existed and that there was no such adjudication. State *v.* Board of Police Com'rs, 14 Mo. App. 297 [*affirmed* in 88 Mo. 144].

5. *California.*— Sayers *v.* San Francisco Super. Ct., 84 Cal. 642, 24 Pac. 296.

Delaware.— Wolcott *v.* Shaw, 5 Houst. (Del.) 25; Hudson *v.* Messick, 1 Houst. (Del.) 275.

Michigan.— Fruitport *v.* Dickerman, 90 Mich. 20, 51 N. W. 109.

New Jersey.— State *v.* Foster, 44 N. J. L. 378; State *v.* Van Winkle, 25 N. J. L. 73; Westcott *v.* Garrison, 6 N. J. L. 132; Eldridge *v.* Lippincott, 1 N. J. L. 455.

New York.— People *v.* Scannell, 56 N. Y. App. Div. 51, 67 N. Y. Suppl. 433.

Oregon.— Godfrey *v.* Douglas County, 28 Oreg. 446, 43 Pac. 171; Becker *v.* Malheur County, 24 Oreg. 217, 33 Pac. 543.

Pennsylvania.— Rubicum *v.* Williams, 1 Ashm. (Pa.) 230.

Rhode Island.— State *v.* Newport, 18 R. I. 381, 28 Atl. 347.

Vermont.— Paine *v.* Leicester, 22 Vt. 44.

Wisconsin.— State *v.* Manitowoc County, 59 Wis. 15, 16 N. W. 617.

See 9 Cent. Dig. tit. "Certiorari," § 178.

It will not be presumed that an affidavit and bond for an attachment were filed and executed where the return is silent as to those prerequisites. Wright *v.* Warner, 1 Dougl. (Mich.) 384.

6. *Michigan.*— Taylor *v.* Shimmel, 107 Mich. 676, 65 N. W. 548; Marquette, etc., Rolling Mill Co. *v.* Morgan, 41 Mich. 296, 1 N. W. 1045; Hitchcock *v.* Sutton, 28 Mich. 86; Case *v.* Frey, 24 Mich. 251; Cicotte *v.* Morse, 8 Mich. 424; Snow *v.* Perkins, 2 Mich. 238; Gaines *v.* Betts, 2 Dougl. (Mich.) 98.

New Jersey.— State *v.* McDonald, 43

sumption that the prosecutor is entitled to relief;[7] but the right to prosecute the writ will not be presumed because of its allowance, where that right is denied.[8]

3. TRIAL DE NOVO. There can be no trial *de novo* in the reviewing court, unless such a trial is authorized by statute.[9] However, in some jurisdictions such a course of procedure is allowable,[10] but in such a case the plaintiff must declare anew,[11] although failure to file a new declaration or to enter appearance may be waived by proceeding to trial without objection.[12] If defendant removes the cause, plaintiff may proceed or not at his option, but if the original pleadings are adopted in the superior court the defendant may compel the plaintiff to proceed.[13]

R. Determination and Disposition — 1. AFFIRMANCE OR QUASHING. Unless otherwise provided, the judgment should be that the proceedings below be quashed, or that they be affirmed.[14] Thus, where there is nothing on which the court

N. J. L. 591; Overseer of Poor *v.* Overseer of Poor, 42 N. J. L. 493.

New York.— Wilson *v.* Fenner, 3 Johns. (N. Y.) 439.

Oregon:— Godfrey *v.* Douglas County, 28 Oreg. 446, 43 Pac. 171.

Rhode Island.— O'Brien *v.* Pawtucket, 20 R. I. 49, 37 Atl. 302, 530.

See 9 Cent. Dig. tit. "Certiorari," § 178.

7. Rutgers College Athletic Assoc. *v.* New Brunswick, 55 N. J. L. 279, 26 Atl. 87.

8. State *v.* Hoboken, 59 N. J. L. 383, 36 Atl. 693.

9. Fore *v.* Fore, 44 Ala. 478.

In New Jersey, under the act constituting the state board of assessors to value the property of railroads and canals, the case to be reviewed on certiorari by the supreme court should be made by the proofs and exceptions on the appeal before such board and not on a rule to take testimony granted by the supreme court, since this would practically devolve the original functions of the state board on the supreme court, and such an intention will not be presumed on the part of the legislature. Central R. Co. *v.* State Bd. of Assessors, 49 N. J. L. 1, 7 Atl. 306.

10. Carroll *v.* Tuskaloosa, 12 Ala. 173; Moore *v.* Hardison, 10 Tex. 467; Newson *v.* Chrisman, 9 Tex. 113. See also Mundy *v.* Martin, 44 Ga. 195.

Nature of proceedings above.— In Texas the proceedings in the reviewing court are not collateral, and the decision in the inferior court may be reviewed without that court having an opportunity to correct its errors. Linch *v.* Broad, 70 Tex. 92, 6 S. W. 751.

If the writ is improperly granted a trial *de novo* may be had, regardless of the defects in the application. Wright *v.* Gray, 20 Ala. 363.

The judgment below is no evidence of any fact on the new trial. Kalteyer *v.* Wipff, (Tex. Civ. App. 1899) 49 S. W. 1055.

Resummoning jury.— On the removal from the common pleas of an assize of nuisance the supreme court may resummon the jury who viewed the nuisance, to try the assize. Livezey *v.* Gorgas, 2 Binn. (Pa.) 192.

Necessity of notice.— In New York, on certiorari to review the action of a board in carrying into effect a city ordinance, a retrial of the action of the council, on facts not presented to the board, cannot be had without notice to the board that such is to be the proceeding. People *v.* Board of Contract, 39 N. Y. App. Div. 30, 56 N. Y. Suppl. 334.

11. Patterson *v.* Smith, 14 U. C. C. P. 525.

Plaintiff may declare in a different form of action, but not for a different cause. Mason *v.* Morgan, 3 Ont. Pr. 325. And see Hunter *v.* Grand Trunk R. Co., 6 Ont. Pr. 67.

12. Hankey *v.* Grand Trunk R. Co., 17 U. C. Q. B. 472; Fulton *v.* Grand Trunk R. Co., 17 U. C. Q. B. 428.

13. Patterson *v.* Smith, 14 U. C. C. P. 525. In Dennison *v.* Knox, 3 Ont. Pr. 150, a cause was removed pending an issue at law, and the court refused to compel defendant to enter an appearance or to assist plaintiff to proceed.

14. *Alabama.*— *Ex p.* Madison Turnpike Co., 62 Ala. 93; Fore *v.* Fore, 44 Ala. 478.

Arkansas.— St. Louis, etc., R. Co. *v.* Barnes, 35 Ark. 95; Jefferson County *v.* Hudson, 22 Ark. 595; Earle *v.* Byrd, 14 Ark. 499; Jones *v.* State, 14 Ark. 170; Pulaski *v.* Irvin, 4 Ark. 473; Causin *v.* Taylor, 4 Ark. 55; Auditor *v.* Davies, 2 Ark. 494.

Massachusetts.— Com. *v.* Ellis, 11 Mass. 462; Com. *v.* Blue-Hill Turnpike Corp., 5 Mass. 420; Edgar *v.* Dodge, 4 Mass. 670; Melvin *v.* Bridge, 3 Mass. 305; Vandusen *v.* Comstock, 3 Mass. 184.

New Hampshire.— Hopkinton *v.* Smith, 15 N. H. 152.

New York.— People *v.* Ferris, 36 N. Y. 218, 1 Transcr. App. (N. Y.) 19, 34 How. Pr. (N. Y.) 189; Luff *v.* Pope, 5 Hill (N. Y.) 413 [*affirmed* in 7 Hill (N. Y.) 577]; Lord *v.* New York, 3 Hill (N. Y.) 426.

West Virginia.— See Dryden *v.* Swinburn, 15 W. Va. 234.

Wisconsin.— Owens *v.* State, 27 Wis. 456.

See 9 Cent. Dig. tit. "Certiorari," § 185 *et seq.*

For form of judgment of reviewing court see Macon *v.* Shaw, 16 Ga. 172; Chicago, etc., R. Co. *v.* Fell, 22 Ill. 333; Dryden *v.* Swinburne, 20 W. Va. 89; Hart *v.* Dunlop, 17 Quebec Super. Ct. 383.

The proper judgment is that the proceedings are valid or invalid, not whether they are wise or discreet. Harvey *v.* Dean, 62 Ill. App. 41.

Immaterial irregularity.— Irregularity in quashing the writ instead of affirming the

can act,[15] where no necessity exists for an examination of the questions involved,[16] where the proceedings sought to be reviewed are ended, leaving nothing to be determined,[17] where any judgment which the reviewing court might order would be ineffectual as to the real parties in interest,[18] or where it is apparent that the inferior tribunal had jurisdiction, proceeded regularly, and that its determination was warranted on the law and facts[19] the writ should be dismissed or the judgment affirmed.[20] Likewise the judgment will be affirmed where the prosecutor has failed to proceed within a reasonable time after the filing of the return;[21] but if it appears that the tribunal below was without jurisdiction or that its determination was erroneous, the record, or the proceedings below, must be quashed.[22]

2. AFFIRMANCE IN PART. Where distinct determinations are presented for review, or the legal and illegal matters are each independent of the other, the court may quash, reverse, or correct such part or parts of the proceedings as are illegal and affirm as to the residue which are legal.[23] But where the several parts of the proceedings are so connected and dependent on each other that one part cannot be quashed, without leaving the other incomplete, or more extensive than

judgment (State *v.* Daubner, 111 Wis. 671, 87 N. W. 802) or in affirming the judgment below in addition to quashing the writ may be disregarded (State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942).

Equitable relief cannot be granted. Moore *v.* Turner, 43 Ark. 243.

15. State *v.* Williams, 70 Mo. App. 238; Willis *v.* Dun, Wright (Ohio) 130; Com. *v.* Craine, 2 Pa. Dist. 615, 12 Pa. Co. Ct. 286.

16. Jordan *v.* Wapello Dist. Ct., 74 Iowa 762, 38 N. W. 430, where the supreme court of the United States had in effect determined the question involved.

Where the parties enter into a compromise after application for writ of certiorari or review and have no actual interest in the issues presented, the court will not authoritatively pass on the question involved before the compromise. Bosio *v.* Picton, 106 La. 248, 30 So. 699.

17. State *v.* Waterloo Sav. Bank, 39 Iowa 706.

18. State *v.* Washoe County, 23 Nev. 247, 45 Pac. 529.

19. *Idaho.*— Porter *v.* Steele, (Ida. 1900) 63 Pac. 187.

Illinois.— Behrens *v.* Highway Com'rs, 169 Ill. 558, 48 N. E. 578; Wright *v.* Highway Com'rs, 150 Ill. 138, 36 N. E. 980; Savage *v.* County Com'rs, 10 Ill. App. 204.

Iowa.— Wilson *v.* Remley, (Iowa 1899) 80 N. W. 452; Harty *v.* Kavanagh, 81 Iowa 756, 46 N. W. 1070.

New Jersey.— Lamberson *v.* Owen, 14 N. J. L. 504.

Texas.— Fitzwilliams *v.* Davie, 18 Tex. Civ. App. 81, 43 S. W. 840.

See 9 Cent. Dig. tit. "Certiorari," § 185 *et seq.*

20. Rudolph *v.* Platt, (N. J. 1888) 13 Atl. 264.

21. Ferrell *v.* Rodgers, 1 N. J. L. 265, without examination of the proceedings.

22. *Illinois.*— Behrens *v.* Highway Com'rs, 169 Ill. 558, 48 N. E. 578; Smith *v.* Highway Com'rs, 150 Ill. 385, 36 N. E. 967.

New York.— Stone *v.* New York, 25 Wend. (N. Y.) 157; Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167.

Vermont.— West River Bridge Co. *v.* Dix, 16 Vt. 446.

West Virginia.— Fleming *v.* Kanawha County, 32 W. Va. 637, 9 S. E. 867.

Wisconsin.— State *v.* Roberts, 87 Wis. 292, 58 N. W. 409.

See 9 Cent. Dig. tit. "Certiorari," § 185 *et seq.*

Consent.— The judgment below may be reversed by consent on an admission of the errors assigned. Rogers *v.* Guieren, 16 N. J. L. 356.

Loss of record.— It is a sufficient ground for reversal that the papers and evidence in the cause have been lost without fault of the parties. Wilkinson *v.* Martin, 13 La. Ann. 479; Powers *v.* Seeley, 16 N. J. L. 216.

Action on judgment.— The court in reversing a judgment founded on another judgment cannot reverse the original judgment, although it is undoubtedly erroneous. Bordine *v.* Service, 16 N. J. L. 47.

Appeal from justice's proceedings.— If a justice's order is annulled by the sessions, to revive the order the proceedings of the sessions should be set aside, and then the proceedings of the justice may be quashed. State *v.* Overseers of Poor, 32 N. J. L. 275.

23. Com. *v.* West Boston Bridge, 13 Pick. (Mass.) 195; Com. *v.* Derby, 13 Mass. 433; Com. *v.* Blue-Hill Turnpike Corp., 5 Mass. 420; New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; People *v.* Westchester County, 57 Barb. (N. Y.) 377, 8 Abb. Pr. N. S. (N. Y.) 277. See also Barnes *v.* Robinson, 4 Yerg. (Tenn.) 185.

On review of a judgment against husband and wife it may be reversed as to the latter only. Connors *v.* Wonder, 1 Pa. Co. Ct. 577, 3 Del. Co. (Pa.) 26, 3 C. Pl. Rep. (Pa.) 7.

For erroneous inclusion of costs in a judgment otherwise proper see Com. *v.* Carpenter, 3 Mass. 268; Williams *v.* Sherman, 15 Johns. (N. Y.) 195; Bronson *v.* Mann, 13 Johns. (N. Y.) 460; Claflin *v.* Hubbard, Brayt. (Vt.) 38; Shafer *v.* Hogue, 70 Wis. 392, 35 N. W. 928.

it should be, the whole of the proceedings in all its separate parts must be set aside.[24]

3. MODIFICATION. If the court has power to correct or modify the judgment or determination complained of, it may do so, and need not reverse absolutely.[25]

4. STATEMENT OF FINDINGS AND CONCLUSIONS. If the court is required to state the facts found and conclusions of law thereon, it cannot dismiss on the merits without stating such facts and conclusions.[26]

5. NECESSITY OF REMAND. In some jurisdictions and under some circumstances, final judgment may be rendered by the reviewing court, without remanding the cause,[27] as where the court below was without jurisdiction,[28] where there is no error apparent of record,[29] where the error complained of is an error of law, controlling the case,[30] or where questions of fact are involved not necessarily depending on a controlling question of law.[31] In others and especially where it

24. New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; Hay *v.* Imley, 3 N. J. L. 401; Robinson *v.* Hedges, 3 N. J. L. 262; Rex *v.* Madley, 2 Str. 1198.

25. Childs *v.* Crawford, 8 Ala. 731; Marshall *v.* Burton, 5 Harr. (Del.) 295; State *v.* Cook, 54 N. J. L. 513, 24 Atl. 758. The reviewing court may modify an order complained of without passing on the question whether it is void or simply voidable. Baker *v.* Shasta County Super. Ct., 71 Cal. 583, 12 Pac. 685. But see Will *v.* Sinkwitz, 39 Cal. 570.

Cal. Code Civ. Proc. § 2141, declaring that the court, on the hearing of a cause on certiorari, may modify the determination reviewed, does not authorize the court to declare an illegal discharge of an officer valid, as of a later date, because of the consolidation at such time of his office with another. People *v.* Brookfield, 1 N. Y. App. Div. 68, 37 N. Y. Suppl. 107, 72 N. Y. St. 153.

In New Jersey the failure of the court of common pleas to formally reverse the judgment of the district court before entering judgment anew on an appeal therefrom can be remedied either by an amendment in the common pleas or in the supreme court on the hearing of the certiorari. State *v.* Ohl, 58 N. J. L. 557, 34 Atl. 755.

Where a judgment is void for want of jurisdiction and its validity as to form and amount is questioned, it cannot be modified. Will *v.* Sinkwitz, 39 Cal. 570.

26. People *v.* Buffalo, 39 N. Y. App. Div. 245, 57 N. Y. Suppl. 261. Where the court on setting aside an assessment stated that property other than that assessed was benefited and should have been included in the assessment and that one of relator's grounds for vacating the assessment was the omission of the assessors to include property so benefited, it was held that the decision stated the facts found and the conclusion of law, within N. Y. Code Civ. Proc. § 1022. People *v.* Buffalo, 39 N. Y. App. Div. 651, 57 N. Y. Suppl. 263 [*affirmed* in 159 N. Y. 571, 54 N. E. 1094].

In West Virginia it is the duty of the court, where further proceedings are necessary, to remand the cause to the inferior tribunal with distinct decisions on the points involved. Alderson *v.* Kanawha County, 32 W. Va. 454, 9 S. E. 863.

27. Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167; State *v.* Lawler, 103 Wis. 460, 79 N. W. 777; 2 Hawkins P. C. c. 27, § 63; Reg. *v.* Zickrick, 11 Manitoba 452.

In Colorado, under Colo. Laws (1872), p. 110, § 7, allowing the court on certiorari to "render such judgment as the facts and law warrant" the district judge may render an independent judgment on the law and the evidence, without reference to the inquiry whether the judgment of the justice was an entirety or otherwise. Hoppie *v.* Best, 4 Colo. 555; Miller *v.* Sparks, 4 Colo. 303.

In New Jersey, if the court reverses the judgment below and determines what final judgment should be rendered, it should direct the entry of the same, without remitting the record. Smith *v.* Ocean Castle No. 11, K. of G. E., 59 N. J. L. 198, 35 Atl. 917.

In Tennessee statutes authorize the reviewing court on dismissal to enter final judgment. Weigand *v.* Malatesta, 6 Coldw. (Tenn.) 362; Roddy *v.* Bacon, 3 Coldw. (Tenn.) 253; Marshall *v.* Hill, 8 Yerg. (Tenn.) 101.

In Texas after affirmation of a judgment that defendant had no title to property claimed and dismissal of an appeal from such affirmation the reviewing court should render judgment of dismissal. Barclay *v.* Cameron, 25 Tex. 232.

In West Virginia when certiorari is used as an appellate proceeding the superior court may affirm the judgment of the inferior court, set aside or annul it and enter up such judgment as the inferior court should have entered, or remand the cause as in a case brought up on error. Dryden *v.* Swinburn, 15 W. Va. 234.

28. Dorsey *v.* Miller, 105 Ga. 88, 31 S. E. 736.

29. Lamberson *v.* Owen, 14 N. J. L. 504.

30. Ga. Civ. Code, § 4652; Farmer *v.* Rogers, 85 Ga. 290, 11 S. E. 615.

31. Velvin *v.* Austin, 109 Ga. 200, 34 S. E. 335; Holmes *v.* Pye, 107 Ga. 784, 33 S. E. 816; Johnson *v.* Coleman, 106 Ga. 205, 32 S. E. 122; Pinkston *v.* White, 102 Ga. 561, 27 S. E. 665; Almand *v.* Georgia R., etc., Co., 102 Ga. 151, 29 S. E. 159; Rogers *v.* Georgia R.

would be difficult if not impossible to reach the ends of justice without so doing, no final judgment can be rendered, but the cause must be remanded for further proceedings, or a new trial,[32] or it may be remitted for modification or correction,[33] or with directions or instructions to the court below as to further proceedings.[34]

6. RESTITUTION. On annulling the proceedings below, the reviewing court may order restitution to a relator who has suffered by the illegal action.[35]

7. EFFECT OF JUDGMENT. The judgment may be entered against all the parties to the original judgment.[36] An affirmance of the adjudication complained of establishes the rights of the parties as originally found,[37] and the determination stands as of the time when made.[38] On reversal, the whole case falls,[39] as well as incidental proceedings dependent thereon.[40] If the matter is one of general public interest, the reversal inures to the benefit of all persons similarly affected as well as those who sued out the writ.[41] In determining the general liability of a municipality, the court does not adjudicate the sufficiency of the particular claim presented.[42]

Co., 100 Ga. 699, 28 S. E. 457, 62 Am. St. Rep. 351; Williams *v.* Wardlaw, 94 Ga. 697, 20 S. E. 92; Sapp *v.* Adams, 65 Ga. 600; Shannon *v.* Daniel, 64 Ga. 448; Claton *v.* Ganey, 63 Ga. 331; Desvergers *v.* Kruger, 60 Ga. 100; Ga. Civ. Code, § 4652. See also Walker *v.* Reese, 110 Ga. 582, 35 S. E. 771; Healey *v.* Dean, 68 Ga. 514; Mitchell *v.* Western, etc., R. Co., 66 Ga. 242; Gilmer *v.* Warren, 17 Ga. 426.

32. *Massachusetts.*— Lowell *v.* Middlesex County, 6 Allen (Mass.) 131.

New Hampshire.— Hayward *v.* Bath, 35 N. H. 514; Hopkinton *v.* Smith, 15 N. H. 152.

New Jersey.— State *v.* Berry, 42 N. J. L. 60; Plotts *v.* Rosebury, 28 N. J. L. 146; Gulick *v.* Conover, 15 N. J. L. 420. And see Lamberson *v.* Owen, 14 N. J. L. 504.

North Carolina.— Hunter *v.* Kirk, 11 N. C. 277.

Texas.— Wooton *v.* Manning, 11 Tex. 327.

See 9 Cent. Dig. tit. "Certiorari," § 194.

In New Jersey, in attachment proceedings on reversal of the judgment, the action is continued and the subsequent proceedings are had in the reviewing court. Cory *v.* Lewis, 5 N. J. L. 994.

New trial.— Under N. C. Laws (1777), c. 1, § 6, and Acts (1779), c. 4, § 1, providing that trial in caveat causes shall be in the county court of the county where the premises are situate, on the reversal of a judgment in such cause by certiorari the new trial must be had in the county court, and not in the reviewing court. Henry *v.* Heritage, 3 N. C. 201.

After return of the record under procedendo the inferior court may set aside the judgment and permit the defendant to plead. Barnes *v.* Cox, 16 U. C. C. P. 236.

Nunc pro tunc order.— Where the prosecutor had no opportunity to move to remit the record, that a new return might be made to a second writ obtained after dismissal of the first writ for informality, an order for remittitur may be entered *nunc pro tunc.* State *v.* Gartly, (N. J. 1896) 34 Atl. 984.

33. Doremus *v.* Howard, 23 N. J. L. 390; Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

34. Will *v.* Sinkwitz, 39 Cal. 570; Star Glass Co. *v.* Longley, 64 Ga. 576; Hunter *v.* Hunter, T. U. P. Charlt. (Ga.) 303; People *v.* Sutphin, 166 N. Y. 163, 59 N. E. 770 [*modifying* 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49].

35. Leonard *v.* Peacock, 8 Nev. 157; Arrowsmith *v.* Vanarsdale, 21 N. J. L. 471; State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593.

Where the amount of the judgment has been raised, if the judgment is reversed in part and affirmed in part, the restitution will be for the amount raised beyond the amount adjudged due on affirmance and the execution fees with interest. Arrowsmith *v.* Vanarsdale, 21 N. J. L. 471.

Restitution will not be awarded where the right invaded is a mere legal one, is against equity and justice, and the application is addressed to the discretion of the court. Grant *v.* Rodgers, 6 Phila. (Pa.) 132, 23 Leg. Int. (Pa.) 141.

36. and this is true although one of them did not join in the bond to procure the writ. Dobson *v.* Dickson, 8 Ala. 252.

37. Ewing *v.* Thompson, 43 Pa. St. 372.

38. Lord *v.* New York, 3 Hill (N. Y.) 426.

39. Morrison *v.* Emsley, 53 Mich. 564, 19 N. W. 187. And see Ewing *v.* Thompson, 43 Pa. St. 372.

40. A judgment nullifying an injunction also nullifies contempt proceedings for the violation of the same. State *v.* Judge Civil Dist. Ct., 34 La. Ann. 741. On reversal of a decision discharging defendant from arrest the remand does not revive the arrest or the warrant therefor. Dusenbury *v.* Keiley, 85 N. Y. 383.

41. In Bergen *v.* State, 32 N. J. L. 490, it was held that a judgment setting aside an assessment and proceedings thereunder annulled the assessment as an entirety and not merely as to the parties who prosecuted the writ.

42. On reversing a determination that a claim is not a legal charge against a town the propriety of the claim is not adjudicated. People *v.* Clinton, 28 N. Y. App. Div. 478, 51 N. Y. Suppl. 115.

8. Compliance With Judgment. Where a judgment of reversal is at once complied with, the relator cannot complain of a failure to wait until the time for a rehearing had elapsed.[43]

S. Costs[44] — 1. At Common Law. At common law no costs were allowed on certiorari, hence, in the absence of statutory regulation, neither party may recover them.[45]

2. By Statute — a. In General. The allowance of costs in these proceedings is now generally regulated by statutes, which permit their recovery by the prevailing party,[46] but to authorize such a recovery the case must be clearly within the terms of the statute.[47]

43. State *v.* St. Paul, 104 La. 103, 28 So. 839.

44. See, generally, Costs.

45. *District of Columbia.*— See Fraser *v.* District of Columbia, 7 Mackey (D. C.) 150.
Georgia.—Nunnelly *v.* Road Com'rs, Dudley (Ga.) 192.
Illinois.—Arnold *v.* Tharpe, 9 Ill. App. 357.
Massachusetts.— Com. *v.* Ellis, 11 Mass. 462.
Montana.— State *v.* Second Judicial Dist. Ct., 25 Mont. 1, 63 Pac. 402.
New Hampshire.— State *v.* Leavitt, 3 N. H. 44.
New Jersey.—Randolph *v.* Bayles, 2 N. J. L. 49. See also Montgomery *v.* Bruere, 11 N. J. L. 168, where the court, following the unreported precedents, held that costs were allowable where the writ is quashed for want of jurisdiction.
New York.— People *v.* Nelliston, 79 N. Y. 638; People *v.* McDonald, 69 N. Y. 362 [*reversing* 4 Hun (N. Y.) 187]; People *v.* O'Brien, 3 Abb. Dec. (N. Y.) 552, 6 Abb. Pr. N. S. (N. Y.) 63; People *v.* Heath, 20 How. Pr. (N. Y.) 304; Wheeler *v.* Roberts, 7 Cow. (N. Y.) 536; Baldwin *v.* Wheaton, 12 Wend. (N. Y.) 262; Williams *v.* Sherman, 15 Johns. (N. Y.) 195; Low *v.* Rogers, 8 Johns. (N. Y.) 321.
Washington.— Bringgold *v.* Spokane, 19 Wash. 333, 53 Pac. 368.
Canada.— Desjardins *v.* Lauzon, 2 Quebec 192.
See 9 Cent. Dig. tit. "Certiorari," § 209 *et seq.*
In proceedings by crown, costs cannot be awarded in favor of or against the crown. Reg. *v.* Little, 6 Brit. Col. 321, 2 Can. Crim. Cas. 240.
Costs of opposing application unless authorized by statute cannot be imposed. *Re* Rice, 20 Nova Scotia, 437, 9 Can. L. T. 198.
Nor on discharging a rule nisi.— See *Ex p.* Simpson, 22 N. Brunsw. 132; *Ex p.* Daley, 6 N. Brunsw. 435.
Discretion to grant.— In People *v.* Fuller, 40 How. Pr. (N. Y.) 35, it was said that at common law certiorari is a special proceeding authorizing the court to award costs in its discretion.

46. People *v.* Wheeler, 21 N. Y. 82; People *v.* Stilwell, 19 N. Y. 531; People *v.* Van Alstyne, 3 Abb. Dec. (N. Y.) 575, 3 Keyes (N. Y.) 35; People *v.* Highway Com'rs, 27 How. Pr. (N. Y.) 158 [*disapproving* People *v.* Heath, 20 How. Pr. (N. Y.) 304]; People *v.* Board of Metropolitan Police, 26 How. Pr. (N. Y.) 450; People *v.* Robinson, 25 How. Pr. (N. Y.) 345; People *v.* Flake, 14 How. Pr. (N. Y.) 527; Haviland *v.* White, 7 How. Pr. (N. Y.) 154; Barnes *v.* Robinson, 4 Yerg. (Tenn.) 185; Fleming *v.* Kanawha County, 32 W. Va. 637, 9 S. E. 867; *Re* Murphy, 28 Nova Scotia 196; Reg. *v.* Carter, 13 Nova Scotia 307; Reg. *v.* McKarcher, 12 Nova Scotia 337; Corley *v.* Roblin, 5 Ont. L. J. 225.
Costs may be taxed against the adverse party below, although the writ was issued to the court only, and to reverse its action. State *v.* Rock County Probate Ct., 67 Minn. 51, 69 N. W. 609. 908.
On reversal of a judgment of a court-martial costs may be imposed. Matter of Leary, 30 Hun (N. Y.) 394.
Analogy to error.— The allowance of costs is clearly within the spirit and equity of statutes giving costs on error. Aller *v.* Shurts, 17 N. J. L. 188.
Judgment for costs against a personal representative should be special, requiring their payment to be made in the course of administration. Dye *v.* Noel, 85 Ill. 290.

47. See, generally, Costs.
Decision of inferior court.— The decision of a supreme court justice is not "the decision of a court of inferior jurisdiction," within N. Y. Code Proc. §§ 318–320, relating to costs. People *v.* O'Brien, 3 Abb. Dec. (N. Y.) 552, 6 Abb. Pr. N. S. (N. Y.) 63. A police board is not an inferior court, or proceedings before it for the removal of a police officer, a "special proceeding" within such statute. People *v.* Board of Police, 39 N. Y. 506.
On final disposition.— Under a provision permitting costs of taking a case to the superior court only where that court makes a final disposition of the case, if a new trial is ordered, only such costs as have accrued in the superior court should be adjudged. Haire *v.* McCardle, 107 Ga. 775, 33 S. E. 683.
Special proceeding.— S. D. Comp. Laws, § 5189, providing that in special proceedings the clerk shall tax costs in favor of the prevailing party, does not apply to certiorari brought to a court. Kirby *v.* McCook County Cir. Ct., 10 S. D. 196, 72 N. W. 461.
The reversal of an execution is not within a statute giving a right to costs on reversal

b. On Affirmance. In some of the states costs are allowed on affirmance, but not on reversal.[48] This is said to be because the costs will abide the final result.[49]

c. Discretion. In many of the jurisdictions the allowance of costs is discretionary.[50] In such case they may be refused to a successful party who has unnecessarily sued out the writ instead of pursuing other available remedies,[51] or where the award will entail hardship.[52] Nor will they be awarded against the plaintiff, when a material error is corrected,[53] or against a public board which, in the exercise of judicial functions, made an honest mistake of judgment and was guilty of no corruption or wilful wrong.[54] But in such a case the costs may be awarded against the persons[55] or political subdivision on whose behalf such board acted.[56]

d. Amount. Where no special provision for the amount of costs to be allowed has been made, the sums allowable on a special proceeding should be awarded,[57] or the amount recoverable in an action at issue on a question of law,[58] together with the necessary disbursements in the proceedings.[59] If the amount is required to

of proceeding, when by the statute costs are given as a penalty for vexing the opposite party who has the merits with him, by mere matters of form. Atkinson *v.* Crossland, 4 Watts (Pa.) 450.

48. Hann *v.* McCormick, 4 N. J. L. 126; Jewell *v.* Arwine, 1 N. J. L. 44. And see Stiers *v.* Stiers, 20 N. J. 52.

The New Jersey Revision, p. 1315, § 90, expressly denies costs to a plaintiff in a certiorari issued to the district court by the supreme court. Seabury *v.* Bolles, 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136.

Costs on writ of restitution.— Plaintiff in certiorari, who has obtained a reversal of the judgment and has issued a writ of restitution, is entitled to costs on that writ. Hann *v.* McCormick, 4 N. J. L. 126.

49. Backus *v.* Foy, 2 C. Pl. Rep. (Pa.) 137.

50. Myers *v.* Pownal, 16 Vt. 426; Reg. *v.* Smith, 31 Nova Scotia 468; Halifax *v.* Hartland, 14 Nova Scotia 116; Fraser *v.* New Glasgow, 13 Nova Scotia 250; *In re* Nova Scotia Bank, 12 Nova Scotia 32.

If the order for the writ is silent as to costs none will be allowed. Kerr *v.* Cornell, 1 Ont. L. J. N. S. 326.

Where the judgment below was set aside without objection an attachment for costs was refused. Cramer *v.* Nelles, Taylor (U. C.) 36.

If an amendment allowed to a writ necessitates a new return costs may be imposed on the relator. People *v.* Feitner, 58 N. Y. App. Div. 343, 68 N. Y. Suppl. 1058.

Necessity of hearing.— Costs cannot be imposed on a party who has had no opportunity of being heard. Marcotte *v.* St. Casimir, 11 Quebec Super. Ct. 282, where it is further held that if they are so imposed the part of the judgment imposing them may be annulled.

Unauthorized suggestion of death of relator.— Costs may be awarded against obligors on the relator's bond, who without the right to do so suggest his death upon the record. Woolard *v.* Woolard, 30 N. C. 322.

51. Adams *v.* Abram, 38 Mich. 302.

52. Arnold *v.* Tharpe, 9 Ill. App. 357; *Ex p.* Cushman, 4 Mass. 565; State *v.* Reed, 31 N. J. L. 133.

Correction of error by consent.— In Georgia costs cannot be imposed on the plaintiff, where the writ to which he has been compelled to resort is dismissed on correction, by consent, of the error complained of. Western, etc., R. Co. *v.* Greeson, 68 Ga. 180.

53. Paulk *v.* Tanner, 106 Ga. 219, 32 S. E. 99.

54. *Alabama.*— Russell Com'rs Ct. *v.* Tarver, 25 Ala. 480.

Georgia.— Nunnelly *v.* Road Com'rs, Dudley (Ga.) 192.

Illinois.— School Directors *v.* School Directors, 135 Ill. 464, 28 N. E. 49; Board of Education *v.* School Trustees, 74 Ill. App. 401.

Iowa.— Tiedt *v.* Carstensen, 64 Iowa 131, 19 N. W. 885.

Michigan.— People *v.* Springwells, 12 Mich. 434.

New York.— People *v.* Keator, 67 How. Pr. (N. Y.) 277; People *v.* Flake, 14 How. Pr. (N. Y.) 527.

Wisconsin.— Oshkosh *v.* State, 59 Wis. 425, 18 N. W. 324.

See 9 Cent. Dig. tit "Certiorari," § 211.

55. Tiedt *v.* Carstensen, 64 Iowa 131, 19 N. W. 885.

56. People *v.* Flake, 14 How. Pr. (N. Y.) 527; Oshkosh *v.* State, 59 Wis. 425, 18 N. W. 324.

Indemnity of board.— Under a statute permitting an award of costs against any party who maintains or objects to the proceedings, costs may be awarded against county commissioners, who may obtain indemnity from the county. Stetson *v.* Penobscot County, 72 Me. 17.

57. People *v.* Van Alstyne, 3 Abb. Dec. (N. Y.) 575, 3 Keyes (N. Y.) 35.

58. People *v.* Gower, 44 How. Pr. (N. Y.) 26.

59. State *v.* Second Judicial Dist. Ct., 25 Mont. 1, 63 Pac. 402; State *v.* Second Judicial Dist. Ct., 24 Mont. 425, 62 Pac. 688; People *v.* Gower, 44 How. Pr. (N. Y.) 26; Kirby *v.* McCook County Cir. Ct., 10 S. D. 196, 72 N. W. 461, further holding that when an inferior court is a party and succeeds disburse-

be fixed by the court, the clerk cannot tax any costs without an order from the court so to do.[60]

e. Additional Costs. Sometimes, by statute, on dismissal of the writ or affirmance of the judgment below, the court may award interest in addition to costs.[61] But a statute permitting additional costs in specified cases, where a gross sum is taxable as costs, or on certiorari against a public officer, is inapplicable to certiorari generally, although a stated sum is allowed as costs.[62]

f. Application For Costs. Where a judgment of reversal makes no provision as to costs, a special application should be made therefor.[63] An application to the appellate court to tax attorney's fees as costs cannot be considered where no judgment was rendered and the adverse party is not before the court.[64]

g. Security For Costs. Unless required by statute, security for costs need not be given to secure the writ,[65] or on removal of the cause.[66]

T. Appeal and Error[67] **— 1. Right of Review — a. In General.** A court's determination on certiorari may generally be reviewed by the tribunal, if any, possessing appellate jurisdiction over such court.[68]

b. Amount in Controversy.[69] In some states a review cannot be had unless the amount necessary to confer jurisdiction on the appellate court is involved.[70] In

ments cannot be awarded. A chairman of a board, who alone has notice of the petition and who appears and dismisses it, can tax for his travel and attendance only. Ipswich *v.* Essex County, 10 Pick. (Mass.) 519.

60. People *v.* Board of Town Auditors, 42 N. Y. App. Div. 250, 59 N. Y. Suppl. 10.

61. See, generally, Costs.

In Tennessee twelve and one-half per cent in addition to costs may be awarded. Roddy *v.* Bacon, 3 Coldw. (Tenn.) 253; Marshall *v.* Hill, 8 Yerg. (Tenn.) 101.

Statutory rate.— Such provisions only authorize the allowance of the statutory rate. Payne *v.* Sebastian, Cooke (Tenn.) 408.

Certiorari to quash execution.—A statute authorizing the addition of twelve and one-half per cent interest, where a cause brought up by certiorari is dismissed for want of prosecution or for other cause, does not apply to the dismissal of a certiorari to quash an execution on the ground that the judgment has been satisfied. Kincaid *v.* Smith, 8 Yerg. (Tenn.) 217.

62. Cheney *v.* Windsor, 5 Den. (N. Y.) 96. N. Y. Code Civ. Proc. § 3258, subd. 1, providing that on a final order in a special proceeding instituted by a state writ the defendant if a public officer, is entitled to recover additional costs, does not apply to a writ of certiorari. People *v.* Board of Town Auditors, 42 N. Y. App. Div. 250, 59 N. Y. Suppl. 10.

63. People *v.* Robinson, 25 How. Pr. (N. Y.) 345.

64. Garrett *v.* Bishop, 113 Iowa 23, 84 N. W. 923.

65. Reg. *v.* Assessors of Rates, 12 N. Brunsw. 528; Reg. *v.* Jardine, 10 N. Brunsw. 645.

66. Reg. *v.* Hart, 45 U. C. Q. B. 1; Reg. *v.* Swalwell, 12 Ont. 391. See, generally, Criminal Law.

67. See, generally, Appeal and Error, 2 Cyc. 474.

68. *Alabama.* — Lowndes County Com'rs Ct. *v.* Bowie, 34 Ala. 461.

California.— Morley *v.* Elkins, 37 Cal. 454.

Florida.— Deans *v.* Wilcoxon, 18 Fla. 531; Edgerton *v.* Green Cove Springs, 18 Fla. 528.

Illinois.— School Trustees *v.* School Directors, 88 Ill. 100.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Northern Cent. R. Co., 15 Md. 193; Swann *v.* Cumberland, 8 Gill (Md.) 150.

Michigan.— Robens *v.* Videto, 33 Mich. 240.

Minnesota.— Moede *v.* Stearns County, 43 Minn. 312, 45 N. W. 435.

New York.— People *v.* Board of Assessors, 39 N. Y. 81, 6 Transcr. App. (N. Y.) 116; Matter of Light, 30 N. Y. App. Div. 50, 51 N. Y. Suppl. 743.

Ohio.— Johnston *v.* Hanna, Wright (Ohio) 138.

Tennessee. — Lawson *v.* Scott, 1 Yerg. (Tenn.) 92.

West Virginia. — Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10; Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337; Board of Education *v.* Hopkins, 19 W. Va. 84.

See 9 Cent. Dig. tit. "Certiorari," § 195.

As to appellate jurisdiction of courts see Courts.

69. As to amount in controversy on appeal generally see Appeal and Error, 2 Cyc. 542.

70. Bienenfeld *v.* Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113; People *v.* Carman, 18 Cal. 693. But see *contra*, Winter *v.* Fitzpatrick, 35 Cal. 269.

In West Virginia, in cases in which the writ is made a substitute for the writ of error, the supreme court has no jurisdiction, unless the amount in controversy exceeds the jurisdictional amount. But in cases in which the writ is proper at common law the court has jurisdiction without regard to the amount in controversy. Cushwa *v.* Lamar, 45 W. Va. 326, 32 S. E. 10; Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906; Farnsworth *v.* Baltimore, etc., R. Co., 28 W. Va. 815.

Jurisdictional question not raised.— It is immaterial that the question of jurisdiction

other states, however, a review may be had irrespective of the amount involved in the controversy.[71]

2. APPEAL OR ERROR. In some jurisdictions appeal may be resorted to for the review of the determination made on certiorari proceedings.[72] In others resort may be had to error.[73]

3. PARTIES. An appeal may be prosecuted by a party named in the writ,[74] or, on his decease pending an appeal, his personal representatives may be substituted.[75]

4. TIME OF TAKING. The appeal must be taken within the time prescribed by statute, the provisions of which cannot be altered or extended by the parties.[76]

5. RECORD. To authorize a review of the alleged errors, the record should contain a proper bill of exceptions.[77] It seems that the petition for the writ should not be included in the record,[78] and so with a petition which has not been sanctioned. Such a petition should be embodied in a bill of exceptions and certified or verified by the judge who refused to sanction it.[79] Affidavits not read below, or there acted upon, form no part of the record.[80]

6. MATTERS REVIEWABLE — a. In General. The appellate court will only consider the grounds on which the proceedings were based,[81] and matters irrespon-

is not raised on the argument. Bienenfeld *v.* Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113.

71. Hyslop *v.* Finch, 99 Ill. 171.

72. *Alabama.*— Lowndes. County Com'rs Ct. *v.* Bowie, 34 Ala. 461.

California.— Morley *v.* Elkins, 37 Cal. 454.

Illinois.— School Trustees *v.* School Directors, 88 Ill. 100.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Northern Cent. R. Co., 15 Md. 193; Swann *v.* Cumberland, 8 Gill (Md.) 150.

Minnesota.— Moede *v.* Stearns County, 43 Minn. 312, 45 N. W. 435.

New York.— People *v.* Brooklyn, 103 N. Y. 370, 8 N. E. 730; People *v.* Board of Assessors, 39 N. Y. 81, 6 Transcr. App. (N. Y.) 116.

West Virginia.— Cunningham *v.* Squires, 2 W. Va. 422, 98 Am. Dec. 770.

See 9 Cent. Dig. tit. "Certiorari," § 195.

In Florida either appeal or error may be resorted to. Deans *v.* Wilcoxon, 18 Fla. 531; Edgerton *v.* Green Cove Springs, 18 Fla. 528.

Other remedy.—Appeal is not appropriate where there is an available remedy by motion. People *v.* Feitner, 37 N. Y. App. Div. 362, 56 N. Y. Suppl. 93.

73. *Michigan.*— Robens *v.* Videto, 33 Mich. 240.

Ohio.— Johnston *v.* Hanna, Wright (Ohio) 138.

Pennsylvania.— Cooke *v.* Reinhart, 1 Rawle (Pa.) 317.

Tennessee.— Lawson *v.* Scott, 1 Yerg. (Tenn.) 92.

West Virginia.—Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337; Board of Education *v.* Hopkins, 19 W. Va. 84; Dryden *v.* Swinburn, 15 W. Va. 234.

See 9 Cent. Dig. tit. "Certiorari," § 195.

When the writ is quashed for error apparent on its face error will not lie, for there is nothing to be brought up on a record. People *v.* New York, 1 How. Pr. (N. Y.) 90.

74. Glennon *v.* Britton, 155 Ill. 232, 40 N. E. 594; Watson *v.* Nelson, 69 N. Y. 536.

Parties who complain of an adjudication of their proceedings as a court may appeal in the name of the court. Lowndes County Com'rs Ct. *v.* Bowie, 34 Ala. 461.

75. People *v.* Brooklyn, 105 N. Y. 674, 12 N. E. 179.

76. Lusk *v.* Capehart, 129 Ala. 599, 30 So. 31.

77. Thompson *v.* White, 64 Ill. 314; Le Fevere *v.* Watson, 70 Ill. App. 646; Belleville *v.* Stauder, 47 Ill. App. 376; Hersey *v.* Schaedel, 6 Ill. App. 188; Dryden *v.* Swinburne, 20 W. Va. 89.

A bill of exceptions which, after reciting that a petition for certiorari had been presented to the judge and he had refused to sanction the same, alleges that the applicant excepted to the order of the judge refusing to sanction the application, and that the judge erred "in refusing the writ of certiorari applied for," contains an assignment of error sufficient to bring under investigation the grounds of complaint embraced in the petition for certiorari. Georgia Cent. R. Co. *v.* Woolsey, 112 Ga. 365, 37 S. E. 392.

78. Rauer *v.* San Francisco, 115 Cal. 84, 46 Pac. 870; Georgia Cent. R. Co. *v.* Whitehead, 105 Ga. 492, 30 S. E. 814. But see People *v.* Hobson, 48 Mich. 27, 11 N. W. 771; Grand Trunk R. Co. *v.* Russ, 47 Mich. 500, 11 N. W. 289, holding that only such grounds as are alleged in the affidavit for the writ can be considered.

79. Evans *v.* Bloodworth, 105 Ga. 835, 31 S. E. 778; Brewer *v.* State, 105 Ga. 507, 31 S. E. 146; Marchant *v.* Tifton, 103 Ga. 573, 30 S. E. 254; Wilks *v.* Smith, 101 Ga. 229, 28 S. E. 630; Lake *v.* Kellum, 99 Ga. 130, 24 S. E. 874; Fleming *v.* Bainbridge, 84 Ga. 622, 10 S. E. 1098; James *v.* Davis, 76 Ga. 100; Watson *v.* McCarty, 72 Ga. 216; Warren *v.* State, 72 Ga. 215.

80. Hendley *v.* Clark, 8 App. Cas. (D. C.) 165.

81. Winter *v.* Fitzpatrick, 35 Cal. 269; People *v.* Gilon, 9 N. Y. Suppl. 690, 31 N. Y. St. 263.

Reversal of justice's judgment.— Where a justice's judgment is reversed on certiorari by the circuit court an appeal to the supreme

sive to the writ will be disregarded.[82] On error, the court is confined to matters stated in the record.[83]

b. Errors Considered — (I) *In General.* The appellate court will only consider the errors which are presented [84] and specifically pointed out.[85] In some jurisdictions, however, where the cause is removed by writ of error, special assignments of error are not required, but those stated in the affidavit for the writ will be deemed sufficient.[86]

(II) *Formal Errors.* Mere formal errors, or errors which do not affect the substantial rights of the parties, will be disregarded.[87]

(III) *Objections Not Taken Below.* As in other cases, rulings below to which no objection was made or exceptions taken cannot be objected to for the first time in the appellate court,[88] but an exception to a refusal to dismiss the writ is not waived by proceeding to argue on the merits.[89]

c. Findings of Fact. Findings of fact based on competent evidence will not be reviewed.[90]

d. Interlocutory Orders. An appeal will not lie from orders made in the certiorari proceedings, which are not final in their character. Thus an appeal will not lie from an order refusing to quash a writ,[91] from an order reversing an order quashing a writ,[92] from an order denying an application made on the hearing,[93] from an order denying a motion to require amendment of the return [94]

court brings up only the question of the justice's jurisdiction. Brandies *v.* Robinson, 45 Wis. 464.

82. De Rochebrune *v.* Southeimer, 12 Minn. 78.

83. Oakland R. Co. *v.* Keenan, 56 Pa. St. 198; McMillan *v.* Graham, 4 Pa. St. 140; Buckmyer *v.* Dubs, 5 Binn. (Pa.) 29.

84. Champion *v.* Minnehaha County, 5 Dak. 416, 41 N. W. 739; Ballard *v.* Shaw, 110 Ga. 265, 34 S. E. 302.

The grounds of error need not be specified to give jurisdiction to the appellate court, but should be required to inform the adverse party of what he will be expected to controvert on the hearing. Woodruff *v.* Douglas County, 17 Oreg. 314, 21 Pac. 49.

85. A judgment remanding a cause without instructions will not be disturbed when the excepting party does not specify what the desired "instructions" should have been. Williams *v.* Georgia R., etc., Co., 103 Ga. 575, 30 S. E. 260.

In South Dakota only such errors can be reviewed as appear on the judgment-roll, which by Comp. Laws, § 5516, consists of the judgment, writ, and return. Van den Bos *v.* Douglas County, 11 S. D. 190, 76 N. W. 935.

86. Wilson *v.* McCrillies, 50 Mich. 347, 15 N. W. 504; Chicago, etc., R. Co. *v.* Campbell, 47 Mich. 265, 11 N. W. 152. *Contra,* Burnham *v.* Van Gelder, 32 Mich. 490.

87. Shearouse *v.* Morgan, 111 Ga. 858, 36 S. E. 927; McPherson *v.* Stroup, 100 Ga. 228, 28 S. E. 157; Rodman *v.* Clark, 81 Mich. 466, 45 N. W. 1001; Davis *v.* Newark, 54 N. J. L. 144, 23 Atl. 276; Charles *v.* Byrd, 29 S. C. 544, 8 S. E. 1.

88. Belleville *v.* Stauder, 47 Ill. App. 376; O'Leary *v.* Bolton, 50 Miss. 172; People *v.* Campbell, 139 N. Y. 68, 34 N. E. 753, 54 N. Y. St. 451; People *v.* McLean, 80 N. Y. 254; People *v.* Sutphin, 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49; People *v.* Lantry, 44 N. Y. App. Div. 392, 60 N. Y. Suppl. 1009; Burke *v.* Monroe County, 4 W. Va. 371.

89. Bunday *v.* Dunbar, 5 Minn. 444.

90. *Alabama.*— Dane *v.* Mobile, 36 Ala. 304.

Georgia.— Mitchell *v.* Braswell, 105 Ga. 502, 30 S. E. 947; Holt *v.* State, 102 Ga. 569, 28 S. E. 969; Tucker *v.* Banks, 99 Ga. 302, 25 S. E. 654; Walker *v.* Browning, 91 Ga. 183, 16 S. E. 983.

Michigan.— Elliott *v.* Whitmore, 5 Mich. 532; Miller *v.* Chaffee, 1 Mich. 257.

New Jersey.— Vreeland *v.* Bayonne, 60 N. J. L. 168, 37 Atl. 737; State *v.* Jersey City, 58 N. J. L. 144, 35 Atl. 284. See also Morris, etc., Dredging Co. *v.* Jersey City, 64 N. J. L. 587, 46 Atl. 609.

New York.—People *v.* Board of Fire Com'rs, 106 N. Y. 257, 12 N. E. 596; People *v.* Hicks, 105 N. Y. 198, 11 N. E. 653.

See 9 Cent. Dig. tit. "Certiorari," § 203.

N. Y. Code Civ. Proc. § 2140, providing that on certiorari the court on "the hearing" shall have power to determine whether there was a preponderance of evidence against the existence of any fact found, that the verdict of the jury affirming its existence, rendered in the action in the supreme court, "would be set aside as against the weight of evidence," has no application to a review by the court of appeals of the decision of the supreme court on certiorari. People *v.* French, 92 N. Y. 306.

The sufficiency of the evidence will not be inquired into, where its insufficiency to support the judgment is not complained of. Hargrove *v.* Turner, 108 Ga. 580, 34 S. E. 1.

91. Hersey *v.* Schaedel, 6 Ill. App. 188; State *v.* Fond du Lac, 35 Wis. 37.

92. People *v.* Barker, 155 N. Y. 308, 49 N. E. 775.

93. People *v.* McNamara, 18 N. Y. App. Div. 17, 45 N. Y. Suppl. 456.

94. State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942.

or directing a further return,[95] or from an order directing the clerk to send up a transcript of the record and proceedings.[96]

e. Discretionary Action. Unless the discretion of the court in allowing, refusing, sustaining, or dismissing the writ, or in determining disputed questions of fact involved, is arbitrarily exercised or abused, a determination made in the exercise of such discretion will not be interfered with.[97]

f. Conclusiveness of Determination Below. Appeal or error will not lie where the court below had exclusive jurisdiction or its determination was conclusive.[98]

7. Presumptions. If the return does not deny the allegations in the writ and the application therefor, the right to sue out the writ will be conclusively presumed.[99] So in the absence of the writ, if the parties submitted their case without objection, it will be presumed that the writ was waived or lost.[1] It will also be presumed from the absence of the writ that no sanction was given;[2] in the absence of anything to the contrary that the writ issued regularly;[3] that the omission of the return was by the negligence of the clerk;[4] and, where no reason for dismissing the writ appears, that a sufficient reason existed.[5]

8. Judgment. By statute, in some jurisdictions, on error to review the dismissal of a certiorari, a judgment may be rendered in accordance with the law and facts.[6] But on appeal from a refusal of the writ no determination can be made as to the validity of matters upon which the proceedings sought to be reviewed are founded.[7] If the irregularity does not affect the merits the court will not reverse, but will substitute the proper determination.[8] On affirmance the appellate court may authorize an application below to vacate the determination appealed from and to amend the writ;[9] but has no power to require a further return.[10]

95. Matter of Larson, 96 N. Y. 381 [*reversing* 31 Hun (N. Y.) 539].

96. Farmers' Nat. Bank *v.* Burns, 107 N. C. 465, 12 S. E. 252.

97. *Alabama.*— Carter *v.* Douglass, 2 Ala. 499.

Georgia.—Strickland *v.* Reese, 110 Ga. 263, 34 S. E. 275; Crapp *v.* Morris, 108 Ga. 793, 33 S. E. 951; Hilton, etc., Lumber Co. *v.* Browning, 105 Ga. 841, 32 S. E. 125; Georgia Cent. R. Co. *v.* Chancy, 105 Ga. 827, 31 S. E. 732; Crosby *v.* Georgia Cent. R. Co., 105 Ga. 508, 31 S. E. 151; Boggs' Plow Co. *v.* Biggers, 105 Ga. 471, 30 S. E. 656; Holt *v.* State, 102 Ga. 569, 28 S. E. 969; Savannah, etc., R. Co. *v.* Fennell, 100 Ga. 474, 28 S. E. 437; Electric R. Co. *v.* Sheftall, 97 Ga. 296, 22 S. E. 524.

Illinois.— Board of Supervisors *v.* Magoon, 109 Ill. 142.

Michigan.— Dibble *v.* Rogers, 2 Mich. 404.

New Jersey.— State *v.* Jersey City, 43 N. J. L. 662.

New York.— People *v.* Lord, 157 N. Y. 408, 52 N. E. 185; People *v.* Queens County, 153 N. Y. 370, 47 N. E. 790; People *v.* Board of Fire Com'rs, 106 N. Y. 257, 12 N. E. 596; People *v.* McCarthy, 102 N. Y. 630, 8 N. E. 85; People *v.* Kingston, 101 N. Y. 82, 4 N. E. 348; People *v.* Board of Tax Com'rs, 85 N. Y. 655; People *v.* Board of Police, 82 N. Y. 506; People *v.* Board of Fire Com'rs, 77 N. Y. 605, 19 Alb. L. J. 396; People *v.* Hill, 53 N. Y. 547; People *v.* Stilwell, 19 N. Y. 531. And see People *v.* Board of Police, 86 N. Y. 639.

Utah.— Crosby *v.* Probate Ct., 3 Utah 51, 5 Pac. 552.

West Virginia.— Michaelson *v.* Cantley, 45 W. Va. 533, 32 S. E. 170.

See 9 Cent. Dig. tit. "Certiorari," § 205.

Although the grant of the writ is discretionary, yet after it has been granted and the record certified in obedience to it, the questions arising on that record must be determined according to fixed rules of law, and their determination is reviewable on error. Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697.

98. Loomis *v.* Commercial Bank, 4 How. (Miss.) 660; Atlantic City Water Works Co. *v.* Read, 50 N. J. L. 665, 15 Atl. 10; Silvergood *v.* Storrick, 1 Watts (Pa.) 532; Alexander *v.* Goldstein, 13 Pa. Super. Ct. 518; Crumley *v.* Crescent Coal Co., 13 Pa. Super. Ct. 231; Carroll *v.* Barnes, 11 Pa. Super. Ct. 590.

99. State *v.* McDavid, 84 Mo. App. 47. To same effect see State *v.* Moore, 84 Mo. App. 11.

1. Turnly *v.* Stinson, 1 Ala. 456.

2. Glenn *v.* Shearer, 44 Ga. 16.

3. State *v.* Moore, 84 Mo. App. 11.

4. Redmond *v.* Anderson, 18 Ark. 449.

5. West Chicago St. R. Co. *v.* Becker, 57 Ill. App. 533.

6. State *v.* Paterson, 39 N. J. L. 489; Martin *v.* Thompson, 10 N. J. L. 142.

7. People *v.* Long Island City, 76 N. Y. 20, where, in proceedings relating to a levy for interest on municipal bonds, the court refused to consider or determine the validity of the bonds.

8. Harvey *v.* Jewell, 84 Ga. 234, 10 S. E. 631.

9. People *v.* Roe, 25 N. Y. App. Div. 107, 49 N. Y. Suppl. 227.

10. Wight *v.* Warner, 1 Dougl. (Mich.) 384.

VI. LIABILITY ON BONDS OR UNDERTAKINGS.[11]

A. Condition and Breach Thereof. A condition that the proceeding shall be prosecuted in the court above contemplates that it shall be prosecuted or followed up to a conclusion.[12] Hence, if the certiorari is dismissed because of failure to prosecute it according to the rules and practice of the court, the condition is broken.[13] Nor is it a defense that the writ was not allowed, where the principal had the benefit of a hearing and determination thereon.[14] However, a condition to prosecute with effect, or to perform the judgment rendered in the cause, is not broken by the dismissal of the writ for informality in granting it[15] or for failure to comply with a rule requiring better security.[16] Nor is the unsuccessful determination of present proceedings a breach of a condition to pay such costs and damages as may be recovered in any action thereafter brought.[17]

B. Extent of Liability. A condition to abide by the judgment binds the surety to perform it and pay the sum recovered,[18] but the liability only extends to the amount of the penalty.[19] If the conditions do not include all the statutory requirements the surety is liable to the extent of such conditions, or commensurate with the undertaking.[20] A condition to pay damages and costs does not obligate the surety to pay the debt.[21] An obligation by one to whom a judgment has been paid to restore, on reversal, the debt or damages for which the judgment was obtained, and costs, imposes no liability for the costs of reversal.[22]

C. As Between Surety on Bond For Writ and Surety on Appeal-Bond. As between the surety on a bond to procure the writ and the surety on appeal from the determination thereon the latter is primarily liable.[23]

D. Release or Discharge From Liability. If the party giving the bond is successful,[24] or the writ is dismissed for want of jurisdiction,[25] or is dismissed and the costs paid because of the election of the relator to appeal, there is no liability on the bond.[26] A statute[27] permitting sureties for the prosecution or defense of any suit to obtain a release by requiring the plaintiff to give counter security applies in favor of sureties on certiorari without regard to the status of the party.[28]

E. Judgment. By statute a summary judgment may be rendered on the bond,[29] but otherwise if such a proceeding is not authorized.[30] So by statute judgment may be rendered against the principal and surety at the same time[31] or on a new trial.[32] A judgment in excess of the penalty may be amended.[33]

11. **As to necessity and sufficiency of bond or undertaking** see *supra*, V, I.
12. Such a stipulation is not satisfied by a mere return of the writ. Marryott *v.* Young, 33 N. J. L. 336.
13. Marryott *v.* Young, 33 N. J. L. 336.
14. Patton *v.* Miller, 13 Serg. & R. (Pa.) 254.
15. Brown *v.* Newton, 6 Yerg. (Tenn.) 436.
16. McIntosh *v.* Langtree, 6 Yerg. (Tenn.) 316.
17. Hopson *v.* Murphy, 4 Tex. 248.
18. Molton *v.* Hooks, 10 N. C. 342.
19. McKeen *v.* Nelms, 9 Ala. 507; Yates *v.* Collins, 19 Tex. 137.
20. Triplet *v.* Gray, 7 Yerg. (Tenn.) 15.
21. Tipton *v.* Anderson, 8 Yerg. (Tenn.) 221.
22. Griffin *v.* Mortimer, 8 Wend. (N. Y.) 538.
23. Moore *v.* Lassiter, 16 Lea (Tenn.) 630.
24. Swanson *v.* Ball, Hempst. (U. S.) 39, 23 Fed. Cas. No. 13,676*a*.
25. Turner *v.* Farley, 3 Yerg. (Tenn.) 299; Taul *v.* Collinsworth, 2 Yerg. (Tenn.) 579.
26. Landa *v.* Moody, (Tex. Civ. App. 1900) 57 S. W. 51.
27. Tenn. Code, §§ 3665, 3666.
28. Kincaid *v.* Sharp, 3 Head (Tenn.) 150. Where, after proceedings to require such counter security, the plaintiff is permitted to prosecute his suit *in forma pauperis*, the existing surety is only discharged from the payment of such costs as may thereafter accrue and is not released from any preëxisting liability. Kincaid *v.* Sharp, 3 Head (Tenn.) 150.
29. Speight *v.* Wooten, 14 N. C. 289.
30. Smith *v.* Bissell, 2 Greene (Iowa) 379. **Unless prescribed by statute** scire facias will not lie. Fox *v.* Steele, 4 N. C. 48.
31. Chambers *v.* Haley, Peck (Tenn.) 159.
32. Hudson *v.* Nalty, 55 Miss. 582. **On dismissal** judgment should not be rendered against the principal and sureties, as on affirmance after a trial *de novo*. Givens *v.* Blocker, 23 Tex. 633.
33. On motion in the court below or in the appellate court. McKeen *v.* Nelms, 9 Ala. 507.

CERTUM EST QUOD CERTUM REDDI POTEST. A maxim meaning "That is sufficiently certain which can be made certain."[1]

CESSANTE CAUSA, CESSAT EFFECTUS. A maxim meaning "The cause ceasing, the effect ceases also."[2]

CESSANTE RATIONE LEGIS, CESSAT IPSA LEX.[3] A maxim meaning "When the reason of any particular law ceases so does the law itself."[4]

CESSANTE STATU PRIMITIVO, CESSAT DERIVATIVUS. A maxim meaning "The derived estate ceases on the determination of the original estate."[5]

CESSER. Neglect; a ceasing from or omission to do a thing; the determination of an estate;[6] CESSION,[7] *q. v.*

CESSET EXECUTIO. Literally, "Let execution stay." A stay of execution or an order therefor; the entry of such stay on record.[8]

1. Broom Leg. Max.
Applied in the following cases:
California.— Preble *v.* Abrahams, 88 Cal. 245, 251, 26 Pac. 99, 22 Am. St. Rep. 301; Kelly *v.* McKibben, 54 Cal. 192.
Colorado.—Grand County *v.* Larimer County, 9 Colo. 268, 279, 11 Pac. 193.
Georgia.— Sheffield *v.* Clark, 73 Ga. 92.
Missouri.— Smith *v.* Smith, 62 Mo. App. 596, 601.
New Jersey.— State *v.* Plainfield, 38 N. J. L. 95, 96; State *v.* Utter, 33 N. J. L. 183, 189; Coster *v.* New Jersey R., etc., Co., 23 N. J. L. 227, 235; Clark *v.* Badgley, 8 N. J. L. 233, 241; King *v.* Ruckman, 20 N. J. Eq. 316, 359.
New York.—Smith *v.* Fyler, 2 Hill (N. Y.) 648, 649; People *v.* Cavanagh, 2 Park. Crim. (N. Y.) 650, 661.
Virginia.— Protestant Episcopal Education Soc. *v.* Churchman, 80 Va. 718, 763.
West Virginia.— Central Land Co. *v.* Calhoun, 16 W. Va. 361, 369.
Wisconsin.— Bulger *v.* Moore, 67 Wis. 430, 434, 30 N. W. 713; Lake *v.* Loysen, 66 Wis. 424, 427, 29 N. W. 214; Strain *v.* Gardner, 61 Wis. 174, 183, 21 N. W. 35; Van Steenwyck *v.* Washburn, 59 Wis. 483, 500, 17 N. W. 289, 48 Am. Rep. 532.
United States.— Parsons *v.* Jackson, 99 U. S. 434, 439, 25 L. ed. 457; Noonan *v.* Braley, 2 Black (U. S.) 499, 504, 17 L. ed. 278.
England.— Barber *v.* Butcher, 8 Q. B. 863, 870, 10 Jur. 814, 15 L. J. Q. B. 289, 55 E. C. L. 863; Daniel *v.* Gracie, 6 Q. B. 145, 152, 8 Jur. 708, 13 L. J. Q. B. 309, 51 E. C. L. 145; Wildman *v.* Glossop, 1 B. & Ald. 9, 12; Gordon *v.* Whitehouse, 18 C. B. 747, 753, 25 L. J. C. P. 300, 86 E. C. L. 747; Maugham *v.* Sharpe, 17 C. B. N. S. 443, 463, 10 Jur. N. S. 989, 34 L. J. C. P. 19, 10 L. T. Rep. N. S. 870, 12 Wkly. Rep. 1057, 112 E. C. L. 443; Orby *v.* Mohun, 3 Ch. Rep. 102, 142; Shrewsbury's Case, 9 Coke 46*b*; King *v.* Badeley, 3 Myl. & K. 417, 425, 10 Eng. Ch. 417; Owen *v.* Thomas, 3 Myl. & K. 353, 356, 10 Eng. Ch. 353; Palmer *v.* Moxon, 2 M. & S. 43, 50; Goodright *v.* Richardson, 3 T. R. 462, 463.

2. Burrill L. Dict.
Applied in Liford's Case, 11 Coke 46*b*, 50*b*; Tyrringham's Case, 4 Coke 36*b*, 38*b*.

3. The maxim is also written: *Cessante ratione, cessat quoque lex* (Shultz *v.* Sutter, 3 Mo. App. 137, 142); *cessat ratio, cessat etiam lex* (Orr *v.* U. S. Bank, 1 Ohio 36, 44, 13 Am. Dec. 588); *cessante ratione cessat et lex* (Holmes *v.* Simmons, L. R. 1 P. & D. 523, 528, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024).

4. Broom Leg. Max.
Applied in the following cases:
Arkansas.—Burleson *v.* McDermott, 57 Ark. 229, 231, 21 S. W. 222.
Connecticut.— Beardsley *v.* Hartford, 50 Conn. 529, 542, 47 Am. Rep. 677.
Kansas.— Wilson County *v.* McIntosh, 30 Kan. 234, 238, 1 Pac. 572; Merritt *v.* Williams, 17 Kan. 287, 290; Ferguson *v.* Smith, 10 Kan. 396, 402.
Missouri.— Taylor *v.* Pullen, 152 Mo. 434, 438, 53 S. W. 1086; Russell *v.* Russell, 122 Mo. 235, 239, 26 S. W. 677, 43 Am. St. Rep. 581; Johnson County *v.* Wood, 84 Mo. 489, 509; Houser *v.* Andersch, 61 Mo. App. 15, 18; Costigan *v.* Michael Transp. Co., 38 Mo. App. 219, 224; Buford *v.* Keokuk Northern Line Packet Co., 3 Mo. App. 159, 166; Shultz *v.* Sutter, 3 Mo. App. 137, 142.
New Hampshire.— Harris *v.* Webster, 58 N. H. 481, 484; Cole *v.* Winnipisseogee Lake Cotton, etc., Mfg. Co., 54 N. H. 242, 285; Darling *v.* Westmoreland, 52 N. H. 401, 408, 13 Am. Rep. 55; Hammond *v.* Corbett, 50 N. H. 501, 507, 9 Am. Rep. 288.
New Jersey.— Heywood *v.* Shreve, 44 N. J. L. 94, 96; Powers *v.* Totten, 42 N. J. L. 442, 446; State *v.* Passaic Turnpike Co., 27 N. J. L. 217, 220; Clark *v.* Clark, 51 N. J. Eq. 404, 405, 26 Atl. 1012; Westerfield *v.* Westerfield, 36 N. J. Eq. 195, 197; Dayton *v.* Melick, 27 N. J. Eq. 362, 364; Hennion *v.* Jacobus, 27 N. J. Eq. 28, 30; Metler *v.* Metler, 18 N. J. Eq. 270, 276.
North Carolina.— Kitchen *v.* Herring, 42 N. C. 190, 192.
Ohio.— Rosenthal *v.* Mayhugh, 33 Ohio St. 155, 161; Borland *v.* Marshall, 2 Ohio St. 308, 310; Orr *v.* U. S. Bank, 1 Ohio 36, 44, 13 Am. Dec. 588.
England.— Holmes *v.* Simmons, L. R. 1 P. & D. 523, 528, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024.

5. Broom Leg. Max.
Applied in Paine's Case, 8 Coke 34*a*.

6. Burrill L. Dict.

7. Anderson L. Dict.

8. Burrill L. Dict.

CESSET PROCESSUS. Literally, "Let the process stay." A stay of the process or proceedings on an issue; the entry of such stay on record.[9]

CESSIO BONORUM. The surrender of an insolvent's estate and effects to his creditors.[10] (See, generally, ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY.)

CESSION. A giving up, relinquishment or abandonment of a right, or of property.[11] (Cession: Of Property by Insolvents, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY. Of Territory, see INTERNATIONAL LAW; STATES; TREATIES.)

CESTUI QUE TRUST. The beneficiary of an estate, held in trust; he for whose benefit another person is enfeoffed or seized of lands or tenements, or is possessed of personal property.[12] (See, generally, TRUSTS.)

CESTUI QUE USE. He to whose use lands or other hereditaments were held by another person.[13] (See, generally, TRUSTS.)

CESTUI QUE VIE. He whose life is the measure of the duration of an estate.[14] (See, generally, LIFE ESTATES.)

CF. An abbreviated form of the Latin word *conferre*,— compare.[15]

CHAIN. An engineer's measure of twenty-two yards length;[16] a series of things linked together.[17]

CHAIRMAN. A name given to the presiding officer of an assembly, public meeting, convention, deliberative or legislative body, board of directors, committee, etc.[18] (Chairman: Of Board of Directors of Corporation, see CORPORATIONS. Of Deliberative Body, Generally, see PARLIAMENTARY LAW.)

CHALDRON. Twelve sacks of coal each holding three bushels.[19]

CHALLENGE. An objection to persons returned to be jurors in a civil or criminal proceeding;[20] a summons or invitation, given by one person to another, to engage in a personal combat; a request to fight a duel.[21] (Challenge: Of Juror, see GRAND JURIES; JURIES. To Fight, see DUELING.)

CHAMBER BUSINESS. All business done out of court by the judge.[22]

CHAMBERLAIN. The receiver of the rents and revenues of a city.[23]

CHAMBER OF COMMERCE. An association, which may or may not be incorporated, comprising the principal merchants, manufacturers, and traders of a city, designed for convenience in buying, selling, and exchanging goods, and to foster the commercial and industrial interests of the place.[24] (See, generally, EXCHANGES.)

CHAMBERS. The private room or office of a judge, where, for the convenience of parties, he hears such matters and transacts such business as a judge in vacation is authorized to hear, and which do not require a hearing by the judge sitting as a court;[25] the office or private rooms of a judge, where parties are heard and orders made, in matters not requiring to be brought before the full court, and where costs are taxed, judgments signed, and similar business trans-

9. Burrill L. Dict.
10. Black L. Dict.
11. Burrill L. Dict.
12. Bouvier L. Dict. [*quoted* in Grubbs *v.* McGlawn, 39 Ga. 672, 676].
13. Sweet L. Dict.
14. 1 Washburn Real Prop. (6th ed.) § 221.
15. Black L. Dict.
16. Wharton L. Lex.
17. Century Dict.

Alienage of any one in a chain of persons as affecting descent see ALIENS, 2 Cyc. 95, note 49.

Necessity of chain of title to title by adverse possession see ADVERSE POSSESSION, 1 Cyc. 1085, note 80.

18. Black L. Dict.
19. Wharton L. Lex.
20. Sweet L. Dict.
21. Black L. Dict.
22. *In re* Neagle, 39 Fed. 833, 855, 5 L. R. A. 78.
23. Burrill L. Dict.
24. Black L. Dict.
25. Haskins *v.* Baxter, 64 Minn. 226, 229, 66 N. W. 969. See also Whereatt *v.* Ellis, 65 Wis. 639, 644, 27 N. W. 630, 28 N. W. 333 (where it is said: "'A judge at chambers' is simply a judge acting out of court"); *In re* Neagle, 39 Fed. 833, 855, 5 L. R. A. 78 (where the court said: "The judges' chambers do not appear to have any 'local habitation'").

acted;[26] parts of the ocean included within lines drawn from promontory to promontory, or perhaps from points a league distant from each.[27] (Chambers: Appealability of Orders at, see APPEAL AND ERROR. Authority of Judges at,[28] see JUDGES. Of Commerce, see CHAMBER OF COMMERCE.)

CHAMBRE. French "room."[29]

CHAMPAGNE. An effervescent wine.[30] (Champagne: Regulation of Manufacture, Sale, and Use, see INTOXICATING LIQUORS. Taxation of, see CUSTOMS DUTIES; INTERNAL REVENUE.)

CHAMPARTY. See CHAMPERTY AND MAINTENANCE.

CHAMPERTOR. One who is guilty of the offense of champerty.[31] (See, generally, CHAMPERTY AND MAINTENANCE.)

26. Burrill L. Dict. [*quoted* in Pittsburg, etc., R. Co. *v.* Hurd, 17 Ohio St. 144, 146].

27. Findlay *v.* The William, 1 Pet. Adm. 12, 29 note, 9 Fed. Cas. No. 4,790.

28. **To admit to bail** see BAIL, 5 Cyc. 76, note 71.

To grant appeal see APPEAL AND ERROR, 2 Cyc. 808, note 2.

To hear motion to set aside supersedeas see APPEAL AND ERROR, 2 Cyc. 907, note 48.

To increase security given for stay of proceedings see APPEAL AND ERROR, 2 Cyc. 905, note 40.

To order an exoneratur on discharge of principal see BAIL, 5 Cyc. 37, note 3.

To settle expenses incurred by officer in preserving attached property see ATTACHMENT, 4 Cyc. 724, note 18.

Notice of appeal at chambers see APPEAL AND ERROR, 2 Cyc. 868, note 50.

29. Wusthoff *v.* Dracourt, 3 Watts (Pa.) 240, 242.

30. Century Dict.

31. Burrill L. Dict. [*citing* 4 Bl. Comm. 135].

CHAMPERTY AND MAINTENANCE

By Frank W. Jones and J. Breckinridge Robertson

I. DEFINITION AND ELEMENTS.

A. Definition — 1. CHAMPERTY. Champerty,[1] which is a species of maintenance,[2] has been defined to be the unlawful maintenance of a suit, in consideration of some bargain, to have a part of the thing in dispute, or some profit out of it;[3] a bargain with a plaintiff or defendant, *campum partire*, to divide the land or other thing sued for between them if they prevail at law, the champertor agreeing to carry on the suit at his own expense.[4]

1. Derivation.—Champerty originally spelled "champarty" is said to be "derived from an old French law term, *champart*, which was used to denote a customary field rent, consisting of a certain part of the crops in kind; which answers to the ordinary case in this country of renting a farm for a part or share of the produce." Small *v.* Mott, 22 Wend. (N. Y.) 403, 405. But by Blackstone it is derived from the words "*campi partitio.*" 4 Bl. Comm. 135 [*quoted* in Verdier *v.* Simons, 2 McCord Eq. (S. C.) 385, 392].

2. *Alabama.* — Gilman *v.* Jones, 87 Ala. 691, 697, 5 So. 785, 7 So. 48, 4 L. R. A. 113; Holloway *v.* Lowe, 7 Port. (Ala.) 488, 490.

Connecticut.— Richardson *v.* Rowland, 40 Conn. 565, 570.

Delaware. — Bayard *v.* McLane, 3 Harr. (Del.) 139, 208.

Indiana.— Scobey *v.* Ross, 13 Ind. 117, 118.

Kentucky.— Rust *v.* Larue, 4 Litt. (Ky.) 411, 417, 14 Am. Dec. 172; Brown *v.* Beauchamp, 5 T. B. Mon. (Ky.) 413, 416, 17 Am. Dec. 81.

Maine.— Hovey *v.* Hobson, 51 Me. 62.

Massachusetts.— Manning *v.* Sprague, 148 Mass. 18, 20, 18 N. E. 673, 12 Am. St. Rep. 508, 1 L. R. A. 516.

Missouri.— Duke *v.* Harper, 2 Mo. App. 1, 4 [*affirmed* in 66 Mo. 51, 27 Am. Rep. 311].

New York.— Sedgwick *v.* Stanton, 14 N. Y. 289, 295; Small *v.* Mott, 22 Wend. (N. Y.) 403; Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 648, 15 Am. Dec. 308.

North Carolina.— Barnes *v.* Strong, 54 N. C. 100, 104.

Ohio.— Reece *v.* Kyle, 49 Ohio St. 475, 481, 31 N. E. 747, 16 L. R. A. 723; Key *v.* Vattier, 1 Ohio 132, 143.

South Carolina.— Verdier *v.* Simons, 2 McCord (S. C.) 385, 392.

West Virginia.— Davis *v.* Settle, 43 W. Va. 17, 25, 26 S. E. 557.

United States.— McIntyre *v.* Thompson, 10 Fed. 531, 532.

England.—Savill *v.* Langman, 79 L. T. Rep. N. S. 44.

The distinction between maintenance and champerty seems to be this: Where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but where he stipulates to receive part of the thing ir suit he is guilty of champerty. 4 Cooley Bl. Comm. 134 note [*quoted* in Stotsenburg *v.* Marks, 79 Ind. 193, 196; Quigley *v.* Thompson, 53 Ind. 317, 320]; Gilman *v.* Jones, 87 Ala. 691, 697, 5 So. 785, 7 So. 48, 4 L. R. A. 113; Wheeler *v.* Pounds, 24 Ala. 472, 473 [*citing* Bouvier L. Dict.]; Lytle *v.* State, 17 Ark. 608, 624; Backus *v.* Byron, 4 Mich. 535, 538 [*quoting* 4 Bouvier Inst. 436].

3. *Alabama.*— Price *v.* Carney, 75 Ala. 546, 553; Ware *v.* Russell, 70 Ala. 174, 179, 45 Am. Rep. 82; Poe *v.* Davis, 29 Ala. 676, 683; Holloway *v.* Lowe, 7 Port. (Ala.) 488, 490.

Georgia.— Meeks *v.* Dewberry, 57 Ga. 263, 264.

Kentucky.— Waller *v.* Marks, 100 Ky. 541, 552, 19 Ky. L. Rep. 121, 38 S. W. 894; Brown *v.* Beauchamp, 5 T. B. Mon. (Ky.) 413, 416, 17 Am. Dec. 81. See also Preston *v.* Breckinridge, 86 Ky. 619, 632, 10 Ky. L. Rep. 2, 6 S. W. 641.

Massachusetts.— Thurston *v.* Percival, 1 Pick. (Mass.) 415, 416.

Michigan.— Backus *v.* Byron, 4 Mich. 535, 538.

Missouri.— Duke *v.* Harper, 66 Mo. 51, 55, 27 Am. Rep. 314 [*affirming* 2 Mo. App. 1].

Nebraska.— Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 48, 57 N. W. 767.

New York.— Sedgwick *v.* Stanton, 14 N. Y. 289, 294.

North Carolina.— Barnes *v.* Strong, 54 N. C. 100, 104.

United States.— Roberts *v.* Cooper, 20 How. (U. S.) 467, 484, 15 L. ed. 969.

England.— Stanley *v.* Jones, 7 Bing. 369, 377, 9 L. J. C. P. O. S. 51, 5 M. & P. 193, 20 E. C. L. 169 [*quoted* in Scobey *v.* Ross, 13 Ind. 117, 119]; Wood *v.* Downes, 18 Ves. Jr. 120, 126, 11 Rev. Rep. 160; 1 Hawkins P. C. c. 84, § 1.

4. *Alabama.*— Wheeler *v.* Pounds, 24 Ala. 472, 473 [*citing* Bouvier L. Dict.].

Illinois.— Torrence *v.* Shedd, 112 Ill. 466, 475; Thompson *v.* Reynolds, 73 Ill. 11, 13.

Indiana.— Coquillard *v.* Bearss, 21 Ind. 479, 482, 83 Am. Dec. 362 [*citing* Bouvier L. Dict.]; Scobey *v.* Ross, 13 Ind. 117, 118.

Iowa.— Vimont *v.* Chicago, etc., R. Co., 69 Iowa 296, 306, 22 N. W. 906, 28 N. W. 612 [*quoting* Bouvier L. Dict.].

Kansas.— Aultman *v.* Waddle, 40 Kan. 195, 202, 19 Pac. 730.

Massachusetts.— See Scott *v.* Harmon, 109 Mass. 237, 238, 12 Am. Rep. 685 [*quoted* in Burnham *v.* Heselton, 84 Me. 578, 588, 24 Atl. 955].

Michigan.— Backus *v.* Byron, 4 Mich. 535, 538 [*citing* 4 Bouvier Inst. 436; 2 Chitty Crim. L. 234, note *a*].

Missouri.— Duke *v.* Harper, 66 Mo. 51, 56, 27 Am. Rep. 311 [*affirming* 2 Mo. App. 1].

Nebraska.— Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 48, 57 N. W. 767.

Ohio.— Reece *v.* Kyle, 49 Ohio St. 475, 481,

2. Maintenance. Maintenance[5] is defined to be an officious intermeddling in a suit[6] that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it;[7] an unlawful taking in hand

31 N. E. 747, 16 L. R. A. 723; Key *v.* Vattier, 1 Ohio 132, 143.

Pennsylvania.— Maires' Disbarment, 189 Pa. St. 99, 108, 41 Atl. 988.

Virginia.— Nickels *v.* Kane, 82 Va. 309, 312.

West Virginia.— Lewis *v.* Broun, 36 W. Va. 1, 6, 14 S. E. 444; Anderson *v.* Caraway, 27 W. Va. 385, 396.

United States.— McIntyre *v.* Thompson, 10 Fed. 531, 532.

England.— 4 Bl. Comm. 135.

Other definitions are: "The maintaining of one side, in consideration of some bargain to have part of the thing in dispute." Richardson *v.* Rowland, 40 Conn. 565, 570.

"A bargaine with the demandant or tenant, plaintife or defendant, to have part of the thing in suit, if he prevail therein, for maintenance of him in that suit." Bayard *v.* McLane, 3 Harr. (Del.) 139, 208 [*quoting* 2 Inst. 208].

"The unlawful maintenance of a suit in consideration of an agreement to have a part of the thing in dispute." Johnson *v.* Van Wyck, 4 App. Cas. (D. C.) 294, 315, 41 L. R. A. 520 [*citing* 1 Hawkins P. C. 545; Coke Litt. 368].

"An agreement to aid in a suit, and then divide the thing recovered." Rust *v.* Larue, 4 Litt. (Ky.) 411, 417, 14 Am. Dec. 172.

"An agreement to prosecute at one's own risk and expense, and to take a part of the thing received, in compensation." Weakly *v.* Hall, 13 Ohio 167, 175, 42 Am. Dec. 194.

"A bargain with a plaintiff or defendant in a cause to divide the matter sued for, if they prevail, whereupon the champertor is to carry on the party's suit at his own expense." Spicer *v.* Jarrett, 2 Baxt. (Tenn.) 454, 457 [*citing* 2 Story Eq. 1048].

"An agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail — the champertor to carry on the suit at his own expense." Hamilton *v.* Gray, 67 Vt. 233, 235, 31 Atl. 315, 48 Am. St. Rep. 811.

"The unlawful maintenance of a suit in consideration of a part of the matter in controversy." Davis *v.* Settle, 43 W. Va. 17, 25, 26 S. E. 557.

"A bargain by which a person agrees to carry on a suit, at his own expense, for the recovery of another's property, on condition of dividing the proceeds." Benjamin Sales, § 528 [*quoted* in Torrence *v.* Shedd, 112 Ill. 466, 475].

"A bargain with a plaintiff or defendant, to divide the land or other matter sued for, between them, if they prevail at law; whereupon the champertee is to carry on the party's suit at his own expense." 2 Chitty Cont. (11th Am. ed.) 996 [*quoted* in Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 48, 57 N. W. 767].

"To maintain to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit." Coke Litt. 368*b* [*quoted* in Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 48, 57 N. W. 767].

"A bargain with the plaintiff or defendant in any suit to have part of the land, debt, or other thing sued for, if the party that undertakes it prevails therein; whereupon the champertor is to carry on the party's suit at his own expense." Jacob L. Dict. [*quoted* in Coquillard *v.* Bearss, 21 Ind. 479, 482, 83 Am. Dec. 362].

"An agreement by a stranger, having otherwise no interest, with the plaintiff or defendant in a suit, to supply money, services, information, or evidence, by which to aid in maintaining and carrying on a suit in consideration that he shall receive a part of the matter in suit, as commission or otherwise, if the party with whom the agreement is made prevails; the purchasing a suit, or right of suing; maintenance, with the addition of an agreement to divide the thing in suit." Webster Dict. [*quoted* in Burnham *v.* Heselton, 84 Me. 578, 588, 24 Atl. 955].

5. Derivation.— "Maintenance, *manutenentia*, is derived of the verb *manutenere*." Coke Litt. 368*b*.

"Maintenance seems to embrace champerty and embracery." Danforth *v.* Streeter, 28 Vt. 490, 495.

"It is divided into two classes. First: Ruralis, or in the country, as where one assists another in his pretensions to certain lands, or stirs up quarrels and suits in the country, in relation to matters wherein he is in no way concerned. Secondly: Curialis, or in a court of justice, as where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money, or otherwise, in the prosecution or defence of any such suit." Brown *v.* Beauchamp, 5 T. B. Mon. (Ky.) 413, 414, 17 Am. Dec. 81 [*quoted* in Waller *v.* Marks, 100 Ky. 541, 552, 19 Ky. L. Rep. 121, 38 S. W. 894]. See also Coke Litt. 368*b*; 1 Hawkins P. C. c. 83, §§ 2, 3.

Distinguished from "barratry" see BARRATRY, 5 Cyc. 617, note 2.

Distinguished from "champerty" see *supra*, I, A, 1, note 2.

6. It is confined to civil actions and does not apply to criminal proceedings. Grant *v.* Thompson, 18 Cox C. C. 100, 72 L. T. Rep. N. S. 264, 15 Reports 290, 43 Wkly. Rep. 446 [*criticizing*, on this point, the decision of Coleridge, C. J., in Bradlaugh *v.* Newdegate, 11 Q. B. D. 1, 52 L. J. Q. B. 454, 31 Wkly. Rep. 792, and *declaring* it to be mere *dictum*].

7. *Alabama.*—Vaughan *v.* Marable, 64 Ala. 60, 66.

Indiana.— Quigley *v.* Thompson, 53 Ind. 317, 319.

or upholding of quarrels or sides to the disturbance or hindrance of common right.[8]

B. Elements. To constitute champerty it is not essential that there be an action pending at the time the contract was entered into.[9] There must, however, be a contemplated litigation.[10] To constitute maintenance the pendency of a suit is essential. There must also be actual assistance.[11]

II. ORIGIN AND HISTORY.

A. Existence Under Roman Law. By the Roman law it was a species of *crimen falsi* to enter into any confederacy or to do any act to support another's lawsuit by money, witnesses, or patronage.[12]

Massachusetts.— Manning *v.* Sprague, 148 Mass. 18, 20, 18 N. E. 673, 12 Am. St. Rep. 508, 1 L. R. A. 516.

Missouri.— Duke *v.* Harper, 2 Mo. App. 1, 4 [*affirmed* in 66 Mo. 51, 27 Am. Rep. 314].

Tennessee.— Spicer *v.* Jarrett, 2 Baxt. (Tenn.) 454, 457 [*citing* 2 Story Eq. 1048].

Wisconsin.— Andrews *v.* Thayer, 30 Wis. 228, 233 [*citing* 4 Bl. Comm. 134; Burrill L. Dict.].

United States.— See McIntyre *v.* Thompson, 10 Fed. 531, 532.

England.— 4 Bl. Comm. 134.

8. *Colorado.*— Casserleigh *v.* Wood, 14 Colo. App. 265, 59 Pac. 1024.

Connecticut.— Richardson *v.* Rowland, 40 Conn. 565, 570.

Delaware.— Bayard *v.* McLane, 3 Harr. (Del.) 139, 208.

Kentucky.— Brown *v.* Beauchamp, 5 T. B. Mon. (Ky.) 413, 414, 17 Am. Dec. 81 [*quoted* in Waller *v.* Marks, 100 Ky. 541, 552, 19 Ky. L. Rep. 121, 38 S. W. 894].

Maine.— Hovey *v.* Hobson, 51 Me. 62, 63; Palmer *v.* Dougherty, 33 Me. 502, 507, 54 Am. Dec. 636; Gowen *v.* Nowell, 1 Me. 292, 295 [*citing* Coke Litt. 368*b*].

West Virginia.— Davis *v.* Settle, 43 W. Va. 17, 35, 26 S. E. 557.

England.— 1 Hawkins P. C. c. 83, § 1.

Other definitions are: "An officious intermeddling in a suit that no way belongs to one, by assisting either party, to the disturbing of the community by stirring up suits." Reece *v.* Kyle, 49 Ohio St. 475, 481, 31 N. E. 747, 16 L. R. A. 723.

"An officious or unlawful intermeddling with suits, in which one has no interest real or supposed, or the upholding of quarrels by assisting either party with money or otherwise." Danforth *v.* Streeter, 28 Vt. 490, 495 [*citing* 4 Bacon Abr. 488; 4 Bl. Comm. 134].

"A malicious, or at least officious, interference in a suit in which the offender has no interest, to assist one of the parties to it, against the other, with money or advice, to prosecute or defend the action, without any authority of law." Bouvier L. Dict. [*quoted* in Casserleigh *v.* Wood, 14 Colo. App. 265, 59 Pac. 1024].

9. Roberts *v.* Yancey, 94 Ky. 243, 15 Ky. L. Rep. 10, 21 S. W. 1047, 42 Am. St. Rep. 357; Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172. See also Hamilton *v.* Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

It is not material at what time a person becomes a party to a champertous contract; if he becomes a party to it at any stage of its execution, he will, in contemplation of law, be deemed to have been a party to it from its inception. Gammons *v.* Gulbranson, 78 Minn. 21, 80 N. W. 779.

10. An agreement which does not provide for the prosecution or defense of a suit may be fraudulent, or, for some other reason, illegal, but it cannot be champertous.

Illinois.— Neal *v.* Franklin County, 43 Ill. App. 267. See also Torrence *v.* Shedd, 112 Ill. 466.

Maine.— Burnham *v.* Heselton, 84 Me. 578, 24 Atl. 955.

Massachusetts.— Scott *v.* Harmon, 109 Mass. 237, 12 Am. Rep. 685.

Vermont.— Hamilton *v.* Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

England.— Sprye *v.* Porter, 7 E. & B. 58, 3 Jur. N. S. 330, 26 L. J. Q. B. 64, 5 Wkly. Rep. 81, 90 E. C. L. 58.

11. Fletcher *v.* Ellis, Hempst. (U. S.) 300, 9 Fed. Cas. No. 4,863*a*.

12. "These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law, '*qui improbe ceount in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur*;' . . . and they were punished by the forfeiture of a third part of their goods, and perpetual infamy." 4 Bl. Comm. 135.

The Roman law by its provisions for preventing groundless and vexatious suits required that plaintiff should take an oath that the suit was not commenced from malice, and that he believed his case to be legal and just. Defendant was required to swear that in his belief plaintiff had no just claim. The advocates on both sides were required to take similar oaths. Where plaintiff failed in his suit, he was fined in a sum which was sometimes a tenth part of the demand, and in cases of great malice and vexation plaintiff was further punished by a decree of ignominy. Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.)

B. Early English Doctrine — 1. At Common Law. According to the better doctrine the various statutes enacted in England concerning champerty and maintenance[13] were in substance merely declaratory of the common law, the fundamental principles of the law upon this subject being well established prior to the statutes.[14]

2. In Equity. The court of chancery in the main followed the courts of law in treating champerty and maintenance in all its forms as illegal, and went further in some respects, giving relief against or refusing to enforce transactions not strictly involving champerty or maintenance but savoring of it.[15]

C. Modification of Common Law — 1. In General. The rigid doctrine of the early common law has been greatly modified and relaxed in England by modern decisions;[16] and maintenance now seems to be confined to the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing litigation.[17]

623, 15 Am. Dec. 308 [*citing* Code, bk. 2, tit. 59; Dig. bk. 5, tit. 1, 79; Huber, Praelect, 457, 1478; Inst. bk. 4, tit. 16; Inst. bk. 4, tit. 1, 33; Wood Civ. L. 341].

13. Statute of Westminster I, c. 25; 3 Edw. I; 28 Edw. I, c. 11; 33 Edw. I; 32 Hen. VIII, c. 9.

14. *District of Columbia.*— Johnson *v.* Van Wyck, 4 App. Cas. (D. C.) 294, 41 L. R. A. 520, 22 Wash. L. Rep. 713.

Illinois.— Thompson *v.* Reynolds, 73 Ill. 11.

Indiana.— Scobey *v.* Ross, 13 Ind. 117.

Iowa.— Boardman *v.* Thompson, 25 Iowa 487.

Kentucky.— Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

Massachusetts.— Thurston *v.* Percival, 1 Pick. (Mass.) 415; Swett *v.* Poor, 11 Mass. 549.

Michigan.— Backus *v.* Byron, 4 Mich. 535.

Mississippi.— Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130.

New York.— Small *v.* Mott, 22 Wend. (N. Y.) 403.

Rhode Island.— Martin *v.* Clarke, 8 R. I. 389, 5 Am. Rep. 586.

England.— Stanley *v.* Jones, 7 Bing. 369, 20 E. C. L. 169; Cholmondeley *v.* Clinton, 4 Bligh 1, 2 Jac. & W. 1, 2 Meriv. 171, 4 Eng. Reprint 721; Pechell *v.* Watson, 11 L. J. Exch. 225, 8 M. & W. 691; Wallis *v.* Portland, 3 Ves. Jr. 494, 4 Rev. Rep. 78.

Malum in se.—Maintenance, of which champerty is one species, is not only *malum prohibitum*, but *malum in se*. Wallis *v.* Portland, 3 Ves. Jr. 494, 4 Rev. Rep. 78.

In India the English common law and statutes in regard to champerty and maintenance are not in force as specific laws. Coondoo *v.* Mookerjee, 2 App. Cas. 186; Chetty *v.* Maicker, L. R. 1 Indian App. 241.

The English doctrine of maintenance arose from causes peculiar to the state of the society in which it was established. The great reason for the suppression of champerty and maintenance was an apprehension that justice itself was endangered by these practices. Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308.

15. *Illinois.*— Gilbert *v.* Holmes, 64 Ill. 548.

New York.— Merritt *v.* Lambert, 10 Paige (N. Y.) 352; Arden *v.* Patterson, 5 Johns. Ch. (N. Y.) 44; Berrien *v.* McLane, Hoffm. (N. Y.) 421.

Pennsylvania.— Gribbel *v.* Brown, 9 Pa. Dist. 524.

United States.— Gregerson *v.* Imlay, 4 Blatchf. (U. S.) 503, 10 Fed. Cas. No. 5,795.

England.— Elborough *v.* Ayres, L. R. 10 Eq. 367, 39 L. J. Ch. 601, 23 L. T. Rep. N. S. 68, 18 Wkly. Rep. 913; De Hoghton *v.* Money, L. R. 2 Ch. 164, 15 L. T. Rep. N. S. 403, 15 Wkly. Rep. 214; Powell *v.* Knowler, 2 Atk. 224; Cholmondeley *v.* Clinton, 4 Bligh 1, 2 Jac. & W. 1, 2 Meriv. 171, 4 Eng. Reprint 721; *In re* Paris Skating Rink Co., 5 Ch. D. 959, 37 L. T. Rep. N. S. 298, 25 Wkly. Rep. 701; Reynell *v.* Sprye, 1 De G., M. & G. 660, 21 L. J. Ch. 633, 50 Eng. Ch. 510; Strachan *v.* Brander, 1 Eden 303; Kenney *v.* Browne, 3 Ridg. P. C. 462; Wood *v.* Downes, 18 Ves. Jr. 120, 11 Rev. Rep. 160; Stevens *v.* Bagwell, 15 Ves. Jr. 139, 10 Rev. Rep. 46; Wallis *v.* Portland, 3 Ves. Jr. 494, 4 Rev. Rep. 78; Prosser *v.* Edmonds, 1 Y. & C. Exch. 481.

Canada.— Wigle *v.* Setterington, 19 Grant Ch. (U. C.) 512; Little *v.* Hawkins, 19 Grant Ch. (U. C.) 267; Muchall *v.* Banks, 10 Grant Ch. (U. C.) 25.

Contract savoring of champerty.—An agreement may amount to champerty or maintenance, or savor of champerty, though made between persons not standing in the relation of solicitor and client, or in any analogous relation, and such agreement, if not amounting strictly to champerty or maintenance so as to constitute a punishable offense, may still be against the policy of the law and mischievous and such as a court of equity ought to discourage and relieve against. Reynell *v.* Sprye, 8 Hare 222, 32 Eng. Ch. 222.

16. Campbell *v.* Jones, 4 Wend. (N. Y.) 306; Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Sherley *v.* Riggs, 11 Humphr. (Tenn.) 52; Master *v.* Miller, 4 T. R. 320; Allan *v.* McHeffey, 5 Nova Scotia 120; Welbourne *v.* Canadian Pac. R. Co., 16 Ont. Pr. 343.

17. Dorwin *v.* Smith, 35 Vt. 69; Findon *v.* Parker, 7 Jur. 903, 12 L. J. Exch. 444, 11 M. & W. 975.

2. In the United States. The courts of the states of the United States having the English common law as a basis of their systems of jurisprudence differ as to the extent to which the principles of the common law and the provisions of the early English statutes should be deemed to have been introduced into their respective systems.[18] The tendency of the courts, however, is strongly in the direction of relaxing the stringency of the doctrine of the common law so as to permit greater liberty of contract between an attorney and client than was formerly allowed, and this for the reason that the peculiar condition of society which gave rise to the doctrine has in a great measure passed away.[19] In some of the states the common-law doctrine seems to have been accepted by the courts in general;[20] in some the doctrine has been accepted only in part;[21]

The gist of the offense is that the intermeddling is unlawful; that it is officious and in a suit which in no way belongs to the intermeddler. Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328.

18. *Connecticut.*— Richardson *v.* Rowland, 40 Conn. 565.

Kansas.— Aultman *v.* Waddle, 40 Kan. 195, 19 Pac. 730.

Minnesota.— Huber *v.* Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456.

Oregon.— Dahms *v.* Sears, 13 Oreg. 47, 11 Pac. 891.

United States.— Roberts *v.* Cooper, 20 How. (U. S.) 467, 15 L. ed. 969; Gregerson *v.* Imlay, 4 Blatchf. (U. S.) 503, 10 Fed. Cas. No. 5,795.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 1.

In Mississippi while the rule of the common law in regard to champerty has been adopted, it has been held that 32 Hen. VIII, c. 9, is not in force and the offense must be complete by the common law. Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130.

In Georgia, New York, and Virginia, if the common law and early English statutes relating to champerty were ever fully accepted, they were at an early stage superseded by local statutes. And even where accepted they were generally superseded or modified by legislation. Ellis *v.* Smith, 112 Ga. 480, 37 S. E. 739; Johnson *v.* Hilton, 96 Ga. 577, 23 S. E. 841; King *v.* Sears, 91 Ga. 577, 18 S. E. 830; Durgin *v.* Ireland, 14 N. Y. 322; Hoyt *v.* Thompson, 5 N. Y. 320; Browne *v.* West, 9 N. Y. App. Div. 135, 41 N. Y. Suppl. 146, 75 N. Y. St. 604; Lyon *v.* Hussey, 82 Hun (N. Y.) 15, 31 N. Y. Suppl. 281, 63 N. Y. St. 531; Voorhees *v.* Dorr, 51 Barb. (N. Y.) 580; Benedict *v.* Stuart, 23 Barb. (N. Y.) 420; Sedgwick *v.* Stanton, 18 Barb. (N. Y.) 473; Bundy *v.* Newton, 19 N. Y. Suppl. 734, 47 N. Y. St. 242; Peck *v.* Briggs, 3 Den. (N. Y.) 107; Small *v.* Mott, 22 Wend. (N. Y.) 403; Mott *v.* Small, 20 Wend. (N. Y.) 212; Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Lewis *v.* Broun, 36 W. Va. 1, 14 S. E. 444.

19. Sedgwick *v.* Stanton, 14 N. Y. 289; Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285; Courtright *v.* Burnes, 3 McCrary (U. S.) 60, 13 Fed. 317.

20. *Indiana.*— Hart *v.* State, 120 Ind. 88, 21 N. E. 654, 24 N. E. 151; Cleveland, etc., R. Co. *v.* Davis, 10 Ind. App. 342, 36 N. E. 778, 37 N. E. 1069.

Kansas.— Aultman *v.* Waddle, 40 Kan. 195, 19 Pac. 730; Atchison, etc., R. Co. *v.* Johnson, 29 Kan. 218.

Kentucky.— Lucas *v.* Allen, 80 Ky. 681; Lynn *v.* Moss, 23 Ky. L. Rep. 214, 62 S. W. 712.

Maine.— Hovey *v.* Hobson, 51 Me. 62; Buck *v.* Babcock, 36 Me. 491.

Massachusetts.— Ackert *v.* Parker, 131 Mass. 436; Thurston *v.* Percival, 1 Pick. (Mass.) 415.

Michigan.— Wildey *v.* Crane, 63 Mich. 720, 30 N. W. 327; Backus *v.* Byron, 4 Mich. 535.

Missouri.— Duke *v.* Harper, 66 Mo. 51, 27 Am. Rep. 314.

Oregon.— Brown *v.* Bigné, 21 Oreg. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745; Dahms *v.* Sears, 13 Oreg. 47, 11 Pac. 891.

Rhode Island.— Orr *v.* Tanner, 12 R. I. 94; Martin *v.* Clarke, 8 R. I. 389, 5 Am. Rep. 586.

Utah.— Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285. In Potter *v.* Ajax Min. Co., 19 Utah 421, 57 Pac. 270, and *In re* Evans, 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L. R. A. 952, the question is treated as one of public policy.

Vermont.— Hamilton *v.* Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

Wisconsin.— Miles *v.* Mutual Reserve Fund L. Assoc., 108 Wis. 421, 84 N. W. 159; Kelly *v.* Kelly, 86 Wis. 170, 56 N. W. 637; Davies *v.* Stowell, 78 Wis. 334, 47 N. W. 370, 10 L. R. A. 190; Martin *v.* Veeder, 20 Wis. 466; Barker *v.* Barker, 14 Wis. 131.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 1.

21. *District of Columbia.*— In Matthews *v.* Hevner, 2 App. Cas. (D. C.) 349, and Peck *v.* Heurich, 167 U. S. 627, 11 S. Ct. 927, 42 L. ed. 302, it was held that the law against the conveyance of lands held adversely had not been adopted. In the latter case and in Johnson *v.* Van Wyck, 4 App. Cas. (D. C.) 294, 41 L. R. A. 520, it was held that champertous contracts were void as against public policy.

Illinois.— In Thompson *v.* Reynolds, 73 Ill. 11, champerty was held to be illegal, and a champertous contract void. In Gilbert *v.* Holmes, 64 Ill. 548, the principle of equity

while in others it has never been adopted or become a part of their system of jurisprudence.[22]

III. CONTRACTS AND CONVEYANCES PROHIBITED.

A. Assignment of Right of Action —1. IN GENERAL. It is now the well-nigh universally accepted doctrine that the *bona fide* purchaser or assignee of a mere right of action is not guilty of champerty or maintenance;[23] nor will the fact that it may become necessary for the assignee to institute legal proceedings

against enforcing a champertous contract was applied. In Fetrow *v.* Merriwether, 53 Ill. 275, it was held that there was no law in Illinois against purchasing claims on speculation, or for the purpose of prosecuting them in the courts. In Newkirk *v.* Cone, 18 Ill. 449, it seems to have been considered that the statute defining the offense of maintenance had superseded the common law.

Minnesota.—Gammons *v.* Johnson, 69 Minn. 488, 72 N. W. 563; Huber *v.* Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456.

Montana.— Quirk *v.* Muller, 14 Mont. 467, 36 Pac. 1077, 43 Am. St. Rep. 647, 25 L. R. A. 87.

Nebraska.— Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767.

Ohio.— The rule against the conveyance of lands in adverse possession was not adopted. Hall *v.* Ashby, 9 Ohio 96, 34 Am. Dec. 424; Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565. Nor were the common law or the statutes as to criminal offenses. Key *v.* Vattier, 1 Ohio 132. But contracts are held void for champerty. Reece *v.* Kyle, 49 Ohio St. 745, 31 N. E. 747, 16 L. R. A. 723; Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 1.

22. *Arkansas.*—Lytle *v.* State, 17 Ark. 608.

California.— Howard *v.* Throckmorton, 48 Cal. 482; Ballard *v.* Carr, 48 Cal. 74; Hoffman *v.* Vallejo, 45 Cal. 564; Mathewson *v.* Fitch, 22 Cal. 86.

Connecticut.— Richardson *v.* Rowland, 40 Conn. 565.

Delaware.— Bayard *v.* McLane, 3 Harr. (Del.) 139.

Iowa.— Wright *v.* Meek, 3 Greene (Iowa) 472.

Maryland.— Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708.

New Jersey.—Schomp *v.* Schenck, 40 N. J. L. 195, 29 Am. Rep. 219.

Texas.—Wheeler *v.* Riviere, (Tex. Civ. App. 1899) 49 S. W. 697.

West Virginia.— Lewis *v.* Broun, 36 W. Va. 1, 14 S. E. 444.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 1.

23. *Alabama.*— Broughton *v.* Mitchell, 64 Ala. 210.

Colorado.— Walsh *v.* Allen, 6 Colo. App. 303, 40 Pac. 473.

Connecticut.— Metropolitan L. Ins. Co. *v.* Fuller, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196.

Illinois.— Fetrow *v.* Merriwether, 53 Ill. 275; Guthrie *v.* Wabash R. Co., 40 Ill. 109.

Indiana.— Hart *v.* State, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; Stotsenburg *v.* Marks, 79 Ind. 193.

Iowa.— Knadler *v.* Sharp, 36 Iowa 232.

Kentucky.—Chiles *v.* Conley, 9 Dana (Ky.) 385; Adkins *v.* Ferguson, 11 Ky. L. Rep. 95.

Massachusetts.— Bragg *v.* Raymond, 11 Cush. (Mass.) 274.

New York.— Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Ward *v.* Van Bokkelen, 2 Paige (N. Y.) 289.

Rhode Island.— Thompson *v.* Ide, 6 R. I. 217; Sayles *v.* Tibbitts, 5 R. I. 79.

South Carolina.— Verdier *v.* Simons, 2 McCord Eq. (S. C.) 385.

Tennessee.— Neilson *v.* Gilliam, 7 Yerg. (Tenn.) 473.

Vermont.— Danforth *v.* Streeter, 28 Vt. 490.

United States.— Lewis *v.* Bell, 17 How. (U. S.) 616, 15 L. ed. 203; Rucker *v.* Bolles, 80 Fed. 504, 49 U. S. App. 358, 25 C. C. A. 600.

England.— Williams *v.* Protheroe, 5 Bing. 309, 2 M. & P. 779, 3 Y. & J. 129, 30 Rev. Rep. 608, 15 E. C. L. 596; Hare *v.* London, etc., R. Co., Johns. Ch. (Eng.) 722, 7 Jur. N. S. 1145; Hartley *v.* Russell, 3 L. J. Ch. O. S. 146, 25 Rev. Rep. 196, 2 Sim. & St. 244; Master *v.* Miller, 4 T. R. 320; White *v.* Gardner, 1 Y. & C. Exch. 385; Scully *v.* Delaney, 2 Ir. Eq. 379.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 5; and ASSIGNMENTS, I, D [4 Cyc. 9].

In Louisiana public officers connected with courts of justice, such as judges, advocates, attorneys, clerks, and sheriffs, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages, and interest. Buck *v.* Blair, 36 La. Ann. 16; Duson *v.* Dupré, 33 La. Ann. 1131; Consolidated Assoc. *v.* Comeau, 3 La. Ann. 552. Where the parties purchasing such claims are not officers or employees of the court the prohibition contained in the statute does not apply. Gilkeson-Sloss Commission Co. *v.* Bond, 44 La. Ann. 841, 11 So. 220; Seymour *v.* Bougeat, 12 La. 123; Simmins *v.* Parker, 4 Mart. N. S. (La.) 200. A right is not litigious merely because it may give rise to litigation. There must have been a suit actually instituted. Bonner *v.* Beard, 43 La. Ann. 1036, 10 So. 373; McDougall *v.* Monlezun, 38 La. Ann. 223; Kellar *v.* Blanchard, 21 La. Ann. 38; Grayson *v.* Sanford, 12 La. Ann. 646; Pearson *v.* Grice, 6 La. Ann. 232;

to protect the thing assigned from unjust claims brought against it invest the transaction with the character of maintenance.[24] And one who has an interest in the subject-matter of a suit is not guilty of maintenance by buying the interest of plaintiff or defendant *pendente lite*, and thereafter prosecuting or defending the suit himself.[25]

2. Assignment of Equitable Title. A bill by an assignee for specific performance of a contract to convey land conditionally is not open to the objection of champerty, where the assignor had complied with the conditions of the contract previous to the assignment, and the complainant is only attempting to convert his equitable title into a legal one.[26]

3. Assignment of Right to File Bill in Equity. The assignment of a bare right to file a bill in equity for a fraud committed upon the assignor is void, being contrary to public policy and savoring of the character of maintenance.[27]

4. Right of Action For Tort. A right of action for tort may be sold or

Means *v.* Ross, 106 La. 175, 30 So. 300; Prevost *v.* Johnson, 9 Mart. (La.) 123; Morgan *v.* Livingston, 6 Mart. (La.) 19. There must also be a contest in the suit. Billiot *v.* Robinson, 13 La. Ann. 529; Morgan *v.* Livingston, 6 Mart. (La.) 19. The purchase of a claim after final judgment is not the purchase of a litigious claim. Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708; Marshall *v.* McCrea, 2 La. Ann. 79; Denton *v.* Willcox, 2 La. Ann. 60; McMicken *v.* Perin, 18 How. (U. S.) 507, 15 L. ed. 504. See also Lackey *v.* Tiffin, 12 La. Ann. 53. But a judgment in litigation under an action to nullify the same has been held to be a litigious right. Buck *v.* Blair, 36 La. Ann. 16. And a judgment pending an appeal is a litigious right. Mullen *v.* Amas, 7 La. Ann. 71; Watterston *v.* Webb, 4 La. Ann. 173. See also Buck *v.* Blair, 36 La. Ann. 16. The code provides that a party against whom a litigious right has been transferred may be released from liability by paying to the transferee the real price of the transaction, together with the interest from its date. Billiot *v.* Robinson, 13 La. Ann. 529. To avail himself of this provision he must pay or tender the price as soon as he has been made acquainted with the transfer. Duson *v.* Dupré, 33 La. Ann. 1131. The gratuitous transfer of a litigious right is not subject to the repurchase authorized by the statute. Independent Ice, etc., Mfg. Co. *v.* Anderson, 106 La. 95, 30 So. 272.

24. Fraser *v.* Charleston, 13 S. C. 533; Williams *v.* Protheroe, 5 Bing. 309, 2 M. & P. 779, 3 Y. & J. 129, 30 Rev. Rep. 608, 15 E. C. L. 596; Wilson *v.* Short, 6 Hare 366, 12 Jur. 301, 17 L. J. Ch. 289, 31 Eng. Ch. 366.

Mortgage pendente lite.—A party prosecuting his claim to a fund in court, to which he was ultimately found entitled, mortgaged it, *pendente lite*, to enable him to carry on his claim. It was held that the transaction was not void for champerty. Cockell *v.* Taylor, 15 Beav. 103, 21 L. J. Ch. 545.

The sale of a chose in action by the receivers and trustees of an insolvent corporation is in the nature of a judicial sale, and is not open to objection on the ground of champerty or maintenance. Hoyt *v.* Thompson, 5 N. Y. 320 [*reversing* 3 Sandf. (N. Y.) 416].

25. Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328; Blackerby *v.* Holton, 5 Dana (Ky.) 520; Ross *v.* Ft. Wayne, 64 Fed. 1006, 24 U. S. App. 506, 12 C. C. A. 627; Hunter *v.* Daniel, 4 Hare 420, 9 Jur. 526, 14 L. J. Ch. 194, 30 Eng. Ch. 420.

A second mortgagee may lawfully purchase the interest of a prior mortgagee which was in litigation, and contract to indemnify the latter against past and future costs, where the claim asserted against the prior mortgagee might affect the second mortgagee. Hunter *v.* Daniel, 4 Hare 420, 9 Jur. 520, 14 L. J. Ch. 197, 30 Eng. Ch. 420.

The assignment of the causes of action of several adjoining landowners to one person for the purpose of bringing one action for the determination of the issues involved is not open to the objection of champerty. Blashfield *v.* Empire State Telephone, etc., Co., 18 N. Y. Suppl. 250. But where a tax collector in Ohio had distrained property of several banks for non-payment of taxes, an assignment made by all of them after the distress to a citizen of New York, with a view of having him bring a suit in the United States courts for the recovery of the property, was held to be champertous and void. Deshler *v.* Dodge, 16 How. (U. S.) 622, 14 L. ed. 1084.

26. Davis *v.* Williams, 121 Ala. 542, 25 So. 704; Wood *v.* Griffith, 1 Swanst. 43, 18 Rev. Rep. 18.

Where there is a trust estate in lands, either actual or constructive, which is controverted by the trustee, the *cestui que trust*, or beneficiary, may, nevertheless, assign it, and the assignee may in equity enforce his rights to the same, where the assignment is *bona fide* and does not savor of maintenance. Gaudy *v.* Fortner, 119 Ala. 303, 24 So. 425; Gilman *v.* Jones, 87 Ala. 691, 5 So. 785, 7 So. 48, 4 L. R. A. 113. And the *cestui que trust* may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee. Baker *v.* Whiting, 3 Sumn. (U. S.) 45, 2 Fed. Cas. No. 787.

27. *Georgia.*— Marshall *v.* Means, 12 Ga. 61, 56 Am. Dec. 444.

Illinois.— Illinois Land, etc., Co. *v.* Speyer, 138 Ill. 137, 27 N E. 931; Norton *v.* Tuttle, 60 Ill. 130.

assigned just as any other cause of action may be, and where the assignee agrees to pay a portion of the amount recovered to the assignor such assignment and agreement do not constitute champerty.[28]

5. Effect of Indemnity Against Costs. While it is not maintenance to purchase an interest in the subject-matter of a suit,[29] yet if the vendee indemnifies the vendor against all the costs that have been or may be incurred by the vendor in the prosecution of such suit the transaction amounts to maintenance.[30]

B. Assignment or Transfer of Chattels in Adverse Possession — 1. Rule at Common Law — a. In General. Choses in action, as contradistinguished from things in possession, were not assignable at common law; the reason of the rule being to prevent maintenance and to discourage litigation.[31] Hence, where personal property was in the adverse possession of a third person claiming it as his own, the sale or assignment of such chattel, even by the real owner, was held to be against public policy and void.[32] If, however, the possession of the third per-

Maryland.— Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708.

Michigan.— Dayton *v.* Fargo, 45 Mich. 153, 7 N. W. 758; Dickinson *v.* Seaver, 44 Mich. 624, 7 N. W. 182; Brush *v.* Sweet, 38 Mich. 574; Morris *v.* Morris, 5 Mich. 171; Carroll *v.* Potter, Walk. (Mich.) 355.

Missouri.— Smith *v.* Harris, 43 Mo. 557.

Nevada.— Gruber *v.* Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

New York.— Gardner *v.* Adams, 12 Wend. (N. Y.) 297; Ward *v.* Van Bokkelen, 2 Paige (N. Y.) 289.

Tennessee.— Morrison *v.* Deaderick, 10 Humphr. (Tenn.) 341.

Virginia.— Jeffries *v.* Southwest Virginia Imp. Co., 88 Va. 862, 14 S. E. 661.

Wisconsin.— Milwaukee, etc., R. Co. *v.* Milwaukee, etc., R. Co., 20 Wis. 174, 88 Am. Dec. 740; Crocker *v.* Bellangee, 6 Wis. 645, 70 Am. Dec. 489.

United States.— Traer *v.* Clews, 115 U. S. 528, 6 S. Ct. 155, 29 L. ed. 467.

England.— De Hoghton *v.* Money, L. R. 2 Ch. 164, 15 L. T. Rep. N. S. 403, 15 Wkly. Rep. 214; *In re* Paris Skating Rink Co., 5 Ch. D. 959, 37 L. T. Rep. N. S. 298, 25 Wkly. Rep. 701; Prosser *v.* Edmonds, 1 Y. & C. Exch. 481; Twiss *v.* Noblett, Ir. R. 4 Eq. 65.

28. Vimont *v.* Chicago, etc., R. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9; Gray *v.* McCallister, 50 Iowa 497; Shafer *v.* Grimes, 23 Iowa 550; Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132; McKinlay *v.* McGregor, 10 Iowa 111; Carson *v.* McFadden, 10 Iowa 91; Snyder *v.* Wabash, etc., R. Co., 86 Mo. 613 [*overruling* Wallen *v.* St. Louis, etc., R. Co., 74 Mo. 521]; Rucker *v.* Bolles, 80 Fed. 504, 49 U. S. App. 358, 25 C. C. A. 600.

Contra.— Wintermute *v.* Humphrey, 1 Ohio Dec. (Reprint) 439, 10 West. L. J. 52.

29. See *supra*, III, A, 1.

30. Poe *v.* Davis, 29 Ala. 676; Harrington *v.* Long, 2 Myl. & K. 590, 7 Eng. Ch. 590; Stevens *v.* Bagwell, 15 Ves. Jr. 139, 10 Rev. Rep. 46.

Assignment of litigious rights.— Where a patentee fourteen years after the issuance of his patent assigned such patent with full knowledge of both the assignor and assignee that the same had been infringed, the assignee agreeing to prosecute suits against the infringers at his own expense and divide the recoveries with the assignor, such agreement was held to be champertous and unenforceable. Keiper *v.* Miller, 68 Fed. 627. See also Campbell *v.* Dexter, 17 App. Cas. (D. C.) 454.

31. Hinton *v.* Nelms, 13 Ala. 222; Stedman *v.* Riddick, 11 N. C. 29; 2 Bl. Comm. 389; Coke Litt. 214. See also Assignments, I, B [4 Cyc. 7].

32. *Alabama.*— Foy *v.* Cochran, 88 Ala. 353, 6 So. 685; Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349; Huddleston *v.* Huey, 73 Ala. 215; Foster *v.* Goree, 5 Ala. 424; Dunklin *v.* Wilkins, 5 Ala. 199; Brown *v.* Lipscomb, 9 Port. (Ala.) 472; Goodwin *v.* Lloyd, 8 Port. (Ala.) 237. See also Billingsley *v.* Harrell, 11 Ala. 775.

Illinois.— O'Keefe *v.* Kellogg, 15 Ill. 347; McGoon *v.* Ankeny, 11 Ill. 558; Erickson *v.* Lyon, 26 Ill. App. 17.

Kentucky.— Young *v.* Ferguson, 1 Litt. (Ky.) 298.

Mississippi.— Davis *v.* Herndon, 39 Miss. 484. See also Hundley *v.* Buckner, 6 Sm. & M. (Miss.) 70.

New York.— Gardner *v.* Adams, 12 Wend. (N. Y.) 297.

North Carolina.— Stedman *v.* Riddick, 11 N. C. 29.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 14.

The mere fact that a third party sets up a hostile claim is not sufficient to bring the case within the rule, but the possession must have been acquired and asserted in good faith in order to change the title of the owner into a right of action. Carlos *v.* Ansley, 8 Ala. 900; Dunbar *v.* McFall, 9 Humphr. (Tenn.) 505.

Time of assignment.— Whenever the question is raised that nothing passed by an assignment or grant, by reason of the fact that at the time thereof possession was in another adverse to the assignor or grantor, then the time to which the assignment or grant is to relate is the time when the bargain for the assignment or transfer was finally concluded between the parties; and consequently any intermediate adverse possession before the

son was derived from and held in subordination to that of the owner, as in the case of a bailment, such owner might sell or assign such chattel, and his vendee would have the right to sue for its recovery, if the possession was improperly withheld.[33]

b. Judicial Sales. The rule against maintenance, where the property in question was in adverse possession at the time of sale, does not apply to a judicial sale or to a sale made by a public officer under legal process.[34]

2. Rule in United States. The rule now recognized in most of the states of the United States is that the sale or assignment of personal property which at the time of such sale or assignment is in the adverse possession of a third person claiming title thereto is not open to the objection of champerty or maintenance,[35] and a person may assign his equity of redemption in securities held by a third person, even *pendente lite*, without being guilty of maintenance.[36]

C. Contracts Between Attorney and Client — 1. For Contingent Fees — a. Where Attorney Defrays Costs — (i) *At Common Law.* Contracts between attorney and client by which the former agrees, in consideration of having a part of the money or thing recovered, to support at his own expense the litigation of the latter or to indemnify the latter against costs and charges are regarded as being within the prohibition of the ancient common law against champerty, and also of the early English statutes.[37]

(ii) *In the United States* — (A) *In General.* Such contracts are likewise regarded as champertous in states which have adopted, even in a modified form, the common-law rule in regard to champerty and maintenance.[38]

execution of the conveyance (which is only the technical consummation or evidence of the assignment or grant) can never affect such transfer. Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349; West *v.* Drawhorn, 20 Ga. 170, 65 Am. Dec. 614; Jackson *v.* Bull, 1 Johns. Cas. (N. Y.) 81; Hale *v.* Darter, 10 Humphr. (Tenn.) 91.

33. Foster *v.* Goree, 5 Ala. 424.

Conveyance of equitable title.— This rule of the common law has been held not to apply where the assignor had conveyed an equitable interest before the adverse possession commenced, and afterward transferred the legal title to his assignee. Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349.

Purchaser at execution sale.—Possession of a chattel by a purchaser at an execution sale thereof against the mortgagor is not adverse to the mortgagee, so far as to invalidate a subsequent sale under the mortgage by the mortgagee as maintenance. Rust *v.* Electric Lighting Co., 124 Ala. 202, 27 So. 263.

34. Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Humes *v.* Bernstein, 72 Ala. 546.

35. Kimbro *v.* Hamilton, 2 Swan (Tenn.) 190; Lally *v.* Holland, 1 Swan (Tenn.) 396; Graham *v.* Graham, 10 W. Va. 355. See also The Brig Sarah Ann, 2 Sumn. (U. S.) 206, 21 Fed. Cas. No. 12,342; and *supra*, III, A, 1.

In Michigan it has been held that there is no law to prevent an attorney from buying a chattel from one person and then suing another in replevin to get possession of it. Town *v.* Tabor, 34 Mich. 262.

36. Poe *v.* Davis, 29 Ala. 676; Hoppiss *v.* Eskridge, 37 N. C. 54.

37. Peck *v.* Heurich, 167 U. S. 624, 17 S. Ct. 927, 42 L. ed. 302; Gregerson *v.* Imlay, 4 Blatchf. (U. S.) 503, 10 Fed. Cas. No. 5,795; Swanston *v.* Morning Star Min. Co., 4 McCrary (U. S.) 241, 13 Fed. 215; Courtright *v.* Burnes, 3 McCrary (U. S.) 60, 13 Fed. 317; Grell *v.* Levy, 16 C. B. N. S. 73, 10 Jur. N. S. 210, 9 L. T. Rep. N. S. 721, 12 Wkly. Rep. 378, 111 E. C. L. 73; Earle *v.* Hopwood, 9 C. B. N. S. 566, 7 Jur. N. S. 775, 30 L. J. C. P. 217, 3 L. T. Rep. N. S. 670, 9 Wkly. Rep. 272, 99 E. C. L. 566; James *v.* Kerr, 40 Ch. D. 449, 53 J. P. 628, 58 L. J. Ch. 355, 60 L. T. Rep. N. S. 212, 37 Wkly. Rep. 279; Knight *v.* Bowyer, 2 De G. & J. 421, 4 Jur. N. S. 569, 27 L. J. Ch. 521, 6 Wkly. Rep. 565, 61 Eng. Ch. 334; Strachan *v.* Brander, 1 Eden 304; Hunter *v.* Daniel, 4 Hare 420, 9 Jur. 520, 14 L. J. Ch. 197, 30 Eng. Ch. 420; *In re* Masters, 1 Harr. & W. 348; Harrington *v.* Long, 2 Myl. & K. 590, 7 Eng. Ch. 590; Strange *v.* Brennan, 15 Sim. 346, 38 Eng. Ch. 346; Stevens *v.* Bagwell, 15 Ves. Jr. 139, 10 Rev. Rep. 46; O'Connor *v.* Gemmill, 26 Ont. App. 47 [*affirming* 29 Ont. 47].

Supplying funds for suit.—A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy; but agreements of this kind ought to be carefully watched, and when found to be extortionate, unconscionable, or made for improper objects, such as the purpose of gambling in litigation, or injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them. Coondoo *v.* Mookerjee, 2 App. Cas. 186.

38. *Alabama.*— Byrd *v.* Odem, 9 Ala. 755.

Georgia.— Taylor *v.* Hinton, 66 Ga. 743; Meeks *v.* Dewberry, 57 Ga. 263.

(B) *Where Common-Law Rule Is Not Recognized.* In states in which the common-law doctrine of champerty and maintenance has not been adopted it has been held that there is nothing contrary to law, morals, or public policy in a contract by an attorney to recover land or other property for an interest in it, even though he also agrees to pay the costs and expenses.[39]

b. Where Client Defrays Costs — (I) *In Absence of Statutory Provisions* — (A) *In General.* Where the attorney does not undertake to support the litigation at his own expense, or to indemnify the client against costs and charges, but merely agrees to render the ordinary services of an attorney, in consideration of receiving a percentage of the money or a part of the thing recovered, the courts are not agreed, in the absence of statute, as to whether this constitutes champerty or not.[40] One line of decisions declares that this does not constitute

Illinois.— Greer *v.* Frank, 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110; Coleman *v.* Billings, 89 Ill. 183; Thompson *v.* Reynolds, 73 Ill. 11; Gilbert *v.* Holmes, 64 Ill. 548. *Compare* Dunne *v.* Herrick, 37 Ill. App. 180.

Indiana.— Quigley *v.* Thomspon, 53 Ind. 317; Coquillard *v.* Bearss, 21 Ind. 479, 83 Am. Dec. 362.

Iowa.— Hyatt *v.* Burlington, etc., R. Co., 68 Iowa 662, 27 N. W. 815; Boardman *v.* Thompson, 25 Iowa 487. See also Adye *v.* Hanna, 47 Iowa 264, 29 Am. Rep. 484.

Kansas.— Atchison, etc., R. Co. *v.* Johnson, 29 Kan. 218.

Maine.— Low *v.* Hutchinson, 37 Me. 196.

Massachusetts.— Lancy *v.* Havender, 146 Mass. 615, 16 N. E. 464; Thurston *v.* Percival, 1 Pick. (Mass.) 415. See also Belding *v.* Smythe, 138 Mass. 530.

Minnesota.— Huber *v.* Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456.

Missouri.—Million *v.* Ohnsorg, 10 Mo. App. 432.

New York.— Coughlin *v.* New York Cent., etc., R. Co., 71 N. Y. 443, 27 Am. Rep. 75. *Compare* Chester *v.* Jumel, 2 Silv. Supreme (N. Y.) 159, 5 N. Y. Suppl. 809, 24 N. Y. St. 214; Brotherson *v.* Consalus, 26 How. Pr. (N. Y.) 213.

North Carolina.— Slade *v.* Rhodes, 22 N. C. 24.

Ohio.— Brown *v.* Ginn, 66 Ohio St. 316, 64 N. E. 123; Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194; Key *v.* Vattier, 1 Ohio 132.

Rhode Island.— Orr *v.* Tanner, 12 R. I. 94; Martin *v.* Clarke, 8 R. I. 389, 5 Am. Rep. 586.

Tennessee.— Hayney *v.* Coyne, 10 Heisk. (Tenn.) 339.

Utah.— *In re* Evans, 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L. R. A. 952; Nelson *v.* Evans, 21 Utah 202, 60 Pac. 557; Croco *v.* Oregon Short Line Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

Wisconsin.— Kelly *v.* Kelly, 86 Wis. 170, 56 N. W. 637; Stearns *v.* Felker, 28 Wis. 594.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 26.

Evidence of agreement to defray costs.— The intention that all costs and expenses of obtaining title and possession of lands conveyed to an attorney and another in trust for that purpose shall be borne by the attorney and in no part by the grantors is shown by the stipulation that he shall receive one third of the proceeds "after paying all expenses, costs, and expenditures of" the trustees in the execution of the trust "out of the same" — evidently meaning out of his third part. Peck *v.* Heurich, 167 U. S. 624, 17 S. Ct. 927, 42 L. ed. 302.

39. *Arkansas.*— Lytle *v.* State, 17 Ark. 608.

California.— Howard *v.* Throckmorton, 48 Cal. 482; Ballard *v.* Carr, 48 Cal. 74; Hoffman *v.* Vallejo, 45 Cal. 564; Mathewson *v.* Fitch, 22 Cal. 86.

Michigan.— By How. Stat. (Mich.) § 9004, the common law relating to champerty has been virtually repealed, and under it a contract between an attorney and his client that the attorney should pay all costs incurred on account of bringing an action in case he failed to recover anything has been held to be valid. Wildey *v.* Crane, 63 Mich. 720, 30 N. W. 327.

New Jersey.— Hassell *v.* Van Houten, 39 N. J. Eq. 105.

New York.— See Fogerty *v.* Jordan, 2 Rob. (N. Y.) 319.

Oregon.— Brown *v.* Bigné, 21 Oreg. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745, where it was held that the doctrine of champerty is directed against speculation in law suits and to repress the gambling propensity by buying up doubtful claims; that it is not and never was intended to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it.

Texas.— Bentinck *v.* Franklin, 38 Tex. 458.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 26.

40. This lack of harmony seems to have arisen from the fact that one line of decisions has adopted Lord Coke's and Sergeant Hawkins' definitions of champerty, which omit the element that the champertor is to carry on the suit at his own expense (Coke Litt. 368*b*; 2 Hawkins P. C. 436, § 1. See also Lathrop *v.* Amherst Bank, 9 Metc. (Mass.) 489; Brown *v.* Bigné, 21 Oreg. 260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L. R. A. 745), while the other line has adopted the definitions of Blackstone and Chitty which make agreement by the attorney to maintain a suit at his own cost an essential element of the

champerty.[41] Another line of decisions holds that such an arrangement is champertous.[42]

offense (4 Bl. Comm. 135; 2 Chitty Contr. (11th Am. ed.) 996).

41. *Arkansas.*— Davis *v.* Wehher, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L. R. A. 196; Lytle *v.* State, 17 Ark. 608.

California.— Ballard *v.* Carr, 48 Cal. 74; Hoffman *v.* Vallejo, 45 Cal. 564.

Delaware.— Bayard *v.* McLane, 3 Harr. (Del.) 139.

Georgia.— Meeks *v.* Dewberry, 57 Ga. 263; Moses *v.* Bagley, 55 Ga. 283; Stansell *v.* Lindsay, 50 Ga. 360.

Illinois.— Geer *v.* Frank, 179 Ill. 570, 53 N. E. 965, 44 L. R. A. 110 [*affirming* 79 Ill. 195]; Phillips *v.* South Park Com'rs, 119 Ill. 626, 10 N. E. 230; Newkirk *v.* Cone, 18 Ill. 449; Rubel *v.* Elliott, 30 Ill. App. 62 [*reversed* on another point in 132 Ill. 9, 23 N. E. 400]; Millard *v.* Richland County, 13 Ill. App. 527.

Iowa.—Wallace *v.* Chicago, etc., R. Co., 112 Iowa 565, 84 N. W. 662; Rickel *v.* Chicago, etc., R. Co., 112 Iowa 148, 83 N. W. 957; Winslow *v.* Central Iowa R. Co., 71 Iowa 197, 32 N. W. 330; Jewel *v.* Neidy, 61 Iowa 299, 16 N. W. 141; McDonald *v.* Chicago, etc., R. Co., 29 Iowa 170.

Kansas.— Aultman *v.* Waddle, 40 Kan. 195, 19 Pac. 730.

Kentucky.— Rau *v.* Boyle, 5 Bush (Ky.) 253; Ramsey *v.* Trent, 10 B. Mon. (Ky.) 336; Wilhite *v.* Roberts, 4 Dana (Ky.) 172; Bell *v.* Gregory, 10 Ky. L. Rep. 636.

Louisiana.— Martinez *v.* Vives, 32 La. Ann. 305; Clay *v.* Ballard, 9 Rob. (La.) 308, 41 Am. Dec. 328; Flower *v.* O'Conner, 7 La. 194; Société de Bienfaisance, etc. *v.* Morris, Mann. Unrep. Cas. (La.) 1.

Maryland.— Wheeler *v.* Harrison, 94 Md. 147, 50 Atl. 523.

Michigan.— Millard *v.* Jordan, 76 Mich. 131, 42 N. W. 1085; Hickey *v.* Baird, 9 Mich. 32. *Compare* Backus *v.* Byron, 4 Mich. 535.

Missouri.— Duke *v.* Harper, 66 Mo. 51, 27 Am. Rep. 314.

Nebraska.— Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767.

New Jersey.— Schomp *v.* Schenck, 40 N. J. L. 195, 29 Am. Rep. 219.

New York.— Coughlin *v.* New York Cent., etc., R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Marsh *v.* Holbrook, 3 Abb. Dec. (N. Y.) 176; Fitch *v.* Gardenier, 2 Abb. Dec. (N. Y.) 153, 2 Keyes (N. Y.) 516; Whittaker *v.* New York, etc., R. Co., 54 N. Y. Super. Ct. 8, 11 N. Y. Civ. Proc. 189, 18 Abb. N. Cas. (N. Y.) 11; Ogden *v.* Des Arts, 4 Duer (N. Y.) 275; Allison *v.* Scheeper, 9 Daly (N. Y.) 365.

Ohio.— Pittsburg, etc., R. Co. *v.* Volkert, 58 Ohio St. 362, 50 N. E. 924; Reece *v.* Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L. R. A. 723; Spencer *v.* King, 5 Ohio 182.

Oregon.— Dahms *v.* Sears, 13 Oreg. 47, 11 Pac. 891.

Pennsylvania.— Perry *v.* Dicken, 105 Pa. St. 83, 51 Am. Rep. 181; Chester County *v.* Barber, 97 Pa. St. 455; Strohecker *v.* Hoffman, 19 Pa. St. 223; Dickerson *v.* Pyle, 4 Phila. (Pa.) 259, 18 Leg. Int. (Pa.) 37.

Texas.— Stewart *v.* Houston, etc., R. Co., 62 Tex. 246; Bentinck *v.* Franklin, 38 Tex. 458; Wheeler *v.* Riviere, (Tex. Civ. App. 1899) 49 S. W. 697.

Virginia.— Nickels *v.* Kane, 82 Va. 309; Major *v.* Gibson, 1 Patt. & H. (Va.) 48.

West Virginia.— Lewis *v.* Brown, 36 W. Va. 1, 14 S. E. 444; Anderson *v.* Caraway, 27 W. Va. 385.

Wisconsin.— Dockery *v.* McLellan, 93 Wis. 381, 67 N. W. 733; McLimans *v.* Lancaster, 63 Wis. 596, 23 N. W. 689; Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817; Kusterer *v.* Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725; Allard *v.* Lamirande, 29 Wis. 502; Ryan *v.* Martin, 16 Wis. 57 [*overruling* Barker *v.* Barker, 14 Wis. 131].

United States.— Jeffries *v.* New York Mut., etc., Co., 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156; Taylor *v.* Bemiss, 110 U. S. 42, 3 S. Ct. 441, 28 L. ed. 64; McPherson *v.* Cox, 96 U. S. 404, 24 L. ed. 746; Semmes *v.* Whitney, 50 Fed. 666; Maybin *v.* Raymond, 16 Fed. Cas. No. 9,338, 4 Am. L. T. Rep. N. S. 21, 15 Nat. Bankr. Reg. 353.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 24.

Settlement of criminal prosecution.—A contract whereby an attorney undertakes for a contingent fee the quashing of a criminal prosecution would not come within the rule, such a contract being against the policy of the law and unenforceable. Ormerod *v.* Dearman, 100 Pa. St. 561, 45 Am. Rep. 391.

42. *Alabama.*— Brindley *v.* Brindley, 121 Ala. 429, 25 So. 751; Elliott *v.* McClelland, 17 Ala. 206; Holloway *v.* Lowe, 7 Port. (Ala.) 488.

District of Columbia.— Stanton *v.* Haskin, 1 MacArthur (D. C.) 558, 29 Am. Rep. 612.

Indiana.— Scobey *v.* Ross, 13 Ind. 117.

Massachusetts.— Ackert *v.* Barker, 131 Mass. 436; Call *v.* Calef, 13 Metc. (Mass.) 362; Lathrop *v.* Amherst Bank, 9 Metc. (Mass.) 489; Allen *v.* Hawks, 13 Pick. (Mass.) 79; Swett *v.* Poor, 11 Mass. 549. But see Hadlock *v.* Brooks, 178 Mass. 425, 59 N. E. 1009, holding that the employment of an attorney under an agreement that he shall receive part of the recovery does not constitute champerty, unless it also contains a further element that the attorney's services shall not constitute a debt due from the client either before or after the recovery, but that the attorney must look solely to the recovery for his compensation.

New Hampshire.— Butler *v.* Legro, 62 N. H. 350, 13 Am. St. Rep. 573. *Compare* Taylor *v.* Gilman, 58 N. H. 417.

Rhode Island.— Orr *v.* Tanner, 12 R. I. 94.

United States.— See The J. Carl Jackson, 29 Fed. 396.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 24.

Agreement for fixed sum and percentage.—

(B) *Claims Against United States.* Agreements to pay contingent compensation for professional services of a legitimate character before the courts, or departments of the government of the United States, or commissions appointed under treaties to examine claims are not in violation of any rule of law or public policy.[43]

(II) *Under Statutory Provisions* — (A) *In England.* By statute, in England, a solicitor retained to prosecute any suit or action is prohibited from stipulating for payment of his fee only in the contingency of success in such suit, action, or proceeding, or from contracting for any portion of the subject-matter of the suit as his fee.[44]

(B) *In the United States.* In some states of the United States, by special statutory provisions, agreements between clients and attorneys whereby the latter were to conduct the litigation and receive as their compensation a certain percentage of the thing recovered in case of success, and nothing in case they were unsuccessful, are declared to be champertous and unenforceable.[45] In other states the statutes expressly provide that an attorney may stipulate with his client for a part of the subject-matter of the suit as compensation for his services, contingent upon the success of the litigation.[46]

Where a client gave a note to his attorney for services to be rendered in a certain suit, and at the same time executed an instrument by which he agreed to allow him one half the damages that might be recovered, the court held that the note and agreement formed but one contract, and both were champertous and void. Dumas *v.* Smith, 17 Ala. 305. See also Elliott *v.* McClelland, 17 Ala. 206, to the same effect, where the agreement was for a percentage of the claim or for a fixed sum, at the attorney's option.

43. Burbridge *v.* Fackler, 2 MacArthur (D. C.) 407; Manning *v.* Perkins, 85 Me. 172, 26 Atl. 1015; Manning *v.* Sprague, 148 Mass. 18, 18 N. E. 673, 12 Am. St. Rep. 508, 1 L. R. A. 516; Central R., etc., Co. *v.* Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 L. ed. 915; Taylor *v.* Bemiss, 110 U. S. 42, 3 S. Ct. 441, 28 L. ed. 64; Bachman *v.* Lawson, 109 U. S. 659, 3 S. Ct. 479, 27 L. ed. 1067; McPherson *v.* Cox, 96 U. S. 404, 24 L. ed. 746; Stanton *v.* Embry, 93 U. S. 548, 23 L. ed. 983; Wright *v.* Tebbitts, 91 U. S. 252, 23 L. ed. 320; Texas *v.* White, 10 Wall. (U. S.) 483, 19 L. ed. 992; Wylie *v.* Coxe, 15 How. (U. S.) 415, 14 L. ed. 753.

Agreement to divide fee with third person. —A contract whereby an attorney, in consideration of the assistance of a third party in procuring his appointment as special counsel in causes against the United States, and of aid given him in managing the defense of them, agrees to divide his fee with such party, is void, as contrary to public policy. Meguire *v.* Corwine, 101 U. S. 108, 25 L. ed. 899.

Presenting claim to congress.—An agreement to take charge of a claim against the government and prosecute it before congress as agent and attorney of the claimant for one fourth of whatever sum congress should allow is valid. Burke *v.* Child, 21 Wall. (U. S.) 441, 22 L. ed. 623.

44. Jennings *v.* Johnson, L. R. 8 C. P. 425; Grell *v.* Levy, 16 C. B. N. S. 73, 10 Jur. N. S. 210, 9 L. T. Rep. N. S. 721, 12 Wkly. Rep. 378, 111 E. C. L. 73; Earle *v.* Hopwood, 9 C. B. N. S. 566, 7 Jur. N. S. 775, 30 L. J. C. P. 217, 3 L. T. Rep. N. S. 670, 9 Wkly. Rep. 272, 99 E. C. L. 566; *In re* Attorneys, etc., Act, 1 Ch. D. 573, 45 L. J. Ch. 47, 24 Wkly. Rep. 38; Thomas *v.* Lloyd, 3 Jur. N. S. 288; Strange *v.* Brennan, 15 Sim. 346, 38 Eng. Ch. 346; Wood *v.* Downes, 18 Ves. Jr. 120, 11 Rev. Rep. 160.

45. Churchman *v.* Martin, 54 Ind. 380; Roberts *v.* Yancey, 94 Ky. 243, 15 Ky. L. Rep. 10, 21 S. W. 1047, 42 Am. St. Rep. 357; Redman *v.* Sanders, 2 Dana (Ky.) 68; Weedon *v.* Wallace, Meigs (Tenn.) 286; Moore *v.* Campbell Academy, 9 Yerg. (Tenn.) 114; Byrne *v.* Kansas City, etc., R. Co., 55 Fed. 44.

46. *Michigan.*— Denman *v.* Johnston, 85 Mich. 387, 48 N. W. 565.

Minnesota.— Canty *v.* Latterner, 31 Minn. 239, 17 N. W. 385.

New York.— Fowler *v.* Callan, 102 N. Y. 395, 7 N. E. 169; Sussdorff *v.* Schmidt, 55 N. Y. 319; Logbaum *v.* Parker, 55 N. Y. 120; Ely *v.* Cook, 28 N. Y. 365, 2 Abb. Dec. (N. Y.) 14; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Marsh *v.* Holbrook, 3 Abb. Dec. (N. Y.) 176; Hall *v.* Crouse, 13 Hun (N. Y.) 557; Brown *v.* New York, 9 Hun (N. Y.) 587; Benedict *v.* Stuart, 23 Barb. (N. Y.) 420; Porter *v.* Parmly, 39 N. Y. Super. Ct. 219. But statutes permitting agreements with attorneys for contingent fees do not take away the superintending powers of the courts over dealings between attorney and client to prevent overreaching, or abrogating the statute of champerty and maintenance. Barry *v.* Whitney, 3 Sandf. (N. Y.) 696.

Utah.— Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

West Virginia.— Lewis *v.* Broun, 36 W. Va. 1, 14 S. E. 444.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 24.

c. Where Costs Are Advanced as Loan. It is neither against public policy nor champertous for an attorney to loan his client money with which to pay costs of suit, nor to advance money necessary to carry on the suit as needed, when such advances are made as a loan, with the express or implied understanding or agreement for its repayment, and there is no contract of indemnity against the client's liability to pay costs.[47]

d. Where Fee Is Lien on Judgment. Under statutes prohibiting attorneys from contracting for contingent fees it has been held that a contract by an attorney to conduct a suit, the client agreeing to pay him a certain amount to be retained by the attorney out of the money when collected, is not champertous.[48]

2. Assignment or Purchase of Subject-Matter of Suit — a. In General. The doctrine seems to be well recognized that an attorney while holding that relation cannot, as a general rule, make a valid purchase of the subject-matter of litigation of his client, and the same is voidable at the option of the client.[49]

47. Bristol *v.* Dann, 12 Wend. (N. Y.) 142, 27 Am. Dec. 122; Potter *v.* Ajax Min. Co., 22 Utah 273, 61 Pac. 999.

48. Christie *v.* Sawyer, 44 N. H. 298; Cross *v.* Bloomer, 6 Baxt. (Tenn.) 74; Benton *v.* Henry, 2 Coldw. (Tenn.) 83; Floyd *v.* Goodwin, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130.

In Massachusetts it has been held that where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit or a part of them as security for payment the agreement is not champertous; but such an agreement would be champertous if there was to be no personal liability on the part of the client. Blaisdell *v.* Ahern, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99 [*distinguishing* Ackert *v.* Barker, 131 Mass. 436; Belding *v.* Smythe, 138 Mass. 530].

Insolvent client.— This was held to be the case where the contract was for the payment of a certain sum as a fee, the attorney knowing that his client would be utterly unable to pay it unless successful in the suit. Moore *v.* Campbell Academy, 9 Yerg. (Tenn.) 114.

49. *California.*— Bulkeley *v.* State Bank, 68 Cal. 80, 8 Pac. 643.

Illinois.— Sutherland *v.* Reeve, 151 Ill. 384, 38 N. E. 130.

Indiana.— Lafferty *v.* Jelley, 22 Ind. 471.

Louisiana.— Denny *v.* Anderson, 36 La. Ann. 762; Consolidated Assoc. *v.* Comeau, 3 La. Ann. 552; Copley *v.* Moody, 2 La. Ann. 487.

Oregon.— Dahms *v.* Sears, 13 Oreg. 47, 11 Pac. 891.

Pennsylvania.— Maires' Case, 7 Pa. Dist. 297, 21 Pa. Co. Ct. 69, 4 Lack. Leg. N. (Pa.) 139.

Texas.— Ennis *v.* Bestwick, 37 Tex. 662.

West Virginia.— Lewis *v.* Broun, 36 W. Va. 1, 14 S. E. 444.

Wisconsin.— Miles *v.* Mutual Reserve Fund L. Assoc., 108 Wis. 421, 84 N. W. 159.

England.— Simpson *v.* Lamb, 7 E. & B. 84, 3 Jur. N. S. 412, 26 L. J. Q. B. 121, 5 Wkly. Rep. 227, 90 E. C. L. 84; Wood *v.* Downes, 18 Ves. Jr. 120, 11 Rev. Rep. 160; Jones *v.* Thomas, 2 Y. & C. Exch. 498.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 36.

Burden of proof.— Where an attorney purchases the subject-matter of litigation from his client, he has the burden of proving the perfect fairness and equity of the transaction. Burnham *v.* Heselton, 82 Me. 495, 20 Atl. 80, 9 L. R. A. 90.

Purchase from third party.— In Evans *v.* Wilkinson, 6 Rob. (La.) 172, it was held that the purchase by one who had acted as attorney for defendant of a valid title to the land in litigation from persons not parties to such litigation was not the purchase of a litigious right which is declared to be null and void by the Louisiana code. See also Chenango Bank *v.* Hyde, 4 Cow. (N. Y.) 567.

In New York an attorney is prohibited by statute from purchasing or becoming in any manner interested in buying a bond, note, or other thing in action with the intent and for the purpose of bringing an action thereon. Browning *v.* Marvin, 100 N. Y. 144, 2 N. E. 635; Moses *v.* McDivitt, 88 N. Y. 62; Maxon *v.* Cain, 22 N. Y. App. Div. 270, 47 N. Y. Suppl. 855; Ramsey *v.* Gould, 57 Barb. (N. Y.) 398, 8 Abb. Pr. N. S. (N. Y.) 174, 39 How. Pr. (N. Y.) 62; Mann *v.* Fairchild, 14 Barb. (N. Y.) 548; Hall *v.* Bartlett, 9 Barb. (N. Y.) 297; Baldwin *v.* Latson, 2 Barb. Ch. (N. Y.) 306; Carpenter *v.* Cummings, 20 Misc. (N. Y.) 661, 46 N. Y. Suppl. 252 [*reversing* 18 Misc. (N. Y.) 587, 42 N. Y. Suppl. 239]; Arden *v.* Patterson, 5 Johns. Ch. (N. Y.) 44. In order to bring an attorney within the terms of this statute there must be proven an intent to obtain title for the purpose of commencing an action. Moses *v.* McDivitt, 88 N. Y. 62; Creteau *v.* Foote, etc., Glass Co., 40 N. Y. App. Div. 215, 57 N. Y. Suppl. 1103; Tilden *v.* Aitkin, 37 N. Y. App. Div. 28, 55 N. Y. Suppl. 735; Van Dewater *v.* Gear, 21 N. Y. App. Div. 201, 47 N. Y. Suppl. 503; De Forest *v.* Andrews, 27 Misc. (N. Y.) 145, 58 N. Y. Suppl. 358, 29 N. Y. Civ. Proc. 250; Williams *v.* Matthews, 3 Cow. (N. Y.) 252. The statute does not apply to the purchase of chattels (Van Dewater *v.* Gear, 21 N. Y. App. Div. 201, 47 N. Y. Suppl. 503), to a purchase of stock in a corporation (Ramsey *v.* Gould, 57 Barb. (N. Y.) 398, 8 Abb. Pr. N. S.

b. After Judgment. An attorney employed to institute suit for the recovery of property is not precluded after judgment from acquiring an interest in the property in controversy, as it is then no longer in litigation.[50]

c. In Liquidation of Precedent Debt. A grant or assignment of an interest in the subject-matter of the suit made by the client to his attorney in consideration of a precedent debt is not contrary to public policy or champertous.[51]

3. Agreement Not to Settle or Compromise. There are cases which hold that a contract with an attorney, in which it is agreed that the attorney shall prosecute the claim and receive a fee from the amount to be recovered and that the claim shall not be compromised without the consent of the attorney, is void.[52]

4. Contracts With Political Body. The contract of an attorney with a state or other political body for a fee contingent upon the amount recovered is not champertous, the reason of the law ceasing where a state is a party.[53]

(N. Y.) 174, 39 How. Pr. (N. Y.) 62), to a suit brought in a justice's court (Goodell v. People, 5 Park. Crim. (N. Y.) 206), or to a contract by a layman (Irwin *v.* Curie, 171 N. Y. 409, 64 N. E. 161). And where an attorney has purchased a bond, mortgage, or other evidence of indebtedness, with a view to the protection of other interests, and not with the primary object of bringing suit thereon, the fact that he is subsequently compelled to bring suit in order to enforce his claim does not bring him within the prohibition. Moses *v.* McDivitt, 88 N. Y. 62; Baldwin *v.* Latson, 2 Barb. Ch. (N. Y.) 306; West *v.* Kurtz, 2 N. Y. Suppl. 110, 16 N. Y. St. 696.

50. *Alabama.*—Walker *v.* Cuthbert, 10 Ala. 213.

Mississippi.— Moody *v.* Harper, 38 Miss. 599.

Missouri.— Kinealy *v.* Macklin, 10 Mo. App. 582.

Ohio.— Pittsburg, etc., R. Co. *v.* Volkert, 58 Ohio St. 362, 50 N. E. 924; Reece *v.* Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L. R. A. 723.

Tennessee.— Floyd *v.* Goodwin, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130.

United States.— McMicken *v.* Perin, 18 How. (U. S.) 507, 15 L. ed. 504.

England.—Anderson *v.* Radcliffe, E. B. & E. 806, 6 Jur. N. S. 578, 29 L. J. Q. B. 128, 1 L. T. Rep. N. S. 487, 8 Wkly. Rep. 283, 96 E. C. L. 806.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 44.

The transfer or assignment to counsel of specific parts of judgments which have been rendered, or to be rendered, is essentially different from a contract by which they are to have a part of the thing in dispute for maintaining a suit for its recovery. Price *v.* Carney, 75 Ala. 546.

Purchase of judgment.— In the absence of statutory enactment there is nothing to prevent an attorney from buying a judgment for the purpose of issuing an execution thereon and collecting the debt. Denton *v.* Willcox, 2 La. Ann. 60; Brotherson *v.* Consalus, 26 How. Pr. (N. Y.) 213; Warner *v.* Paine, 3 Barb. Ch. (N. Y.) 630. So the purchase of a senior judgment by a junior judgment creditor, an attorney at law, was held not to be void as being within the prohibition of the statute "to prevent abuses in the practice of the law" where it was made for the mere purpose of securing the younger debt. Van Rensselaer *v.* Sheriff, 1 Cow. (N. Y.) 443. See also Hall *v.* Gird, 7 Hill (N. Y.) 586.

51. Tapley *v.* Coffin, 12 Gray (Mass.) 420; Jordan *v.* Gillen, 44 N. H. 424; Christie *v.* Sawyer, 44 N. H. 298; Watson *v.* McLaren, 19 Wend. (N. Y.) 557; 1 Bacon Abr. 575. And sections 73 and 76 of the N. Y. Code of Civ. Proc., which prohibit an attorney from buying a thing in action with intent to bring an action thereon, except in payment for services rendered, do not prohibit the assignment by a client to her attorney of a cause of action on an attachment bond for services rendered in vacating the attachment. Epstein *v.* U. S. Fidelity, etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl. 527 [*reversing* 28 Misc. (N. Y.) 440, 58 N. Y. Suppl. 1135]. See also Ware *v.* Russell, 70 Ala. 174, 45 Am. Rep. 82.

In Louisiana, under the statute forbidding a purchase of litigious rights by court officers, an attorney cannot receive from his client an interest in the subject-matter of the suit in payment of a debt due to himself. Copley *v.* Lambeth, 1 La. Ann. 316.

52. *Arkansas.*— Davis *v.* Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L. R. A. 196.

Illinois.— North Chicago St. R. Co. *v.* Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177 [*reversing* 58 Ill. App. 572].

Iowa.— Boardman *v.* Thompson, 25 Iowa 487. See also Ellwood *v.* Wilson, 21 Iowa 523.

Minnesota.— Huber *v.* Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456.

Ohio.— Brown *v.* Ginn, 66 Ohio St. 316, 64 N. E. 123; Lewis *v.* Lewis, 15 Ohio 715; Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194; Key *v.* Vattier, 1 Ohio 132.

Pennsylvania.—Murray's Estate, 2 Pa. Dist. 681.

Wisconsin.— *Compare* Ryan *v.* Martin, 16 Wis. 57. See also Kusterer *v.* Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 42.

53. Millard *v.* Richland County, 13 Ill.

D. Contracts Between Laymen — 1. In General. By the common law, and in most of the states which have adopted the common law or enacted statutes on the subject, an agreement by a third person other than an attorney to defray the expenses of a suit in which he has no interest, or to give substantial support in aid thereof in consideration of a share of the recovery is champertous.[54]

2. Agreements to Furnish Evidence. An agreement to furnish such evidence as shall enable the party to recover a sum of money, or other thing, by action, and to exert influence for procuring evidence to substantiate the claim on condition of receiving a portion of the thing recovered is champertous.[55]

App. 527; State *v.* Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469.

54. *Alabama.*— Wheeler *v.* Pounds, 24 Ala. 472; Byrd *v.* Odem, 9 Ala. 755.

Georgia.— Meeks *v.* Dewberry, 57 Ga. 263.

Illinois.— Coleman *v.* Billings, 89 Ill. 183.

Kentucky.— Brown *v.* Beauchamp, 5 T. B. Mon. (Ky.) 413, 17 Am. Dec. 81.

Minnesota.—Gammons *v.* Johnson, 76 Minn. 76, 78 N. W. 1035.

New Hampshire.— Taylor *v.* Gilman, 58 N. H. 417.

New York.— Lyon *v.* Hussey, 82 Hun (N. Y.) 15, 31 N. Y. Suppl. 281, 63 N. Y. St. 531; Campbell *v.* Jones, 4 Wend. (N. Y.) 306; Burt *v.* Place, 6 Cow. (N. Y.) 431; Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Ward *v.* Van Bokkelen, 2 Paige (N. Y.) 289.

North Carolina.— Munday *v.* Whissenhunt, 90 N. C. 458; Martin *v.* Amos, 35 N. C. 201; Slade *v.* Rhodes, 22 N. C. 24.

Ohio.— Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194.

Pennsylvania.— Gribbel *v.* Brown, 9 Pa. Dist. 524; Harris *v.* Brown, 9 Pa. Dist. 521.

Tennessee.— Hayney *v.* Coyne, 10 Heisk. (Tenn.) 339.

Vermont.— Hamilton *v.* Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

Wisconsin.— Miller *v.* Larson, 19 Wis. 463; Underwood *v.* Riley, 19 Wis. 412.

United States.— Goodyear Dental Vulcanite Co. *v.* White, 10 Fed. Cas. No. 5,602, 2 N. J. L. J. 150.

England.— Reynell *v.* Sprye, 8 Hare 222, 32 Eng. Ch. 222; Littledale *v.* Thompson, 4 L. R. Ir. 43.

Canada.— *Re* Cannon, 13 Ont. 70. See also Langtry *v.* Dumoulin, 7 Ont. 644.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 4.

Indemnity against costs.— An agreement by navy agents, during the pendency of a suit in the admiralty court, to indemnify against the costs of the proceeds if prize-money was not recovered, in consideration of one-fifth share of the moneys which might be recovered, was held to be a case of champerty. Stevens *v.* Bagwell, 15 Ves. Jr. 139, 10 Rev. Rep. 46.

Correlative agreement to proceed with action not essential.—Where A advanced to B a sum of money, upon his agreement to pay to A one third of any damages he might recover in an action for tort B then had pending, it was held that this agreement amounted to champerty and was void; that in order to constitute champerty it is not essential that there should be an undertaking on the part of a litigant to proceed with the action. Ball *v.* Warwick, 50 L. J. Q. B. 382, 44 L. T. Rep. N. S. 218, 29 Wkly. Rep. 468.

55. *Illinois.*— See Goodrich *v.* Tenney, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371.

Kentucky.— Lucas *v.* Allen, 80 Ky. 681.

Montana.— Quirk *v.* Muller, 14 Mont. 467, 36 Pac. 1077, 43 Am. St. Rep. 647, 25 L. R. A. 87.

New York.—Lyon *v.* Hussey, 82 Hun (N. Y.) 15, 31 N. Y. Suppl. 281, 63 N. Y. St. 531.

Ohio.— Getchell *v.* Welday, 4 Ohio S. & C. Pl. Dec. 65.

England.— Stanley *v.* Jones, 7 Bing. 369, 20 E. C. L. 169.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 11.

Aid in levying execution.— Where A, holding a judgment against B, agreed with D that if he would discover property of B on which execution could be levied he should receive as compensation for his services one third of the amount realized on execution, it was held that the contract was not champertous, and would not have been so even had D agreed to pay a part of the expense. Hickey *v.* Baird, 9 Mich. 32.

A contract to communicate information on terms of getting a share of any property which may thereby be recovered by the person to whom the information is given is not in itself champerty; but if the contract further provides that the person who gives the information, and who is to share in what may be recovered, shall himself recover the property, or actually assist in the recovery of it, by procuring evidence or similar means, then the contract is contrary to the policy of the law and void. Rees *v.* De Bernardy, [1896] 2 Ch. 437, 65 L. J. Ch. 656, 74 L. T. Rep. N. S. 585. But see Casserleigh *v.* Wood, 14 Colo. App. 265, 59 Pac. 1024, where plaintiff supplied documentary evidence necessary to establish the citizenship of the locator of a mine in which defendants claimed an interest, by which they were able to prove their claim, and agreed to defray the expenses of litigation for a contingent fee payable out of the recovery, and the court held that since defendants desired to bring a suit to assert their claim which a verdict in their favor established to have been well founded, the contract was a valid agreement to assist in establishing a meritorious claim and was not within the statute.

3. Benevolent Aid. The rule seems to be well established that a person is not guilty of maintenance who furnishes assistance, in money or otherwise, to a poor man to enable him to carry on his suit.[56] And it has been held that such a defense would be good to an action of maintenance, where defendant acts in good faith, even where it is shown that had he made full inquiry he would have ascertained that there was no reasonable or probable grounds for the proceedings which he assisted.[57] But such a transaction must be entered into with the view of subserving the ends of justice alone, and if it is turned to the purpose of speculation by a stipulation for a share of the verdict or judgment it will amount to champerty.[58]

4. Employment of Non-Professional Agents. A person acting in good faith may lawfully employ a non-professional agent to aid and assist him in conducting a suit, in like manner as he may employ an agent in any other lawful business, and where the latter for a sufficient consideration undertakes to save the principal harmless from all costs and damages it is not maintenance, and a recovery upon the undertaking will be sustained.[59]

5. Effect of Interest — a. Actual Interest. Where a person promoting the suit of another has any interest whatever, legal or equitable, in the thing demanded, distinct from that which he may acquire by an agreement with the suitor, he is in effect also a suitor according to the nature and extent of his interest. It is accordingly a principle that any interest whatever in the subject-matter of the suit is sufficient to exempt a party giving aid to the suitor from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to the party

The release of a guarantor of a note by the holder thereof, so as to enable such guarantor to be called as a witness to maintain an action against the maker of the note, is free from the taint of maintenance. Small *v.* Mott, 22 Wend. (N. Y.) 403. See also Dorwin *v.* Smith, 35 Vt. 69.

The sale of information relative to an outstanding title to land in the adverse possession of another constitutes a good consideration for a promissory note and such sale does not amount to champerty. Lucas *v.* Pico, 55 Cal. 126.

56. Perine *v.* Dunn, 3 Johns. Ch. (N. Y.) 508; State *v.* Chitty, 1 Bailey (S. C.) 379; Sherley *v.* Riggs, 11 Humphr. (Tenn.) 52; Harris *v.* Brisco, 17 Q. B. D. 504, 55 L. J. Q. B. 423, 55 L. T. Rep. N. S. 14, 34 Wkly. Rep. 729; Anonymous, Y. B. 22 Hen. VI, 35; Pomeroy *v.* Buckfast, Y. B. 21 Hen. VI, 15; 4 Bl. Comm. 134; 1 Hawkins P. C. (8th ed.) 460.

An attorney at law may lawfully commence an action for a poor person and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Shapley *v.* Bellows, 4 N. H. 347. See also *supra*, III, C, 1.

Where a legatee, too poor to sue, assigned his legacy for less than it was worth to a person who bought it for the purpose of enforcing payment by suit, it was held that this did not amount to champerty or maintenance. Tyson *v.* Jackson, 30 Beav. 384.

57. Harris *v.* Brisco, 17 Q. B. D. 504, 55 L. J. Q. B. 423, 55 L. T. Rep. N. S. 14, 34 Wkly. Rep. 729.

58. State *v.* Chitty, 1 Bailey (S. C.) 379; *In re* Evans, 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L. R. A. 952; Hutley *v.* Hutley, L. R. 8 Q. B. 112, 42 L. J. Q. B. 52, 28 L. T. Rep. N. S. 63, 21 Wkly. Rep. 479.

Passage of parliamentary act.— Where A provided a fund for defraying the expenses of obtaining an act of parliament to dissolve the marriage of B and C, who was A's illegitimate daughter, it was held that the transaction was not illegal. Moore *v.* Usher, 4 L. J. Ch. 205, 7 Sim. 24.

59. Raymond *v.* McCleery, 15 Ky. L. Rep. 269; Bell *v.* Gregory, 10 Ky. L. Rep. 636; Joy *v.* Metcalf, 161 Mass. 514, 37 N. E. 671; Cross *v.* Bloomer, 6 Baxt. (Tenn.) 74; Sherley *v.* Riggs, 11 Humphr. (Tenn.) 52; Renshaw *v.* Tullahoma First Nat. Bank, (Tenn. Ch. 1900) 63 S. W. 194.

Action in name of third party.— Where A obtained permission to bring an action for his own benefit, in the name of B against C, to recover a debt supposed to be due, promising to indemnify B, the nominal plaintiff, against all damages and costs, it was held that the promise was valid, and that the contract did not amount to champerty. Knight *v.* Sawin, 6 Me. 361. So it is not maintenance for a person to become a trustee of another for the collection of a note. McIntyre *v.* Mancius, 16 Johns. (N. Y.) 592.

Mortgage to third person to secure attorney's fees.— Where a mortgagor procured the mortgagee to employ an attorney and to attend to certain litigation and executed the mortgage in question to secure the mortgagee for his services and for the attorney's fee for which the mortgagee had become se-

who has such an interest to participate in the suit of another.[60] So a contract between persons interested in the subject-matter of a suit, such as the vendor and vendee of a tract of land, to unite in the prosecution or defense of a suit involving such subject-matter and to share between themselves the fruits of such litigation is not champertous.[61]

b. Supposed Interest. So it has been held that one may lawfully agree to promote a suit where he has reasonable grounds to believe himself interested, though in reality he is not interested.[62]

curity, it was held that the mortgagee being in no way interested in the result of the litigation, and it being merely an employment by the mortgagee of an agent to attend to the litigation for which he was entitled to be paid as well as to be reimbursed for any moneys expended for the benefit of and at the instance of the principal, the transaction constituted neither champerty nor maintenance. Lutkenhoff *v.* Lutkenhoff, 13 Ky. L. Rep. 584, 17 S. W. 863.

60. *Alabama.*— Gilman *v.* Jones, 87 Ala. 691, 5 So. 785, 7 So. 48, 4 L. R. A. 113; Johnston *v.* Smith, 70 Ala. 108; Williamson *v.* Sammons, 34 Ala. 691; McCall *v.* Capehart, 20 Ala. 521.

Colorado.— Currency Min. Co. *v.* Bentley, 10 Colo. App. 271, 50 Pac. 920.

Illinois.— Chicago City R. Co. *v.* General Electric Co., 74 Ill. App. 465.

Indiana.— Allen *v.* Frazee, 85 Ind. 283.

Maine.— Industry *v.* Starks, 65 Me. 167; Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572.

Massachusetts.— Williams *v.* Fowle, 132 Mass. 385; Call *v.* Calef, 13 Metc. (Mass.) 362; Lathrop *v.* Amherst Bank, 9 Metc. (Mass.) 489.

New York.— Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Wickham *v.* Conklin, 8 Johns. (N. Y.) 220.

Vermont.— Dorwin *v.* Smith, 35 Vt. 69.

West Virginia.— Lewis *v.* Broun, 36 W. Va. 1, 14 S. E. 444; Anderson *v.* Caraway, 27 W. Va. 385; Graham *v.* Graham, 10 W. Va. 355.

Wisconsin.— Gilbert-Arnold Land Co. *v.* O'Hare, 93 Wis. 194, 67 N. W. 38; Davies *v.* Stowell, 78 Wis. 334, 47 N. W. 370, 10 L. R. A. 190.

England.— Bradlaugh *v.* Newdeigate, 11 Q. B. D. 1, 52 L. J. Q. B. 454, 31 Wkly. Rep. 792; Williamson *v.* Henley, 6 Bing. 299, 3 M. & P. 731, 19 E. C. L. 140; Guy *v.* Churchill, 40 Ch. D. 481, 58 L. J. Ch. 345, 60 L. T. Rep. N. S. 473, 37 Wkly. Rep. 504; Pierson *v.* Hughes, Freem. K. B. 81; Hunter *v.* Daniel, 4 Hare 420, 9 Jur. 520, 14 L. J. Ch. 197, 30 Eng. Ch. 420; Byrne *v.* Frere, 2 Molloy 157; Sharp *v.* Carter, 3 P. Wms. 374.

Canada.— Edwards *v.* Cook, Hodg. El. Cas. 617.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 15.

Advertisements to persons interested for subscriptions to defend suit.—An injunction having been granted to restrain defendants from infringing a patent for nickel plating, they gave notice of appeal and published in a newspaper an advertisement inviting the trade to subscribe toward the expense of the appeal. Plaintiffs moved to commit the publishers of the newspaper for contempt of court for publishing the advertisements as being an interference with the course of justice. It was held that as all persons engaged in the trade of plating had a common interest in resisting the claims of plaintiffs, the advertisement was open to no objection. Plating Co. *v.* Farquharson, 17 Ch. D. 49, 50 L. J. Ch. 406, 44 L. T. Rep. N. S. 389, 29 Wkly. Rep. 510.

A guarantor has an interest in a suit brought to coerce payment from the principal debtor, and such guarantor may assist pecuniarily in prosecuting the suit without being chargeable with maintenance. Bartholomew County *v.* Jameson, 86 Ind. 154.

61. *Indiana.*— Beard *v.* Puett, 105 Ind. 68, 4 N. E. 671; Allen *v.* Frazee, 85 Ind. 283.

Iowa.— Jewel *v.* Neidy, 61 Iowa 299, 16 N. W. 141; Cooley *v.* Osborne, 50 Iowa 526.

Maine.— Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572; Frost *v.* Paine, 12 Me. 111.

Michigan.— Jones *v.* Shaw, 56 Mich. 332, 23 N. W. 33.

Mississippi.— Morgan *v.* Blewett, 71 Miss. 409, 14 So. 33.

New York.— Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308 [*reversing* 20 Johns. (N. Y.) 386].

Tennessee.— Mobile, etc., R. Co. *v.* Etheridge, 16 Lea (Tenn.) 398; Tilman *v.* Searcy, 7 Humphr. (Tenn.) 346.

Wisconsin.—Davies *v.* Stowell, 78 Wis. 334, 47 N. W. 370, 10 L. R. A. 190.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 16.

Resisting parish taxes.— Where several persons who were taxed for the support of public worship in a parish where they supposed themselves not subject to taxation entered into an agreement to pay each one his proportion of the expense of defending any suit that might be commenced for the collection of such tax and of any legal mode of resisting payment thereof, such agreement was held to be valid, and that the parties thereto were not guilty of maintenance. Gowen *v.* Nowell, 1 Me. 292.

Vendor with warranty.— It is not maintenance for a vendor with warranty to uphold his vendee in a suit to establish title. Williamson *v.* Sammons, 34 Ala. 691; Allen *v.* Frazee, 85 Ind. 283.

62. Gilman *v.* Jones, 87 Ala. 691, 5 So. 785, 7 So. 48, 4 L. R. A. 113; Vaughan *v.* Marable, 64 Ala. 60; Rindge *v.* Coleraine, 11

6. Effect of Relationship — a. In General. Where a party is related by ties of consanguinity or affinity to either of the parties to a suit he may rightfully assist in the prosecution or defense of such suit either by furnishing counsel or contributing to the expense thereof, and may in order to strengthen his position purchase the interest of another party in addition to his own; agreements of this character being well-nigh universally upheld as valid.[63]

b. Where Aid Is For Speculative Purposes. The kinsman is not allowed, however, to maintain such suit as a speculative venture based upon an agreement to share in the proceeds of the litigation in case the suitor should recover.[64]

E. Contracts to Procure Claims For Collection. In some jurisdictions an attorney is prohibited by statute from entering into agreements to divide fees with or give any valuable consideration to a third person, upon such person placing claims in his hands for collection, such agreements being declared champertous and void.[65]

F. Conveyances of Land Held Adversely — 1. In General. The conveyance of land held adversely by a third person is a common-law offense, punishable by fine and imprisonment. The declaratory act of Henry VIII (32 Hen. VIII, c. 9), prohibits under prescribed penalties the buying or selling of any pretended right or title to land, unless the vendor is in actual possession of the land or of the reversion or remainder.[66] In the United States, where lands are an article of commerce, the title passing from one to another with great rapidity, the ancient

Gray (Mass.) 157; Lewis *v.* Broun, 36 W. Va. 1, 14 S. E. 444; Findon *v.* Parker, 7 Jur. 903, 12 L. J. Exch. 444, 11 M. & W. 975.

Agreement beyond common object.— While it is true that it is proper for persons having a common interest to agree to unite in the prosecution or defense of an action, such agreement must not extend beyond the common object had in view; thus, an agreement between several owners and tenants of land in a parish to unite in defending any suit commenced against any of them by the present or any future rector for the tithes of articles covered by certain specified moduses and binding themselves not to compromise or settle, such agreement not being limited to their continuance in the parish or to any particular time, would be illegal. Stone *v.* Yea, 1 Jac. 426, 4 Eng. Ch. 426.

63. *Alabama.*— Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328.

Iowa.— Wright *v.* Meek, 3 Greene (Iowa) 472.

Kentucky.— Blackerby *v.* Holton, 5 Dana (Ky.) 520.

Massachusetts.— Call *v.* Calef, 13 Metc. (Mass.) 362.

New York.— Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Perine *v.* Dunn, 3 Johns. Ch. (N. Y.) 508.

Tennessee.— Tilman *v.* Searcy, 7 Humphr. (Tenn.) 346.

Wisconsin.— Barker *v.* Barker, 14 Wis. 131.

England.— Persse *v.* Persse, 7 Cl. & F. 279, 4 Jur. 358, West H. L. 110, 7 Eng. Reprint 1073.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 15.

By the prior of two wills the eldest son of an heir at law of a testator took an estate tail in remainder. By a subsequent will this remainder was taken from him and limited to another person. The subsequent will was admitted to probate but the heir contested its validity. Afterward a compromise was effected. The heir and his son were alleged to have made a sub-agreement between themselves as to the first will (under which the son would take), and then both joined to resist the second will, which gave the estate completely away to strangers. It was held that this was not an agreement savoring of champerty. Bainbrigge *v.* Moss, 3 Jur. N. S. 58.

Seduction and breach of promise.— Under the Tennessee code, allowing a father to sue for the seduction of his daughter, though there has been no loss of service, it is not maintenance for a daughter living with her father to prosecute, with funds furnished by him, a suit for seduction and breach of promise of marriage. Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272.

64. The law of maintenance and champerty forbids the meddling by any person, not a party to the suit, whatever may be his relation to the suitor for the purpose of speculation or profit. Barnes *v.* Strong, 54 N. C. 100; *In re* Evans, 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L. R. A. 952; Barker *v.* Barker, 14 Wis. 131.

65. Alpers *v.* Hunt, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17, 9 L. R. A. 483; Allen *v.* Hawks, 13 Pick. (Mass.) 79; Gammons *v.* Johnson, 76 Minn. 76, 78 N. W. 1035; Hirschbach *v.* Ketchum, 5 N. Y. App. Div. 324, 39 N. Y. Suppl. 291.

66. 4 Bl. Comm. 134; Burton Compend. § 363; Coke Litt. 214*a*; 4 Dane Abr. c. 104, art. 3, c. 109, art. 6; 1 Hawkins P. C. c. 86. See also the following cases:

doctrine of maintenance is in many states entirely rejected. In some it has been treated as obsolete by the courts;[67] in others it has been abolished by statute;[68]

Alabama.— Dexter *v.* Nelson, 6 Ala. 68.
Iowa.— Wright *v.* Meek, 3 Greene (Iowa) 472.
Kentucky.—Chrisman *v.* Gregory, 4 B. Mon. (Ky.) 474.
Maine.— Austin *v.* Stevens, 24 Me. 520.
Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.
Mississippi.— Cassedy *v.* Jackson, 45 Miss. 397.
North Carolina.—Barnes *v.* Strong, 54 N. C. 100; Hoyle *v.* Logan, 15 N. C. 495.
Virginia.— Carrington *v.* Goddin, 13 Gratt. (Va.) 587.
Wisconsin.— Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473; Whitney *v.* Powell, 2 Pinn. (Wis.) 115, Chandl. (Wis.) 52.
United States.— Baker *v.* Whiting, 3 Sumn. (U. S.) 45, 2 Fed. Cas. No. 787.
England.—Cholmondeley *v.* Clinton, 4 Bligh 1, 2 Jac. & W. 1, 2 Meriv. 171, 4 Eng. Reprint 721; Pechell *v.* Watson, 11 L. J. Exch. 225, 8 M. & W. 691; Partridge *v.* Strange, 1 Plowd. 77; Innes *v.* Dunlop, 8 T. R. 595; Winch *v.* Keeley, 1 T. R. 619.

"It was a principle conformable to the whole genius and policy of the common law, that the grantor, in a conveyance of land, unless in the case of a mere release to the party in possession, should have in him, at the time, a right of possession; for the original simplicity of that law admitted of no estate in lands which was not clothed with the immediate seizin and possession thereof." Cassedy *v.* Jackson, 45 Miss. 397, 402.

Object of statute.— In Slywright *v.* Paige, 1 Leon. 166, 167, it was said that the meaning of 32 Hen. VIII, c. 9, concerning maintenance, was to "repress the practises of many, That when they thought they had title or right unto any Land, they for the furtherance of their pretended Right conveyed their interest in some part thereof to great persons, and with their countenance did oppress the possessors." In Baker *v.* Whiting, 3 Sumn. (U. S.) 45, 2 Fed. Cas. No. 787, it was said that "the object of the statute, as well as of the common law, was, doubtless, to prevent the buying up of controverted legal titles, which the owner did not think it worth his while to pursue, upon mere speculation; so that in fact, it might properly be deemed the mere purchase of a law-suit."

67. *California.*— Mathewson *v.* Fitch, 22 Cal. 86. See also Lucas *v.* Pico, 55 Cal. 126, decided under Cal. Civ. Code, § 1047.
Delaware.— Doe *v.* Stephens, 1 Houst. (Del.) 31.
District of Columbia.— Matthews *v.* Hevner, 2 App. Cas. (D. C.) 349.
Georgia.— Milsaps *v.* Johnson, 22 Ga. 105, in which it was held that a *qui tam* action did not lie in Georgia to recover a penalty given by 32 Hen. VIII, c. 9, for the sale of pretended titles to land. But see *infra*, note 69.

68. *Arkansas.*—Drennen *v.* Walker, 21 Ark. 539.
California.— Lucas *v.* Pico, 55 Cal. 126.
Illinois.— Willis *v.* Watson, 5 Ill. 64.
Kentucky.— Aldridge *v.* Kincaid, 2 Litt. (Ky.) 390. But see *infra*, note 69.
Maine.— Putnam Free School *v.* Fisher, 34 Me. 172; Austin *v.* Stevens, 24 Me. 520. *Compare* Buck *v.* Babcock, 36 Me. 491.
Massachusetts.— McLoud *v.* Mackie, 175 Mass. 355, 56 N. E. 714. See also Harrison *v.* Dolan, 172 Mass. 395, 52 N. E. 513. But see *infra*, note 69.
Michigan.— Since March 1, 1847, when Rev. Stat. (1846), p. 263, § 7, destroyed the common-law doctrine, lands may be conveyed notwithstanding they are at the time held adversely to the grantor. Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430. Previously the common law that land held adversely could not be lawfully conveyed had been held to be in force (Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19); but this decision was practically nullified by a later case which held that the deed was good by way of estoppel, and that the grantee could sue in the grantor's name to recover the land (Stockton *v.* Williams, 1 Dougl. (Mich.) 546).
Mississippi.— Morgan *v.* Blewett, 71 Miss. 409, 14 So. 33; Cassedy *v.* Jackson, 45 Miss. 397.
South Dakota.— See Frum *v.* Weaver, 13 S. D. 457, 83 N. W. 579.
Virginia.— Carrington *v.* Goddin, 13 Gratt. (Va.) 587.
Wisconsin.— By Wis. Stat. (1898), § 2205, the common-law rule is abrogated. It had been previously abrogated by Rev. Stat. (1849), c. 59 (Stewart *v.* McSweeney, 14 Wis. 468), but was subsequently reëstablished by Rev. Stat. (1858), c. 59, § 7 (Chase *v.* Dearborn, 21 Wis. 57; Peabody *v.* Leach, 18 Wis. 657).

in others the common law has been held to be in force;[69] while in some, statutes have been passed declaratory of the common law.[70]

2. What Constitutes Adverse Possession — a. In General. Adverse possession in order to avoid conveyances must be such as, if continued the requisite time, would ripen into title,[71] that is, it must be actual, visible, exclusive, hostile, and, in some jurisdictions, under claim of title, and in good faith.[72] Color of title

The statute of 1849 was restored by Gen. Laws (1865), c. 365.

United States.— Walden *v.* Gratz, 1 Wheat. (U. S.) 292, 4 L. ed. 94.

69. *Alabama.*—Dexter *v.* Nelson, 6 Ala. 68.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391; Nelson *v.* Brush, 22 Fla. 374; Doe *v.* Roe, 13 Fla. 602.

Georgia.— Doe *v.* Brooking, 37 Ga. 5; Gresham *v.* Webb, 29 Ga. 320 [*overruling* Cain *v.* Monroe, 23 Ga. 82]; Helms *v.* May, 29 Ga. 121; Thompson *v.* Richards, 19 Ga. 594; Way *v.* Arnold, 18 Ga. 181; Harrison *v.* Adcock, 8 Ga. 68; Harris *v.* Cannon, 6 Ga. 382; Pitts *v.* McWhorter, 3 Ga. 5, 46 Am. Dec. 405. But see Milsaps *v.* Johnson, 22 Ga. 105.

Indiana.— Steeple *v.* Downing, 60 Ind. 478; Webb *v.* Thompson, 23 Ind. 428; Hearick *v.* Doe, 4 Ind. 164; Wellman *v.* Hickson, 1 Ind. 581; Michael *v.* Doe, 1 Ind. 481; Galbreath *v.* Doe, 8 Blackf. (Ind.) 366; Martin *v.* Pace, 6 Blackf. (Ind.) 99; Fite *v.* Doe, 1 Blackf. (Ind.) 127.

Maine.—Hovey *v.* Hobson, 51 Me. 62; Buck *v.* Babcock, 36 Me. 491. But see *supra*, note 68.

Massachusetts.—Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Everenden *v.* Beaumont, 7 Mass. 76.

Michigan.—Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19. But see *supra*, note 68.

Mississippi.— See Cassedy *v.* Jackson, 45 Miss. 397; Ellis *v.* Turner, 11 Sm. & M. (Miss.) 422. But see *supra*, note 68.

North Carolina.— Williams *v.* Council, 49 N. C. 206; Hoyle *v.* Logan, 15 N. C. 495; Den *v.* Shearer, 5 N. C. 114.

Rhode Island.— Burdick *v.* Burdick, 14 R. I. 574; Campbell *v.* Point St. Iron Works, 12 R. I. 452.

Wisconsin.— See Stewart *v.* McSweeney, 14 Wis. 468; Barker *v.* Barker, 14 Wis. 131; Whitney *v.* Powell, 2 Pinn. (Wis.) 115, 1 Chandl. (Wis.) 52. And see *infra*, note 70.

70. *Connecticut.*— Sherwood *v.* Barlow, 19 Conn. 471; Goodman *v.* Newell, 13 Conn. 75, 33 Am. Dec. 378; Phelps *v.* Sage, 2 Day (Conn.) 151; Freeman *v.* Thompson, 1 Root (Conn.) 402; Holebrook *v.* Lucas, 1 Root (Conn.) 199; Isham *v.* Avery, 1 Root (Conn.) 100.

Kentucky.— A deed of land in the possession of an adverse claimant made since July 1, 1824, is void. Griffith *v.* Dicken, 2 B. Mon. (Ky.) 20; Sheperd *v.* McIntire, 5 Dana (Ky.) 574; Moss *v.* Scott, 2 Dana (Ky.) 271; Doe *v.* Lively, 1 Dana (Ky.) 60. Previous to that date the Virginia Champerty Act of 1786 making void a sale of land unless the grantor had been in possession one year had been repealed by the Ky. Stat. of 1798, but only as to titles derived from Virginia. Ring *v.* Gray, 6 B. Mon. (Ky.) 368; Chiles *v.* Jones, 4 Dana (Ky.) 479; Smith *v.* Roberson, 5 J. J. Marsh. (Ky.) 634; Young *v.* Kimberland, 2 Litt. (Ky.) 223; Conn *v.* Manifee, 2 A. K. Marsh. (Ky.) 396, 12 Am. Dec. 417; Kercheval *v.* Triplett, 1 A. K. Marsh. (Ky.) 493; Ewing *v.* Savary, 4 Bibb (Ky.) 424.

New York.— Pepper *v.* Haight, 20 Barb. (N. Y.) 429; Towle *v.* Smith, 2 Rob. (N. Y.) 489. See also Webb *v.* Bindon, 21 Wend. (N. Y.) 98, in which it was held that by the alteration of the statute of champerty in New York the taking a conveyance from a party in possession of lands, the subject of legal controversy, is no longer forbidden.

Tennessee.— Fain *v.* Headerick, 4 Coldw. (Tenn.) 327; Williams *v.* Hogan, Meigs (Tenn.) 187; Lipe *v.* Mitchell, 2 Yerg. (Tenn.) 400.

Vermont.— State University *v.* Joslyn, 21 Vt. 52.

Wisconsin.— Chase *v.* Dearborn, 21 Wis. 57; Peabody *v.* Leach, 18 Wis. 657. But see *supra*, notes 68, 69.

71. Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855.

Contra.— Crary *v.* Goodman, 22 N. Y. 170, under the terms of N. Y. Rev. Stat. p. 739, § 147. And see Barret *v.* Coburn, 3 Metc. (Ky.) 510, 514 [*citing* Baley *v.* Deakins, 5 B. Mon. (Ky.) 159; Griffith *v.* Dicken, 4 Dana (Ky.) 561; Castleman *v.* Combs, 7 T. B. Mon. (Ky.) 273], in which it is said that "it is clear that possession may be adverse under the act of limitations, without being adverse under the champerty act."

72. *Alabama.*— Williams *v.* Hatch, 38 Ala. 338.

Connecticut.— Merwin *v.* Morris, 71 Conn. 555, 42 Atl. 855; Sherwood *v.* Waller, 20 Conn. 262; Read *v.* Leeds, 19 Conn. 182.

Georgia.— Weitman *v.* Thiot, 64 Ga. 11; Davis *v.* Howard, 56 Ga. 430.

Kentucky.— Daniel *v.* McHenry, 4 Bush (Ky.) 277; Johnson *v.* Hurst, 10 Ky. L. Rep. 622, 9 S. W. 828.

Maine.— Hovey *v.* Hobson, 51 Me. 62.

New York.— Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567 [*affirming* 2 N. Y. App. Div. 617, 37 N. Y. Suppl. 1143, 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336]; Vandevoort *v.* Gould, 36 N. Y. 639, 3 Transcr. App. (N. Y.) 57; Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 37 Hun (N. Y.) 9; Moore *v.* Brown, 16 N. Y. Suppl. 592, 41 N. Y. St. 847; Rogers *v.* Eagle Fire Co., 9 Wend. (N. Y.) 611; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Jackson *v.* Demont, 9 Johns. (N. Y.) 55, 6 Am. Dec. 259; Wickham *v.* Conklin, 8 Johns. (N. Y.) 220.

is not necessary. It is enough if there be one in adverse possession exercising acts of ownership and claiming to be lawfully in possession.[73] The validity or invalidity of the grantor's title or of that of the person in possession is immaterial.[74]

b. Necessity of Actual Possession. Numerous authorities support the doctrine that in order to avoid a deed for champerty there must be an actual adverse possession by a third person at the time of the execution of the deed.[75]

Tennessee.— McSpadden *v.* Starrs Mountain Iron Co., (Tenn. Ch. 1897) 42 S. W. 497.

Virginia.— Morrison *v.* Campbell, 2 Rand. (Va.) 206.

See, generally, ADVERSE POSSESSION, 1 Cyc. 968; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 66.

It must be clearly made out by positive facts, and cannot be left to inference or conjecture. Rogers *v.* Eagle Fire Co., 9 Wend. (N. Y.) 611; Wickham *v.* Conklin, 8 Johns. (N. Y.) 220.

73. *Alabama.*— Murray *v.* Hoyle, 92 Ala. 559, 9 So. 368; Eureka Co. *v.* Edwards, 71 Ala. 248, 46 Am. Rep. 314. But see Cawsey *v.* Driver, 13 Ala. 818, in which it was held that possession of land by one not having any written evidence of title is not such an adverse possession as will avoid a deed of the land by one having the legal paper title though out of possession.

Connecticut.—Sherwood *v.* Waller, 20 Conn. 262; Read *v.* Leeds, 19 Conn. 182.

Kentucky.— Gregory *v.* Ford, 5 B. Mon. (Ky.) 471; Chrisman *v.* Gregory, 4 B. Mon. (Ky.) 474; Lillard *v.* McGee, 3 J. J. Marsh. (Ky.) 549; Bentley *v.* Childres, 9 Ky. L. Rep. 954, 7 S. W. 628; Woodford *v.* Young, 4 Ky. L. Rep. 981.

Maine.— Foxcroft *v.* Barnes, 29 Me. 128.

Mississippi.— Ellis *v.* Turner, 11 Sm. & M. (Miss.) 422.

New York.— A deed is not void under 1 N. Y. Rev. Stat. p. 739, § 147, as to a conveyance of land held adversely, unless the adverse holder claims under a specific title and not under a general claim of ownership. Danziger *v.* Boyd, 120 N. Y. 628, 24 N. E. 482, 30 N. Y. St. 889 [*affirming* 55 N. Y. Super. Ct. 537, 12 N. Y. St. 64]; Dawley *v.* Brown, 79 N. Y. 390; Matter of Dept. of Public Parks, 73 N. Y. 560; Higinbotham *v.* Stoddard, 72 N. Y. 94 [*affirming* 9 Hun (N. Y.) 1]; Christie *v.* Gage, 71 N. Y. 189; Towle *v.* Remsen, 70 N. Y. 303; Laverty *v.* Moore, 33 N. Y. 658; Crary *v.* Goodman, 22 N. Y. 170; Biglow *v.* Biglow, 39 N. Y. App. Div. 103, 56 N. Y. Suppl. 794; Jones *v.* Hoyt, 85 Hun (N. Y.) 35, 32 N. Y. Suppl. 625, 66 N. Y. St. 136; Sand *v.* Church, 70 Hun (N. Y.) 483, 20 N. Y. Suppl. 251, 54 N. Y. St. 58; Smith *v.* Faulkner, 48 Hun (N. Y.) 186, 15 N. Y. St. 637; Allen *v.* Welch, 18 Hun (N. Y.) 226; Hallas *v.* Bell, 53 Barb. (N. Y.) 247; Clark *v.* Davis, 19 N. Y. Suppl. 191, 28 Abb. N. Cas. (N. Y.) 135; Barley *v.* Roosa, 13 N. Y. Suppl. 209, 35 N. Y. St. 898, 20 N. Y. Civ. Proc. 113; Johnson *v.* Snell, 11 N. Y. Suppl. 868, 34 N. Y. St. 177; Harris *v.* Oakley, 2 N. Y. Suppl. 305, 17 N. Y. St. 198; De Silva *v.* Flynn, 9 N. Y. Civ. Proc. 426; Sayres *v.* Rathbone, 9 Abb. Pr. N. S. (N. Y.) 277.

North Dakota.— The adverse possession must be under a specific claim of title. Kreuger *v.* Schultz, 6 N. D. 310, 70 N. W. 269.

Tennessee.— Kincaid *v.* Meadows, 3 Head (Tenn.) 188; Bullard *v.* Copps, 2 Humphr. (Tenn.) 409, 37 Am. Dec. 561.

Vermont.— To avoid a deed where the grantor is not in possession under the statute of 1807, it is essential that the person in possession should claim the whole estate adverse to the grantor or under a title wholly adverse to him. Selleck *v.* Starr, 6 Vt. 194.

Virginia.— Davis *v.* Martin, 3 Munf. (Va.) 285.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 67.

74. *Alabama.*—Sharp *v.* Robertson, 76 Ala. 343.

Indiana.— Hearick *v.* Doe, 4 Ind. 164.

Kentucky.— Dubois *v.* Marshall, 3 Dana (Ky.) 336.

Massachusetts.— Barry *v.* Adams, 3 Allen (Mass.) 493. *Compare* Austin *v.* Shaw, 10 Allen (Mass.) 552, in which it was held that an entry for breach of condition by one claiming under an invalid assignment of a mortgage and subsequent possession by his administrators claiming under his title did not constitute adverse possession such as to prevent the owner of the equity of redemption from conveying his interest.

New York.— Pearce *v.* Moore, 114 N. Y. 256, 21 N. E. 419, 23 N. Y. St. 196; Thurman *v.* Cameron, 24 Wend. (N. Y.) 87; Tomb *v.* Sherwood, 13 Johns. (N. Y.) 289. *Compare* Finn *v.* Lally, 1 N. Y. App. Div. 411, 37 N. Y. Suppl. 437, 72 N. Y. St. 492; Chalmers *v.* Wright, 5 Rob. (N. Y.) 713, in which deeds made by mortgagors after void foreclosure proceedings were held valid.

See also ADVERSE POSSESSION, VII, C, 2, a [1 Cyc. 1085]; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 68.

75. *Indiana.*— Bender *v.* Stewart, 75 Ind. 88.

Kentucky.— Wickliffe *v.* Wilson, 2 B. Mon. (Ky.) 43; Cardwell *v.* Sprigg, 1 B. Mon. (Ky.) 369; Moss *v.* Scott, 2 Dana (Ky.) 271; Young *v.* McCampbell, 6 J. J. Marsh. (Ky.) 490; Rice *v.* West, 19 Ky. L. Rep. 832, 42 S. W. 116; Johnson *v.* Hurst, 10 Ky. L. Rep. 622, 9 S. W. 828.

Mississippi.— Hanna *v.* Renfro, 32 Miss. 125.

New York.— Marsh *v.* Ne-Ha-Sa-Ne Park Assoc., 18 Misc. (N. Y.) 314, 42 N. Y. Suppl. 996; Cameron *v.* Irwin, 5 Hill (N. Y.) 272.

Virginia.—Cline *v.* Catron, 22 Gratt. (Va.) 378.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 70.

An actual inclosure is not necessary to con-

Pedis possessio is not necessary,[76] but there must be such acts on the part of the adverse claimant as will indicate to the world that he has taken actual possession, the sufficiency of which is a question of fact for the determination of the jury.[77]

c. Duration of Possession. It does not require any length of adverse possession to make a sale and conveyance of land possessed by another champertous and void. The fact that it is adversely held is sufficient.[78]

d. Possession By or Under Persons Having Contingent or Limited Estates or Interests — (I) *In General.* Possession of land by or under persons having a contingent or limited estate or interest therein is not such an adverse possession as to avoid a deed made by the owner for champerty and maintenance.[79]

(II) *By Bankrupt.* The sale by an assignee in bankruptcy of lands of which he has permitted the bankrupt to remain in possession is not champertous, the possession of the bankrupt not being adverse to the assignee.[80]

(III) *By Former Owner After Execution or Tax Sale.* The possession of the former owner or his grantee after the sale of his land on execution or for taxes is not adverse to that of the vendee.[81]

(IV) *By Mortgagor or Vendor.* The possession of land by a mortgagor or a vendor after the execution of the mortgage or conveyance is not adverse to the mortgagee or grantee, so as to avoid conveyances made by the latter;[82] but a

stitute possession, but when there is no one on the land against whom an action can be brought to try the right there is no adverse possession. Moss *v.* Scott, 2 Dana (Ky.) 271.

A mere entry, though it may give possession for some purposes, does not of itself give such an actual adverse possession as will invalidate a conveyance of land made at any time after the entry and while there is no person or thing on the land indicating actual possession. Cardwell *v.* Sprigg, 1 B. Mon. (Ky.) 369.

76. Lillard *v.* McGee, 3 J. J. Marsh. (Ky.) 549; Gately *v.* Wilder, 12 Ky. L. Rep. 621, 14 S. W. 680; Hanna *v.* Renfro, 32 Miss. 125.

77. Cardwell *v.* Sprigg, 1 B. Mon. (Ky.) 369, 7 Dana (Ky.) 36; Cross *v.* Mowers, 1 N. Y. Suppl. 341, 16 N. Y. St. 425.

78. Logan *v.* Phenix, 23 Ky. L. Rep. 2300, 66 S. W. 1042; Sohier *v.* Coffin, 101 Mass. 179; Snyder *v.* Church, 70 Hun (N. Y.) 428, 24 N. Y. Suppl. 337, 53 N. Y. St. 674; Howard *v.* Howard, 17 Barb. (N. Y.) 663; Kincaid *v.* Meadows, 3 Head (Tenn.) 188.

79. Driskell *v.* Hanks, 18 B. Mon. (Ky.) 855; Christie *v.* Gage, 71 N. Y. 189; Broiestedt *v.* South Side R. Co., 55 N. Y. 220; Willis *v.* Gehlert, 34 Hun (N. Y.) 566; Hoyt *v.* Dillon, 19 Barb. (N. Y.) 644; Grout *v.* Townsend, 2 Den. (N. Y.) 336 [*affirming* 2 Hill (N. Y.) 554]; Arnold *v.* Patrick, 6 Paige (N. Y.) 310; Chairs *v.* Hobson, 10 Humphr. (Tenn.) 354; Buckmaster *v.* Needham, 22 Vt. 617; Hibbard *v.* Hurlburt, 10 Vt. 173; Catlin *v.* Kidder, 7 Vt. 12.

Equitable estates.— There can be no possession adverse to an equitable estate, unless it be at the same time adverse to the legal estate on which the equitable estate depends. Morrison *v.* Campbell, 2 Rand. (Va.) 206.

Possession of land by a husband claiming in right of his wife is not adverse so as to defeat her grantee. Vandevoort *v.* Gould, 36 N. Y. 639, 3 Transcr. App. (N. Y.) 57.

Possession of one of several joint devisees, not being to a marked and well-defined boundary, cannot be regarded as adverse, so as to render champertous the sale by another devisee of his undivided interest; and therefore the purchaser of such interest may have a division of the land, and recover for timber cut by the devisee in possession. Hemmingway *v.* Cohen, 20 Ky. L. Rep. 666, 46 S. W. 495.

80. Buckler *v.* Rogers, 21 Ky. L. Rep. 1265, 53 S. W. 529, 54 S. W. 848.

81. *Indiana.*— Webb *v.* Thompson, 23 Ind. 428; Major *v.* Brush, 7 Ind. 232; Neal *v.* Pressell, 4 Ind. 594; Foust *v.* Moorman, 2 Ind. 17.

Kentucky.— Snowdon *v.* McKinney, 7 B. Mon. (Ky.) 258.

New York.— Cook *v.* Travis, 20 N. Y. 400; Hubbell *v.* Weldon, Lalor (N. Y.) 139; Jackson *v.* Collins, 3 Cow. (N. Y.) 89.

Tennessee.— Mitchell *v.* Lipe, 8 Yerg. (Tenn.) 178, 29 Am. Dec. 116.

Wisconsin.— See Chase *v.* Dearborn, 21 Wis. 57, in which a conveyance by one claiming under a tax deed to the wife of a tenant under the owner of the land was held to be within Wis. Rev. Stat. p. 86, § 7, making void conveyances of land held adversely.

See also Adverse Possession, VI, F, 27 [1 Cyc. 1054]; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 75.

A person holding under a tax lease does not hold under an adverse title within the New York statutes of champerty. Willis *v.* Gehlert, 34 Hun (N. Y.) 566; Hoyt *v.* Dillon, 19 Barb. (N. Y.) 644.

82. *Alabama.*— Ashurst *v.* Peck, 101 Ala. 499, 14 So. 541.

Indiana.— Fite *v.* Doe, 1 Blackf. (Ind.) 127.

Kentucky.— Griffith *v.* Dicken, 4 Dana (Ky.) 561.

New York.— Jackson *v.* Jackson, 5 Cow. (N. Y.) 173.

North Carolina.— Murray *v.* Blackledge, 71 N. C. 492.

grantee in a void deed cannot claim by adverse possession as against a person claiming under a subsequent deed from his grantor who has remained in possession.[83] After payment of the debt secured by the mortgage the possession of the mortgagor will be deemed so far adverse to the grantor as to avoid a conveyance made by the latter.[84]

(v) *By Occupant After Judgment in Ejectment or Admission of Paramount Title.* The possession of land by an occupant after a judgment in ejectment against him or after his admission of the paramount title of the claimant is not adverse to the title of the true owner.[85]

(vi) *By Tenant in Common.* The possession of a tenant in common is not presumed to be adverse to his cotenant,[86] but possession under a deed given by a tenant in common or joint tenant is adverse to the other tenant.[87]

(vii) *By Tenant or Licensee.* The possession of a tenant or licensee is not adverse to his lessor or licensor,[88] and can only become so by a clear and unequivocal disclaimer brought to the notice of him under whom he holds.[89]

(viii) *By Vendee Under Executory Contract.* The possession of a vendee holding under an executory contract of purchase is not adverse to that of his vendor until he has performed the conditions of the contract or repudiated his vendee's title.[90]

Tennessee.— Curry *v.* Williams, (Tenn. Ch. 1896) 38 S. W. 278.

Vermont.— *Compare* Robinson *v.* Douglass, 2 Aik. (Vt.) 364, in which it was said that possession by the grantor of part of the land conveyed may be so adverse to the grantee as to invalidate a conveyance by the latter to a third person of premises, including the part so held adversely.

Virginia.— Duval *v.* Bibb, 3 Call (Va.) 362.

Wisconsin.—Wright *v.* Sperry, 25 Wis. 617.

See also Adverse Possession, VI, F, 1 [1 Cyc. 1039]; VI, F, 42 [1 Cyc. 1069]; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 72.

Possession of lands by a mortgagee is not adverse to the mortgagor so as to defeat his conveyance unless limitation has run, since so long as a mortgage is redeemable the possession is regarded as in trust for the mortgagor. Borst *v.* Boyd, 3 Sandf. Ch. (N. Y.) 501.

Possession of the purchaser at an execution sale against the mortgagor is not adverse to the mortgagee, so as to render a subsequent sale under the mortgage invalid. Williams *v.* Hatch, 38 Ala. 338.

83. Parks *v.* Barnett, 104 Ala. 438, 16 So. 136.

84. Lane *v.* Shears, 1 Wend. (N. Y.) 433.

85. Swager *v.* Crutchfield, 9 Bush (Ky.) 411; Batterton *v.* Chiles, 12 B. Mon. (Ky.) 348, 54 Am. Dec. 539; Jones *v.* Chiles, 2 Dana (Ky.) 25; Sand *v.* Church, 152 N. Y. 174, 46 N. E. 609; Keneda *v.* Gardner, 4 Hill (N. Y.) 469.

86. Buckmaster *v.* Needham, 22 Vt. 617; Catlin *v.* Kidder, 7 Vt. 12. See also Adverse Possession, VI, F, 44, a, *et seq.* [1 Cyc. 1071].

87. Adkins *v.* Whalen, 87 Ky. 153, 10 Ky. L. Rep. 17, 7 S. W. 912, 12 Am. St. Rep. 470; Jackson *v.* Smith, 13 Johns. (N. Y.) 406. See also cases cited *infra*, note 88.

88. Turner *v.* Thomas, 13 Bush (Ky.) 518; Baley *v.* Deakins, 5 B. Mon. (Ky.) 159; Castleman *v.* Combs, 7 T. B. Mon. (Ky.) 273; Taylor *v.* Combs, 20 Ky. L. Rep. 1828, 50 S. W. 64; Webster *v.* Van Steenbergh, 46 Barb. (N. Y.) 211; Aldis *v.* Burdick, 8 Vt. 21; Early *v.* Garland, 13 Gratt. (Va.) 1.

89. *Alabama.*— Alexander *v.* Caldwell, 61 Ala. 543.

Indiana.— Buckley *v.* Taggart, 62 Ind. 236.

Kentucky.— Barret *v.* Coburn, 3 Metc. (Ky.) 510.

Maine.— Porter *v.* Hammond, 3 Me. 188.

New York.— Church *v.* Schoonmaker, 115 N. Y. 570, 22 N. E. 575, 26 N. Y. St. 779 [*affirming* 42 Hun (N. Y.) 225]; Becker *v.* Church, 115 N. Y. 562, 22 N. E. 748, 26 N. Y. St. 775 [*affirming* 42 Hun (N. Y.) 258]; Sands *v.* Hughes, 53 N. Y. 287.

Tennessee.— Stephenson *v.* Richmond, 11 Humphr. (Tenn.) 591; Bullard *v.* Copps, 2 Humphr. (Tenn.) 409, 37 Am. Dec. 561.

See also Adverse Possession, VI, F, 37 (III) [1 Cyc. 1060]; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 77.

90. *Indiana.*— Allen *v.* Smith, 6 Blackf. (Ind.) 527.

Kentucky.— Turner *v.* Thomas, 13 Bush (Ky.) 518; Akers *v.* Percifull, 6 Ky. L. Rep. 290.

New York.— See Whitney *v.* Wright, 15 Wend. (N. Y.) 171, in which it was held that a possession under an executory contract for the purchase of land invalidates a deed executed under a title adverse to such possession. *Compare* Jackson *v.* Foster, 12 Johns. (N. Y.) 488.

South Dakota.— See Fitzgerald *v.* Miller, 7 S. D. 61, 63 N. W. 221.

Vermont.— Ripley *v.* Yale, 19 Vt. 156, 18 Vt. 220.

Virginia.— Williams *v.* Snidow, 4 Leigh (Va.) 14.

See also Adverse Possession, VI, F, 10

e. Possession by Indians. The possession of Indians existing as an independent nation is not such adverse possession as will render void an alienation by patentees of lands granted to them by the state.[91]

f. Possession by Public Officer. Where a public officer has possession of property, as a sheriff under a writ of attachment,[92] or a receiver appointed by court,[93] his possession is not of so adverse a character as to invalidate conveyances of it for champerty.[94]

g. Possession by Trespasser. The possession of a mere trespasser is not adverse to the title of the true owner.[95]

h. Possession Under Deed Procured by Fraud. Possession under a deed procured by fraud is not adverse.[96]

3. Alienations and Contracts Prohibited — a. In General. Generally speaking any alienation which has a tendency to stir up litigation is prohibited, as well those within the spirit as those within the letter of the statute.[97] Conversely, an alienation not within the spirit and policy of the statute will be upheld wherever possible, unless it is manifestly and clearly within its terms.[98] Similarly, statutes

[1 Cyc. 1044]; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 73.

91. Jackson *v.* Hudson, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500.

But no adverse possession of lands can exist in a private party while such lands are a portion of the "Indian country" and the right of occupancy in the Indians has not been terminated by the United States. Kreuger *v.* Schultz, 6 N. D. 310, 70 N. W. 269.

92. **Possession by sheriff under an attachment** is not adverse to the attachment debtor. Merrick *v.* Hutt, 15 Ark. 331; Winstandley *v.* Stipp, 132 Ind. 548, 32 N. E. 302.

93. **Possession of receiver** is sufficient to make a deed by a stranger invalid. He holds for the true owner. Ft. Wayne, etc., R. Co. *v.* Mellett, 92 Ind. 535.

94. Meigs *v.* Roberts, 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215 [*reversing* 24 Misc. (N. Y.) 668, 54 N. Y. Suppl. 214].

95. *Alabama.*— McCall *v.* Capehart, 20 Ala. 521.

Georgia.— Coggins *v.* Griswold, 64 Ga. 323.

Indiana.— Ft. Wayne, etc., R. Co. *v.* Mellett, 92 Ind. 535.

New York.— Willey *v.* Greenfield, 64 N. Y. App. Div. 220, 71 N. Y. Suppl. 1046; Bowie *v.* Brahe, 3 Duer (N. Y.) 35; Jackson *v.* Sharp, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267.

North Carolina.— Falls *v.* Carpenter, 21 N. C. 237, 28 Am. Dec. 592.

Oklahoma.— Long-Bell Lumber Co. *v.* Martin, (Okla. 1901) 66 Pac. 328.

See also Adverse Possession, VI, A, 5, b, (I) [1 Cyc. 1029]; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 76.

Contra.— Hall *v.* Hall, 3 Call (Va.) 488.

96. McMahon *v.* Allen, 35 N. Y. 403, 3 Abb. Pr. N. S. (N. Y.) 74, 32 How. Pr. (N. Y.) 313 [*reversing* 34 Barb. (N. Y.) 56, 12 Abb. Pr. (N. Y.) 275]; Moody *v.* Moody, 16 Hun (N. Y.) 189.

Possession by a fraudulent purchaser of land to defeat execution is not adverse to the judgment debtor, so as to make the execution sale a champertous conveyance by a disseizee. Daniel *v.* McHenry, 4 Bush (Ky.) 277.

97. *Connecticut.*— Sherwood *v.* Waller, 20 Conn. 262.

Indiana.— Wellman *v.* Hickson, Smith (Ind.) 407.

Kentucky.— Clay *v.* Wyatt, 6 J. J. Marsh. (Ky.) 583.

New York.—Lane *v.* Shears, 1 Wend. (N. Y.) 433.

Tennessee.— Gass *v.* Malony, 1 Humphr. (Tenn.) 452; Peck *v.* Peck, 9 Yerg. (Tenn.) 301.

England.— Doe *v.* Evans, 1 C. B. 717, 14 L. J. C. P. 237, 9 Jur. 712, 50 E. C. L. 717.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 84.

An assignment of a bid after the sale has been set aside, and the biddings opened and a sale had, is a sale of a "pretended claim." Newland *v.* Gaines, 1 Heisk. (Tenn.) 720.

Contract to acquire title by limitation.— In Glenn *v.* Mathews, 44 Tex. 400, it was held that a contract for the purpose of acquiring title to land by the statute of limitations, in which one party, having no title to the land, gave the other a deed to it, with warranty to be used as a "deed duly recorded," in the acquisition of such land, was illegal, and that no action lay for its breach.

Voluntary conveyances.— The statute extends to voluntary conveyances, as well as to such as are founded on a valuable consideration. The word "purchase" in the statute is used technically. Clay *v.* Wyatt, 6 J. J. Marsh. (Ky.) 583.

98. Henderson *v.* Peck, 3 Humphr. (Tenn.) 247.

Where a trustee in a deed of trust for benefit of creditors sells the lands of the debtor included in the deed, and the creditors credit the amount of the bid on the debtor's notes held by them, but agree not to exact payment of the bid, unless the purchaser's title shall prove good, the agreement is not champertous. In such a case the object of the sale is as fully accomplished as if the money had been paid to the trustee, and by him to the creditors. Simpson *v.* Montgomery, 25 Ark. 365, 99 Am. Dec. 228.

abrogating the common-law rule as to alienations will be liberally construed by the courts.[99]

b. Assignment of Lease. An assignment of a lease for lives is void, if the premises are adversely held by another claimant of the same leasehold estate.[1]

c. Contracts As to Land Held Adversely. An agreement, the consideration of which is the division of land adversely held upon its recovery,[2] or a share of the proceeds of the sale of land so held,[3] is champertous. On the other hand an agreement to buy land and convey an undivided interest to another, who is then to bring suit for its recovery and to pay his share of the costs is not champertous.[4] Similarly, a purchase of land under an agreement whereby the purchaser is to pay a certain price, if he can recover it from those in adverse possession, the proceedings to be instituted in the purchaser's name and at his expense, is valid.[5]

d. Conveyances After Entry. A conveyance by a person who, having the right to enter, has formally and peacefully entered on the land is good to pass his title, notwithstanding another person was in actual and adverse possession of the same land at the time of such entry and conveyance.[6]

e. Conveyances at Judicial and Official Sales, or Under Decree of Court — (I) *IN GENERAL.* Conveyances made at judicial and official sales or under decree of court of lands adversely held by third parties are not champertous either at common law or under the statutes.[7]

(II) *BY PURCHASER AT JUDICIAL SALE.* A conveyance by a purchaser at an

99. Aldridge *v.* Kincaid, 2 Litt. (Ky.) 390.

1. Mosher *v.* Yost, 33 Barb. (N. Y.) 277.

2. *District of Columbia.*— Johnson *v.* Van Wyck, 4 App. Cas. (D. C.) 294, 41 L. R. A. 520, 22 Wash. L. Rep. 713.

Georgia.— Johnson *v.* Hilton, 96 Ga. 577, 23 S. E. 841.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60.

New York.— Giddings *v.* Eastman, 1 Clarke (N. Y.) 19.

England.—Cholmondeley *v.* Clinton, 4 Bligh N. S. 1, 2 Jac. & W. 1, 2 Meriv. 171, 4 Eng. Reprint 721.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 93.

Contracts made in consideration of the conveyance of land adversely held at the time of the conveyance are invalid, and no action can be maintained thereon. Martin *v.* Pace, 6 Blackf. (Ind.) 99; Breckinridge *v.* Moore, 3 B. Mon. (Ky.) 629; Vallett *v.* Parker, 6 Wend. (N. Y.) 615; Whitaker *v.* Cone, 2 Johns. Cas. (N. Y.) 58; Witter *v.* Blodget, 4 N. Y. Leg. Obs. 263. But see Edwards *v.* Parkhurst, 21 Vt. 472, holding that a contract for the sale of land adversely held is not champertous.

3. **A promise to pay an agent for the sale of land held adversely** to the promisor a certain portion of the proceeds of the land is void. Belding *v.* Pitkin, 2 Cai. (N. Y.) 147.

4. Moore *v.* Ringo, 82 Mo. 468.

5. Torrence *v.* Shedd, 112 Ill. 466; Nichols *v.* Bunting, 10 N. C. 86. See also Pratt *v.* Pierce, 36 Me. 448, 58 Am. Dec. 758, construing Me. Rev. Stat. c. 91, § 1.

Where a party agrees with plaintiff in execution that he will purchase the property levied on, when sold by the sheriff, but it is also agreed that he is not to pay the price bid to plaintiff, unless the title is good, the contract is not within the law against champerty and maintenance. Goodwin *v.* Floyd, 10 Yerg. (Tenn.) 520.

6. Birthright *v.* Hall, 3 Munf. (Va.) 536. See also Young *v.* Kimberland, 2 Litt. (Ky.) 223, in which it was held that where the vendor acquires no seizin, by his actual entry, to sell, the vendee acquires no seizin, by his actual entry, to purchase, or by his purchase.

7. *Alabama.*— Sibley *v.* Alba, 95 Ala. 191, 10 So. 831; Humes *v.* Bernstein, 72 Ala. 546.

Connecticut.— Barney *v.* Cuttler, 1 Root (Conn.) 489.

Indiana.— Vannoy *v.* Blessing, 36 Ind. 349; McGill *v.* Doe, 9 Ind. 306. But see Martin *v.* Pace, 6 Blackf. (Ind.) 99, in which a sale and conveyance of land in the adverse possession of a third person, made by commissioners under an order of court in a partition suit, was held invalid.

Kentucky.— The Kentucky statute does not apply to titles acquired under judicial proceedings other than a sale on execution. Preston *v.* Breckinridge, 86 Ky. 619, 10 Ky. L. Rep. 2, 6 S. W. 641; White *v.* White, 2 Metc. (Ky.) 185; Little *v.* Bishop, 9 B. Mon. (Ky.) 240; Dubois *v.* Marshall, 3 Dana (Ky.) 336; Violett *v.* Violett, 2 Dana (Ky.) 323; Frizzle *v.* Veach, 1 Dana (Ky.) 211; Saunders *v.* Groves, 2 J. J. Marsh. (Ky.) 406; Kidd *v.* Central Trust, etc., Co., 23 Ky. L. Rep. 1402, 65 S. W. 355; Carlisle *v.* Cassady, 20 Ky. L. Rep. 562, 46 S. W. 490; Arnold *v.* Stephens, 13 Ky. L. Rep. 622, 17 S. W. 859; Townsend *v.* Chenault, 13 Ky. L. Rep. 319, 17 S. W. 185; Hobson *v.* Hendrick, 7 Ky. L. Rep. 362. See also Sneed *v.* Hope, 16 Ky. L. Rep. 871, 30 S. W. 20; Kenton Furnace R. Co. *v.* Lowder, 1 Ky. L. Rep. 399, in which execution sales of property held adversely to defendants in execution were held void under the statute.

Mississippi.— Hanna *v.* Renfro, 32 Miss. 125.

execution sale of lands held adversely is void as against the adverse holder;[8] but one who claims under the judgment debtor has not such an adverse possession as will avoid a conveyance made by a purchaser under an execution on the judgment.[9]

f. Conveyances Between Kindred. Relationship by blood or marriage may justify maintenance,[10] but will not, save in exceptional cases, avoid the effect of champerty.[11]

g. Conveyances Between Patentees. The purchase by a junior patentee of the title of the elder patentee to lands held adversely to the latter is champertous.[12]

h. Conveyances by Infant After Disaffirmance. There is a conflict of authority as to the validity of a conveyance by an infant after attaining his majority, of land held adversely to him under a conveyance made during infancy. On the one hand such a conveyance has been held to be valid;[13] on the other it has been held void by equally respectable authority.[14] Where the elder grantee has never been in possession the conveyance is valid.[15]

i. Conveyances by Non-Resident. In Tennessee it is provided by statute that a conveyance by a non-resident shall not be void when at the time of such convey-

New York.— Coleman *v.* Manhattan Beach Imp. Co., 94 N. Y. 229 [*affirming* 26 Hun (N. Y.) 525]; Smith *v.* Scholtz, 68 N. Y. 41; Hoyt *v.* Thompson, 5 N. Y. 320 [*reversing* 3 Sandf. (N. Y.) 416]; Sandiford *v.* Frost, 9 N. Y. App. Div. 55, 41 N. Y. Suppl. 103, 75 N. Y. St. 564; Truax *v.* Thorn, 2 Barb. (N. Y.) 156; Baldwin *v.* Ryan, 3 Thomps. & C. (N. Y.) 251; Stevens *v.* Palmer, 10 Bosw. (N. Y.) 60; Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; Varick *v.* Jackson, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571. But see De Garmo *v.* Phelps, 64 N. Y. App. Div. 590, 72 N. Y. Suppl. 773; Jackson *v.* Vrooman, 13 Johns. (N. Y.) 488.

North Carolina.—Williams *v.* Bennett, 26 N. C. 122. But see Clark *v.* Arnold, 3 N. C. 467, in which a conveyance by the trustees of the state university (the grantees of the state) was held invalid, where a third person was in possession claiming adversely.

Pennsylvania.— Jarrett *v.* Tomlinson, 3 Watts & S. (Pa.) 114.

Tennessee.— McClain *v.* Easly, 4 Baxt. (Tenn.) 520; Todd *v.* Cannon, 8 Humphr. (Tenn.) 511; Sims *v.* Cross, 10 Yerg. (Tenn.) 459; Park *v.* Larkin, 1 Overt. (Tenn.) 101.

Vermont.—Aldis *v.* Burdick, 8 Vt. 21; Farnsworth *v.* Converse, D. Chipm. (Vt.) 139.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 107.

Contra.— Carroll *v.* Dowson, 5 Cranch C. C. (U. S.) 514, 5 Fed. Cas. No. 2,452.

8. Bernstein *v.* Humes, 60 Ala. 582, 31 Am. Rep. 52; Dubois *v.* Marshall, 3 Dana (Ky.) 336; Violett *v.* Violett, 2 Dana (Ky.) 323; Frizzle *v.* Veach, 1 Dana (Ky.) 211. But see Webb *v.* Bindon, 21 Wend. (N. Y.) 98.

9. Jackson *v.* Collins, 3 Cow. (N. Y.) 89; Mitchell *v.* Lipe, 8 Yerg. (Tenn.) 178, 29 Am. Dec. 116 (under Tenn. Stat. 1821).

10. *Kentucky.*— *Compare* Howard *v.* Howard, 96 Ky. 445, 29 S. W. 285.

Mississippi.—Morris *v.* Henderson, 37 Miss. 492.

New York.— Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308 [*reversing* 20 Johns. (N. Y.) 386].

North Carolina.— Wright *v.* Cain, 93 N. C. 296.

Wisconsin.— Barker *v.* Barker, 14 Wis. 131.

England.— 4 Bl. Comm. 135; 4 Hawkins P. C. c. 27, § 26.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 105.

11. Barnes *v.* Strong, 54 N. C. 100; Fain *v.* Headerick, 4 Coldw. (Tenn.) 327. But see Thallhimer *v.* Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308 [*reversing* 20 Johns. (N. Y.) 386], in which the distinction between champerty and maintenance is rejected, so far as the justification by relationship is concerned, and it is held that wherever maintenance would be justified, the party maintaining may contract for his compensation, as well out of the property to be recovered as out of any other.

Effect of motive.—"We think, therefore, that if the rule justifying mere maintenance between relatives is to be extended so as to allow the party to contract for his compensation out of the property to be recovered in any case, it can only be carried so far as is consistent with the idea that he is influenced by that desire to benefit his relation, which the law approves, and not so far as to sustain a contract which entirely excludes that idea, and shows that he acts wholly from motives of self-interest, having bought his relative's right to litigate for a mere nominal consideration." Barker *v.* Barker, 14 Wis. 131, 145.

12. Bowling *v.* Roark, 15 Ky. L. Rep. 499, 24 S. W. 4.

13. Vallandingham *v.* Johnson, 85 Ky. 288, 8 Ky. L. Rep. 940, 3 S. W. 173; Moore *v.* Baker, 92 Ky. 518, 13 Ky. L. Rep. 724, 18 S. W. 363; Ridgely *v.* Britton, 4 Harr. & M. (Md.) 507.

14. Harrison *v.* Adcock, 8 Ga. 68; Harris *v.* Cannon, 6 Ga. 382; Murray *v.* Shanklin, 20 N. C. 357.

15. Jackson *v.* Burchin, 14 Johns. (N. Y.)

ance the lands are not adversely held by one holding under "deed, devise, or inheritance." [16]

j. Conveyances by Occupant. A conveyance is not void as being champertous, if the grantor is in actual possession at the time of its execution.[17]

k. Conveyances by State. The common-law rule and the statutes making conveyances of land held adversely void do not apply to conveyances made by the state, since the state is incapable of being disseized.[18] It seems, however, that a grant by one state may be champertous as to another state;[19] and the fact that a champertous conveyance is made by the executive officers of a state will not purge it of that vice, as being an act of the state, since only an exercise of legislative power can accomplish that result.[20]

l. Conveyances by Tenant in Common or Coparcener — (I) *IN GENERAL.* Conveyances by tenants in common or coparceners of land adversely held by their cotenants, are champertous, where it is shown by certain and satisfactory evidence that the tenant in possession has, by specific and unequivocal acts, renounced his allegiance to his cotenants.[21] Similarly a conveyance made by a tenant in common while the land is adversely held by a grantee of his cotenant is invalid.[22]

(II) *TO COTENANT.* A conveyance by one tenant in common to his cotenant of his undivided interest in land held adversely is not champertous.[23]

m. Conveyances in Performance of Lawful Executory Contracts or to Correct Mistakes. A deed to land in the adverse possession of a third person is not invalid, if executed in performance of a lawful contract entered into when the land was not so held.[24] Similarly a deed is not invalid, if executed to correct mis-

124, in which the court questioned the validity of such a conveyance if the prior grantee held actual adverse possession.

16. Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 204, 15 S. W. 737, construing Tenn. Code, § 1779, and deciding that a holding under a grant or under a decree of chancery vesting title is a holding under deed within the statute, and that therefore a sale by a non-resident, where there is such holding, is champertous and void. See also Hardwick *v.* Beard, 10 Heisk. (Tenn.) 659; McCoy *v.* Williford, 2 Swan (Tenn.) 641, in which it was held that a non-resident may lawfully sell and convey lands, though held adversely at the time of sale, if that possession be a mere naked possession without title.

17. Barret *v.* Coburn, 3 Metc. (Ky.) 510; Bledsoe *v.* Rogers, 3 Sneed (Tenn.) 466. *Compare* McCall *v.* Capehart, 20 Ala. 521, in which it was held that a contract by which a trespasser agrees to sell the possession of land acquired by the trespass cannot be sustained.

18. Allen *v.* Hoyt, Kirby (Conn.) 221; Hill *v.* Dyer, 3 Me. 441; Ward *v.* Bartholomew, 6 Pick. (Mass.) 409; Meigs *v.* Roberts, 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215 [*reversing* 24 Misc. (N. Y.) 668, 54 N. Y. Suppl. 214]; Brady *v.* Begun, 36 Barb. (N. Y.) 533; Jackson *v.* Gumaer, 2 Cow. (N. Y.) 552.

19. Woodworth *v.* Janes, 2 Johns. Cas. (N. Y.) 417, in which it was held that the individual states, having submitted their territorial claims to the judiciary of the United States, are so far to be considered as having ceded their sovereignty, and as corporations; and that their right to transfer land must be judged by the same rules of common law as the rights of other persons, natural or politic.

20. People *v.* New York, 19 How. Pr. (N. Y.) 289 [*reversing* 28 Barb. (N. Y.) 240, 17 How. Pr. (N. Y.) 56].

21. Barret *v.* Coburn, 3 Metc. (Ky.) 510; Wall *v.* Wayland, 2 Metc. (Ky.) 155; Bird *v.* Bird, 40 Me. 398. See also Harmon *v.* James, 7 Sm. & M. (Miss.) 111, 45 Am. Dec. 296, in which it is made a *quære* whether, if a tenant in common be ousted by his cotenant, he may lawfully convey his interest in the premises, or whether the deed will be void for champerty.

Contra.— Elliott *v.* Frakes, 90 Ind. 389; Patterson *v.* Nixon, 79 Ind. 251.

22. Adkins *v.* Whalin, 87 Ky. 153, 10 Ky. L. Rep. 17, 7 S. W. 912, 12 Am. St. Rep. 470; Jackson *v.* Smith, 13 Johns. (N. Y.) 406.

23. Russell *v.* Doyle, 84 Ky. 386, 8 Ky. L. Rep. 366, 1 S. W. 604; Cummins *v.* Latham, 4 T. B. Mon. (Ky.) 97; Speer *v.* Duff, 23 Ky. L. Rep. 1323, 65 S. W. 126.

24. *Connecticut.*— Gunn *v.* Scovil, 4 Day (Conn.) 234, 4 Am. Dec. 208.

Georgia.— West *v.* Drawhorn, 20 Ga. 170, 65 Am. Dec. 614.

Kentucky.— Middlesboro Waterworks *v.* Neal, 105 Ky. 586, 20 Ky. L. Rep. 1403, 49 S. W. 428; Greer *v.* Wintersmith, 85 Ky. 516, 9 Ky. L. Rep. 96, 4 S. W. 232, 7 Am. St. Rep. 613; Simon *v.* Gouge, 12 B. Mon. (Ky.) 156; Chiles *v.* Conley, 9 Dana (Ky.) 385; Chiles *v.* Jones, 7 Dana (Ky.) 528; Norton *v.* Doe, 1 Dana (Ky.) 14; Black *v.* Allen, 21 Ky. L. Rep. 620, 52 S. W. 809; Thacker *v.* Belcher, 10 Ky. L. Rep. 853, 11 S. W. 3.

New York.— Cameron *v.* Irwin, 5 Hill (N. Y.) 272.

takes in a conveyance made before the commencement of the adverse possession.[25]

n. Conveyances of Dower or Curtesy. A conveyance of the right of dower[26] or curtesy[27] in lands adversely held is void.

o. Conveyances of Easements and Incorporeal Hereditaments. Conveyances of easements and incorporeal hereditaments are not within the inhibition as to conveyances of land adversely held.[28]

p. Conveyances of Equitable Interests — (I) *In General.* The sale or purchase of equitable interests in land are not within the prohibition of conveyances of land adversely held.[29]

(II) *Equity of Redemption.* The sale or purchase of an equity of redemption is not invalid.[30]

(III) *Merger of Legal and Equitable Estates.* When a trust relation subsists between the parties, a conveyance by either that merges the legal and equitable estates is valid, though the land is in the actual adverse possession of a third person.[31]

Tennessee.—Augusta Mfg. Co. *v.* Vertrees, 4 Lea (Tenn.) 75; McCoy *v.* Williford, 2 Swan (Tenn.) 641; Hale *v.* Darter, 10 Humphr. (Tenn.) 91. But see Whiteside *v.* Martin, 7 Yerg. (Tenn.) 383.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 96.

Executory verbal contract.—A conveyance of land, made in conformity with an executory verbal contract of sale, is not champertous, though the land should be adversely possessed at the date of the conveyance. Cardwell *v.* Sprigg, 1 B. Mon. (Ky.) 369.

25. Hopkins *v.* Paxton, 4 Dana (Ky.) 36; Coleman *v.* Manhattan Beach Imp. Co., 94 N. Y. 229 [*affirming* 26 Hun (N. Y.) 525]; Fryer *v.* Rockefeller, 63 N. Y. 268; Cameron *v.* Irwin, 5 Hill (N. Y.) 272; Ross *v.* Blair, Meigs (Tenn.) 525.

A deed of confirmation, notwithstanding words of positive grant, though the grantee took no estate in the land under the original deed, is not void for champerty, though the land is held adversely to the grantor at the time the deed of confirmation is delivered. Augusta Mfg. Co. *v.* Vertrees, 4 Lea (Tenn.) 75. See also Coleman *v.* Manhattan Beach Imp. Co., 94 N. Y. 229 [*affirming* 26 Hun (N. Y.) 525].

New acknowledgment.— If a widow to whom dower has not been assigned release her right to the heirs not in possession, but such release is not duly acknowledged to pass the wife's interest before the champerty act, her acknowledgment after its passage is not champertous, unless the transaction was so in its inception. Ross *v.* Blair, Meigs (Tenn.) 525.

26. Kinsolving *v.* Pierce, 18 B. Mon. (Ky.) 782.

Contra.— Ross *v.* Blair, Meigs (Tenn.) 525.

27. Vrooman *v.* Shepherd, 14 Barb. (N. Y.) 441.

28. Sherwood *v.* Burr, 4 Day (Conn.) 244, 4 Am. Dec. 211; Hegan *v.* Pendennis Club, 23 Ky. L. Rep. 861, 64 S. W. 464; Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191 [*affirming* 39 Barb. (N. Y.) 311].

The existence of an easement in land is not such adverse possession by the servient tenant as to prevent the owner of the dominant tenement from conveying the right of soil. Witter *v.* Blodgett, 4 N. Y. Leg. Obs. 263; Everett *v.* Dockery, 52 N. C. 390.

29. *New York.*— Wilson *v.* Wilson, 32 Barb. (N. Y.) 328, 20 How. Pr. (N. Y.) 41.

Vermont.— Mitchell *v.* Stevens, 1 Aik. (Vt.) 16.

Virginia.— Allen *v.* Smith, 1 Leigh (Va.) 231.

United States.— Baker *v.* Whiting, 3 Sumn. (U. S.) 45, 2 Fed. Cas. No. 787.

England.— Wood *v.* Griffith, 1 Swanst. 43, 18 Rev. Rep. 18.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 85.

A conveyance, such as a court of equity would compel parties to make, e. g., from an administrator to an heir, is not void by reason of adverse possession at the time. Appleton *v.* Edson, 8 Vt. 239.

Property previously conveyed by voidable deed.—A conveyance, whether voluntary or for valuable consideration, of property which the grantor has previously conveyed by a deed voidable in equity, is not void on the ground of champerty. Dickinson *v.* Burrell, L. R. 1 Eq. 337, 12 Jur. N. S. 199, 35 L. J. Ch. 371, 14 Wkly. Rep. 412.

30. Tutwiler *v.* Atkins, 106 Ala. 194, 17 So. 394; Borst *v.* Boyd, 3 Sandf. Ch. (N. Y.) 501; Waggener *v.* Dyer, 11 Leigh (Va.) 400. *Compare* Wright *v.* Whithead, 14 Vt. 268, in which it was held that a purchase of a right of redemption under an agreement to pay a certain sum if the purchaser should succeed in obtaining a decree permitting him to redeem and nothing if he should fail to obtain such decree was illegal and void, where the party in possession had held possession for a long time under a deed of warranty, intended to convey the fee of the land, and had made large improvements with the knowledge of the owner of the equity, and without disturbance.

31. Townsend Sav. Bank *v.* Todd, 47 Conn. 190; Stacy *v.* Bostwick, 48 Vt. 192.

q. Conveyances Pendente Lite. A *bona fide* conveyance of land in dispute made after the commencement of the suit by plaintiff is not void for champerty or maintenance.[32] But a purchase of land while a suit concerning the title to it is pending, if made with knowledge of the suit, is void for champerty.[33]

r. Conveyances With Consent of Occupant. Where a person holding lands adversely assents to a conveyance thereof to a third person the transaction is not champertous.[34]

s. Devises. Devises are not within the rule against conveying pretended titles.[35]

t. Mortgages and Assignments Thereof. The weight of authority is to the effect that a mortgage of land adversely held or an assignment thereof, when the land is held adversely to the mortgagee, is void as to the person in possession.[36]

u. Purchase by Occupant of Outstanding Title. The statute to prevent the buying of pretended titles was not intended to prevent a person in possession from confirming his title by purchasing the rights of others, but

32. *Alabama.*— Comp *v.* Forrest, 13 Ala. 114. *Compare* Johnson *v.* Cook, 73 Ala. 537, in which it was held that a deed from plaintiff in ejectment to defendant conveying all right and title to the premises was void as against an adverse claimant in possession.

Indiana.— Frazier *v.* Harris, 51 Ind. 156; Rowe *v.* Beckett, 30 Ind. 154, 95 Am. Dec. 676.

Kentucky.— Smith *v.* Price, (Ky. 1888) 7 S. W. 918.

Maryland.—Cresap *v.* Hutson, 9 Gill (Md.) 269.

Michigan.— Michigan Cent. R. Co. *v.* McNaughton, 45 Mich. 87, 7 N. W. 712.

New York.— Requa *v.* Holmes, 26 N. Y. 338; Davis *v.* Duffie, 18 Abb. Pr. (N. Y.) 360; Parks *v.* Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; Jackson *v.* Leggett, 7 Wend. (N. Y.) 377; Clowes *v.* Hawley, 12 Johns. (N. Y.) 484. See also White *v.* Carpenter, 2 Paige (N. Y.) 217.

South Carolina.— Verdier *v.* Simons, 2 McCord Eq. (S. C.) 385.

Tennessee.— Gheen *v.* Osborne, 11 Heisk. (Tenn.) 61. See also Garretson *v.* Brien, 3 Heisk. (Tenn.) 534, in which it was held that a deed executed pending a suit, by parties to the suit, does not affect the title; but the purchaser, though not a party, is bound by the decree. *Contra*, Fowler *v.* Nixon, 7 Heisk. (Tenn.) 719.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 92.

33. West *v.* Raymond, 21 Ind. 305; Jackson *v.* Andrews, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574; Jackson *v.* Ketchum, 8 Johns. (N. Y.) 479; Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441; Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 566.

An application to the comptroller to cancel a tax sale is not a suit pending in court, within N. Y. Pen. Code, § 129, so as to make a sale of the lands in the interim champertous. Meigs *v.* Roberts, 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215 [*reversing* 24 Misc. (N. Y.) 668, 54 N. Y. Suppl. 214].

34. McIntire *v.* Patton, 9 Humphr. (Tenn.) 447; Marsh *v.* Webb, 19 Ont. App. 564 [*affirmed* in 22 Can. Supreme Ct. 437].

35. *Kentucky.*— Clay *v.* Wyatt, 6 J. J. Marsh. (Ky.) 583; May *v.* Slaughter, 3 A. K. Marsh. (Ky.) 505.

Maine.— See Palmer *v.* Dougherty, 33 Me. 502, 54 Am. Dec. 636, which held that a devise of contemplated, but not actually laid out, streets, separate from lots platted and previously devised, was not infected with maintenance, since the fee had remained in the devisor.

Mississippi.— Morris *v.* Henderson, 37 Miss. 92, a devise between near relations.

New York.— Varick *v.* Jackson, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571.

United States.— Waring *v.* Jackson, 1 Pet. (U. S.) 570, 7 L. ed. 266.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 98.

Contra.— Davis *v.* Martin, 3 Munf. (Va.) 285.

36. *Alabama.*— Jackson *v.* Singleton, 122 Ala. 323, 25 So. 204; Vandiveer *v.* Stickney, 75 Ala. 225.

Kentucky.— Redman *v.* Sanders, 2 Dana (Ky.) 68; Wash *v.* McBrayer, 1 Dana (Ky.) 565.

Michigan.— Hubbard *v.* Smith, 2 Mich. 207.

Rhode Island.— Hall *v.* Westcott, 15 R. I. 373, 5 Atl. 629, in which it was held that a mortgage of land adversely held was good in equity between the parties to it.

Vermont.— Converse *v.* Searls, 10 Vt. 578.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 88.

Contra.— Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608; Leonard *v.* Bosworth, 4 Conn. 421; Tobias *v.* New York, 17 Hun (N. Y.) 534; Curry *v.* Williams, (Tenn. Ch. 1896) 38 S. W. 278.

Partial assignment.— The right of a mortgagee to maintain a bill to foreclose is not affected by an equitable assignment of a portion of the indebtedness, he having retained the legal title, as well as a large equitable interest; since, if the assignment is champertous, it is void, and leaves the parties in the same position as they were before the assignment was made. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276.

only prohibits the purchase of latent titles in order to disturb the possession of others.[37]

v. Quitclaim Deed. A quitclaim deed is such an alienation as is prohibited where the land is held adversely to the grantor.[38]

w. Reconveyance by Vendee. A reconveyance by a vendee, who has been evicted in an action by his vendor, made while the land is adversely held by his evictor, is champertous and void.[39]

x. Release to Occupant. One whose estate is divested and turned into a mere right may release his right to the person in possession,[40] and it is immaterial whether the grantee has forcibly obtained possession from a third person on an understanding with the owner that the release shall be given him.[41]

IV. OPERATION AND EFFECT.

A. Of Prohibited Contracts Generally — 1. As Between the Parties — a. In General. Both in England and the United States agreements founded upon considerations tainted with champerty or maintenance are regarded as against public policy and void.[42] If the facts show maintenance or champerty the form of contract adopted by the champertor to defeat the effect of the law will be disregarded.[43] And a court of equity will not, any more than a court of

37. Catlin *v.* Kidder, 7 Vt. 12; Wilcox *v.* Calloway, 1 Wash. (Va.) 38.

The tenant of a tenant in common is not estopped from purchasing the titles of the other tenants; nor are their deeds to him while in possession void. Catlin *v.* Kidder, 7 Vt. 12.

38. Sherwood *v.* Barlow, 19 Conn. 471; Lambert *v.* Huber, 22 Misc. (N. Y.) 462, 50 N. Y. Suppl. 793; Vrooman *v.* Shepherd, 14 Barb. (N. Y.) 441. But see Anson *v.* Lee, 4 Sim. 364, 6 Eng. Ch. 364, in which B, claiming to be tenant in tail, with reversion to C in fee, of lands in the adverse possession of D, conveyed, by lease and release, all his interest to C, and it was held that the conveyance was not within 32 Hen. VIII, c. 9.

39. Gass *v.* Malony, 1 Humphr. (Tenn.) 452.

Where, after a sale and reconveyance, an adverse claim is set up to the land, and thereupon the vendor refunds the purchase-money to the vendee and takes a reconveyance of the land the transaction is not invalid. Martin *v.* Flowers, 8 Leigh (Va.) 158.

40. Chiles *v.* Jones, 7 Dana (Ky.) 528; Adams *v.* Buford, 6 Dana (Ky.) 406; Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130; Dias *v.* Glover, Hoffm. (N. Y.) 71; Williams *v.* Council, 49 N. C. 206.

41. Adams *v.* Buford, 6 Dana (Ky.) 406.

Where the holder of the principal title is in possession, he may take conveyances to correct errors in, or to perfect, his title. Lambert *v.* Huber, 22 Misc. (N. Y.) 462, 50 N. Y. Suppl. 793; Jackson *v.* Given, 8 Johns. (N. Y.) 137, 5 Am. Dec. 328; Smiley *v.* Dixon, 1 Penr. & W. (Pa.) 439. See also *supra*, III, F, 3, m.

42. *Alabama.*— Brindley *v.* Brindley, 121 Ala. 429, 25 So. 751.

District of Columbia.— Johnson *v.* Van Wyck, 4 App. Cas. (D. C.) 294, 41 L. R. A. 520, 22 Wash. L. Rep. 713.

Illinois.— Geer *v.* Frank, 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110 [*affirming* 79 Ill. App. 195].

Iowa.—Adye *v.* Hanna, 47 Iowa 264, 29 Am. Rep. 484.

Kentucky.—Thompson *v.* Warren, 8 B. Mon. (Ky.) 488; Wilhite *v.* Roberts, 4 Dana (Ky.) 172; Brown *v.* Beauchamp, 5 T. B. Mon. (Ky.) 413, 17 Am. Dec. 81.

Louisiana.— New Orleans Gas Light Co. *v.* Webb, 7 La. Ann. 164.

Maine.— Low *v.* Hutchinson, 37 Me. 196.

Massachusetts.— Thurston *v.* Percival, 1 Pick. (Mass.) 415.

Minnesota.— Gammons *v.* Honerud, 82 Minn. 264, 84 N. W. 911; Gammons *v.* Gulbranson, 78 Minn. 21, 80 N. W. 779; Gammons *v.* Johnson, 76 Minn. 76, 78 N. W. 1035.

New York.—Mann *v.* Fairchild, 3 Abb. Dec. (N. Y.) 152, 2 Keyes (N. Y.) 106; Lyon *v.* Hussey, 82 Hun (N. Y.) 15, 31 N. Y. Suppl. 281, 63 N. Y. St. 531; Burt *v.* Place, 6 Cow. (N. Y.) 431.

North Carolina.— Barnes *v.* Strong, 54 N. C. 100; Martin *v.* Amos, 35 N. C. 201; Slade *v.* Rhodes, 22 N. C. 24; Falls *v.* Carpenter, 20 N. C. 237, 28 Am. Dec. 592.

Ohio.— Stewart *v.* Welch, 41 Ohio St. 483; Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194; Key *v.* Vattier, 1 Ohio 132.

Rhode Island.— Martin *v.* Clarke, 8 R. I. 389, 5 Am. Rep. 586.

Vermont.— Hamilton *v.* Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

Virginia.— Nickels *v.* Kane, 82 Va. 309.

Wisconsin.— Underwood *v.* Riley, 19 Wis. 412.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 18.

43. Lynn *v.* Moss, 23 Ky. L. Rep. 214, 62 S. W. 712, where an agent claimed to have contracted "for a sum equal to one third of that recovered," and in that way sought to avoid the effect of the real transaction and to evade the spirit and intent of the statute.

law, encourage by its process a commission of the offense of champerty or maintenance, but will refuse to enforce a contract which it sees to be tainted with it.[44]

b. Recovery For Services Rendered. Though an agreement between an attorney and client be void for champerty, the attorney is nevertheless entitled to compensation for his services in prosecuting the action to judgment.[45] In estimating the attorney's recovery, the jury should not take into consideration the compensation agreed upon,[46] further than to limit it to that amount.[47]

c. Restoration of Status Quo. Where a champertous agreement has been executed, and the party has received some benefit therefrom, the law will not interfere in his behalf to restore to him possession of property parted with or money paid out under such agreement.[48]

2. As to Defendant — a. In General. The fact of a champertous contract between an attorney and client in no wise affects the obligation of defendant to plaintiff. It is the champertous contract, the sale of the litigious right, and not the right itself, which the law avoids.[49] Conversely the laws against

In Powell *v.* Knowler, 2 Atk. 224, enforcement was denied a contract which the court said was evidently artfully drawn to keep it out of the statute of champerty.

44. *Illinois.*—Gilbert *v.* Holmes, 64 Ill. 548.

Kentucky.— Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

Mississippi.— Rives *v.* Weaver, 36 Miss. 374.

New York.— Arden *v.* Patterson, 5 Johns. Ch. (N. Y.) 44.

Pennsylvania.— Gribbel *v.* Brown, 9 Pa. Dist. 524.

Rhode Island.— Sayles *v.* Tibbitts, 5 R. I. 79.

England.— Reynell *v.* Sprye, 1 De G., M. & G. 660, 21 L. J. Ch. 633, 50 Eng. Ch. 510.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 18.

Courts of equity should lend no countenance to agreements which partake in any manner of champerty, although they might be barely valid at law. Gregerson *v.* Imlay, 4 Blatchf. (U. S.) 503, 10 Fed. Cas. No. 5,795; Prosser *v.* Edmonds, 1 Y. & C. Exch. 481.

45. *Alabama.*— Holloway *v.* Lowe, 1 Ala. 246.

Arkansas.— Davis *v.* Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L. R. A. 196.

Iowa.— See Hyatt *v.* Burlington, etc., R. Co., 68 Iowa 662, 27 N. W. 815, in which defendant in an action by plaintiff's attorney for reasonable compensation, having admitted its liability to pay attorney's fees, was held estopped to set up the champertous nature of the contract betwen plaintiff and his attorney.

Kentucky.— Caldwell *v.* Shepherd, 6 T. B. Mon. (Ky.) 389; Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

Massachusetts.—*Compare* Thurston *v.* Percival, 1 Pick. (Mass.) 415, in which compensation was allowed for services rendered before the making of the champertous agreement.

New York.— Timan *v.* Kinney, 14 N. Y. Wkly. Dig. 82.

Utah.— Potter *v.* Ajax Min. Co., 22 Utah 273, 61 Pac. 999.

West Virginia.— Polsley *v.* Anderson, 7 W. Va. 202, 23 Am. Rep. 613.

Wisconsin.— Stearns *v.* Felker, 28 Wis. 594.

See also Attorney and Client, V, B, 2, b, (II), (B), (2) [4 Cyc. 990]; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 51.

Contra.— Gammons *v.* Gulbranson, 78 Minn. 21, 80 N. W. 779.

An attorney sued by his client for negligence and unskilfulness cannot set up champerty in the contract as a defense to the suit. See Attorney and Client, IV, D, 1, b, (III), (A) [4 Cyc. 973].

46. Holloway *v.* Lowe, 1 Ala. 246.

47. Polsley *v.* Anderson, 7 W. Va. 202, 23 Am. Rep. 613. See also *In re* Evans, 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L. R. A. 952.

48. State *v.* Sims, 76 Ind. 328; Ross *v.* Chicago, etc., R. Co., 55 Iowa 691, 8 N. W. 644; Reese *v.* Resburgh, 54 N. Y. App. Div. 378, 66 N. Y. Suppl. 633; Best *v.* Strong, 2 Wend. (N. Y.) 319, 20 Am. Dec. 607; Burt *v.* Place, 6 Cow. (N. Y.) 431; John *v.* Larson, 28 Wis. 604; Miller *v.* Larson, 19 Wis. 463. But see Ackert *v.* Barker, 131 Mass. 436, in which it was held that the client may sue the attorney for money had and received, for the whole amount recovered under a champertous contract, less the costs paid by the attorney. See also Belding *v.* Smythe, 138 Mass. 530.

49. *Georgia.*— Ellis *v.* Smith, 112 Ga. 480, 37 S. E. 739; Robison *v.* Beall, 26 Ga. 17.

Indiana.— See Allen *v.* Frazee, 85 Ind. 283, where it was questioned whether in any case a meritorious defense to an action can or ought to be defeated by a reply that it is made under a champertous agreement between defendant and another.

Iowa.— Small *v.* Chicago, etc., R. Co., 55 Iowa 582, 8 N. W. 437.

Kansas.— Atchison, etc., R. Co. *v.* Johnson, 29 Kan. 218.

Kentucky.— Akers *v.* Martin, (Ky. 1901) 61 S. W. 465; Wehmhoff *v.* Rutherford, 98 Ky. 91, 17 Ky. L. Rep. 659, 32 S. W. 288; Bowser *v.* Patrick, 23 Ky. L. Rep. 1578, 65 S. W. 824.

champerty and maintenance cannot be used as offensive weapons against defendant.[50]

b. Abatement of Action. Some courts have ruled that if the fact that a suit is being prosecuted upon a champertous contract comes to the knowledge of the court in any proper manner it should refuse longer to entertain the proceeding.[51] The weight of authority, however, supports the rule that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defense thereto, and can only be set up between the parties when the champertous agreement itself is sought to be enforced.[52] Some courts draw a

Louisiana.— New Orleans Gas Light Co. *v.* Webb, 7 La. Ann. 164.

Massachusetts.— See Brinley *v.* Whiting, 5 Pick. (Mass.) 348.

Missouri.— Euneau *v.* Rieger, 105 Mo. 659, 16 S. W. 854; Pike *v.* Martindale, 91 Mo. 268, 1 S. W. 858; Bent *v.* Priest, 86 Mo. 475; Bick *v.* Overfelt, 88 Mo. App. 139; Bent *v.* Lewis, 15 Mo. App. 40; Million *v.* Ohnsorg, 10 Mo. App. 432.

Nebraska.— Chamberlain *v.* Grimes, 42 Nebr. 701, 60 N. W. 948; Omaha, etc., R. Co. *v.* Brady, 39 Nebr. 27, 57 N. W. 767.

New York.— Story *v.* Satterlee, 13 Daly (N. Y.) 169; Gilroy *v.* Badger, 27 Misc. (N. Y.) 640, 58 N. Y. Suppl. 392.

Ohio.— Ford *v.* Holden, 4 Ohio Dec. (Reprint) 364, 2 Clev. L. Rep. 33.

South Carolina.— Cooke *v.* Pool, 25 S. C. 593.

Utah.— Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

Wisconsin.— See Miles *v.* Mutual Reserve Fund L. Assoc., 108 Wis. 421, 84 N. W. 159.

United States.— Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991; Byrne *v.* Kansas City, etc., R. Co., 55 Fed. 44; Courtright *v.* Burnes, 3 McCrary (U. S.) 60, 13 Fed. 317.

England.— Elborough *v.* Ayres, L. R. 10 Eq. 367, 39 L. J. Ch. 601, 23 L. T. Rep. N. S. 68, 18 Wkly. Rep. 913; Hilton *v.* Woods, L. R. 4 Eq. 432, 36 L. J. Ch. 491, 16 L. T. Rep. N. S. 736, 15 Wkly. Rep. 1105; Knight *v.* Bowyer, 2 De G. & J. 421, 4 Jur. N. S. 569, 27 L. J. Ch. 521, 6 Wkly. Rep. 565, 61 Eng. Ch. 334.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 48.

Effect of rescission.— Transferees of stock made a demand on the corporation for the transfer of the stock on the books, through an attorney who had made an agreement with them to bring and conduct the suit at his own expense and risk, for a certain share of the amount actually recovered, the demand being made under the agreement for the purpose of bringing the suit. On the trial the fact of the agreement having been brought by defendants to the notice of the court, the parties rescinded it, and it was held that the unlawfulness of the agreement did not render the demand insufficient. Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 231.

A recovery of the statutory penalty for overcharging passengers is not defeated by the fact that it was paid by a passenger under a champertous agreement with an attorney to induce the carrier to accept the overcharge, and then recover the penalty. Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

50. Bick *v.* Overfelt, 88 Mo. App. 139.

Where plaintiff purchased, while deputy sheriff, certain lands at execution at a great sacrifice, and employed an attorney to prosecute his claims, agreeing to give him one third of the land if recovered, and a compromise was made and a payment made to plaintiff, and he thereafter refused to recognize the agreement with his attorney as champertous, and sought to obtain a balance due on the compromise, and refused to allow a payment made to the attorney by defendant because made under the champertous contract, such claim will not avail in equity as against defendant in execution though it might, if presented in a suit between the attorney and the client to enforce such agreement. Caldwell *v.* Shepherd, 6 T. B. Mon. (Ky.) 389.

51. *Indiana.*— Greenman *v.* Cohee, 61 Ind. 201.

Kentucky.— Roberts *v.* Yancey, 94 Ky. 243, 15 Ky. L. Rep. 10, 21 S. W. 1047, 42 Am. St. Rep. 357; Norris *v.* Evans, 15 Ky. L. Rep. 77, 22 S. W. 328.

New York.— Orcutt *v.* Pettit, 4 Den. (N. Y.) 233.

Ohio.— Stewart *v.* Welch, 41 Ohio St. 483.

Tennessee.—Shannon Code (Tenn.), §§ 3176–3184, providing that whenever the fact of champerty appears the court will, even of its own motion, refuse to proceed to the determination of the case and dismiss the suit, was repealed by act of April 7, 1889. Heaton *v.* Dennis, 103 Tenn. 155, 52 S. W. 175.

Wisconsin.— Miles *v.* Mutual Reserve Fund L. Assoc., 108 Wis. 421, 84 N. W. 159; Kelly *v.* Kelly, 86 Wis. 170, 56 N. W. 637; Barker *v.* Barker, 14 Wis. 131.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 48.

52. *Alabama.*— Broughton *v.* Mitchell, 64 Ala. 210.

Arkansas.— Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

California.— Gage *v.* Downey, 79 Cal. 140, 21 Pac. 527, 855.

Georgia.— Bullock *v.* Dunbar, 114 Ga. 754, 40 S. E. 783; Reed *v.* Janes, 84 Ga. 380, 11 S. E. 401; Rohison *v.* Beall, 26 Ga. 17.

Illinois.— Gage *v.* Du Puy, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; Zeigler *v.* Hughes, 55 Ill. 288.

distinction between cases where the right of plaintiff in respect to which he sues is derived under title founded on champerty and maintenance, and where it is not, holding in the first case that the suit must necessarily abate, and in the second that the champertous contract cannot be set up as a defense to the action.[53]

3. As to Third Persons. A stranger to a contract between an attorney and client has no right to question its validity, even though such contract, as between the parties to it, may be champertous.[54]

4. Time and Manner of Making Objections. An objection to complainant's judgment that the contract upon which such judgment was based was champertous, as between complainant and his assignor, should be interposed in the suit at law, and cannot be raised upon complainant filing his bill in equity to subject effects of defendant to such judgment.[55] The defense of champerty should also

Indiana.— Zeigler *v.* Mize, 132 Ind. 403, 31 N. E. 945; Hart *v.* State, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; Cleveland, etc., R. Co. *v.* Davis, 10 Ind. App. 342, 36 N. E. 778, 37 N. E. 1069.

Iowa.— Vimont *v.* Chicago, etc., R. Co., 69 Iowa 296, 22 N. W. 906, 28 N. W. 612; Small *v.* Chicago, etc., R. Co., 55 Iowa 582, 8 N. W. 437; Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

Kansas.— Atchison, etc., R. Co. *v.* Johnson, 29 Kan. 218.

Kentucky.—Chiles *v.* Conley, 9 Dana (Ky.) 385.

Mississippi.— Morgan *v.* Blewett, 71 Miss. 409, 14 So. 33.

Missouri.— Euneau *v.* Rieger, 105 Mo. 659, 16 S. W. 854; Pike *v.* Martindale, 91 Mo. 268, 1 S. W. 858.

New Hampshire.— Taylor *v.* Gilman, 58 N. H. 417. See also Connecticut River Mut. F. Ins. Co. *v.* Way, 62 N. H. 622.

New Jersey.—Whitney *v.* Kirtland, 27 N. J. Eq. 333.

New York.— Hall *v.* Gird, 7 Hill (N. Y.) 586.

North Dakota.— Woods *v.* Walsh, 7 N. D. 376, 75 N. W. 767.

Ohio.— Pennsylvania Co. *v.* Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785.

Texas.— McMullen *v.* Guest, 6 Tex. 275.

Utah.— Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

Washington.— Straw-Ellsworth Mfg. Co. *v.* Cain, 20 Wash. 351, 55 Pac. 321.

United States.— Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991; Boone *v.* Chiles, 10 Pet. (U. S.) 177, 9 L. ed. 388; Keiper *v.* Miller, 68 Fed. 627; Byrne *v.* Kansas City, etc., R. Co., 55 Fed. 44; McIntyre *v.* Thompson, 10 Fed. 531; Courtright *v.* Burnes, 3 McCrary (U. S.) 60, 13 Fed. 317.

England.— Elborough *v.* Ayres, L. R. 10 Eq. 367, 39 L. J. Ch. 601, 33 L. T. Rep. N. S. 68, 18 Wkly. Rep. 913; Hilton *v.* Woods, L. R. 4 Eq. 432, 36 L. J. Ch. 491, 16 L. T. Rep. N. S. 736, 15 Wkly. Rep. 1105.

Canada.—Dussault *v.* Fer du Nord, 12 Quebec 50, 14 Rev. Lég. 207 [*reversing* 11 Quebec 165]; Ritchot *v.* Cardinal, 3 Quebec 55.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 48.

53. *District of Columbia.*—Johnson *v.* Van Wyck, 4 App. Cas. (D. C.) 294, 41 L. R. A. 520.

Missouri.— In Bent *v.* Priest, 86 Mo. 475, 490, the court said: "Unless the plaintiff's title by which he seeks to enforce a right, is infected by a champertous contract, we see no reason why the suit may not proceed, though such a contract exists as between the plaintiff and his attorney. It is time enough to turn a party out of court when he asks the aid of a court to enforce such a contract."

New York.— Gilroy *v.* Badger, 27 Misc. (N. Y.) 640, 58 N. Y. Suppl. 392; Gescheidt *v.* Quirk, 5 N. Y. Civ. Proc. 38, 66 How. Pr. (N. Y.) 272.

Wisconsin.— Miles *v.* Mutual Reserve Fund L. Assoc., 108 Wis. 421, 84 N. W. 159.

United States.— Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991; The Clara A. McIntyre, 94 Fed. 552.

England.— Hilton *v.* Woods, L. R. 4 Eq. 432, 36 L. J. Ch. 491, 16 L. T. Rep. N. S. 736, 15 Wkly. Rep. 1105.

Canada.— Power *v.* Phelan, 4 Dorion (Quebec) 57.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 48.

54. *New York.*— Fogerty *v.* Jordan, 2 Rob. (N. Y.) 319.

South Carolina.— Cooke *v.* Pool, 25 S. C. 593.

Utah.— Potter *v.* Ajax Min. Co., 22 Utah 273, 61 Pac. 999.

West Virginia.— Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557.

England.— Knight *v.* Bowyer, 2 De G. & J. 421, 4 Jur. N. S. 569, 27 L. J. Ch. 521, 6 Wkly. Rep. 565, 61 Eng. Ch. 334.

Contra.— Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

An innocent assignee of a judgment is not affected by a champertous purchase of the judgment by his assignor, but is entitled to enforce it against the judgment debtor. Cooke *v.* Pool, 25 S. C. 593.

55. Long *v.* Page, 10 Humphr. (Tenn.) 540; Hunt *v.* Lyle, 8 Yerg. (Tenn.) 142; Markham *v.* Townsend, 2 Tenn. Ch. 713.

Enforcing judgment.— Chancery has no jurisdiction to restrain a plaintiff from taking proceedings to enforce a judgment in his favor on the ground that the action was brought under circumstances amounting to the common-law offense of maintenance. Elborough

be specially pleaded.[56] It cannot be introduced under the general issue, unless notice of such defense has been filed with the plea.[57]

5. What Law Governs. The question as to whether a contract is champertous or not is governed by the law of the state in which such contract is to be performed.[58]

B. Of Conveyances of Land Held Adversely — 1. As to Person in Possession. Both at common law and under statutes adopting the common law or the statute of Henry VIII (32 Hen. VIII, c. 9), a conveyance of land, though by the rightful owner, while it is in the adverse possession of another claiming to be the owner thereof, is absolutely void as to the party in possession and his privies.[59] In those states, however, which have either never recognized

v. Ayres, L. R. 10 Eq. 367, 39 L. J. Ch. 601, 23 L. T. Rep. N. S. 68, 18 Wkly. Rep. 913.

Where a final decree was made settling the rights of parties to certain slaves, and after a lapse of more than three years a bill was filed alleging that the original suit was prosecuted on a champertous agreement, but that complainants were ignorant of such facts until a short time before filing their bill, it was held that the decree was a final adjudication of the rights of the parties after the adjournment of the term at which it was prosecuted. Allen *v.* Barksdale, 1 Head (Tenn.) 237.

56. *Colorado.*— Currency Min. Co. *v.* Bentley, 10 Colo. App. 271, 50 Pac. 920.

Idaho.— Brumback *v.* Oldham, 1 Ida. 709.

Kansas.— *Compare* Atchison, etc., R. Co. *v.* Johnson, 29 Kan. 218.

Massachusetts.— Suit *v.* Woodhall, 116 Mass. 547. See also Hadlock *v.* Brooks, 178 Mass. 425, 59 N. E. 1009.

Missouri.— Moore *v.* Ringo, 82 Mo. 468.

Tennessee.— Riggs *v.* Shirley, 9 Humphr. (Tenn.) 71.

Texas.— McMullen *v.* Guest, 6 Tex. 275.

Utah.— Croco *v.* Oregon Short Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

England.— Fischer *v.* Naicker, 8 Moore Indian App. 170, 2 L. T. Rep. N. S. 94, 8 Wkly. Rep. 655.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 19.

Contra.— Miles *v.* Mutual Reserve Fund L. Assoc., 108 Wis. 421, 84 N. W. 159; Barker *v.* Barker, 14 Wis. 131.

By answer.—An objection that a bill in equity was filed under an agreement between plaintiffs and certain other parties, which was void for champerty, should be raised formally by answer and not by a motion to take the bill from the files. Sperry *v.* Erie R. Co., 6 Blatchf. (U. S.) 425, 22 Fed. Cas. No. 13,237.

By demurrer.— Where a declaration shows that it is founded on a champertous contract, a general demurrer thereto should be sustained. Miles *v.* Collins, 1 Metc. (Ky.) 308. But where no facts constituting champerty are alleged in a petition, a demurrer on the ground that a patent from the state to certain land is champertous is without merit. Fuson *v.* Bowlin, 17 Ky. L. Rep. 128, 30 S. W. 622.

By plea in abatement.— Evidence that an action is prosecuted under a champertous agreement may be introduced under a plea in abatement. Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

57. Randall *v.* Baird, 66 Mich. 312, 33 N. W. 506; Potter *v.* Ajax Min. Co., 22 Utah 273, 61 Pac. 999.

As to raising objection on appeal see Appeal and Error, 2 Cyc. 665, note 56.

58. *Alabama.*— Gilman *v.* Jones, 87 Ala. 691, 5 So. 785, 7 So. 48, 4 L. R. A. 113.

Connecticut.— Richardson *v.* Rowland, 40 Conn. 565.

Massachusetts.— Thurston *v.* Percival, 1 Pick. (Mass.) 415.

United States.— See also Holladay's Case, 27 Fed. 830; Hickox *v.* Elliott, 10 Sawy. (U. S.) 415, 22 Fed. 13.

England.— Grell *v.* Levy, 16 C. B. N. S. 73, 10 Jur. N. S. 210, 9 L. T. Rep. N. S. 721, 12 Wkly. Rep. 378, 111 E. C. L. 73.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 2.

Contra.— Blackwell *v.* Webster, 23 Blatchf. (U. S.) 537, 29 Fed. 614.

As to what law governs contracts, generally, see Contracts.

Contract to be performed in several states. — The fact that a contract was made in New York and that the common-law doctrine of champerty and maintenance no longer exists in New York is no reason for upholding such contract where it is to operate in many states where such contract would be clearly void. Gregerson *v.* Imlay, 4 Blatchf. (U. S.) 503, 10 Fed. Cas. No. 5,795.

Conveyances of land held adversely.— The *lex loci rei sitæ* governs in the construction of conveyances of land adversely held. Giddings *v.* Eastman, Clarke (N. Y.) 19. See also Caldwell *v.* Sigourney, 19 Conn. 37, in which the defense to an action on a promissory note given for land in Ohio conveyed to defendant was that the land at the time of the conveyance was in the possession of third persons holding adversely, but there was no evidence to show that this fact by the laws of Ohio would avoid the conveyance, and it was held that proof of the adverse possession was inadmissible.

59. *Alabama.*—Pearson *v.* Adams, 129 Ala. 157, 29 So. 977; Prestwood *v.* McCowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136; Chevalier *v.* Carter, 124 Ala. 520, 26 So. 901; Stringfellow *v.* Tennessee Coal, etc., Co., 117

the common-law rule or have abrogated it by a statute, such a conveyance is

Ala. 250, 22 So. 997; Pearson *v.* King, 99 Ala. 125, 10 So. 919; Davis *v.* Curry, 85 Ala. 133, 4 So. 734; Dexter *v.* Nelson, 6 Ala. 68.

Connecticut.—Sherwood *v.* Barlow, 19 Conn. 471; Goodman *v.* Newell, 13 Conn. 75, 33 Am. Dec. 378; Hinman *v.* Hinman, 4 Conn. 575; Phelps *v.* Sage, 2 Day (Conn.) 151; Freeman *v.* Thompson, 1 Root (Conn.) 402; Holebrook *v.* Lucas, 1 Root (Conn.) 199; Isham *v.* Avery, 1 Root (Conn.) 100.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391; Nelson *v.* Brush, 22 Fla. 374; Doe *v.* Roe, 13 Fla. 602. See also Levy *v.* Cox, 22 Fla. 546.

Georgia.— Doe *v.* Brooking, 37 Ga. 5; Gresham *v.* Webb, 29 Ga. 320; Helms *v.* May, 29 Ga. 121; Way *v.* Arnold, 18 Ga. 181.

Indiana.— Vail *v.* Lindsay, 67 Ind. 528; Steeple *v.* Downing, 60 Ind. 478; German Mut. Ins. Co. *v.* Grim, 32 Ind. 249, 2 Am. Rep. 341; Webb *v.* Thompson, 23 Ind. 428; Hearick *v.* Doe, 4 Ind. 164; Wellman *v.* Hickson, 1 Ind. 581; Michael *v.* Doe, 1 Ind. 481; Galbreath *v.* Doe, 8 Blackf. (Ind.) 366; Martin *v.* Pace, 6 Blackf. (Ind.) 99; Fite *v.* Doe, 1 Blackf. (Ind.) 127.

Kentucky.— Ring *v.* Gray, 6 B. Mon. (Ky.) 368; Baley *v.* Deakins, 5 B. Mon. (Ky.) 159; Cardwell *v.* Spriggs, 7 Dana (Ky.) 36; Dubois *v.* Marshall, 3 Dana (Ky.) 336; Redman *v.* Sanders, 2 Dana (Ky.) 68; Wash *v.* McBrayer, 1 Dana (Ky.) 565; Higgins *v.* Howard, 22 Ky. L. Rep. 1863, 61 S. W. 1016; Fair *v.* Miles, 22 Ky. L. Rep. 1584, 60 S. W. 939; Meek *v.* Catlettsburg, etc., Packet Co., 22 Ky. L. Rep. 1318, 60 S. W. 484; West *v.* Chamberlain, 22 Ky. L. Rep. 687, 58 S. W. 584; Keaton *v.* Sublett, 22 Ky. L. Rep. 631, 58 S. W. 528; Ft. Jefferson Imp. Co. *v.* Dupoyster, 21 Ky. L. Rep. 515, 51 S. W. 810, 48 L. R. A. 537; Farmer *v.* Farmer, 19 Ky. L. Rep. 243, 39 S. W. 706; Lillie *v.* Hickman, 15 Ky. L. Rep. 861, 25 S. W. 1062; Combs *v.* McQuim, 10 Ky. L. Rep. 550, 9 S. W. 495. See also Bailey *v.* Tygart Valley Iron Co., 10 Ky. L. Rep. 676, 10 S. W. 234. *Compare* Thurston *v.* Masterson, 9 Dana (Ky.) 228; Oldham *v.* Rowan, 4 Bibb (Ky.) 544, in which it was held that the assignment of an entry on land was not within the statute against champerty and maintenance.

Maine.— Varrell *v.* Holmes, 4 Me. 168.

Massachusetts.— Harrison *v.* Dolan, 172 Mass. 395, 52 N. E. 513; Dadmun *v.* Lamson, 9 Allen (Mass.) 85; Loud *v.* Darling, 7 Allen (Mass.) 205; Barry *v.* Adams, 3 Allen (Mass.) 493; Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Swett *v.* Poor, 11 Mass. 549; Everenden *v.* Beaumont, 7 Mass. 76; Wolcot *v.* Knight, 6 Mass. 418.

Michigan.—Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19; Godfroy *v.* Disbrow, Walk. (Mich.) 260. But see *infra*, note 60.

Mississippi.— Betsey *v.* Torrance, 34 Miss. 132; Ellis *v.* Turner, 11 Sm. & M. (Miss.) 422; Bledsoe *v.* Little, 4 How. (Miss.) 13. *Compare* Alexander *v.* Polk, 39 Miss. 737, in which it was held that a sale of land in the possession of another is not invalid on account of such possession, unless in the sale the vendor is guilty of champerty.

New York.— Dever *v.* Hagerty, 169 N. Y. 481, 62 N. E. 586 [*reversing* 43 N. Y. App. Div. 354, 60 N. Y. Suppl. 181]; Becker *v.* Church, 115 N. Y. 562, 22 N. E. 748, 26 N. Y. St. 775 [*affirming* 42 Hun (N. Y.) 258]; Hay *v.* Cumberland, 25 Barb. (N. Y.) 594; Pepper *v.* Haight, 20 Barb. (N. Y.) 429; Howard *v.* Howard, 17 Barb. (N. Y.) 663; Poor *v.* Horton, 15 Barb. (N. Y.) 485; Van Voorhis *v.* Kelly, 65 How. Pr. (N. Y.) 300; Monnot *v.* Husson, 39 How. Pr. (N. Y.) 447; Cole *v.* Irvine, 6 Hill (N. Y.) 634; Livingston *v.* Proseus, 2 Hill (N. Y.) 526; Thurman *v.* Cameron, 24 Wend. (N. Y.) 87; Tomb *v.* Sherwood, 13 Johns. (N. Y.) 289; Short *v.* Wilson, 13 Johns. (N. Y.) 33; Jackson *v.* Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Jackson *v.* Demont, 9 Johns. (N. Y.) 55, 6 Am. Dec. 259; Teele *v.* Fonda, 7 Johns. (N. Y.) 251; Williams *v.* Jackson, 5 Johns. (N. Y.) 489; Jackson *v.* Todd, 2 Cai. (N. Y.) 183; Belding *v.* Pitkin, 2 Cai. (N. Y.) 147; Whitaker *v.* Cone, 2 Johns. Cas. (N. Y.) 58; Burhans *v.* Burhans, 2 Barb. Ch. (N. Y.) 398. See also Meigs *v.* Roberts, 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215.

North Carolina.— Johnson *v.* Prairie, 94 N. C. 773; Williams *v.* Council, 49 N. C. 206; Hoyle *v.* Logan, 15 N. C. 495; Den *v.* Shearer, 5 N. C. 114; Cobham *v.* Ashe, 1 N. C. 74.

Rhode Island.—Burdick *v.* Burdick, 14 R. I. 574; Campbell *v.* Point St. Iron Works, 12 R. I. 452.

South Dakota.— See Frum *v.* Weaver, 13 S. D. 457, 83 N. W. 579.

Tennessee.— Fain *v.* Headerick, 3 Coldw. (Tenn.) 327; Kincaid *v.* Meadows, 3 Head (Tenn.) 188; Williams *v.* Hogan, Meigs (Tenn.) 187; Lipe *v.* Mitchell, 2 Yerg. (Tenn.) 400; McSpadden *v.* Starrs Mountain Iron Co., (Tenn. Ch. 1897) 42 S. W. 497.

Virginia.— Early *v.* Garland, 13 Gratt. (Va.) 1; Kincheloe *v.* Tracewells, 11 Gratt. (Va.) 587; Clay *v.* White, 1 Munf. (Va.) 162; Hall *v.* Hall, 3 Call (Va.) 488; Tabb *v.* Baird, 3 Call (Va.) 475.

Wisconsin.— Woodard *v.* McReynolds, 2 Pinn. (Wis.) 268, 1 Chandl. (Wis.) 244; Whitney *v.* Powell, 2 Pinn. (Wis.) 115, 1 Chandl. (Wis.) 52.

United States.— Peck *v.* Heurich, 167 U. S. 624, 17 S. Ct. 927, 42 L. ed. 302; Jackson *v.* Huntington, 5 Pet. (U. S.) 402, 8 L. ed. 170; U. S. Bank *v.* Benning, 4 Cranch C. C. (U. S.) 81, 2 Fed. Cas. No. 908; Dubois *v.* McLean, 4 McLean (U. S.) 486, 7 Fed. Cas. No. 4,107.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 54.

How far avoided.—A deed can be avoided for champerty only to the extent that the land conveyed was adversely held by another. McSpadden *v.* Starrs Mountain Iron Co.,

clearly valid.[60] Where the land conveyed, though not in the possession of the grantor, is not adversely held by the occupant, the deed is valid.[61]

2. As Between the Parties. There is a conflict of authority as to the validity of a conveyance of land adversely held as between the parties, due in a large measure to the language of the various statutes. On the one hand it is held that as between the grantor and grantee and persons standing in legal privity with them, the conveyance is operative and passes title.[62] On the other hand such conveyances are held to be void to all intents and purposes.[63] In either case the legal

(Tenn. Ch. 1897) 42 S. W. 497. See also Goodman *v.* Newell, 13 Conn. 75, 33 Am. Dec. 378.

Effect of subsequent conveyance to adverse party.— Where the owner of property adversely held conveys the same by a void deed, and thereafter conveys the same property to the person holding adversely, such owner cannot bring ejectment to recover the premises for the benefit of the prior grantee. Dever *v.* Hagerty, 169 N. Y. 481, 62 N. E. 586 [*reversing* 43 N. Y. App. Div. 354, 60 N. Y. Suppl. 181].

60. *Arkansas.*—Drennen *v.* Walker, 21 Ark. 539.

Delaware.— Doe *v.* Stephens, 1 Houst. (Del.) 31.

District of Columbia.— Matthews *v.* Hevner, 2 App. Cas. (D. C.) 349.

Illinois.— Willis *v.* Watson, 5 Ill. 64.

Kentucky.— Poage *v.* Chinn, 4 Dana (Ky.) 50 (decided under the act of 1798); Young *v.* Pate, 3 Dana (Ky.) 306 (a conveyance before the act of 1824).

Michigan.—Wagar *v.* Bowley, 104 Mich. 38, 62 N. W. 293; Stockton *v.* Williams, 1 Dougl. (Mich.) 546.

New Hampshire.— Farrar *v.* Fessenden, 39 N. H. 268. *Compare* Dame *v.* Wingate, 12 N. H. 291, in which, however, the grantor had never been in possession of the land, and had no title, nor color, nor claim of title to the land.

Ohio.— Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565; Hall *v.* Ashby, 9 Ohio 96, 34 Am. Dec. 424.

Pennsylvania.— Dillon *v.* Dougherty, 2 Grant (Pa.) 99; Cresson *v.* Miller, 2 Watts (Pa.) 272; Smiley *v.* Dixon, 1 Penr. & W. (Pa.) 439; Stoever *v.* Whitman, 6 Binn. (Pa.) 416; Murray's Estate, 13 Pa. Co. Ct. 70.

South Carolina.—Poyas *v.* Wilkins, 12 Rich. (S. C.) 420; Sims *v.* De Graffenreid, 4 McCord (S. C.) 253; Verdier *v.* Simons, 2 McCord Eq. (S. C.) 385.

Texas.— Campbell *v.* Everts, 47 Tex. 102; Carder *v.* McDermett, 12 Tex. 546; White *v.* Gay, 1 Tex. 384.

United States.—Roberts *v.* Cooper, 20 How. (U. S.) 467, 15 L. ed. 969; Noonan *v.* Braley, 2 Black (U. S.) 499, 17 L. ed. 278.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 54.

61. Gamble *v.* Hamilton, 31 Fla. 401, 12 So. 229; Russell *v.* Coffin, 8 Pick. (Mass.) 143; Cornwell *v.* Clement, 87 Hun (N. Y.) 50, 33 N. Y. Suppl. 866, 67 N. Y. St. 482.

62. *Alabama.*—Prestwood *v.* McGowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136; Stringfellow *v.* Tennessee Coal, etc., Co., 117 Ala. 250, 22 So. 997; Pearson *v.* King, 99 Ala. 125, 10 So. 919; Yarborough *v.* Avant, 66 Ala. 526; Abernathy *v.* Boazman, 24 Ala. 189, 60 Am. Dec. 459; Harvey *v.* Doe, 23 Ala. 635.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Indiana.— Steeple *v.* Downing, 60 Ind. 478. But see Michael *v.* Doe, Smith (Ind.) 291.

Kentucky.— Luen *v.* Wilson, 85 Ky. 503, 9 Ky. L. Rep. 83, 3 S. W. 911; Ft. Jefferson Imp. Co. *v.* Dupoyster, 21 Ky. L. Rep. 515, 51 S. W. 810, 48 L. R. A. 537. But see *infra*, note 63.

Massachusetts.— McMahan *v.* Bowe, 114 Mass. 140, 19 Am. Rep. 321; Farnum *v.* Peterson, 111 Mass. 148. But see Brinley *v.* Whiting, 5 Pick. (Mass.) 348.

Michigan.— Stockton *v.* Williams, 1 Dougl. (Mich.) 546.

New Jersey.— Den *v.* Geiger, 9 N. J. L. 225.

New York.— Hamilton *v.* Wright, 37 N. Y. 502, 5 Transcr. App. (N. Y.) 1; Howard *v.* Howard, 17 Barb. (N. Y.) 663; Poor *v.* Horton, 15 Barb. (N. Y.) 485; Kenada *v.* Gardner, 3 Barb. (N. Y.) 589; Johnson *v.* Snell, 11 N. Y. Suppl. 868, 34 N. Y. St. 177; Livingston *v.* Proseus, 2 Hill (N. Y.) 526; Van Hoesen *v.* Benham, 15 Wend. (N. Y.) 164; Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 511; Jackson *v.* Leggett, 7 Wend. (N. Y.) 377; Jackson *v.* Demont, 9 Johns. (N. Y.) 55, 6 Am. Dec. 259; Williams *v.* Jackson, 5 Johns. (N. Y.) 489; Jackson *v.* Vredenbergh, 1 Johns. (N. Y.) 159; Jackson *v.* Brinckerhoff, 3 Johns. Cas. (N. Y.) 101.

Vermont.— Park *v.* Pratt, 38 Vt. 545; Edwards *v.* Parkhurst, 21 Vt. 472; State University *v.* Joslyn, 21 Vt. 52; Edwards *v.* Roys, 18 Vt. 473; Rood *v.* Willard, Brayt. (Vt.) 66.

Virginia.— Middleton *v.* Arnold, 13 Gratt. (Va.) 489; Tabb *v.* Baird, 3 Call (Va.) 475 [*explaining* Daval *v.* Bibb, 3 Call (Va.) 362].

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 54.

63. *Connecticut.*— Phelps *v.* Sage, 2 Day (Conn.) 151.

Kentucky.— Crowley *v.* Vaughan, 11 Bush (Ky.) 517. But see *supra*, note 62.

Massachusetts.—Brinley *v.* Whiting, 5 Pick. (Mass.) 348.

Tennessee.— Key *v.* Snow, 90 Tenn. 663, 18 S. W. 251; Wilson *v.* Nance, 11 Humphr. (Tenn.) 188; Gass *v.* Malony, 1 Humphr. (Tenn.) 452; Williams *v.* Hogan, Meigs (Tenn.) 187.

title, as against the person in adverse possession, remains in the grantor, in whose name an action for the possession must be brought, whether for his own or his grantee's benefit.[64] Where, however, the conveyance is valid as between the parties, the legal title passes to the grantee as against all other than the disseizor.[65]

3. Effect of Knowledge of Adverse Holding — a. In General. In order to avoid a conveyance by one out of possession, on the ground of an actual adverse possession by another under claim of right, actual notice of such adverse holding is not required, but the notice implied from possession is sufficient.[66]

b. As Affecting Liability to Penalty. A person who sells or purchases land without the knowledge that there is a subsisting adverse possession is not liable to the statutory penalty for selling or purchasing a pretended title, though the seller is in the first instance presumed to be cognizant of the situation of the land.[67]

Virginia.— See *v.* Greenlee, 6 Munf. (Va.) 303; Hopkins *v.* Ward, 6 Munf. (Va.) 38; Tabb *v.* Baird, 3 Call (Va.) 475.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 54.

64. *District of Columbia.*— Johnson *v.* Van Wyck, 4 App. Cas. (D. C.) 294, 41 L. R. A. 520.

Georgia.— Doe *v.* Brooking, 37 Ga. 5.

Indiana.— Steeple *v.* Downing, 60 Ind. 478.

Kentucky.— Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Swager *v.* Crutchfield, 9 Bush (Ky.) 411; Ring *v.* Gray, 6 B. Mon. (Ky.) 368; Chiles *v.* Conley, 9 Dana (Ky.) 385; Beaty *v.* Hudson, 9 Dana (Ky.) 322; Griffith *v.* Dicken, 4 Dana (Ky.) 561; Chiles *v.* Jones, 4 Dana (Ky.) 479; Redman *v.* Sanders, 2 Dana (Ky.) 68; Wash *v.* McBrayer, 1 Dana (Ky.) 565.

Massachusetts.— McMahan *v.* Bowe, 114 Mass. 140, 19 Am. Rep. 321; Farnum *v.* Peterson, 111 Mass. 148; Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Wolcot *v.* Knight, 6 Mass. 418.

Michigan.— Stockton *v.* Williams, 1 Dougl. (Mich.) 546.

New York.— Chamberlain *v.* Taylor, 92 N. Y. 348, 12 Abb. N. Cas. (N. Y.) 473 [*reversing* 26 Hun (N. Y.) 601]; Hotchkiss *v.* Auburn, etc., R. Co., 36 Barb. (N. Y.) 600; Van Voorhis *v.* Kelly, 65 How. Pr. (N. Y.) 300; Williams *v.* Jackson, 5 Johns. (N. Y.) 489; Jackson *v.* Vredenbergh, 1 Johns. (N. Y.) 159.

Tennessee.— Key *v.* Snow, 90 Tenn. 663, 18 S. W. 251; Wilson *v.* Nance, 11 Humphr. (Tenn.) 188.

Vermont.— Park *v.* Pratt, 38 Vt. 545; Mason *v.* Blaisdell, 17 Vt. 216.

Virginia.— Early *v.* Garland, 13 Gratt. (Va.) 1; See *v.* Greenlee, 6 Munf. (Va.) 303; Hopkins *v.* Ward, 6 Munf. (Va.) 38; Tabb *v.* Baird, 3 Call (Va.) 475.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 58.

The possession of the purchaser under a sale void for champerty is the possession of the vendor. Chiles *v.* Jones, 4 Dana (Ky.) 479.

A subsequent conveyance to a third person, after the grantor has obtained possession, will convey title as against a previous grantee. Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Tabb *v.* Baird, 3 Call (Va.) 475.

65. Livingston *v.* Proseus, 2 Hill (N. Y.) 526.

66. *Alabama.*— Bernstein *v.* Humes, 71 Ala. 260.

Mississippi.— Cassedy *v.* Jackson, 45 Miss. 397 [*explaining* and *limiting* Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130]. But see Alexander *v.* Polk, 39 Miss. 737.

New York.— Lowber *v.* Kelly, 17 Abb. Pr. (N. Y.) 452; Lane *v.* Shears, 1 Wend. (N. Y.) 433; Jackson *v.* Demont, 9 Johns. (N. Y.) 55, 6 Am. Dec. 259. *Compare* Sandiford *v.* Frost, 9 N. Y. App. Div. 55, 41 N. Y. Suppl. 103, 75 N. Y. St. 564, in which it was held that a contract between plaintiff and defendant for acquiring title to land and obtaining possession thereof, one party to do the work and the other to furnish the money, was not champertous, where the parties did not know that the grantor was out of possession, and the premises were the subject of pending action.

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600.

England.— See Slywright *v.* Page, 1 Leon. 166, in which it was considered that a deed might be void, and yet the party not liable to the penalty under the statute.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 55.

Contra.— Sewell *v.* Draughn, (Tenn. Ch. 1897) 44 S. W. 210; Buckmaster *v.* Needham, 22 Vt. 617.

67. *Connecticut.*— Sherwood *v.* Barlow, 19 Conn. 471.

Georgia.— See Milsaps *v.* Johnson, 22 Ga. 105, in which it was held that 32 Hen. VIII, c. 9, was not in force in Georgia so far as the penalty was concerned.

Maine.— Varrell *v.* Holmes, 4 Me. 168.

Massachusetts.—Brinley *v.* Whiting, 5 Pick. (Mass.) 348; Swett *v.* Poor, 11 Mass. 549; Everenden *v.* Beaumont, 7 Mass. 76; Wolcott *v.* Knight, 6 Mass. 418.

New York.— Pepper *v.* Haight, 20 Barb. (N. Y.) 429; Etheridge *v.* Cromwell 8 Wend. (N. Y.) 629; Jackson *v.* Andrews, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574; Preston *v.* Hunt, 7 Wend. (N. Y.) 53; Hassenfrats *v.* Kelly, 13 Johns. (N. Y.) 466; Tomb *v.* Sherwood, 13 Johns. (N. Y.) 289; Teele *v.* Fonda, 7 Johns. (N. Y.) 251; Le Roy *v.* Veeder, 1 Johns. Cas. (N. Y.) 417; Le Roy *v.* Servis, 1 Cai. Cas. (N. Y.) 111, 2 Am. Dec. 281, 2 Cai. Cas. (N. Y.) 175.

4. Acquisition of Title After Repeal of Act. A title acquired by the grantee in a conveyance which was void by reason of an adverse possession, after the enactment of a statute permitting such conveyances, is valid.[68]

5. Question of Law or Fact. The question whether a deed is void for maintenance is a question of fact to be determined by the jury,[69] as is the question whether an action is prosecuted for the benefit of the vendor or the vendee.[70]

V. Remedies.

A. Prohibited Contracts Generally — 1. Action For Damages — a. Right of Action. An action will lie at common law to recover damages for maintenance.[71]

b. Pleading. In a common-law action for maintenance, the declaration need not charge the maintenance to have been committed *contra formam statuti*, it being a wrongful act at common law, and the statutes relating to maintenance being only declaratory of the common law, with additional penalties.[72] Nor need the declaration allege that defendant was not interested in the action maintained; for if he was so interested it is a matter to be pleaded by him.[73]

c. Evidence. In order to maintain an action for champerty or maintenance, it is necessary to establish that the transaction was against good policy and justice, or tended to promote unnecessary litigation.[74]

2. Criminal Prosecution — a. At Common Law. Champerty was a misdemeanor at common law and punishable as such.[75] In the United States, where-

England.— Slywright *v.* Page, 1 Leon. 166.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 60.

Burden of proof.— In an action for the penalty prescribed by 1 N. Y. Rev. Laws, p. 173, § 8, against one who sold land held adversely while he had no title, the burden is on him to show that he did not know that the land was held adversely. Etheridge *v.* Cromwell, 8 Wend. (N. Y.) 629.

The value to be recovered in such case is not only that of the land actually occupied and cultivated, but of the whole lot claimed in connection with it. Tomb *v.* Sherwood, 13 Johns. (N. Y.) 289.

68. Meredith *v.* Kennedy, Litt. Sel. Cas. (Ky.) 516; McLoud *v.* Mackie, 175 Mass. 355, 56 N. E. 714.

69. Welborn *v.* Anderson, 37 Miss. 155, in which it was held error for the court to exclude a deed offered in evidence upon the ground that the proof showed that it had been made when the land was held adversely to the grantor.

70. Baley *v.* Deakins, 5 B. Mon. (Ky.) 159.

71. Fletcher *v.* Ellis, Hempst. (U. S.) 300, 9 Fed. Cas. No. 4,863*a*; Harris *v.* Brisco, 17 Q. B. D. 504, 55 L. J. Q. B. 423, 55 L. T. Rep. N. S. 14, 34 Wkly. Rep. 729; Bradlaugh *v.* Newdegate, 11 Q. B. D. 1, 52 L. J. Q. B. 454, 31 Wkly. Rep. 792; Wallis *v.* Portland, 3 Ves. Jr. 494, 4 Rev. Rep. 78; Pechell *v.* Watson, 11 L. J. Exch. 225, 8 M. & W. 691; Hopkins *v.* Smith, 1 Ont. L. Rep. 659.

Common-law remedy.—It was held in Goodyear Dental Vulcanite Co. *v.* White, 10 Fed. Cas. No. 5,602, 2 N. J. L. J. 150, that where a person not interested in defending suits brought upon a patent assisted infringers to defend such suits with money and otherwise, he was liable to an action at common law for maintenance at the suit of the patentee.

72. Pechell *v.* Watson, 11 L. J. Exch. 225, 8 M. & W. 691.

Pendency of suit.— In an action for maintenance it is necessary to allege in the declaration not only the pendency of a suit but also to designate the particular court in which it was pending, together with the time and circumstances. Fletcher *v.* Ellis, Hempst. (U. S.) 300, 9 Fed. Cas. No. 4,863*a*; Goodyear Dental Vulcanite Co. *v.* White, 10 Fed. Cas. No. 5,602, 2 N. J. L. J. 150. See also Flight *v.* Leman, 4 Q. B. 883, D. & M. 67, 7 Jur. 557, 12 L. J. Q. B. 353, 45 E. C. L. 883, wherein a count charging that defendant unlawfully and maliciously did advise, procure, instigate, and stir up J T to commence and prosecute an action of trespass, etc., was held bad on demurrer, for not averring that the action was commenced and prosecuted without reasonable or probable cause; this not being a count for maintenance in the proper sense of maintaining an existing suit, but for procuring one to be commenced.

73. Pechell *v.* Watson, 11 L. J. Exch. 225, 8 M. & W. 691.

74. Fischer *v.* Naicker, 8 Moore Indian App. 170, 2 L. T. Rep. N. S. 94, 8 Wkly. Rep. 655.

75. *Illinois.*— Thompson *v.* Reynolds, 73 Ill. 11; Newkirk *v.* Cone, 18 Ill. 449.

Indiana.— Quigley *v.* Thompson, 53 Ind. 317.

Ohio.— Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194.

Tennessee.— Douglass *v.* Wood, 1 Swan (Tenn.) 392.

United States.— Fletcher *v.* Ellis, Hempst. (U. S.) 300, 9 Fed. Cas. No. 4,863*a*.

England.— Pechell *v.* Watson, 11 L. J. Exch. 225, 8 M. & W. 691.

ever the common law has been adopted, the common-law rule against champerty must be regarded as in force, so far as applicable, where it has not been specifically modified or repealed by statute.[76]

b. By Statute. Champerty is also prohibited in England by various statutes, commencing as early as the Statute of Westminster I, c. 25, all of which enact heavy penalties for their violation.[77] In some of the states of the United States champerty is made an indictable offense by statute.[78]

3. Discovery. Discovery is not enforceable in equity in cases of champerty and maintenance, and a plaintiff should not be compelled on examination to answer questions touching an alleged champertous agreement.[79]

B. Conveyances of Land Held Adversely — 1. Between the Parties — a. Action on Covenants. Where a conveyance is void for champerty and maintenance no action on the covenants contained therein lies in favor of the grantee against the grantor, the transaction being an offense at law for which the parties may be punished.[80]

b. In Equity. A rescission of a conveyance or of a contract to convey will be decreed in chancery, if it is void for champerty and maintenance, though the parties are *in pari delicto*. Adverse possession alone is sufficient cause for rescission.[81] Similarly, restoration may be compelled where, after a decree rescinding a contract, the vendee surrenders to the vendor, which decree is subsequently

Canada.— Hopkins *v.* Smith, 1 Ont. L. Rep. 659.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 21.

At common law the punishment for champerty, if committed by a common person, was by fine and imprisonment. 1 Hawkins P. C. 463.

76. *Alabama.*— Jenkins *v.* Bradford, 59 Ala. 400.

District of Columbia.— Stanton *v.* Haskin, 1 MacArthur (D. C.) 558, 29 Am. Rep. 612.

Georgia.— Meeks *v.* Dewberry, 57 Ga. 263.

Illinois.— Thompson *v.* Reynolds, 73 Ill. 11 [*distinguishing* Newkirk *v.* Cone, 18 Ill. 449].

Kentucky.— Brown *v.* Beauchamp, 5 T. B. Mon. (Ky.) 413, 17 Am. Dec. 81; Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

Massachusetts.— Lathrop *v.* Amherst Bank, 9 Metc. (Mass.) 489; Thurston *v.* Percival, 1 Pick. (Mass.) 415; Wolcot *v.* Knight, 6 Mass. 418.

Rhode Island.— Orr *v.* Tanner, 12 R. I. 94.

Tennessee.— Hayney *v.* Coyne, 10 Heisk. (Tenn.) 339; Douglass *v.* Wood, 1 Swan (Tenn.) 392.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 21.

77. Thompson *v.* Reynolds, 73 Ill. 11. See also State *v.* Chitty, 1 Bailey (S. C.) 379.

In Ontario the criminal law of England, as it stood on September 17, 1792, was adopted as the common law of Ontario, by the provincial act of 40 Geo. III. At the common law, and by various statutes passed by the English parliament long before that date and remaining unrepealed, maintenance is an indictable offense, and hence is now an indictable offense in Ontario. Hopkins *v.* Smith, 1 Ont. L. Rep. 659.

78. Stoddard *v.* Mix, 14 Conn. 12; Low *v.* Hutchinson, 37 Me. 196; Irwin *v.* Curie, 171 N. Y. 409, 64 N. E. 161; People *v.* Walbridge, 6 Cow. (N. Y.) 512; Wickham *v.* Conklin, 8 Johns. (N. Y.) 220; Blackwell *v.* Webster, 23 Blatchf. (U. S.) 537, 29 Fed. 614. See also Holladay's Case, 27 Fed. 830.

Intent gravamen of offense.— Under Cal. Pen. Code, § 161, providing that every attorney who either directly or indirectly buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor, it has been held that the court will not presume that the attorney in an action on an assigned claim took the same with criminal intent. Bulkeley *v.* State Bank, 68 Cal. 80, 8 Pac. 643.

79. Bradlaugh *v.* Newdegate, 11 Q. B. D. 1, 52 L. J. Q. B. 454, 31 Wkly. Rep. 792; Coondoo *v.* Mookerjee, 2 App. Cas. 186; Sharp *v.* Carter, 3 P. Wms. 374; Wallis *v.* Portland, 3 Ves. Jr. 494, 4 Rev. Rep. 78; Welbourne *v.* Canadian Pac. R. Co., 16 Ont. Pr. 343; Hopkins *v.* Smith, 1 Ont. L. Rep. 659.

80. Graves *v.* Leathers, 17 B. Mon. (Ky.) 665; Swett *v.* Poor, 11 Mass. 549; Everenden *v.* Beaumont, 7 Mass. 76; Waters *v.* Hutton, 85 Tenn. 109, 1 S. W. 787.

81. Bryant *v.* Hill, 9 Dana (Ky.) 67; Williams *v.* Carter, 3 Dana (Ky.) 198.

Contra.— Ruffin *v.* Johnson, 5 Heisk. (Tenn.) 604, in which it was held that the maker of a deed will not be heard in equity to allege, against the averment of his deed, that it was champertous because the land was adversely held at the time of the conveyance.

Heirs may defeat the enforcement of their ancestor's contract for a conveyance by showing that it was champertous, but they cannot obtain the annulment of a champertous conveyance by their ancestor, where they are out of possession, and the conveyance has been unquestioned for many years. Bryant *v.* Hill, 9 Dana (Ky.) 67.

reversed and the original contract confirmed.[82] A court of equity will not, however, interfere either to compel the vendor to refund the purchase-money, or to enjoin him from prosecuting his action for it against the vendee, but will leave the parties to their remedies, if any, at law,[83] unless the vendor has made fraudulent representations in regard to the property at the time of sale.[84]

2. Against Occupant — a. Of Grantee. The grantee in a conveyance of land adversely held is not entitled to sue the occupant in his own name, save in those jurisdictions in which the common law has either never been recognized or has been abrogated by statute.[85] Where the conveyance is void not only as to the person in adverse possession, but also as between the parties, no action lies for the benefit of the grantee;[86] but where, though void as to the occupant, it is valid as between the parties, an action may be maintained in the name of the grantor for the benefit of the grantee.[87] When it has been apprehended that a deed might be attacked on the ground of an adverse holding at the time it was made, not infrequently counts have been inserted in the declaration on the title of the grantor and of the grantee, so that if the suit should fail as to the one it might succeed as to the other.[88]

b. Of Grantor. A grantor is not precluded from recovery on the ground that he has executed a deed to a third person to lands held adversely by a third person. Such a conveyance, though absolutely void, does not work a forfeiture of title.[89]

82. Castleman *v.* Combs, 7 T. B. Mon. (Ky.) 273, in which it was further held that a conveyance by the vendor after the decree of rescission, but before the entry of the mandate of the supreme court reversing the decree, was a transaction *pendente lite,* and did not affect the vendor's rights.

83. Miller *v.* Mulvey, 7 Ky. L. Rep. 40; Woodworth *v.* Janes, 2 Johns. Cas. (N. Y.) 417. See also Waters *v.* Hutton, 85 Tenn. 109, 1 S. W. 787.

84. Miller *v.* Mulvey, 7 Ky. L. Rep. 40.

85. Chicago *v.* Vulcan Iron Works, 93 Ill. 222; Shortall *v.* Hinckley, 31 Ill. 219; Osborne *v.* Anderson, 89 N. C. 261; Hoyle *v.* Logan, 15 N. C. 495; Dillon *v.* Dougherty, 2 Grant (Pa.) 99. See also *supra,* IV, B, 2.

Waiver by occupant.—In Cameron *v.* Irwin, 5 Hill (N. Y.) 272, it was held that as the statute of maintenance was intended for the protection of adverse claimants they may renounce the benefit of it and agree to abide the result of an action brought by the grantee.

86. Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Harman *v.* Brewster, 7 Bush (Ky.) 355; Baley *v.* Deakins, 5 B. Mon. (Ky.) 159; Marks *v.* Jordan, 3 B. Mon. (Ky.) 116; Cardwell *v.* Spriggs, 7 Dana (Ky.) 36; Lillie *v.* Hickman, 15 Ky. L. Rep. 861, 25 S. W. 1062; Miller *v.* Mulvey, 7 Ky. L. Rep. 40; Wentworth *v.* Abbetts, 78 Wis. 63, 46 N. W. 1044.

87. *Alabama.*— Pearson *v.* King, 99 Ala. 125, 10 So. 919 [*distinguishing* Scranton *v.* Ballard, 64 Ala. 402].

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Georgia.— Thompson *v.* Richards, 19 Ga. 594; Pitts *v.* McWhorter, 3 Ga. 5, 46 Am. Dec. 405.

Indiana.— Steeple *v.* Downing, 60 Ind. 478. See also Michael *v.* Doe, Smith (Ind.) 291.

Massachusetts.— McMahan *v.* Bowe, 114 Mass. 140, 19 Am. Rep. 321; Farnum *v.* Peterson, 111 Mass. 148; Cleverly *v.* Whitney, 7 Pick. (Mass.) 36.

New York.— Chamberlain *v.* Taylor, 92 N. Y. 348, 12 Abb. N. Cas. (N. Y.) 473 [*reversing* 26 Hun (N. Y.) 601]; Hamilton *v.* Wright, 37 N. Y. 502, 5 Transcr. App. (N. Y.) 1; Smith *v.* Long, 12 Abb. N. Cas. (N. Y.) 113 (holding that the right is limited to an immediate, and not a remote, grantee); Livingston *v.* Proseus, 2 Hill (N. Y.) 526; Jackson *v.* Leggett, 7 Wend. (N. Y.) 377.

North Carolina.— Justice *v.* Eddings, 75 N. C. 581.

Tennessee.— Augusta Mfg. Co. *v.* Vertrees, 4 Lea (Tenn.) 75 (holding that grantor's permission must be obtained); Wilson *v.* Nance, 11 Humphr. (Tenn.) 188. But see Lenoir *v.* Mining Co., 88 Tenn. 168, 14 S. W. 378, in which it was held that, notwithstanding Tenn. Act 1877, c. 97, courts of chancery will not grant relief in a suit by a vendor and vendee to recover, for the benefit of the vendee, land which was adversely held at the time of sale.

Vermont.— Edwards *v.* Parkhurst, 21 Vt. 472.

See also *supra,* IV, B, 2; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 63.

88. Pitts *v.* McWhorter, 3 Ga. 5, 46 Am. Dec. 405; Jackson *v.* Leggett, 7 Wend. (N. Y.) 377; Williams *v.* Jackson, 5 Johns. (N. Y.) 489; Augusta Mfg. Co. *v.* Vertrees, 4 Lea (Tenn.) 75; Wilson *v.* Nance, 11 Humphr. (Tenn.) 188.

89. *Kentucky.*— Luen *v.* Wilson, 85 Ky. 503, 9 Ky. L. Rep. 83, 3 S. W. 911; Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Baley *v.* Deakins, 5 B. Mon. (Ky.) 159; Hobson *v.* Hendrick, 7 Ky. L. Rep. 362.

Massachusetts.— Wolcot *v.* Knight, 6 Mass. 418.

c. Defenses. It is no defense to an action for the recovery of land adversely held that plaintiff has previously made a champertous conveyance of it. Such an unlawful conveyance is only a defense, where it is itself the foundation of the action.[90]

3. Of Occupant. The person in possession of land cannot sustain a bill in equity for the avoidance of a deed executed to another by a person claiming adversely to the tenant, on the ground that the deed is void in consequence of his adverse possession.[91]

4. Rights of Third Persons. Third persons cannot be heard to object to a conveyance or contract on the ground that it is tainted with champerty.[92]

CHANCE.[1] Possibility;[2] hazard, risk, or the result or issue of uncertain and unknown conditions or forces,[3] neither understandingly brought about by one's act nor pre-estimated by one's understanding.[4] (Chance: As Defense to Crime, see Criminal Law. Bargain, see Sales; Vendor and Purchaser. Game of, see Gaming; Lotteries. Medley, see Chance-Medley. Verdict, see New Trial; Trial.)

CHANCELLOR. The name given in some states to the judge or presiding judge of the court of chancery. In England, besides being the designation of the chief judge of the court of chancery, the term is used as the title of several judicial officers attached to bishops or other high dignitaries and to the universities. In Scotch practice, the foreman of an assize or jury.[5] (See, generally, Equity; Judges.)

New York.— Mosher *v.* Yost, 33 Barb. (N. Y.) 277.

Tennessee.— Saylor *v.* Stewart, 2 Heisk. (Tenn.) 510.

Vermont.— Parkhurst *v.* Edwards, 15 Vt. 618.

Virginia.— Hopkins *v.* Ward, 6 Munf. (Va.) 38.

See also *supra*, IV, B, 2; and 9 Cent. Dig. tit. "Champerty and Maintenance," § 63.

Rescission of champertous conveyance.— In Kentucky a champertous grantor must abandon and rescind his champertous conveyance before he can sue for the recovery of the land. Luen *v.* Wilson, 85 Ky. 503, 9 Ky. L. Rep. 83, 3 S. W. 911; Crowley *v.* Vaughan, 11 Bush (Ky.) 517; Hobson *v.* Hendrick, 7 Ky. L. Rep. 362.

90. *Alabama.*— Sibley *v.* Alba, 95 Ala. 191, 10 So. 831.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Kentucky.—Chrisman *v.* Gregory, 4 B. Mon. (Ky.) 474; Meredith *v.* Kennedy, Litt. Sel. Cas. (Ky.) 516. But an action founded on a champertous sale and prosecuted by the vendee in the name of the champertous vendor, with the latter's permission, may be defeated by proof of the true character of the sale. Crowley *v.* Vaughan, 11 Bush (Ky.) 517. See also Woodford *v.* Young, 4 Ky. L. Rep. 981, in which the action was brought on the champertous conveyance.

Massachusetts.— Cleverly *v.* Whitney, 7 Pick. (Mass.) 36.

Virginia.— Bream *v.* Cooper, 5 Munf. (Va.) 7.

See 9 Cent. Dig. tit. "Champerty and Maintenance," § 63.

91. Keneda *v.* Gardner, 4 Hill (N. Y.) 469.

Contra.— Wellman *v.* Hickson, Smith (Ind.) 407, in which the decree below, so far as the setting aside of the conveyance for maintenance was concerned, was affirmed, but was reversed as to the vesting of title in the complainant.

An occupant who has been ousted cannot bring an action of ejectment against those in possession, on the ground that the suit by which he was ousted had been commenced in pursuance of a champertous contract. The statute is only for the protection of those in actual adverse possession. Smith *v.* Paxton, 4 Dana (Ky.) 391.

92. King *v.* Sears, 91 Ga. 577, 18 S. E. 830; Doe *v.* Ingersoll, 11 Sm. & M. (Miss.) 249, 49 Am. Dec. 57; Knight *v.* Bowyer, 2 De G. & J. 421, 4 Jur. N. S. 569, 27 L. J. Ch. 521, 6 Wkly. Rep. 565, 61 Eng. Ch. 334.

1. **Distinguished from "accident."**—"There is a wide difference between 'chance' and 'accident.' The one is the intervention of some unlooked for circumstances to prevent an expected result, the other is the uncalculated effect of mere luck. The shot discharged at random strikes its object by chance; that which is turned aside from its well directed aim by some unforseen circumstance misses its mark by accident." Harless *v.* U. S., Morr. (Iowa) 169, 173.

2. Bonner *v.* State, 107 Ala. 97, 107, 18 So. 226.

3. Dixon *v.* Pluns, 98 Cal. 384, 387, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698.

4. Goodman *v.* Cody, 1 Wash. Terr. 329, 335, 34 Am. Rep. 808 [*quoted* in Gordon *v.* Trevarthan, 13 Mont. 387, 392, 34 Pac. 185, 40 Am. St. Rep. 452].

5. Black L. Dict.

CHANCELLOR OF A DIOCESE. A law officer appointed to hold the bishop's court in his diocese and to adjudicate upon matters of ecclesiastical law.[6]

CHANCE-MEDLEY. The accidental killing a man in self-defense in a sudden rencounter.[7]

CHANCER. To adjust according to the principles of equity, as would be done by a court of chancery.[8]

CHANCERY. See EQUITY.

CHANGE. To alter;[9] an alteration; substitution of one thing for another;[10] bills, or gold or silver coins, or some of each, of lesser denominations, in amount of equal value;[11] a fixed place where merchants meet, at certain hours, for the transaction of business with each other, subject to such general rules or understanding as they think proper to be governed by.[12] (Change: Of Form of Action, see PLEADING. Of Grade of Street or Highway, see EMINENT DOMAIN; MUNICIPAL CORPORATIONS; RAILROADS; STREET RAILROADS; STREETS AND HIGHWAYS. Of Name, see NAMES. Of Occupancy or Title of Insured Premises, see FIRE INSURANCE. Of Occupation[13] of Insured Person, see ACCIDENT INSURANCE; LIFE INSURANCE. Of Possession of Property — Mortgaged, see CHATTEL MORTGAGES; Sold as Against Creditors and Subsequent Purchasers, see FRAUDULENT CONVEYANCES. Of Venue — In Civil Actions, see VENUE; In Criminal Prosecutions, see CRIMINAL LAW.)

CHANNEL.[14] The bed of a stream of water, the hollow or course in which a stream flows;[15] the hollow bed of running water;[16] the bed in which the stream of the river flows;[17] a passage-way between banks through which flow the waters of the stream; the bed of the stream over which its waters run;[18] the place where the river flows, including the whole breadth of the river;[19] the depression of a bed below permanent banks, forming a conduit along which waters flow, and which may be at some times full, and at others nearly if not quite dry;[20] that part of a stream in which the current flows; that part of tide waters on which vessels move;[21] the bed of a stream of water; especially the deeper part of a river or bay where the main current flows;[22] the line of the deep water which vessels follow;[23] the course over its bed along which the water is deepest, and the navigation safest.[24] (Channel: As Boundary — In General, see BOUNDARIES. Of States, see STATES. Collisions in, see COLLISION. Improvement of, see NAVIGABLE WATERS.)

CHAPEL. See RELIGIOUS SOCIETIES.

CHAPMAN. A trader who trades from place to place.[25]

6. Wharton L. Lex.

7. 4 Bl. Comm. 184.

8. Century Dict. See also James *v.* Smith, 1 Tyler (Vt.) 128.

9. *In re* Alston, 1 Pennew. (Del.) 359, 360, 40 Atl. 938; Wallace *v.* Blair, 1 Grant (Pa.) 75, 79.

10. Black L. Dict. See also ALTERATION.

11. Murphy *v.* People, 104 Ill. 528, 535.

12. White *v.* Brownell, 2 Daly (N. Y.) 329, 356, 4 Abb. Pr. N. S. (N. Y.) 162.

13. Of Chinese see ALIENS, 2 Cyc. 125, note 78.

14. "The main channel is that bed of a river over which the principal volume of water flows." St. Louis, etc., Packet Co. *v.* Keokuk, etc., Bridge Co., 31 Fed. 755, 757.

15. Century Dict. [*quoted* in Willey *v.* Lewis, 11 Ohio Dec. (Reprint) 607, 611, 28 Cinc. L. Bul. 104].

16. Worcester Dict. [*quoted* in Willey *v.* Lewis, 11 Ohio Dec. (Reprint) 607, 611, 28 Cinc. L. Bul. 104].

17. Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 564, 8 N. W. 443 [*followed* in Cooley *v.* Golden, 117 Mo. 33, 53, 23 S. W. 100, 21 L. R. A. 300 (*citing* Black L. Dict.)].

18. Benjamin *v.* Manistee River Imp. Co., 42 Mich. 628, 637, 4 N. W. 483.

19. Alabama *v.* Georgia, 23 How. (U. S.) 505, 513, 16 L. ed. 556.

20. Cessill *v.* State, 40 Ark. 501, 504.

21. The Oliver, 22 Fed. 848, 849.

22. Webster Dict. [*quoted* in Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 547, 17 N. E. 439, 5 Am. St. Rep. 545; Willey *v.* Lewis, 11 Ohio Dec. (Reprint) 607, 611, 28 Cinc. L. Bul. 104].

23. Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 564, 8 N. W. 443 [*quoted* in Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 547, 17 N. E. 439, 5 Am. St. Rep. 545].

24. Cessill *v.* State, 40 Ark. 501, 504. See also The Sarah, 52 Fed. 233, 235, 2 U. S. App. 390, 3 C. C. A. 56.

25. Kearle *v.* Boulter, Say. 191, 192, where the word is said to be derived from the German *copeman*,— a trader.

CHAR. To reduce wood to a coal by burning.[26]

CHARACTER.[27] The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of one's distinguishing attributes;[28] the peculiar qualities impressed by nature or habit on a person, which distinguish him from others;[29] reputation,[30] or the estimation in the community in which one is held;[31] personal virtue;[32] account; description;[33] the personal, official or special character in which a party sues or is sued.[34] While doubtless there is a distinction, observed by careful writers, between character and reputation; character, where the distinction is observed, signifying the reality, and reputation merely what is reported, or understood from report, to be the reality about a person or thing;[35] it more frequently refers to reputation or common report[36] and is seldom used as synonymous with mere inclination or propensity, or even secret habit, nor as descriptive of the mere qualities of individuals, only so far as others have formed opinions from their conduct.[37] (Character: Bad, as Ground For Disbarment, see ATTORNEY AND CLIENT. Evidence of in Civil Cases — As Affecting Damages, Generally, see DAMAGES; For Assault and Battery, see ASSAULT AND BATTERY; For Breach of Marriage Promise, see BREACH OF PROM-

26. State *v.* Sandy, 25 N. C. 570, 574. See also State *v.* Hall, 93 N. C. 571, 573.

27. "Conversation" and "character" see ABDUCTION, 1 Cyc. 153, note 77. See also CONVERSATION.

28. Black L. Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

29. Webster Dict. [*quoted* in Cox *v.* Strickland, 101 Ga. 482, 494, 28 S. E. 655; State *v.* Andre, 5 Iowa 389, 394, 68 Am. Dec. 708; Carpenter *v.* People, 8 Barb. (N. Y.) 603, 608].

30. *Alabama.*— Smith *v.* State, 88 Ala. 73, 76, 7 So. 52; Hussey *v.* State, 87 Ala. 121, 130, 6 So. 420 [*citing* 1 Taylor Ev. § 350]; Sullivan *v.* State, 66 Ala. 48, 50; Haley *v.* State, 63 Ala. 63, 86.

Iowa.— State *v.* Egan, 59 Iowa 636, 13 N. W. 730; State *v.* Prizer, 49 Iowa 531, 31 Am. Rep. 155.

Maryland.— World *v.* State, 50 Md. 49, 56.

Minnesota.— Rudsdill *v.* Slingerland, 18 Minn. 380.

Nebraska.—Berneker *v.* State, 40 Nebr. 810, 816, 59 N. W. 372 [*quoting* Wharton Crim. Ev. c. 2, § 58].

Nevada.— State *v.* Pearce, 15 Nev. 188, 190.

New York.— Safford *v.* People, 1 Park. Crim. (N. Y.) 474, 478.

Ohio.— Bucklin *v.* State, 20 Ohio 18, 24.

Pennsylvania.—Kimmel *v.* Kimmel, 3 Serg. & R. (Pa.) 336, 338, 8 Am. Dec. 655.

Rhode Island.— State *v.* Wilson, 15 R. I. 180, 181, 1 Atl. 415; Brownlee *v.* State, 13 Tex. App. 255, 257 [*quoting* Wharton Crim. Ev. c. 2, § 58].

United States.— Knode *v.* Williamson, 17 Wall. (U. S.) 586, 588, 21 L. ed. 670; Edwards *v.* Kansas City Times Co., 32 Fed. 813, 816.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 29, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

31. Smith *v.* State, 88 Ala. 73, 76, 7 So. 52; Haley *v.* State, 63 Ala. 83, 86 [*quoted* in Sullivan *v.* State, 66 Ala. 48, 50]; Powers *v.* Leach, 26 Vt. 270, 278.

Other definitions of similar import but differing slightly in language are: "The opinion, estimate, or knowledge of those residing in the neighborhood generally." Fahnestock *v.* State, 23 Ind. 231, 238.

"The general credit which a man has obtained in public opinion." Hussey *v.* State, 87 Ala. 121, 130, 6 So. 420 [*citing* 1 Taylor Ev. § 350].

"The estimation in which one is held by the public who know his standing." De Arman *v.* State, 71 Ala. 351, 361.

"The estimation in which a person is held in the community where he has resided." Douglass *v.* Tousey, 2 Wend. (N. Y.) 352, 354, 20 Am. Dec. 616.

32. People *v.* Kenyon, 5 Park. Crim. (N. Y.) 254, 270.

33. Webster Dict. [*quoted* in Joost *v.* Sullivan, 111 Cal. 286, 295, 43 Pac. 896].

34. Safford *v.* People, 1 Park. Crim. (N. Y.) 474, 478.

35. *Iowa.*— State *v.* Andre, 5 Iowa 389, 394, 68 Am. Dec. 708 [*quoted* in State *v.* Prizer, 49 Iowa 531, 31 Am. Rep. 155].

New Hampshire.— State *v.* Lapage, 57 N. H. 245, 297, 24 Am. Rep. 69.

New York.— Carpenter *v.* People, 8 Barb. (N. Y.) 603, 608 [*quoting* Webster Dict.]. See also Crozier *v.* People, 1 Park. Crim. (N. Y.) 453, 457.

Ohio.— Bucklin *v.* State, 20 Ohio 18, 23.

Oregon.— Leverich *v.* Frank, 6 Oreg. 212, 213.

Rhode Island.— State *v.* Wilson, 15 R. I. 180, 181, 1 Atl. 415.

United States.— Edwards *v.* Kansas City Times Co., 32 Fed. 813, 816.

Character is a word of broader significance than reputation (Sullivan *v.* State, 66 Ala. 48, 50) and includes it (State *v.* Fleming, 86 Iowa 294, 298, 53 N. W. 234).

36. Safford *v.* People, 1 Park. Crim. (N. Y.) 474, 478; Bucklin *v.* State, 20 Ohio 18, 23.

37. Safford *v.* People, 1 Park. Crim. (N. Y.) 474, 478.

Distinguished from "disposition."— "The term 'character' is not synonymous with 'disposition.'" Hussey *v.* State, 87 Ala. 121, 130, 6 So. 420 [*citing* 1 Taylor Ev. § 350].

ISE TO MARRY; For Criminal Conversation, see HUSBAND AND WIFE; For False Imprisonment, see FALSE IMPRISONMENT; For Libel and Slander, see LIBEL AND SLANDER; For Seduction, see SEDUCTION; Generally, see EVIDENCE. Evidence of in Criminal Prosecutions — For Abduction, see ABDUCTION; For Adultery, see ADULTERY; For Assault and Battery, see ASSAULT AND BATTERY; For Bastardy, see BASTARDS; For Homicide, see HOMICIDE; For Larceny, see LARCENY; For Rape, see RAPE; For Seduction, see SEDUCTION; Generally, see CRIMINAL LAW. Injuries to — As Element of Wrongful Attachment, see ATTACHMENT; Assignability of Claim For, see ASSIGNMENTS; Generally, see LIBEL AND SLANDER. Of Applicant For Naturalization, see ALIENS. Of Female as Element of — Abduction, see ABDUCTION; Rape, see RAPE; Seduction, see SEDUCTION. Of Witness, see WITNESSES. Representations as to, see FRAUDS, STATUTE OF.)

CHARBON. Anthrax; malignant pustule.[38]

CHARGE. A word of very general and varied use.[39] As a verb it signifies to put upon as a task or duty; to overload; to burden; to commission for a certain purpose; to intrust; to lay on or impose as a load or burden; as a task or duty, or trust;[40] as a noun — any onerous condition;[41] obligation directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed;[42] a responsibility peculiar to the person or thing affected and authoritatively imposed;[43] any lien on property of any description;[44] the price required or demanded for service rendered, or (less usually) for goods supplied;[45] custody;[46] the address made by the judge after the case has been closed, when he comments upon the testimony, or instructs the jury in any matter of law arising upon it;[47] the exposition by the court to a petit jury of those principles of the law which the latter are bound to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit;[48] accusation[49] of criminality.[50] (Charge: By Carriers, see CARRIERS. Of Court — To Grand Jury, see GRAND JURIES; To Petit Jury, see CRIMINAL LAW; TRIAL. Of Legacies on Property, see WILLS. Of Pauper on County or Town, see POOR PERSONS. See also CHARGED; CHARGES.)

38. Bacon *v.* U. S. Mutual Acc. Assoc., 123 N. Y. 304, 310, 25 N. E. 399, 33 N. Y. Suppl. 591, 20 Am. St. Rep. 748, 9 L. R. A. 617.

39. Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, 435, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L. R. A. 529 [*quoted* in Ballou *v.* Hawaiian Tramways Co., 10 Hawaii 376, 377], where it is said: "Webster gives it thirteen different meanings, . . . The great dictionary of the Philological Society, now in course of publication, gives it twenty separate principal definitions, besides a nearly equal number of subordinate variations of meaning."

40. People *v.* Angle, 47 Hun (N. Y.) 183, 189 [*citing* Webster Dict.; Worcester Dict.].

41. *In re* Ah Fong, 3 Sawy. (U. S.) 144, 158, 1 Fed. Cas. No. 102, 3 Am. L. Rec. 403, 13 Am. L. Reg. N. S. 761, 9 Am. L. Rev. 359, 1 Centr. L. J. 516, 7 Chic. Leg. N. 17, 20 Int. Rev. Rec. 112.

42. Felix *v.* Wallace County, 62 Kan. 832, 837, 62 Pac. 667, 84 Am. St. Rep. 424 [*quoting* Bouvier L. Dict.]; Merchants Exch. Nat. Bank *v.* Commercial Warehouse Co., 49 N. Y. 635, 639.

43. Merchants Exch. Nat. Bank *v.* Commercial Warehouse Co., 49 N. Y. 635, 639.

44. Mack *v.* Prince, 40 W. Va. 324, 326, 21 S. E. 1012. See also Grigg *v.* Banks, 59 Ala. 311, 317 [*quoted* in Anniston First Nat. Bank *v.* Elliott, 125 Ala. 646, 651, 82 Am. St. Rep. 268; Holden *v.* Rison, 77 Ala. 515, 518; Harris *v.* Miller, 71 Ala. 26, 34], where it is said: "The word 'charge,' is of very large signification, and in the statute its proper signification is, every lien, or incumbrance, or claim the purchaser may have on the premises, and for which, at law or in equity, he would be entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them."

45. Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, 435, 19 Atl. 72, 17 Am. St. Rep. 818, 6 L. R. A. 529 [*quoted* in Ballou *v.* Hawaiian Tramways Co., 10 Hawaii 376, 377].

46. State *v.* Clark, 86 Me. 194, 195, 29 Atl. 984.

47. Millard *v.* Lyons, 25 Wis. 516, 517.

48. Bouvier L. Dict. [*quoted* in Dodd *v.* Moore, 91 Ind. 522, 523; Equitable F. Ins. Co. *v.* Cumberland Presb. Church, 91 Tenn. 135, 137, 18 S. W. 121]. See also Harris *v.* McArthur, 90 Ga. 216, 15 S. E. 758, where "charges" are defined as "final instructions addressed by the court to the jury for the purpose of governing their action in making or aiding to make a final disposition of the case in favor of one litigant or the other."

49. U. S. *v.* Ross, Morr. (Iowa) 164, 166; People *v.* Roosevelt, 12 Misc. (N. Y.) 622, 625, 34 N. Y. Suppl. 228, 68 N. Y. St. 85.

50. Thompson *v.* Lusk, 2 Watts (Pa.) 17, 22, 26 Am. Dec. 91.

CHARGEABLE. Capable of being charged; subject to be charged; liable to be charged; proper to be charged; legally liable to be charged.[51]

CHARGED.[52] Debited.[53]

CHARGES. Expenses;[54] liability;[55] interest payable in respect of a mortgage;[56] an accusation, made in a legal manner, of illegal conduct, either of omission or commission, by the person charged;[57] an original complaint made in the first instance preliminary to a formal trial for a crime;[58] an accusation of official misconduct.[59] (Charges: Of Assignees — In Bankruptcy, see BANKRUPTCY; Of Insolvents, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; INSOLVENCY. Of Executors and Administrators, see EXECUTORS AND ADMINISTRATORS. Of Guardians, see GUARDIAN AND WARD; INSANE PERSONS. See also CHARGE.)

CHARGES D'AFFAIRES. See AMBASSADORS AND CONSULS.

CHARGE-SHEET. A paper kept at a police-station to receive each night the names of the persons brought and given into custody, the nature of the accusation, and the name of the accuser in each case;[60] a blotter.[61]

CHARGING A JURY. Stating the precise principles of law applicable to the case immediately in question.[62]

CHARGING ORDER. An order obtained from a court or judge under English statutes, binding the stocks or bonds of a judgment debtor with the judgment debt.[63]

CHARIOT. A half coach with four wheels, used for convenience and pleasure.[64]

CHARITABLE. Eleemosynary.[65] (See, generally, CHARITIES.)

CHARITABLE TRUSTS ACTS. Certain English statutes,[66] passed to constitute a board of commissioners called the Charity Commissioners, with powers for inquiring into the nature, objects, condition and management of charities, and for giving advice and directions, and making orders for the administration of charity property, and for authorizing leases, sales, and exchanges of charity lands.[67] (See, generally, CHARITIES.)

CHARITABLE USES ACT. An English statute[68] which prohibits gifts to charities of land, or moneys arising from or to be laid out in land, unless made in accordance with the provisions of the act.[69] (See, generally, CHARITIES.)

51. Walbridge *v.* Walbridge, 46 Vt. 617, 625.

52. "The expression 'charged with,' as applied to a crime, is sometimes used in a limited sense — intending the accusation of a crime which precedes a formal trial. In a fuller and more accurate sense the expression includes also the responsibility for the crime." Drinkall *v.* Spiegel, 68 Conn. 441, 447, 36 Atl. 830, 36 L. R. A. 486 [*citing* Anderson L. Dict.].

53. Atty.-Gen. *v.* ——, 2 Anstr. 558, 560.

54. Goodwin *v.* Chaffee, 4 Conn. 163, 166 [*quoted* in Cairns *v.* Smith, (Tex. Civ. App. 1899) 49 S. W. 728, 733]; Green *v.* Jones, 78 N. C. 265, 268; Barnard *v.* Morton, 1 Curtis (U. S.) 404, 405, 2 Fed. Cas. No. 1,005.

55. Bancroft *v.* Winspear, 44 Barb. (N. Y.) 209, 214.

56. Copland *v.* Bartlett, 6 C. B. 18, 27, 13 Jur. 127, 18 L. J. C. P. 50, 2 Lutw. Reg. Cas. 102, 60 E. C. L. 18.

57. Pompert *v.* Lithgow, 1 Bush (Ky.) 176, 180.

58. Ryan *v.* People, 79 N. Y. 593, 598.

59. People *v.* McGuire, 27 N. Y. App. Div. 593, 596, 50 N. Y. Suppl. 520.

60. Wharton L. Lex.

61. Century Dict.

62. Lehman *v.* Hawks, 121 Ind. 541, 543, 23 N. E. 670 [*quoting* Bouvier L. Dict.].

63. Wharton L. Lex.

64. Cincinnati, etc., Turnpike Co. *v.* Neil, 9 Ohio 11, 13.

65. People *v.* New York Soc., etc., 162 N. Y. 429, 436, 56 N. E. 1004; People *v.* Fitch, 16 Misc. (N. Y.) 464, 465, 39 N. Y. Suppl. 926.

"This word, in the expressions 'charitable uses,' 'charitable trusts,' is understood in a very large sense comprising not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and for any other useful and public purpose, as well as donations for pious or religious objects." Burrill L. Dict. [*quoted* in People *v.* Fitch, 154 N. Y. 14, 33, 47 N. E. 983, 38 L. R. A. 591].

"Charitable" and "benevolent" distinguished see BENEVOLENT, 5 Cyc. 682, note 20.

"Charitable" and "educational" are distinguishable in a popular sense. State *v.* Board of Control, 85 Minn. 165, 169, 88 N. W. 533.

66. 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112; 32 & 33 Vict. c. 110.

67. Sweet L. Dict.

68. 9 Geo. II, c. 36.

69. Sweet L. Dict.

CHARITIES

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CROSS-REFERENCES

For Matters Relating to:
Construction and Validity of Particular Instruments, see DEEDS; GIFTS; TRUSTS; WILLS.
Perpetuities, see PERPETUITIES.
Restrictions on Testamentary Dispositions to Charitable Uses, see WILLS.
Taxation of Property of Charitable Societies, or Property Held for Charitable Purposes, see TAXATION.

I. CREATION AND VALIDITY.

A. Definition and Origin — 1. IN GENERAL. In the broadest sense charity includes whatever proceeds from a sense of moral duty or from humane feelings toward others, uninfluenced by one's own advantage or pleasure.[1] It means this

1. Doyle *v.* Lynn, etc., R. Co., 118 Mass. 195, 19 Am. Rep. 431. See also the following cases:

Iowa.— Ft. Madison First M. E. Church *v.* Donnell, 110 Iowa 5, 81 N. W. 171, 46 L. R. A. 858.

Kansas.— Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33, 71 Pac. 286.

Maine.—Maine Baptist Missionary Convention *v.* Portland, 65 Me. 92.

Massachusetts.— Bullard *v.* Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104.

Michigan.— Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159.

Minnesota.— State *v.* State Institutions, 85 Minn. 165, 88 N. W. 533; Hennepin County *v.* Gethsemane Church, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298.

Ohio.— Gerke *v.* Purcell, 25 Ohio St. 229.

Oregon.— Pennoyer *v.* Wadhams, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 210.

Pennsylvania.— Knight's Estate, 159 Pa. St. 500, 28 Atl. 303; Episcopal Academy *v.* Philadelphia, 150 Pa. St. 565, 25 Atl. 55; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417; Donohugh's Appeal, 86 Pa. St. 306.

Rhode Island.— Webster *v.* Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

Virginia.— Protestant Episcopal Education Soc. *v.* Churchman, 80 Va. 718.

Washington.— *In re* Stewart, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

United States.—Kain *v.* Gibboney, 101 U. S. 362, 25 L. ed. 813; Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205; Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146.

Lord Camden's definition.—In Jones *v.* Williams, Ambl. 651, Lord Camden defined a charity to be "a gift to a general public use, which extends to the poor as well as to the rich." This definition has been quoted in the following cases:

Connecticut.— Strong's Appeal, 68 Conn. 527, 37 Atl. 395.

Delaware.— Doughten *v.* Vandever, 5 Del. Ch. 51.

Indiana.— Erskine *v.* Whitehead, 84 Ind. 357.

Kansas.— Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33, 71 Pac. 286.

Maine.— Piper *v.* Moulton, 72 Me. 155.

Massachusetts.—Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371; Jackson *v.* Phillips, 14 Allen (Mass.) 539; Drury *v.* Natick, 10 Allen (Mass.) 169.

Minnesota.— State *v.* State Institutions, 85 Minn. 165, 88 N. W. 533.

New York.— People *v.* Fitch, 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591; People *v.* New York Soc., etc., 42 N. Y. App. Div. 83, 58 N. Y. Suppl. 953; Coggeshall *v.* Pelton, 7 Johns. Ch. (N. Y.) 292, 11 Am. Dec. 471.

Ohio.— Gerke *v.* Purcell, 25 Ohio St. 229.

Oregon.— Pennoyer *v.* Wadhams, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 210.

in those Lord's day statutes which limit business and labor to what is done from "necessity and charity."[2] In the much debated phrase of the Pennsylvania constitution, an "institution of purely public charity," it denotes a "gift to promote the welfare of others," including what is done or given gratuitously in relief of the public burdens or for the advancement of the public good.[3] The principle of charity was recognized, even before the adoption of Christianity, by the Roman law, from which certain of its characteristics were incorporated into the law of England;[4] it was known also to the Jews, who early favored aid toward self-help, and education suitable to that end, but except in cases of actual necessity disapproved of alms-giving as being the lowest form of charity;[5] and probably, as Sir Edward Coke observed, in the reign of Elizabeth, "no time was so barbarous, as to abolish learning and knowledge, nor so uncharitable, as to prohibit relieving the poor."[6] The oft recurring prayer,[7] "This do in work of charity," in the earliest appeals to the English chancellor by those who had no remedy, shows that the common, if not the equitable, concept of the term under Christian influences was the same in remote and modern times.

2. Effect of Statute of Elizabeth. In its more restricted and popular sense charity denotes relief of poverty and distress; but as employed in the English chan-

Rhode Island.— Kelly *v.* Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

Wisconsin.— Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

United States.— Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701; Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146.

In its widest sense charity denotes all the good affections men ought to bear to each other; in its most restricted sense, relief of the poor.

Connecticut.— Hamden *v.* Rice, 24 Conn. 350.

Illinois.— Taylor *v.* Keep, 2 Ill. App. 368.

Indiana.— Erskine *v.* Whitehead, 84 Ind. 357.

Kansas.— Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33, 71 Pac. 286.

Minnesota.— State *v.* State Institutions, 85 Minn. 165, 88 N. W. 533.

South Carolina.— State *v.* Addison, 2 S. C. 499.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

United States.— 4 Wheat. (U. S.) Appendix 1.

England.— Morice *v.* Durham, 9 Ves. Jr. 399, 10 Ves. Jr. 522, 7 Rev. Rep. 232, 5 Eng. Rul. Cas. 548.

The test which determines whether an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit it is not a charitable enterprise. Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 19 U. S. App. 612, 9 C. C. A. 14, 23 L. R. A. 581 [*quoted* in Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33, 71 Pac. 286; Long *v.* Rosedale Cemetery, 84 Fed. 135].

2. See cases cited *supra*, note 1; and the following cases:

Maine.— Buck *v.* Biddeford, 82 Me. 433, 19 Atl. 912.

Massachusetts.— Doyle *v.* Lynn, etc., R. Co., 118 Mass. 195, 19 Am. Rep. 431.

New Hampshire.— Clough *v.* Shepherd, 31 N. H. 490.

Pennsylvania.— Dale *v.* Knepp, 98 Pa. St. 389, 42 Am. Rep. 624.

Vermont.— McClary *v.* Lowell, 44 Vt. 116, 8 Am. Rep. 366.

3. See Philadelphia *v.* Masonic Home, 160 Pa. St. 572, 28 Atl. 954, 40 Am. St. Rep. 736, 23 L. R. A. 545; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417; Burd Orphan Asylum *v.* Upper Darby School Dist., 90 Pa. St. 21.

The word "purely" here means "wholly." Episcopal Academy *v.* Philadelphia, 150 Pa. St. 565, 25 Atl. 55. See also Gray St. Infirmary *v.* Louisville, 23 Ky. L. Rep. 1274, 65 S. W. 11, 55 L. R. A. 270.

4. Notably mortmain, the *cy-pres* doctrine, and indefiniteness of beneficiaries. See 1 Spence Eq. Jur. 523N, 587; 2 Gibbon Hist. Rome, 345; Jackson *v.* Phillips, 14 Allen (Mass.) 539, 554; Church of Jesus Christ *v.* U. S., 136 U. S. 1, 52, 10 S. Ct. 792, 34 L. ed. 478. In White *v.* White, 1 Bro. Ch. 12, 15, Lord Thurlow, referring to the jurisdiction to make legacies certain which were before uncertain, said: "The cases have proceeded upon notions adopted from the Roman and civil law, which are very favorable to charities, that legacies given to public uses not ascertained, shall be applied to some proper object." Such legacies, by the civil law, were preferred to other legacies. Fielding *v.* Bound, 1 Vern. 230.

5. Riker *v.* Leo, 133 N. Y. 519, 30 N. E. 598 [*affirming* 15 N. Y. Suppl. 966], 115 N. Y. 93, 21 N. E. 719, 26 N. Y. St. 978 [*reversing* 1 N. Y. Suppl. 128, 15 N. Y. St. 932], *q. v.* as to the meaning of "relief of indigent Jews in Palestine."

6. Porter's Case, 1 Coke 22*b*.

7. See Kerly Eq. Jur. (Cambridge Prize Essay, 1889), pp. 16, 63.

cery its signification was chiefly derived from the preamble of the English statute,[8] and in a legal sense those purposes came in England to be treated as charitable which are therein enumerated, or which by analogy were deemed within its intendment.[9] The Statute of Elizabeth was repealed in England in 1888,[10] but the repealing act incorporated and continued in force that preamble.[11] With other early English statutes it was brought over by the American settlers as part of their common law. This was the view taken by the supreme court of the United States in the Girard Will case[12] which, under the influence of the then recent investigations of the English record commissioners and of Mr. Binney's celebrated argument in the case, overruled one of its previous decisions.[13] And while the question, What is a charity? is often said in America to be principally regulated and determined by the Statute of Elizabeth,[14] yet the prevailing view has been that trusts for charitable uses which, prior to its enactment, were sustained by the English chancery under its general equity powers are within the original and inherent equity jurisdiction over charities, even where the English statute is not in force and independently thereof. Such appears to be now the accepted doctrine in the majority of the states of the Union.[15]

8. 43 Eliz. c. 4.

9. American Academy of Arts, etc. *v.* Harvard College, 12 Gray (Mass.) 582; Morice *v.* Durham, 9 Ves. Jr. 399, 10 Ves. Jr. 522, 7 Rev. Rep. 232, 5 Eng. Rul. Cas. 548; Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265. See 5 Harv. L. Rev. 389, 509; 31 Am. L. Reg. N. S. 522.

Purposes named in 43 Eliz. c. 4 — Validity and history of this enumeration.— The preamble of this statute enumerated the following charitable purposes: the relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; the education and preferment of orphans; relief or maintenance for houses of correction; marriage of poor maids; aid and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitant concerning payment of fifteens, setting out of soldiers, and other taxes. 1 Chitty Stat. (5th ed.) tit. Charities, p. 68. That some of the purposes here mentioned are not charitable see Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265. Some of these objects were provided for by earlier statutes, such as the impotent poor, scholars in universities, piers and jetties, walls and bridges; and the whole enumeration in the Statute of Elizabeth substantially appears more than two hundred years earlier in the "Vision of Piers Plowman." See 8 Harv. L. Rev. 69, note 70. Referring to the objects named in the preamble to the Statute of Elizabeth, Gray, J., in Drury *v.* Natick, 10 Allen (Mass.) 169, 177, said: "No one can read this sentence without perceiving its aim to have been to show by familiar examples what classes or kinds of uses were considered charitable, or so beneficial to the public as to be entitled to the same protection as strictly charitable uses, rather than to enumerate or specify all the purposes which would fall within the scope and intent of the statute, much less every possible mode of carrying them out. It is accordingly the well-settled construction of this ancient act, both in England and America, that in determining what uses are charitable within the statute, courts are to be guided not by its letter, but by its manifest spirit and reason, and are to consider not what uses are within its words, but what are embraced in its meaning and purpose."

10. By the Mortmain and Charitable Uses Act (1888), 51 & 52 Vict. c. 42, § 13.

11. 51 & 52 Vict. c. 42, § 13, subd. 5 (2).

12. Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205.

13. Philadelphia Baptist Assoc. *v.* Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499, so far as it held that "charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot, independently of the 43 Eliz. c. 4, be sustained by a court of equity, either in exercising its ordinary jurisdiction, or in enforcing the prerogative of the king as *parens patriæ*." See Kain *v.* Gibboney, 101 U. S. 362, 25 L. ed. 813; Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701; Gass *v.* Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446; Griffin *v.* Graham, 8 N. C. 96, 9 Am. Dec. 619.

14. See Wheeler *v.* Smith, 9 How. (U. S.) 55, 13 L. ed. 44; American Academy of Arts, etc. *v.* Harvard College, 12 Gray (Mass.) 582.

15. *Alabama.*— Burke *v.* Roper, 79 Ala. 138; Williams *v.* Pearson, 38 Ala. 299; Carter *v.* Balfour, 19 Ala. 814.

California.— People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270; Hinckley's Estate, 58 Cal. 457.

Delaware.— State *v.* Griffith, 2 Del. Ch. 392.

District of Columbia.— Ould *v.* Washington Hospital, 1 MacArthur (D. C.) 541, 29 Am. Rep. 605 [*affirmed* in 95 U. S. 303, 24 L. ed. 450].

Georgia.— Beall *v.* Fox, 4 Ga. 404.

3. **American Doctrine.** In the modern sense, and especially in America, the accepted definition[16] of a public charity is that it is "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."[17] By the latest American

Illinois.— Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; Crerar *v.* Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; Garrison *v.* Little, 75 Ill. App. 402.

Indiana.— Erskine *v.* Whitehead, 84 Ind. 357; Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690 [*overruling* McCord *v.* Ochiltree, 8 Blackf. (Ind.) 15; Richmond Common Council *v.* State, 5 Ind. 334]; Lagrange County *v.* Rogers, 55 Ind. 297.

Iowa.— Miller *v.* Chittenden, 2 Iowa 315.

Kentucky.— See Gass *v.* Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446.

Maine.— Drew *v.* Wakefield, 54 Me. 291; Howard *v.* American Peace Soc., 49 Me. 288; Tappan *v.* Deblois, 45 Me. 122.

Massachusetts.— Jackson *v.* Phillips, 14 Allen (Mass.) 539; Going *v.* Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645.

Missouri.— Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414; Missouri Historical Soc. *v.* Academy of Science, 94 Mo. 459, 8 S. W. 346; Chambers *v.* St. Louis, 29 Mo. 543.

Nebraska.— St. James Orphan Asylum *v.* Shelby, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553.

New Hampshire.—Haynes *v.* Carr, 70 N. H. 463, 49 Atl. 638; Webster *v.* Sughrow, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100.

New York.— Levy *v.* Levy, 33 N. Y. 97; Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; King *v.* Woodhull, 3 Edw. (N. Y.) 79; Wright *v.* New York M. E. Church, Hoffm. (N. Y.) 202; Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46; Kniskern *v.* St. John's, etc., Lutheran Church, 1 Sandf. Ch. (N. Y.) 439.

North Carolina.— See Griffin *v.* Graham, 8 N. C. 96, 9 Am. Dec. 619.

Ohio.— Sowers *v.* Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418; Landis *v.* Wooden, 1 Ohio St. 160, 59 Am. Dec. 615.

Oregon.— *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

South Carolina.— Shields *v.* Jolly, 1 Rich. Eq. (S. C.) 99, 42 Am. Dec. 349.

Tennessee.— Smith *v.* Thomas, 4 Heisk. (Tenn.) 116. See Dickson *v.* Montgomery, 1 Swan (Tenn.) 348.

Texas.— Hopkins *v.* Upshur, 20 Tex. 89, 70 Am. Dec. 375.

Vermont.— Burr *v.* Smith, 7 Vt. 241, 29 Am. Dec. 154.

Washington.— *In re* Stewart, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

Wisconsin.— See Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

United States.— Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397; Kain *v.* Gibboney, 101 U. S. 362, 25 L. ed. 813; Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450. See Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701; Meade *v.* Beale, Taney (U. S.) 339, 16 Fed. Cas. No. 9,371.

See 9 Cent. Dig. tit. "Charities," § 4; and 2 Perry Trusts (5th ed.), § 748 note.

16. Gray, J., in Jackson *v.* Phillips, 14 Allen (Mass.) 539.

Mr. Binney, in his argument before the supreme court of the United States in Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205, defined a charitable gift to be: "Whatever is given for the love of God or for the love of your neighbor, in the catholic and universal sense — given from these motives and to these ends — free from the stain or taint of every consideration that is personal, private, or selfish." This definition has been quoted in the following cases:

Illinois.— Garrison *v.* Little, 75 Ill. App. 402.

Kansas.— Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33, 71 Pac. 286.

Kentucky.— Ford *v.* Ford, 91 Ky. 572, 13 Ky. L. Rep. 183, 16 S. W. 451.

Maine.—Clement *v.* L'Institut Jacques Cartier, 95 Me. 493, 50 Atl. 376.

Massachusetts.—Jackson *v.* Phillips, 14 Allen (Mass.) 539.

Oregon.— Pennoyer *v.* Wadhams, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 210.

Pennsylvania.— Miller *v.* Porter, 53 Pa. St. 292; Price *v.* Maxwell, 28 Pa. St. 23.

Rhode Island.— Kelly *v.* Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

Wisconsin.— Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

United States.— Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450.

17. *Alabama.*— Johnson *v.* Holifield, 79 Ala. 423, 58 Am. Rep. 596.

California.— People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270; Hinckley's Estate, 58 Cal. 457.

Delaware.— Doughten *v.* Vandever, 5 Del. Ch. 51.

Illinois.— Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; Crerar *v.* Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

Indiana.— Erskine *v.* Whitehead, 84 Ind. 357.

Kansas.— Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33, 71 Pac. 286.

Maine.— Everett *v.* Carr, 59 Me. 325.

decisions a public charity begins only when uncertainty in the recipient begins, and while in a private trust the gift will fail and revert to the donor or his heirs, when the beneficiaries are so uncertain, or so incapable of taking, that they cannot be identified or cannot legally claim its benefits, yet in the case of a charitable gift it is immaterial that the beneficiaries are indefinite or not ascertained, or that the trustee is uncertain or incapable of taking.[18]

4. View of Statute of Elizabeth in Particular States. In Maryland, Michigan, Minnesota, New York, North Carolina, Virginia, West Virginia, and Wisconsin a marked divergence is found, chiefly as the result of local statutes.[19] In Virginia the legislature in 1792 passed an act repealing all English statutes, and particularly the Statute of Elizabeth;[20] but the Virginia acts of April 2, 1839, and of March 10, 1841, excepted gifts and devises from the rule that indefinite and uncertain charities will not there be sustained.[21] In Pennsylvania, although the Statute of Elizabeth was never adopted by the colony or state, and no separate court of chancery has ever existed there, yet it recognized the doctrine of charitable uses as part of its jurisprudence.[22] In Rhode Island not only was the Mort-

Missouri.— State *v.* Powers, 10 Mo. App. 263.

New Hampshire.— Webster *v.* Sughrow, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100.

New Jersey.— Livesey *v.* Jones, 55 N. J. Eq. 204, 35 Atl. 1064; Detwiller *v.* Hartman, 37 N. J. Eq. 347; Brown *v.* Pancoast, 34 N. J. Eq. 321.

Oregon.— Pennoyer *v.* Wadhams, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 210.

Rhode Island.— Webster *v.* Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; Kelly *v.* Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

Virginia.— Protestant Episcopal Education Soc. *v.* Churchman, 80 Va. 718.

Washington.— *In re* Stewart, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

Wisconsin.— Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

United States.— Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146; Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 19 U. S. App. 62, 9 C. C. A. 14, 23 L. R. A. 581.

18. See cases cited *supra*, note 17. These decisions are carefully reviewed and compared in Troutman *v.* De Boissierre Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33. Five judges constituted the majority of the court; and the view of the two dissenting judges, one of whom was Doster, C. J., was that the designated class of beneficiaries must have a claim upon the public, which claim must be founded in nature and humanity, as for the nurture and education of the young, the healing of disease, retreats for the insane, or support of the indigent, and cannot grow out of or exist in the private conventions, class associations, or artificial distinctions of men; and that in order to avoid the rule against perpetuities, the beneficiaries must constitute a public or quasi-public class standing, as a class, in such relations to society that it is under obligations of charity to them, as laborers in the world's work. For opinion on rehearing see (Kan. 1903) 71 Pac. 286.

19. *Maryland.*— Halsey *v.* Protestant Episcopal Convention, 75 Md. 275, 23 Atl. 781; Dumfries *v.* Abercrombie, 46 Md. 172; Dashiell *v.* Atty.-Gen., 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572.

Michigan.— Newark M. E. Church First Soc. *v.* Clark, 41 Mich. 730, 3 N. W. 207.

Minnesota.— Lane *v.* Eaton, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669.

New York.— Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 41 N. Y. St. 951, 27 Am. St. Rep. 487, 14 L. R. A. 33. See now N. Y. Laws (1893), c. 701; Allen *v.* Stevens, 161 N. Y. 122, 55 N. E. 568.

North Carolina.—Griffin *v.* Graham, 8 N. C. 96, 9 Am. Dec. 619.

Virginia.—Fifield *v.* Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; Gallego *v.* Atty.-Gen., 3 Leigh (Va.) 450, 24 Am. Dec. 650.

West Virginia.— Wilmoth *v.* Wilmoth, 34 W. Va. 426, 12 S. E. 731; Heiskell *v.* Trout, 31 W. Va. 810, 8 S. E. 557; Mong *v.* Roush, 29 W. Va. 119, 11 S. E. 906.

Wisconsin.— See Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

United States.— See Barnes *v.* Barnes, 3 Cranch C. C. (U. S.) 269, 2 Fed. Cas. No. 1,014.

See 9 Cent. Dig. tit. "Charities," §§ 3, 4.

20. See cases cited *supra*, note 19; and also Seaburn *v.* Seaburn, 15 Gratt. (Va.) 423; Kain *v.* Gibboney, 101 U. S. 362, 25 L. ed. 813; Philadelphia Baptist Assoc. *v.* Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499; John *v.* Smith, 102 Fed. 218, 42 C. C. A. 275 [*affirming* 91 Fed. 827].

21. Handley *v.* Palmer, 91 Fed. 948 [*affirmed* in 103 Fed. 39, 43 C. C. A. 100].

22. Zimmerman *v.* Anders, 6 Watts & S. (Pa.) 218, 40 Am. Dec. 552; Witman *v.* Lex, 17 Serg. & R. (Pa.) 88, 17 Am. Dec. 644; Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100; Stuart *v.* Easton, 74 Fed. 854, 39 U. S.

main Act[23] restricting gifts of realty to charitable uses treated as too late to be a part of its common law, but this jurisdiction of chancery was held not to originate in statute, or to be confined to the Colonial Act of 1721, which specified only two kinds of charitable trusts, and which, like the Statute of Elizabeth, was held to be retrospective, and hence to include all charitable gifts theretofore, as well as thereafter, valid at common law.[24] In California the Statute of Elizabeth is rejected as inapplicable to our social and political condition.[25] In Michigan the Statute of Charitable Uses, with other English statutes, was repealed in 1810;[26] and the revised statutes of 1847 of that state, in expressly abolishing uses and trusts, except as therein authorized and modified, without distinguishing between charitable and other uses,[27] corresponded to what was also done in New York in 1788,[28] and later in Wisconsin[29] and Minnesota,[30] though in New York the ancient law of charitable trusts has recently been restored by statute.[31] In other jurisdictions,[32] as in Massachusetts, Maine, Connecticut, Rhode Island, Illinois, Georgia, and Kentucky, the Statute of Elizabeth has been referred to in recent years as a guide, and as being substantially a part of the common law of the state.

B. Nature and Requisites — 1. Public and Private Trusts. Charities are either public or private. Every public trust, though benefiting the rich and the poor alike,[33] is a charitable trust, and these terms have the same meaning.[34] A

App. 238, 21 C. C. A. 146; Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly (Pa.) 346, 14 Haz. Reg. (Pa.) 305.

23. 9 Geo. II, c. 36.

24. Potter *v.* Thornton, 7 R. I. 252. And see Newson *v.* Starke, 46 Ga. 88; Beall *v.* Fox, 4 Ga. 404.

25. Hinckley's Estate, 58 Cal. 457.

26. Cooley, J., in Newark M. E. Church First Soc. *v.* Clark, 41 Mich. 730, 3 N. W. 207. In this state charitable trusts are now enforced as at common law, subject to the statutory provision that all trusts must be fully expressed and clearly defined on the face of the instrument creating them. White *v.* Rice, 112 Mich. 403, 70 N. W. 1024; Wheelock *v.* American Tract Soc., 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578.

27. See cases cited *supra*, note 26.

28. N. Y. Laws (1788), c. 46, § 37; Williams *v.* Williams, 8 N. Y. 525. See People *v.* Powers, 147 N. Y. 104, 41 N. E. 432, 69 N. Y. St. 403, 35 L. R. A. 502; Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 41 N. Y. St. 951, 27 Am. St. Rep. 487, 14 L. R. A. 33; Cottman *v.* Grace, 112 N. Y. 299, 19 N. E. 839, 20 N. Y. St. 783, 3 L. R. A. 145; Holland *v.* Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; Potter *v.* Chapin, 6 Paige (N. Y.) 639; Holmes *v.* Mead, 52 N. Y. 332; Bascom *v.* Albertson, 34 N. Y. 584; Levy *v.* Levy, 33 N. Y. 97; Dodge *v.* Pond, 23 N. Y. 69.

29. See Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724; Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278; Heiss *v.* Murphey, 40 Wis. 276; Ruth *v.* Oberbrunner, 40 Wis. 238.

30. Lane *v.* Eaton, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669; Little *v.* Willford, 31 Minn. 173, 17 N. W. 282.

31. N. Y. Laws (1893), c. 701, amended by N. Y. Laws (1901), c. 291. See Allen *v.* Stevens, 161 N. Y. 122, 659, 55 N. E. 568, 57 N. E. 1103.

32. *Connecticut.*— Adye *v.* Smith, 44 Conn. 60, 26 Am. Rep. 424; Treat's Appeal, 30 Conn. 113.

Georgia.— Newson *v.* Starke, 46 Ga. 88.

Illinois.— Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; Garrison *v.* Little, 75 Ill. App. 402.

Kentucky.— Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Gass *v.* Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446.

Maine.—Maine Baptist Missionary Convention *v.* Portland, 65 Me. 92; Tappan *v.* Deblois, 45 Me. 122.

Massachusetts.— Holmes *v.* Coates, 159 Mass. 226, 34 N. E. 190; White *v.* Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 473; Bates *v.* Bates, 134 Mass. 110, 45 Am. Rep. 305; Going *v.* Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645. And see Noble Notes Charity Trusts under Massachusetts Decisions.

New Hampshire.— Charitable uses are here upheld under the original jurisdiction of equity over them, but it has not been judicially determined whether the Statute of Elizabeth has there been adopted. Haynes *v.* Carr, 70 N. H. 463, 49 Atl. 638; Webster *v.* Sughrow, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100.

Rhode Island.—Webster *v.* Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

United States.— Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397; Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701.

33. Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; Jones *v.* Williams, Ambl. 651. See Atty.-Gen. *v.* Wilkinson, 1 Beav. 370, 3 Jur. 358, 17 Eng. Ch. 370.

34. Eliot's Appeal, (Conn. 1902) 51 Atl. 558; Mack's Appeal, 71 Conn. 122, 41 Atl. 242; Webster *v.* Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; Goodman *v.* Saltash, 7 App. Cas. 633, 47 J. P. 276, 52 L. J. Q. B. 193, 48 L. T. Rep. N. S. 239, 31 Wkly. Rep.

gift is a public charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons; and its benefits may be confined to special classes, as decayed seamen, laborers, farmers, etc., of a particular town or county.[35] One characteristic of a public charity is that it cannot exist under a grant or gift for profit or for a consideration in return.[36] Hence gifts to existing schools that are not free or public, or to other private pecuniary enterprises, even though they may indirectly serve charitable ends, are not of this class;[37] while the mere fact that a charitable institution such as a hospital requires and accepts payment from some of its patients,[38] or that a hospital maintained by a railroad corporation for its employees is in part supported by monthly contributions from all its employees does not deprive it of its character as a charity.[39] In the case of a private trust which is too indefinite to be carried into effect the donee or legatee takes the legal title only, and a trust results by implication of law to the donor or his representatives or to the testator's residuary legatees or next of kin;[40] but when a trust may by its terms be applied to objects not charitable in the legal sense, or to persons not defined by name or class, it fails of effect because too indefinite to be carried out.[41]

2. CHARITIES FAVORED BY THE LAW. Trusts for public charitable purposes are favored in the courts of equity administering them, except as modified for special purposes of policy by the Statutes of Mortmain and Superstitious Uses.[42] They are construed as valid when possible, and are often upheld where private trusts would fail.[43] A gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that probably may not happen within a life or lives in being and twenty-one years afterward, is valid, if there is no gift of the property

293; Jones *v.* Williams, Ambl. 651; *In re* Christchurch Inclosure Act, 38 Ch. D. 520, 57 L. J. Ch. 564, 58 L. T. Rep. N. S. 827; Atty.-Gen. *v.* Aspinall, 2 Myl. & C. 613, 1 Jur. 812, 7 L. J. Ch. 51, 14 Eng. Ch. 613; Atty.-Gen. *v.* Heelis, 2 Sim. & St. 67, 1 Eng. Ch. 67; Ommanney *v.* Butcher, Turn. & R. 260, 24 Rev. Rep. 42, 12 Eng. Ch. 260.

35. Burbank *v.* Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; Kent *v.* Dunham, 142 Mass. 216, 7 N. E. 730, 55 Am. Rep. 667.

36. *Connecticut.*— Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224.

Massachusetts.—Stratton *v.* Physio-Medical College, 149 Mass. 505, 21 N. E. 874, 14 Am. St. Rep. 442, 5 L. R. A. 33.

Pennsylvania.— Kerlin *v.* Campbell, 15 Pa. St. 500.

United States.— Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 19 U. S. App. 612, 9 C. C. A. 14, 23 L. R. A. 581.

England.— Barnard Castle Urban Dist. Council *v.* Wilson, [1901] 2 Ch. 813, 70 L. J. Ch. 859, 85 L. T. Rep. N. S. 481, 50 Wkly. Rep. 92; Atty.-Gen. *v.* Haberdashers' Co., 1 Myl. & K. 420, 7 Eng. Ch. 420; Atty.-Gen. *v.* Hewer, 2 Vern. 387; Atty.-Gen. *v.* Newcombe, 14 Ves. Jr. 1.

Reverter.— There is no right of reverter in such cases. Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481. The same is true when there is a charity and the trustees commit a breach of trust if a reverter is not expressly stipulated for. Episcopal Academy *v.* Philadelphia, 150 Pa. St. 565, 25 Atl. 55; Brown *v.* Meeting St. Baptist Soc., 9 R. I. 177; Sickles *v.* New Orleans, 80 Fed. 868, 52 U. S. App. 147, 26 C. C. A. 204; Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146.

37. See cases cited *supra*, note 36.

38. Powers *v.* Massachusetts Homœopathic Hospital, 101 Fed. 896 [*affirmed* in 109 Fed. 294, 47 C. C. A. 122].

39. Union Pac. Ry. Co. *v.* Artist, 60 Fed. 365, 19 U. S. App. 612, 9 C. C. A. 14, 23 L. R. A. 581; Atty.-Gen. *v.* McCarthy, 11 Vict. L. Rep. 617.

40. Sheedy *v.* Roach, 124 Mass. 472, 26 Am. Rep. 680; Thayer *v.* Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 753; Briggs *v.* Penny, 3 De G. & Sm. 525, 13 Jur. 909, 3 MacN. & G. 546, 49 Eng. Ch. 422.

41. Bristol *v.* Bristol, 53 Conn. 242, 5 Atl. 687; Nichols *v.* Allen, 130 Mass. 211, 39 Am. Rep. 445; *In re* Jackson, 1 Pow. Surr. (N. Y.) 241, 20 N. Y. Suppl. 380, 47 N. Y. St. 443; James *v.* Allen, 3 Meriv. 17, 17 Rev. Rep. 4; Morice *v.* Durham, 9 Ves. Jr. 399, 10 Ves. Jr. 522, 7 Rev. Rep. 232, 5 Eng. Rul. Cas. 548; 21 Am. L. Reg. N. S. 659; 31 Am. L. Reg. N. S. 522. See also 5 Harv. L. Rev. 389; 15 Harv. L. Rev. 509.

42. See Magill *v.* Brown, Brightly (Pa.) 346, 16 Fed. Cas. No. 8,952, 14 Haz. Reg. (Pa.) 305; Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100; Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146.

43. *California.*— *In re* Willey, (Cal. 1899) 56 Pac. 550.

Connecticut.—Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346.

Massachusetts.— American Academy of Arts, etc. *v.* Harvard College, 12 Gray (Mass.) 582; Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591.

meanwhile to or for the benefit of any private person.[44] In consequence of such favor gifts of this character are sustained, though vaguely expressed,[45] and, when a deed is clearly for a charitable use, the trustees named therein take the legal estate in fee, though the deed does not in terms run to their heirs and assigns;[46] and though the instrument of gift makes no provision for a conveyance to trustees the donated property becomes immediately charged with the trust in the hands of either the executors or heirs.[47] Equity will not permit these trusts to fail because its particular purposes are uncertain,[48] or for want of a trustee, though no existing donee is named;[49] from which it results at common law that though the gift to a charitable use is to a voluntary association or an unincorporated society, which is uncertain, indefinite, and fluctuating in its membership, the court will nevertheless, under the common-law rule at least, uphold it and appoint a trustee to take and administer the fund according to the terms of the grant.[50] Even in those states like New York, where formerly the statutes did not

New York.— Cottman *v.* Grace, 112 N. Y. 299, 19 N. E. 389, 20 N. Y. St. 783, 3 L. R. A. 145.

Rhode Island.— Meeting St. Baptist Soc. *v.* Hall, 8 R. I. 234; Potter *v.* Thornton, 7 R. I. 252.

Tennessee.—Dickson *v.* Montgomery, 1 Swan (Tenn.) 348.

United States.— Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397; Duggan *v.* Slocum, 92 Fed. 806, 63 U. S. App. 449, 34 C. C. A. 676.

44. See cases cited *supra*, note 43; and also Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Chamberlayne *v.* Brockett, L. R. 8 Ch. 206, 42 L. J. Ch. 368, 28 L. T. Rep. N. S. 248, 21 Wkly. Rep. 299; Sinnett *v.* Herbert, L. R. 7 Ch. 232.

45. Mills *v.* Newberry, 112 Ill. 123, 54 Am. Rep. 213; Miller *v.* Atkinson, 63 N. C. 537, 539; Zeisweiss *v.* James, 63 Pa. St. 465, 3 Am. Rep. 558.

46. Easterbrooks *v.* Tillinghast, 5 Gray (Mass.) 17; Sellers M. E. Church's Petition, 139 Pa. St. 61, 27 Wkly. Notes Cas. (Pa.) 383, 21 Atl. 145, 11 L. R. A. 282; Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739; Potter *v.* Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. ed. 721.

47. *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242. And see Kerlin *v.* Campbell, 15 Pa. St. 500.

48. John *v.* Smith, 91 Fed. 827 [*affirmed* in 102 Fed. 218, 42 C. C. A. 275]; Wood *v.* Paine, 66 Fed. 807.

49. *California.*—Matter of Upham, 127 Cal. 90, 59 Pac. 315; Carpenteria School Dist. *v.* Heath, 56 Cal. 478.

Illinois.— Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; Grand Prairie Seminary *v.* Morgan, 171 Ill. 444, 49 N. E. 516 [*affirming* 70 Ill. App. 575].

Maine.— Howard *v.* American Peace Soc., 49 Me. 288.

New Hampshire.—Wilson *v.* Towle, 36 N. H. 129.

Pennsylvania.—Steven's Estate, 200 Pa. St. 318, 49 Atl. 985; Frazier *v.* St. Luke's Church, 147 Pa. St. 256, 23 Atl. 442.

Wisconsin.— Hood *v.* Dorer, 107 Wis. 149, 82 N. W. 546; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

United States.— Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478; Handley *v.* Palmer, 91 Fed. 948 [*affirmed* in 103 Fed. 39, 43 C. C. A. 100]; John *v.* Smith, 91 Fed. 827 [*affirmed* in 102 Fed. 218, 42 C. C. A. 275].

See 9 Cent. Dig. tit. "Charities," § 42.

50. *Illinois.*— Guilfoil *v.* Arthur, 158 Ill. 600, 41 N. E. 1009.

Iowa.—Byers *v.* McCartney, 62 Iowa 339, 17 N. W. 571.

Maine.— Swasey *v.* American Bible Soc., 57 Me. 523.

Massachusetts.—Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110; Bliss *v.* American Bible Soc., 2 Allen (Mass.) 334; Tucker *v.* Seaman's Aid Soc., 7 Metc. (Mass.) 188.

Missouri.— Missouri Historical Soc. *v.* Academy of Science, 94 Mo. 459, 8 S. W. 346.

New Hampshire.— Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445.

New Jersey.— Goodell *v.* Children's Home Union Assoc., 29 N. J. Eq. 32.

Rhode Island.—St. Peter's Church *v.* Brown, 21 R. I. 367, 43 Atl. 642.

United States.— Wood *v.* Paine, 66 Fed. 807.

England.— Smith *v.* Kerr, [1900] 2 Ch. 511, 64 J. P. 772, 69 L. J. Ch. 755, 82 L. T. Rep. N. S. 795; Cocks *v.* Manners, L. R. 12 Eq. 574, 40 L. J. Ch. 640, 24 L. T. Rep. N. S. 869, 19 Wkly. Rep. 1055.

See 9 Cent. Dig. tit. "Charities," § 26.

Voluntary associations.—The doubts which have been expressed on this point (see Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713; Jackson *v.* Phillips, 14 Allen (Mass.) 539) are confined to gifts to charities generally, with no uses specified, no trust interposed, and either no provision made for an appointment, or the power of appointment delegated to particular persons who die without executing it (Methodist Episcopal Church Missionary Soc. *v.* Chapman, 128 Mass. 265; Jackson *v.* Phillips, 14 Allen (Mass.) 539). Associations formed solely for the mutual benefit of the contributors, though sometimes called "private charities," are not public or general charities in the view of the Statute of Elizabeth or of a court of chancery, but

favor charitable trusts, gifts to charitable, benevolent, scientific, or educational institutions are not against public policy, or restricted beyond what is strictly required by the statutes.[51]

3. PERPETUITIES.[52] It is not a valid objection to charitable gifts that they are made perpetual.[53] A bequest of a fund to trustees "the income only to be paid semi-annually to my nephew A. and his heirs," is not a charity, but an attempted private perpetual trust, and A is entitled to receive the entire fund.[54] So a trust cannot be created for the benefit of the grantor's descendants forever,[55] nor can he create a trust for one of a series of his descendants successively, unless such an one could be ascertained within a life in being and twenty-one years afterwards.[56] The rule against perpetuities does not apply to charitable gifts with no intervening gift to or for the benefit of a private person or corporation, or to a contingent limitation over from one charity to another; but it does apply to a grant or devise to a private person, although limited over after an immediate gift to a charity.[57] Hence perpetual trusts cannot be created for a charity which do not vest within the time limited for ordinary trusts.[58] In those states where charitable or religious trusts are not distinguished from other trusts the rule against perpetuities applies to both alike.[59]

4. ACCUMULATIONS. Questions of greater difficulty arise as to the validity of provisions for accumulating indefinitely for charitable purposes. The common-law rule confining the accumulation of annual income to the same limit as exists for the creation of future estates was found so inconvenient that in England and some of the United States[60] it was still further restrained by statute.[61] The English statute was known as the Thellusson Act,[62] which established narrower limits beyond which no person should by deed, will, "or otherwise howsoever, settle or dispose of any real or personal property," so that the income thereof

are rather in the nature of mutual insurance companies or mutual benefit societies. Young Men's Protestant Temperance, etc., Soc. *v.* Fall River, 160 Mass. 409, 36 N. E. 57; Newcomb *v.* Boston Protective Dept., 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778; Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966; Dolan *v.* Court Good Samaritan, 128 Mass. 437. See also Bangor *v.* Rising Virtue Lodge No. 10, 73 Me. 428; Bolton *v.* Bolton, 73 Me. 299. In Maryland and some other states the association to be benefited must be clearly designated. Crisp *v.* Crisp, 65 Md. 422, 5 Atl. 421; Henry Watson Children's Aid Soc. *v.* Johnston, 58 Md. 139; Domestic, etc., Missionary Soc. *v.* Reynold, 9 Md. 341.

51. Cross *v.* U. S. Trust Co., 131 N. Y. 330, 30 N. E. 125, 43 N. Y. St. 254, 27 Am. St. Rep. 597, 15 L. R. A. 606; Hollis *v.* Drew Theological Seminary, 95 N. Y. 166.

52. See also, generally, PERPETUITIES.

53. Gray Perpetuities, c. 18; Perry Trusts (5th ed.), § 384; 2 Kent Comm. 288, note *a*; Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113; Sherman *v.* Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717.

54. Bartlett, Petitioner, 163 Mass. 509, 40 N. E. 899; Parks *v.* American Home Missionary Soc., 62 Vt. 19, 20 Atl. 107.

55. St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Kent *v.* Dunham, 142 Mass. 216, 7 N. E. 730, 55 Am. Rep. 667.

56. See cases cited *supra*, note 55; and Dungannon *v.* Smith, 12 Cl. & F. 546, 10 Jur. 721, 8 Eng. Reprint 1523.

57. Christ Church *v.* Trustees of Donations, etc., 67 Conn. 554, 35 Atl. 552; Storrs Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141; Jocelyn *v.* Nott, 44 Conn. 55; Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739.

58. See cases cited *supra*, note 57.

59. Methodist Episcopal Church Missionary Soc. *v.* Humphreys, 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432; and *supra*, note 26 *et seq.*

60. As in New York, California, Wisconsin, Michigan, and Minnesota. See for example Cal. Civ. Code, §§ 723, 724; N. Y. Rev. Stat. (9th ed.) pp. 1793, 1797, 1857; Roe *v.* Vingut, 117 N. Y. 204, 22 N. E. 933, 27 N. Y. St. 238; Duncklee *v.* Butler, 38 N. Y. App. Div. 99, 56 N. Y. Suppl. 491; Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

61. Odell *v.* Odell, 10 Allen (Mass.) 1; Thorndike *v.* Loring, 15 Gray (Mass.) 391; Hooper *v.* Hooper, 9 Cush. (Mass.) 122; Wilson *v.* Lynt, 30 Barb. (N. Y.) 124; Young *v.* St.-Mark's Lutheran Church, 200 Pa. St. 332, 49 Atl. 887; Webster *v.* Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; Thellusson *v.* Woodford, 4 Ves. Jr. 227, 4 Rev. Rep. 205 [*affirmed* in 11 Ves. Jr. 112, 8 Rev. Rep. 104]; Perry Trusts (5th ed.) §§ 393–400.

62. 39 & 40 Geo. III, c. 98. This statute was occasioned by the decision in Thellusson *v.* Woodford, 4 Ves. Jr. 227, 4 Rev. Rep. 205 [*affirmed* in 11 Ves. Jr. 112, 8 Rev. Rep. 104] and was named therefrom. See on this statute, Jagger *v.* Jagger, 25 Ch. D. 729, 53 L. J. Ch. 201, 49 L. T. Rep. N. S. 667, 32 Wkly. Rep. 384; and also *In re* Danson, 13 Reports 633.

should be wholly or partly accumulated, except in certain cases, among which charitable trusts were not specified; and it was held that a will made after this statute, which directed an indefinite accumulation for a charitable purpose, could not be carried out in the mode prescribed.[63] Where no statute exists upon the subject, as is the case for the most part in America, it would clearly be unreasonable that the accumulation go on forever, as there would then be no benefit to the charity; or, as the charitable object itself is favored by the law, that it should be subject to the same rules as an accumulation for private purposes. The proper course doubtless is that the limits of an accumulation for the benefit of a charity be controlled by a court of equity within reasonable and desirable bounds.[64] Such control does not follow by analogy the rules as to other trusts, and even an accumulation of a reasonable part of the income of property for so long a period as one hundred years may be allowed.[65] In Illinois, in the absence of a statute as to accumulations, the donor's general intent in favor of the charity prevails, but the trust for accumulation, which is treated as merely a mode for managing the gift, is subject to the rule against perpetuities.[66]

II. CHARITABLE PURPOSES.

A. In General. The principal objects of charity, as established by the decisions of the courts, are: (1) Relief of Poverty and Distress; (2) Advancement of Learning; (3) Religion. The first two of these are clearly indicated in the enumeration of the Statute of Elizabeth;[67] the third, though not expressly there named, except as to the "repair of churches," is held to be fully within the spirit and intendment of the statute.[68]

B. Relief of Poverty and Distress — 1. May Be Combined With Other Purposes. The above purposes may be legally combined in a single gift. Thus a bequest of residuary personal estate to "the poor and the service of God" is valid as a charity;[69] and so is a devise for "the furtherance of Conservative principles and religious and mental improvement," since, while a gift to further conservative principles may not alone be charitable, the gift is to be construed as intended for all these principles in combination.[70]

2. Gifts For Indefinite and Special Purposes. Relief of poverty includes as valid charities gifts for the poor indefinitely,[71] or for the poor of a particular parish, church, or place,[72] and gifts for the benefit of the poorer classes or for the

63. Martin *v.* Maugham, 8 Jur. 609, 14 Sim. 230, 37 Eng. Ch. 230. See Wharton *v.* Masterman, [1895] A. C. 186, 64 L. J. Ch. 369, 72 L. T. Rep. N. S. 431, 11 Reports 169, 43 Wkly. Rep. 449.

64. See Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371; St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Odell *v.* Odell, 10 Allen (Mass.) 1; Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100.

65. Woodruff *v.* Marsh, 63 Conn. 125, 137, 26 Atl. 846, 38 Am. St. Rep. 346. Gifts to charities are subject to the rule against perpetuities before they become vested. Ingraham *v.* Ingraham, 169 Ill. 432, 451, 48 N. E. 561, 49 N. E. 320; Crerar *v.* Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

66. Ingraham *v.* Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320.

67. 43 Eliz. c. 4. See also *infra*, II, B, C.

68. See *infra*, II, D.

69. *In re* Darling, [1896] 1 Ch. 50, 65 L. J. Ch. 52, 73 L. T. Rep. N. S. 382, 13 Reports 834, 44 Wkly. Rep. 75.

70. *In re* Scowcroft, [1898] 2 Ch. 638, 67 L. J. Ch. 697, 79 L. T. Rep. N. S. 342. And see Augusta *v.* Walton, 77 Ga. 517, 1 S. E. 214.

71. Nash *v.* Morley, 5 Beav. 177, 6 Jur. 520, 11 L. J. Ch. 336; Atty.-Gen. *v.* Peacock, Finch 245; Atty.-Gen. *v.* Matthews, 2 Lev. 167.

Contra.— Pratt *v.* Albany Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Suppl. 1035. And see Bullard *v.* Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; Landis *v.* Wooden, 1 Ohio St. 160, 59 Am. Dec. 615.

72. *District of Columbia.*— District of Columbia *v.* Washington Market Co., 3 MacArthur (D. C.) 559.

Illinois.— Heuser *v.* Harris, 42 Ill. 425.

Louisiana.— Fink *v.* Fink, 12 La. Ann. 301.

Massachusetts.—Atty.-Gen. *v.* Goodell, 180 Mass. 538, 62 N. E. 962; Atty.-Gen. *v.* Old South Soc., 13 Allen (Mass.) 474; Atty.-Gen. *v.* Trinity Church, 9 Allen (Mass.) 422.

New Jersey.— Union M. E. Church *v.* Wilkinson, 36 N. J. Eq. 141.

New York.—McLoughlin *v.* McLoughlin, 30 Barb. (N. Y.) 458; Matter of Abbott, 3 Redf. Surr. (N. Y.) 303.

indigent insane;[78] such as gifts to aid or establish hospitals, dispensaries, asylums, orphanages, inebriate retreats, and the like;[74] also bequests for letting land to the poor at low rentals,[75] for free excursions for poor children,[76] or for emigrants to particular colonies;[77] or in aid of the poor rate.[78] A bequest to a town of a fund to be used by it for the support of the poor means *prima facie* that only the income of the fund is to be expended;[79] and when it is clear that the income only was intended to be applied for such a purpose, or for purposes of education, equity will enjoin the appropriation of the principal to any building or improvement of real estate.[80] A bequest "to the poor" of a certain county means technically those whom the county is legally liable to support, and its county board has the right to the custody and control of the fund.[81] A gift is always bad as a charity if the objects defined by the donor go beyond those defined in or by analogy to the Statute of Charitable Uses; but relief of poverty need not be expressed in so many words as the object when it is clear that that was intended, as in the case of income to be distributed "amongst respectable single women of good character above the age of sixty years, to be paid by monthly instalments, but so that no recipient shall receive more than 10*l* per annum."[82]

3. Gifts For Particular Classes of Persons — a. To Widows, Orphans, and the Like. So gifts for widows, orphans, children, abandoned wives, decayed tradesmen, and even sons of the clergy, are charitable without the word "poor";[83]

North Carolina.— State *v.* Gerard, 37 N. C. 210.

Vermont.— Sheldon *v.* Stockbridge, 67 Vt. 299, 31 Atl. 414.

Virginia.— Overseers of Poor *v.* Tayloe, Gilmer (Va.) 336.

United States.— Wood *v.* Paine, 66 Fed. 807; Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly (Pa.) 346, 14 Haz. Reg. (Pa.) 305.

England.—Atty.-Gen. *v.* Clarke, Ambl. 422; Woodford *v.* Parkhurst, Duke 70; Atty.-Gen. *v.* Bovill, 1 Phil. 762, 19 Eng. Ch. 762.

Canada.— McClenaghan *v.* Grey, 4 Ont. 329.

See 9 Cent. Dig. tit. "Charities," § 35.

Contra.— As Maryland rejects the law of charitable trusts, a bequest for the poor of a certain county is held void for uncertainty. Yingling *v.* Miller, 77 Md. 104, 26 Atl. 491; Henry Watson Children's Aid Soc. *v.* Johnston, 58 Md. 139; Dashiell *v.* Atty.-Gen., 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572, 6 Harr. & J. (Md.) 1; Trippe *v.* Frazier, 4 Harr. & J. (Md.) 446.

The word "parish" in a charitable gift is defined in *Re* Sandbach School, etc., Foundation, 84 L. T. Rep. N. S. 815.

73. See Vance's Succession, 39 La. Ann. 371, 2 So. 54.

74. *Massachusetts.*— Burbank *v.* Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748.

New York.— Matter of U. S. Trust Co., 25 Misc. (N. Y.) 643, 56 N. Y. Suppl. 376.

Pennsylvania.— Trim's Estate, 168 Pa. St. 395, 31 Atl. 1071; Philadelphia *v.* Elliott, 3 Rawle (Pa.) 170.

Rhode Island.— Derby *v.* Derby, 4 R. I. 414.

Australia.—Atty.-Gen. *v.* McCarthy, 11 Vict. L. Rep. 617.

See 9 Cent. Dig. tit. "Charities," § 35.

75. Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa. Co. Ct. 241; Crafton *v.* Frith, 4 De G. & Sm. 237, 15 Jur. 737, 20 L. J. Ch. 198.

76. Loring *v.* Wilson, 174 Mass. 132, 54 N. E. 502; Kelly *v.* Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

77. Barclay *v.* Maskelyne, 4 Jur. N. S. 1294. See Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 19 U. S. App. 612, 9 C. C. A. 14, 23 L. R. A. 581; *In re* Cullimore, 27 L. R. Ir. 18.

78. Doe *v.* Howells, 2 B. & Ad. 744, 9 L. J. K. B. O. S. 332, 22 E. C. L. 311; Atty.-Gen. *v.* Bovill, 1 Phil. 762, 19 Eng. Ch. 762.

79. Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 35 N. Y. St. 863, 11 L. R. A. 715. And see Scott *v.* Marion Tp., 39 Ohio St. 153.

80. Prickett *v.* People, 88 Ill. 115; Trim's Estate, 168 Pa. St. 395, 31 Atl. 107; Lawrence County *v.* Leonard, 83 Pa. St. 206. And see Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 35 N. Y. St. 863, 11 L. R. A. 715.

81. Peter *v.* Carter, 70 Md. 139, 16 Atl. 450.

82. *Re* Dudgeon, 74 L. T. Rep. N. S. 613.

83. *Connecticut.*—Beardsley *v.* Bridgeport, 53 Conn. 489, 3 Atl. 557, 55 Am. Rep. 152.

Illinois.— Guilfoil *v.* Arthur, 158 Ill. 600, 41 N. E. 1009.

Indiana.— Erskine *v.* Whitehead, 84 Ind. 357; De Bruler *v.* Ferguson, 54 Ind. 549.

New York.— See Matter of Botsford, 23 Misc. (N. Y.) 388, 52 N. Y. Suppl. 238.

Pennsylvania.— Burd Orphan Asylum *v.* Upper Darby School Dist., 90 Pa. St. 21; Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431.

Tennessee.—A gift to a lodge of Odd Fellows "for the benefit of the widows and orphans" is sufficiently definite, as it clearly refers to those left by deceased members of that lodge. Heiskell *v.* Chickasaw Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699.

as are gifts for the poor of any denomination, or of all except one;[84] for the widows and orphans of a parish or town;[85] for "twenty aged widows and spinsters" of a parish;[86] for the widows and children of seamen at a particular port;[87] for the aged and infirm native-born inhabitants of a town;[88] to furnish needy children with necessary clothing while attending school;[89] or for the relief of disabled firemen, their widows and orphans, and of others injured by fire apparatus.[90] A gift to a church to buy bread or fuel for the poor of that church is clearly valid by the common law,[91] though declared void for uncertainty of beneficiaries in those states which have refused to recognize the law of charity.[92] If only part of such a gift is clearly intended for the poor, the whole fund, including the residue, is not held as a public charity.[93] Public charities need not be universal, and a gift of income for young married apprentices who have served an apprenticeship, to aid them in starting in business, is valid as a charity,[94] and so is a bequest to ameliorate the condition of the Jews in Jerusalem.[95]

b. To Poor Relations; or to the Poorest of a Class. A gift to poor relations or for their benefit is a private gift, though it would prevent their becoming a public charge;[96] but a perpetual relief fund "for the poor; and the same shall be devoted and appropriated in the first place to the aid of my poor relatives, if any such there be," is a public charity and not a private trust, as it provides for the poor generally, giving a preference to such persons as may thereafter be related to him by blood.[97] If the trustees make no selection the poor relatives

Virginia.— Gallego *v.* Atty.-Gen., 3 Leigh (Va.) 450, 24 Am. Dec. 650.

Wisconsin.— Heiss *v.* Murphey, 40 Wis. 276.

United States.— Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205; Barnes *v.* Barnes, 3 Cranch C. C. (U. S.) 269, 2 Fed. Cas. No. 1,014.

England.— Atty.-Gen. *v.* Ironmongers' Co., 2 Beav. 313, 10 Cl. & F. 908, 8 Eng. Reprint 983, 2 Myl. & K. 576, 7 Eng. Ch. 576; Atty.-Gen. *v.* Painter-Stainers Co., 2 Cox C. C. 51; Russell *v.* Kellett, 2 Jur. N. S. 132, 3 Smale & G. 264.

See 9 Cent. Dig. tit. "Charities," § 34 *et seq.*

Contra.— See Newson *v.* Starke, 46 Ga. 88; Beall *v.* Drane, 25 Ga. 430.

84. Bruce *v.* Presbytery of Deer, L. R. 1 H. L. Sc. 96; Collinson *v.* Pater, 9 L. J. Ch. O. S. 158, 2 Russ. & M. 344, 11 Eng. Ch. 344; and cases cited *supra*, note 83.

85. *Connecticut.*— Camp *v.* Crocker, 54 Conn. 21, 5 Atl. 604.

District of Columbia.— District of Columbia *v.* Washington Market Co., 3 MacArthur (D. C.) 559.

Indiana.— De Bruler *v.* Ferguson, 54 Ind. 549.

Iowa.— Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

Kentucky.— Penick *v.* Thom, 90 Ky. 665, 12 Ky. L. Rep. 613, 14 S. W. 830; Peynado *v.* Peynado, 82 Ky. 5.

Louisiana.— Fink *v.* Fink, 12 La. Ann. 301; Mary's Succession, 2 Rob. (La.) 438.

Massachusetts.— Sohier *v.* Burr, 127 Mass. 221.

New Hampshire.— Towle *v.* Nesmith, 69 N. H. 212, 42 Atl. 900.

England.—Atty.-Gen. *v.* Comber, 2 Sim. & St. 93, 25 Rev. Rep. 163.

See 9 Cent. Dig. tit. "Charities," § 34 *et seq.*

86. Thompson *v.* Corby, 27 Beav. 649, 8 Wkly. Rep. 267. See Wood *v.* Paine, 66 Fed. 807.

87. Beekman *v.* People, 27 Barb. (N. Y.) 260; Powell *v.* Atty.-Gen., 3 Meriv. 48, 17 Rev. Rep. 8.

88. Fellows *v.* Miner, 119 Mass. 541.

89. Swasey *v.* American Bible Soc., 57 Me. 523.

90. Potts *v.* Philadelphia Relief Assoc., 8 Phila. (Pa.) 326. See Vaux's Appeal, 16 Wkly. Notes Cas. (Pa.) 229, 33 Pittsb. Leg. J. (Pa.) 387.

91. Witman *v.* Lex, 17 Serg. & R. (Pa.) 88, 17 Am. Dec. 644.

92. See Bird *v.* Merklee, 144 N. Y. 544, 39 N. E. 645, 64 N. Y. St. 243, 27 L. R. A. 423 [*reversing* 75 Hun (N. Y.) 74, 26 N. Y. Suppl. 1021, 57 N. Y. St. 836].

93. Atty.-Gen. *v.* Old South Soc., 13 Allen (Mass.) 474.

94. Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa. Co. Ct. 241.

95. Riker *v.* Leo, 115 N. Y. 93, 21 N. E. 719, 26 N. Y. St. 978, 133 N. Y. 519, 30 N. E. 598, 44 N. Y. St. 63.

96. Kent *v.* Dunham, 142 Mass. 216, 7 N. E. 730, 55 Am. Rep. 667. See Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

97. Swasey *v.* American Bible Soc., 57 Me. 523; Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110; Gafney *v.* Kenison, 64 N. H. 354, 10 Atl. 706; Atty.-Gen. *v.* Sidney Sussex College, L. R. 4 Ch. 722, 34 Beav. 654, 38 L. J. Ch. 656; Gillam *v.* Taylor, L. R. 16 Eq. 581, 42 L. J. Ch. 674, 28 L. T. Rep. N. S. 833, 21 Wkly. Rep. 823; Supple *v.* Lowson, Ambl. 729; Isaac *v.* Defriez, Ambl. 595, 17 Ves. Jr. 373 note; Salusbury *v.* Denton, 3 Kay & J. 529; Atty.-Gen. *v.* Price, 17 Ves. Jr. 371, 11

are those who would take under the statute of distributions, though the trustees might have selected from a larger class, or the court of chancery might exercise the power of selection.[98] In all gifts to poor relatives those who become rich before distribution are to be excluded.[99] In general a gift to the "poor" or "poorest" of a special class can be only treated as charitable when it can be construed as a gift to those actually poor, and not to the least wealthy of a prosperous class;[1] and while a gift to a town for the relief of its poor, or for their education, is usually held not to be too vague,[2] a bequest to "the most deserving poor of" a certain city has been treated as void for uncertainty,[3] as any worthy object may be said to be "deserving."[4] The fact that a charitable institution is so described or limited as to show that the inmates are expected to have some means, and to contribute by payment and bequests to its support and development does not make it less a charity.[5]

4. Gifts to Friendly or Voluntary Societies. A friendly society established to raise a fund by the subscriptions, fines, and forfeitures of its members to provide for the widows of deceased members is not a charity. If on the decease of all its members a part of the fund remains unexpended it cannot be applied to charitable purposes under the *cy-pres* doctrine, but falls into the testator's residuary estate; and there is no resulting trust in favor of the legal personal representatives of the members.[6] But a friendly society formed to provide a fund for sick and distressed members, their widows and children, by the receipt of voluntary donations,[7] or such an association as a theatrical fund society,[8] whose rules provide for the relief of contributors or their orphans, is a charity, if its rules show that poverty is a necessary ingredient in the qualification of applicants for its benefits, and its fund may be administered *cy-pres*.[9] Generally in America unincorporated societies or voluntary associations, such as religious societies, are held capable, at common law, of taking as beneficiaries in a trust;[10] but in those

Rev. Rep. 107; Waldo *v.* Caley, 16 Ves. Jr. 206; Cole *v.* Wade, 16 Ves. Jr. 27, 10 Rev. Rep. 129; Longmore *v.* Broom, 7 Ves. Jr. 124; Brown *v.* Higgs, 4 Ves. Jr. 708, 4 Rev. Rep. 323; Peek *v.* Peek, 17 Wkly. Rep. 1059.

98. Bull *v.* Bull, 8 Conn. 48, 20 Am. Dec. 86; Goodale *v.* Mooney, 60 N. H. 528, 49 Am. Rep. 334; White *v.* White, 7 Ves. Jr. 423, 11 Rev. Rep. 107; and cases cited *supra*, note 97.

99. Mahon *v.* Savage, 1 Sch. & Lef. 111.

1. Atty.-Gen. *v.* Northumberland, 7 Ch. D. 745, 47 L. J. Ch. 569, 38 L. T. Rep. N. S. 245, 26 Wkly. Rep. 586. See Isaac *v.* Defriez, Ambl. 595, 17 Ves. Jr. 373 note; Atty.-Gen. *v.* Price, 17 Ves. Jr. 371, 11 Rev. Rep. 107.

2. Handley *v.* Palmer, 91 Fed. 948 [*affirmed* in 103 Fed. 39, 43 C. C. A. 100]; Wood *v.* Paine, 66 Fed. 807.

3. Hughes *v.* Daly, 49 Conn. 34. But see Strong's Appeal, 68 Conn. 527, 37 Atl. 395; Hesketh *v.* Murphy, 35 N. J. Eq. 23 and note [*affirmed* in 36 N. J. Eq. 304]; Goodell *v.* Union Assoc., 29 N. J. Eq. 32. See also 21 Am. L. Reg. N. S. 659 and note.

4. *In re* Sutton, 28 Ch. D. 464, 54 L. J. Ch. 613, 33 Wkly. Rep. 519.

5. Powers *v.* Massachusetts Homœopathic Hospital, 109 Fed. 294, 47 C. C. A. 122; Cresson *v.* Cresson, 6 Fed. Cas. No. 3,389, 6 Am. L. Reg. 42, 5 Pa. L. J. Rep. 431.

6. Cunnack *v.* Edwards, [1896] 2 Ch. 679, 65 L. J. Ch. 801, 75 L. T. Rep. N. S. 122, 45 Wkly. Rep. 99 [*reversing* [1895] 1 Ch. 489]. See Anonymous, 3 Atk. 277; *In re* Clark, 1 Ch. D. 497, 45 L. J. Ch. 194, 24 Wkly. Rep. 233.

7. *In re* Buck, [1896] 2 Ch. 727, 60 J. P. 775, 65 L. J. Ch. 881, 75 L. T. Rep. N. S. 312, 45 Wkly. Rep. 106.

8. *In re* Lacy, [1899] 2 Ch. 149, 68 L. J. Ch. 488, 80 L. T. Rep. N. S. 706, 47 Wkly. Rep. 664; Spiller *v.* Maude, 32 Ch. D. 158 note; Pease *v.* Pattinson, 32 Ch. D. 154, 55 L. J. Ch. 617, 54 L. T. Rep. N. S. 209, 34 Wkly. Rep. 361; *In re* Ovey, 29 Ch. D. 560, 54 L. J. Ch. 752, 52 L. T. Rep. N. S. 849, 33 Wkly. Rep. 821.

9. *In re* Buck, [1896] 2 Ch. 727, 60 J. P. 775, 65 L. J. Ch. 881, 75 L. T. Rep. N. S. 312, 45 Wkly. Rep. 106; Cunnack *v.* Edwards, [1896] 2 Ch. 679, 65 L. J. Ch. 801, 75 L. T. Rep. N. S. 122, 45 Wkly. Rep. 99 [*reversing* [1895] 1 Ch. 489].

10. *Illinois.*— Tomlin *v.* Blunt, 31 Ill. App. 234.

Kentucky.— Penick *v.* Thom, 90 Ky. 665, 12 Ky. L. Rep. 613, 14 S. W. 830; Cromie *v.* Louisville Orphans' Home Soc., 3 Bush (Ky.) 365; Chambers *v.* Higgins, 20 Ky. L. Rep. 1425, 49 S. W. 436.

Louisiana.— Vance's Succession, 39 La. Ann. 371, 2 So. 54.

Massachusetts.— Byam *v.* Bickford, 140 Mass. 31, 2 N. E. 687; North Alabama First Universalist Soc. *v.* Fitch, 8 Gray (Mass.) 421; Washburn *v.* Sewall, 9 Metc. (Mass.) 280; Bartlett *v.* Nye, 4 Metc. (Mass.) 378.

Michigan.— White *v.* Rice, 112 Mich. 403,

states where the beneficiary must be certain, unincorporated societies, such as the Salvation Army, cannot receive the benefit of gifts in charity.[11] This is the rule in New York, even under the statute of 1893.[12] In Pennsylvania a benefit society organized or chartered for purposes of mutual benevolence among its members only, even though it does not make profit or declare dividends, is not an association for charitable uses, as its benevolence begins and ends at home.[13] In California a duly organized educational society, if governed by a constitution and having regularly elected officers, though unincorporated, can take charitable devises.[14] In general as a public charity is, in legal contemplation, derived from gift or bounty, a fund collected by rates and assessments, being in no respect derived from bounty or charity, or a subscription by a benefit society for mutual relief, is not charitable and does not require the intervention of the attorney-general in suits respecting it.[15]

C. Advancement of Learning — 1. In General. Gifts for schools and scholars are expressly mentioned in the Statute of Elizabeth, and gifts for the advancement of learning, science, and the useful arts generally, without any particular reference to the poor, are regarded as charities.[16] Such is a bequest "for the benefit, advancement, and propagation of education and learning in every part of the

70 N. W. 1024; Matter of Ticknor, 13 Mich. 44.

New Hampshire.— Parker *v.* Cowell, 16 N. H. 149.

New Jersey.— Hadden *v.* Dandy, 51 N. J. Eq. 154, 26 Atl. 464, 32 L. R. A. 625.

South Carolina.— Dye *v.* Beaver Creek Church, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724; Bates *v.* Taylor, 28 S. C. 476, 6 S. E. 327.

United States.— Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly (Pa.) 346, 14 Haz. Reg. (Pa.) 305.

See 9 Cent. Dig. tit. "Charities," § 26.

As to the incorporation in New York of benevolent, charitable, scientific, and missionary societies see N. Y. Laws (1848), c. 319, as amended by N. Y. Laws (1894), c. 325.

11. *Maryland.*— Rizer *v.* Perry, 58 Md. 112; Dashiell *v.* Atty.-Gen., 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572, 6 Harr. & J. (Md.) 1.

Minnesota.— Lane *v.* Eaton, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669.

New York.— Allen *v.* Stevens, 161 N. Y. 122, 55 N. E. 568; Fairchild *v.* Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609: People *v.* Powers, 147 N. Y. 104, 41 N. E. 432, 69 N. Y. St. 403, 35 L. R. A. 502; Wright *v.* New York M. E. Church, Hoffm. (N. Y.) 202; *In re* Jackson, 1 Pow. Surr. (N. Y.) 241, 20 N. Y. Suppl. 380, 47 N. Y. St. 443.

Tennessee.— Rhodes *v.* Rhodes, 88 Tenn. 637, 13 S. W. 590.

Virginia.—Petersburg *v.* Petersburg Benev. Mechanics Assoc., 78 Va. 431.

United States.— Meade *v.* Beale, Taney (U. S.) 339, 16 Fed. Cas. No. 9,371.

See 9 Cent. Dig. tit. "Charities," § 26.

12. Matter of Wheeler, 32 N. Y. App. Div. 183, 52 N. Y. Suppl. 943 [*affirmed* in 161 N. Y. 652, 57 N. E. 1128]; Pratt *v.* Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Suppl. 1035 [*affirmed* in (N. Y. 1901) 59 N. E. 1120]; and cases cited *supra*, note 11.

13. Swift *v.* Easton Beneficial Soc., 73 Pa. St. 362; Babb *v.* Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650. And see Burke *v.* Roper, 79 Ala. 138; Indianapolis *v.* Grand Master, 25 Ind. 518; Bangor *v.* Rising Virtue Lodge No. 10, 73 Me. 428, 40 Am. Rep. 369; Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966.

14. Matter of Winchester, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 281.

15. Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966; Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray (Mass.) 1.

16. *Illinois.*— Price *v.* School Directors, 58 Ill. 452.

Kentucky.— Bedford *v.* Bedford, 99 Ky. 273, 18 Ky. L. Rep. 193, 35 S. W. 926.

Louisiana.— See Meunier's Succession, 52 La. Ann. 79, 26 So. 776, 48 L. R. A. 77.

Maine.— Swasey *v.* American Bible Soc., 57 Me. 523.

Massachusetts.— Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371; Boxford Second Religious Soc. *v.* Harriman, 125 Mass. 321; Drury *v.* Natick, 10 Allen (Mass.) 16; American Academy of Arts, etc. *v.* Harvard College, 12 Gray (Mass.) 582.

New Jersey.— Alfred University *v.* Hancock, (N. J. 1900) 46 Atl. 178; Taylor *v.* Bryn Mawr College, 34 N. J. Eq. 101.

North Carolina.— State *v.* McGowen, 37 N. C. 9.

Pennsylvania.— Pickering *v.* Shotwell, 10 Pa. St. 23.

Virginia.— Kelly *v.* Love, 20 Gratt. (Va.) 124.

United States.— Jones *v.* Habersham, 107 U. S. 174, 5 S. Ct. 336, 27 L. ed. 401; Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205.

England.— Dilworth *v.* Commissioner of Stamps, [1899] A. C. 99, 68 L. J. P. C. 1, 79 L. T. Rep. N. S. 473, 47 Wkly. Rep. 337; Isaac *v.* Defriez, Ambl. 595, 17 Ves. Jr. 373

world as far as circumstances will permit";[17] to endow a college generally,[18] or one "free from all sectional or political influence",[19] or a Friends' school devoted to the support and education of Quaker children in their religious principles;[20] to establish new lectureships, professorships,[21] fellowships, or scholarships in a college; for founding prizes for essays on statistics, government, politics, criticism, or moral philosophy;[22] for a perpetual inn of chancery;[23] for an art institute or an academy of science,[24] a geographical, agricultural, or historical society;[25] for the British museum[26] or other public museums;[27] for free or public libraries,[28] even where towns may appropriate money therefor;[29] for adding books to the library of a particular college or school, and the repair and adornment of the library;[30] for a church library open to the public;[31] for "education in economic and sanitary science in Great Britain;"[32] for the advancement of medical science;[33] for edu-

note; Atty.-Gen. *v.* Nash, 3 Bro. Ch. 588; Whicker *v.* Hume, 7 H. L. Cas. 124, 4 Jur. N. S. 933, 28 L. J. Ch. 396; U. S. President *v.* Drummond [*cited* in Whicker *v.* Hume, 7 H. L. Cas. 124, 155, 4 Jur. N. S. 933, 28 L. J. Ch. 396]; Atty.-Gen. *v.* Price, 17 Ves. Jr. 373, 11 Rev. Rep. 107; White *v.* White, 7 Ves. Jr. 423, 11 Rev. Rep. 107; Peek *v.* Peek, 17 Wkly. Rep. 1059.

See 9 Cent. Dig. tit. "Charities," § 36.

17. Whicker *v.* Hume, 7 H. L. Cas. 124, 4 Jur. N. S. 933, 28 L. J. Ch. 396 [*affirming* 14 Beav. 509].

18. Curtis *v.* Hutton, 14 Ves. Jr. 537; Atty.-Gen. *v.* Bowyer, 3 Ves. Jr. 714, 4 Rev. Rep. 132.

19. Raley *v.* Umatilla County, 15 Oreg. 172, 13 Pac. 890, 3 Am. St. Rep. 142.

20. Price *v.* Maxwell, 28 Pa. St. 23.

21. Yates *v.* University College, L. R. 7 H. L. 438, 45 L. J. Ch. 137, L. R. 8 Ch. 454; Christ's College, Cambridge, Ambl. 351, 1 Eden 10; Atty.-Gen. *v.* Green, 2 Bro. Ch. 492; Porter's Case, 1 Coke 22*a*; Jesus College Case, Duke 78; Rex *v.* Newman, 1 Lev. 284; Atty.-Gen. *v.* Margaret, etc., Professors, 1 Vern. 55; Atty.-Gen. *v.* Andrew, 3 Ves. Jr. 633, 4 Rev. Rep. 110.

22. Thompson *v.* Thompson, 1 Coll. 381, 8 Jur. 839, 28 Eng. Ch. 381.

23. Smith *v.* Kerr, [1900] 2 Ch. 511, 64 J. P. 772, 69 L. J. Ch. 755, 82 L. T. Rep. N. S. 795 [*affirmed* in [1902] 1 Ch. 774].

24. State *v.* Academy of Science, 13 Mo. App. 213; Almy *v.* Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414.

The Act of 10 Charles I (1634).— This act went beyond the Statute of Elizabeth in expressly naming "the liberal arts and sciences"; also in containing these general words, and "for any other like lawful and charitable use and uses, warranted by the laws of this realm." See Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 545, 546, 61 L. J. Q. B. 265.

The California act of March 9, 1885, constitutional.— Cal. Laws (1885), c. 47, "An Act to advance learning, the arts and sciences, and to promote the public welfare, by providing for the conveyance, holding, and protection of property, and the creation of trusts for the founding, endowment, erection, and maintenance within this state of universities, colleges, schools, seminaries of learning, mechanical institutes, museums, and galleries of art," is constitutional, and not in conflict with art. 20, § 9, of the constitution, forbidding perpetuities except for eleemosynary purposes. People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270.

25. Missouri Historical Soc. *v.* Academy of Science, 94 Mo. 459, 8 S. W. 346; Carpenter *v.* Westchester County Historical Soc., 2 Dem. Surr. (N. Y.) 574; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Ireland *v.* Geraghty, 11 Biss. (U. S.) 465, 15 Fed. 35; Beaumont *v.* Oliveira, L. R. 6 Eq. 534 [*affirmed* in L. R. 4 Ch. 309, 38 L. J. Ch. 329, 20 L. T. Rep. N. S. 53, 17 Wkly. Rep. 269]. See London Royal Soc. *v.* Thompson, 17 Ch. D. 407, 50 L. J. Ch. 344, 44 L. T. Rep. N. S. 274, 29 Wkly. Rep. 838.

26. British Museum *v.* White, 2 Sim. & St. 594, 25 Rev. Rep. 270.

27. *Illinois.*— Crerar *v.* Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

Iowa.— Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

Massachusetts.— Bartlett, Petitioner, 163 Mass. 509, 40 N. E. 899.

New York.— Clements *v.* Babcock, 26 Misc. (N. Y.) 90, 56 N. Y. Suppl. 527.

England.— *In re* Pitt Rivers, [1901] 1 Ch. 352, 65 J. P. 168, 70 L. J. Ch. 257, 84 L. T. Rep. N. S. 110, 49 Wkly. Rep. 425; *Re* Holburne, 53 L. T. Rep. N. S. 212.

28. Cary Library *v.* Bliss, 151 Mass. 564, 25 N. E. 92, 7 L. R. A. 765; Drury *v.* Natick, 10 Allen (Mass.) 169; Pepper's Estate, 1 Pa. Dist. 148, 11 Pa. Co. Ct. 257.

In New York see Allen *v.* Stevens, 161 N. Y. 122, 659, 55 N. E. 568, 57 N. E. 1103; Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 41 N. Y. St. 951, 27 Am. St. Rep. 487, 14 L. R. A. 33, 31 Am. L. Reg. N. S. 75, 123, 325, 522; Spencer *v.* De Witt C. Hay Library Assoc., 36 Misc. (N. Y.) 393, 73 N. Y. Suppl. 712.

29. Eastman *v.* Allard, 149 Mass. 154, 21 N. E. 235.

30. Maynard *v.* Woodard, 36 Mich. 423; Atty.-Gen. *v.* Marchant, L. R. 3 Eq. 424, 12 Jur. N. S. 957, 36 L. J. Ch. 47, 15 Wkly. Rep. 144.

31. St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231.

32. *In re* Berridge, 63 L. T. Rep. N. S. 470. See Atty.-Gen. *v.* Hartley, 4 Bro. Ch. 412.

33. Palmer *v.* Union Bank, 17 R. I. 627, 24 Atl. 109.

cating young persons in "the domestic and useful arts;"[34] to worthy but not prosperous literary persons;[35] for the diffusion of useful knowledge and instruction among the working classes,[36] or to promote the knowledge of a particular language, such as the Irish language at Trinity College, Dublin;[37] for a trust "for educational purposes,"[38] either where no limit of space is expressed, or where the gift is confined in terms to a particular locality,[39] and although the limit, though real, is not geometrically exact, as in the case of a gift to a town "and vicinity";[40] for a gift to a town of a fund the income of which is to be "applied, under its direction, to the support of public schools in said town,[41] in such way as the town shall judge best"; and to "providing school books for the public schools,"[42] although this last clause does not authorize the town to buy books and present them to the regular scholars personally.[43] As charitable gifts are construed liberally, a fund to establish a school for poor children will not be limited to the town as it then was, but as it may be extended in territory or divided.[44] A bequest for "the education of poor children, or towards the maintenance of a good common school in said district," has been held to apply only to white children, where a subsequent statute authorized colored children to participate in the benefits of the common schools.[45] A bequest for the support of a free English school for the instruction of youth, "wherever they belong," does not limit the instruction to male children only.[46] A bequest to support "a school for the use of poor children" cannot be applied to a public school where both poor and rich children are instructed.[47]

2. TRUSTS FOR EDUCATION. A trust for education is not void because it does not define the mode of execution or the nature of the work to be done.[48] But the founder of such a charity may give directions for its management or place restrictions upon the use of his gift. Thus, a gift for a school to be "taught by a female or females, wherein no book of instruction is to be used to teach except

34. Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

35. Thompson *v.* Thompson, 1 Coll. 381, 8 Jur. 839, 28 Eng. Ch. 381.

36. Sweeney *v.* Sampson, 5 Ind. 465.

37. Atty.-Gen. *v.* Flood, Hayes 611, Hayes & J. App. xxi.

38. Davis *v.* Barnstable, 154 Mass. 224, 28 N. E. 165; Boxford Second Religious Soc. *v.* Harriman, 125 Mass. 321; Hadley *v.* Hopkins Academy, 14 Pick. (Mass.) 240; Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397; Whicker *v.* Hume, 7 H. L. Cas. 124, 4 Jur. N. S. 933, 28 L. J. Ch. 396.

39. Weston *v.* Amesbury, 173 Mass. 81, 53 N. E. 147; Sears *v.* Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Lowell, Appellant, 22 Pick. (Mass.) 215; Allen *v.* Stevens, 161 N. Y. 122, 55 N. E. 568, 161 N. Y. 659, 57 N. E. 1103; Clement *v.* Hyde, 50 Vt. 716, 28 Am. Rep. 522. In a gift to "an orphan asylum in the city of M.," "in" may be construed as equivalent to "at," so as not to be restricted to the city limits. Old Ladies' Home *v.* Hoffman, (Iowa 1902) 89 N. W. 1066.

In New York a town cannot act as trustee of a charity, unless authorized by statute. Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 35 N. Y. St. 863, 11 L. R. A. 715.

40. Sears *v.* Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Saltonstall *v.* Sanders, 11 Allen (Mass.) 446; Miller *v.* Rowan, 5 Cl. & F. 99, 7 Eng. Reprint 341; Atty.-Gen. *v.* Gladstone, 6 Jur. 498, 11 L. J. Ch. 361, 13 Sim. 7, 36 Eng. Ch. 7; Hill *v.* Burns, 2 Wils. & S. 80. See Gould *v.* Whitman, 3 R. I. 267.

41. Skinner *v.* Harrison Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137.

42. Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172; Drury *v.* Natick, 10 Allen (Mass.) 169. See Matter of Sturgis, 164 N. Y. 485, 58 N. E. 646.

43. Davis *v.* Barnstable, 154 Mass. 224, 28 N. E. 165.

44. Board of Education *v.* Ladd, 26 Ohio St. 210; Zanesville Canal, etc., Co. *v.* Zanesville, 20 Ohio 483; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620. See Soohan *v.* Philadelphia, 33 Pa. St. 9, 1 Grant (Pa.) 494. See also Weston *v.* Amesbury, 173 Mass. 81, 53 N. E. 147; Atty.-Gen. *v.* Briggs, 164 Mass. 561, 42 N. E. 118; Matter of Bogart, 43 N. Y. App. Div. 582, 60 N. Y. Suppl. 496.

45. Leeds *v.* Shaw, 82 Ky. 79. See Farmers' L. & T. Co. *v.* Ferris, 67 N. Y. App. Div. 1, 73 N. Y. Suppl. 475; North Carolina Deaf, etc., School *v.* North Carolina Deaf, etc., Inst., 117 N. C. 164, 23 S. E. 171.

46. Nelson *v.* Cushing, 2 Cush. (Mass.) 519.

47. McIntire *v.* Zanesville Canal, etc., Co., 17 Ohio St. 352.

48. Dexter *v.* Harvard College, 176 Mass. 190, 57 N. E. 371; Farmers' L. & T. Co. *v.* Ferris, 67 N. Y. App. Div. 1, 73 N. Y. Suppl. 475.

spelling books and the Bible," is a valid charity.[49] The founder of scholarships in a college may also prefer his relatives for the enjoyment thereof;[50] in which case if, for any reason, the provision for the benefit of the next of kin fails, a residuary provision in favor of the college will apply both to void and lapsed legacies.[51] So a charitable gift may be made originally for a limited period or during the pleasure of the donor;[52] though, after it is accepted and acted upon, he cannot add new restrictions burdensome to the donee.[53] The donor may also limit the gift to a particular class of persons, such as the maintenance of a schoolmaster or the increase of teachers' salaries;[54] founding a school for the sons of gentlemen;[55] or for the higher education of young women to be selected in a certain order;[56] the diffusion of useful knowledge among workingmen;[57] a school for indigent scholars;[58] the education of the children of a certain county,[59] or of a certain district in a city,[60] or of poor orphans of a county to be selected by the county court or town officers.[61] The absence of power in the charter of an incorporated college to aid worthy indigent students does not affect its right to avail of a general law allowing all incorporated colleges to receive donations and manage them for the uses for which they were given.[62]

D. Religion — 1. In General. Gifts for the advancement of religion were held charitable long before the Statute of Elizabeth, and are by analogy within that statute, though the "repair of churches" is the only reference thereto in its summary of purposes.[63] "No object is more clearly charitable, in the sense of the law, than the advancement of religion and education;"[64] and a bequest to a religious institution is *prima facie* a bequest for a charitable purpose, though, as some religious societies are not charitable in the legal sense, a gift to them generally may be too broad for the gift to be upheld.[65] In general a gift of property, to be lawfully applied for an indefinite number of persons by bringing them under the influence of religion, is *prima facie* charitable in the legal sense;[66]

49. Tainter *v.* Clark, 5 Allen (Mass.) 66.

50. *Illinois.*— Ingraham *v.* Ingraham, 169 Ill. 432, 467, 48 N. E. 561, 49 N. E. 320.

Massachusetts.— Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371; Kent *v.* Dunham, 142 Mass. 216, 7 N. E. 730, 55 Am. Rep. 667.

Tennessee.— Franklin *v.* Armfield, 2 Sneed (Tenn.) 305.

Wisconsin.— Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

United States.— Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701.

England.— Atty.-Gen. *v.* Sidney Sussex College, 34 Beav. 654, L. R. 4 Ch. 722, 38 L. J. Ch. 656; Atty.-Gen. *v.* Northumberland, 7 Ch. D. 745, 47 L. J. Ch. 569, 38 L. T. Rep. N. S. 245, 26 Wkly. Rep. 586; Spencer *v.* All Souls College, Wilmot 163.

See 9 Cent. Dig. tit. "Charities," § 36.

51. Dexter *v.* Harvard College, 176 Mass. 195, 57 N. E. 371.

52. Antones *v.* Eslava, 9 Port. (Ala.) 527.

53. Price *v.* School Directors, 58 Ill. 452.

54. Price *v.* Maxwell, 28 Pa. St. 23; Hynshaw *v.* Morpheth, Duke 77, 111. See Webster *v.* Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

55. Atty.-Gen. *v.* Lonsdale, 5 L. J. Ch. 99, 1 Sim. 105, 27 Rev. Rep. 176, 2 Eng. Ch. 105.

56. Curran's Appeal, 4 Pennyp. (Pa.) 331, 15 Phila. (Pa.) 84, 39 Leg. Int. (Pa.) 158.

57. Sweeney *v.* Sampson, 5 Ind. 465.

58. Griffin *v.* Graham, 8 N. C. 96, 9 Am. Dec. 619.

59. Clement *v.* Hyde, 50 Vt. 716, 28 Am. Rep. 522; Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397.

60. Van Wagenen *v.* Baldwin, 7 N. J. Eq. 211.

61. Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Iseman *v.* Myres, 26 Hun (N. Y.) 651.

62. Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

63. Powerscourt *v.* Powerscourt, Beatty 572, 1 Molloy 616; Thornton *v.* Howe, 31 Beav. 14, 8 Jur. N. S. 663, 31 L. J. Ch. 767, 6 L. T. Rep. N. S. 525, 10 Wkly. Rep. 642; *In re* Lea, 34 Ch. D. 528, 56 L. J. Ch. 671, 56 L. T. Rep. N. S. 482, 35 Wkly. Rep. 572; *In re* White, [1893] 2 Ch. 41, 62 L. J. Ch. 342, 68 L. T. Rep. N. S. 187, 2 Reports 380, 41 Wkly. Rep. 683; *In re* Darling, [1896] 1 Ch. 50, 65 L. J. Ch. 52, 73 L. T. Rep. N. S. 382, 13 Reports 834, 44 Wkly. Rep. 75; Townsend *v.* Carus, 3 Hare 257, 8 Jur. 104, 13 L. J. Ch. 169, 25 Eng. Ch. 257; Atty.-Gen. *v.* Stepney, 10 Ves. Jr. 22, 7 Rev. Rep. 325.

64. Per Gray, J., in Fairbanks *v.* Lamson, 99 Mass. 533.

65. Bartlett, Petitioner, 163 Mass. 509, 40 N. E. 899; De Camp *v.* Dobbins, 29 N. J. Eq. 36, 31 N. J. Eq. 671; Miller *v.* Porter, 53 Pa. St. 292; *In re* White, [1893] 2 Ch. 41, 62 L. J. Ch. 342, 68 L. T. Rep. N. S. 187, 2 Reports 380, 41 Wkly. Rep. 683.

66. Turner *v.* Ogden, 1 Cox Ch. 316.

donations of real or personal estate made to particular churches, when without restriction as to the use to be made of the property, are gifts to be applied for the promotion of public worship and of religious instruction which necessarily influence an indefinite and varying number of persons, though many of them may not be church members; and if in trust they have all the elements of a public charity.[67]

2. Gifts For Benevolent Purposes Distinguished — a. In General. It appears to have always been the policy of the law to distinguish between religious purposes and those of benevolence, and this is the case in the laws of Michigan and perhaps of other states.[68] The mere fact that an ecclesiastical organization is made trustee of an eleemosynary charity does not give a sectarian character to such a charity which, in the general scope of its benevolence, will be treated by the civil courts as essentially unsectarian when the donor has not disclosed a contrary intent.[69] Bequests for building, endowing, or ornamenting a church,[70] for keeping in repair any part thereof, such as a chancel or spire,[71] the pulpit,[72] or a window or monument therein,[73] or building or repairing a parsonage,[74] are charitable, as are also gifts for establishing or keeping up its chimes, organ, or clock;[75] for a course of sermons to be preached in a certain church building during every Lent,[76] or for a sermon, and to pay singers, on Ascension Day.[77] But a bequest for the maintenance and repair of a private chapel or a gift to the chaplain thereof is not charitable.[78]

b. Gifts For Churches Corporate and Unincorporated. A gift to a designated or described church or religious congregation is valid when it can be clearly seen what congregation is intended.[79] Thus a grant to a church, or for the use of a

67. Brunnemeyer *v.* Buhre, 32 Ill. 183; McAlister *v.* Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; Jackson *v.* Phillips, 14 Allen (Mass.) 539; Atty.-Gen. *v.* Old South Soc., 13 Allen (Mass.) 474; Baker *v.* Fales, 16 Mass. 488; Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753; West *v.* Knight, 1 Ch. Cas. 134; Atty.-Gen. *v.* Ruper, 2 P. Wms. 125.

68. People *v.* Father Matthew Soc., 41 Mich. 67, 1 N. W. 931.

69. White Lick Quarterly Meeting *v.* White Lick Quarterly Meeting, 89 Ind. 136.

70. Cumming *v.* Reid Memorial Church, 64 Ga. 105; Alden *v.* St. Peter's Parish, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232; Jackson *v.* Phillips, 14 Allen (Mass.) 539; Atty.-Gen. *v.* Love, 23 Beav. 499, 3 Jur. N. S. 948, 26 L. J. Ch. 539; *Re* Hall's Charity, 14 Beav. 115, 15 Jur. 940; *In re* Palatine Estate Charity, 39 Ch. D. 54, 57 L. J. Ch. 751, 58 L. T. Rep. N. S. 925, 36 Wkly. Rep. 732; Wingfield's Case, Duke 80; *In re* Parker, 4 H. & N. 666, 5 Jur. N. S. 1058, 29 L. J. Exch. 66, 7 Wkly. Rep. 600; *In re* Church of Donington-on-Baine, 6 Jur. N. S. 290, 2 L. T. Rep. N. S. 10, 8 Wkly. Rep. 301; Atty.-Gen. *v.* Dartmouth, 48 L. T. Rep. N. S. 933; Atty.-Gen. *v.* Ruper, 2 P. Wms. 125.

71. Kelley *v.* Welborn, 110 Ga. 540, 35 S. E. 636; Hoare *v.* Osborne, L. R. 1 Eq. 585, 12 Jur. N. S. 243, 35 L. J. Ch. 345, 14 L. T. Rep. N. S. 9, 14 Wkly. Rep. 383; and cases cited *supra*, note 70. Where an ancient charity provided for the reparation, ornaments, and other "necessary occasions" of the parish church, upon the erection of a new parish church a scheme was sanctioned allowing the trustees to provide for a spire as a "necessary occasion." *In re* Palatine Estate Charity, 39 Ch. D. 54, 57 L. J. Ch. 751, 58 L. T. Rep. N. S. 925, 36 Wkly. Rep. 732.

72. Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401.

73. *In re* Rigley, 36 L. J. Ch. 147, 15 L. T. Rep. N. S. 499; and case cited *supra*, note 72.

74. Atty.-Gen. *v.* Chester, 1 Bro. Ch. 444; Brodie *v.* Chandos [*cited* in Atty.-Gen. *v.* Chester, 1 Bro. Ch. 444].

A bequest for the erection of a parsonage carries implied authority to purchase land therefor. Davidson *v.* Boomer, 15 Grant Ch. (U. C.) 1, 218.

75. *In re* Church Estate Charity, L. R. 6 Ch. 296; Adnam *v.* Cole, 6 Beav. 353; Turner *v.* Ogden, 1 Cox Ch. 316; *Re* Hendry, 56 L. T. Rep. N. S. 908; Atty.-Gen. *v.* Oakaver [*cited* in Atty.-Gen. *v.* Whorwood, 1 Ves. 534, 536]. See Spencer *v.* De Witt C. Hay Library Assoc., 36 Misc. (N. Y.) 393, 73 N. Y. Suppl. 712; *Re* Hendry, 56 L. T. Rep. N. S. 908, 35 Wkly. Rep. 730; Durour *v.* Motteux, 1 Ves. 320.

76. McAlister *v.* Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; Atty.-Gen. *v.* Trinity Church, 9 Allen (Mass.) 422; Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray (Mass.) 1; and cases cited *supra*, note 75.

77. Turner *v.* Ogden, 1 Cox Ch. 316.

78. Hoare *v.* Hoare, 56 L. T. Rep. N. S. 147.

79. Greenland Church, etc., Soc. *v.* Hatch, 48 N. H. 393; White *v.* Atty.-Gen., 39 N. C. 19, 44 Am. Dec. 92; Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478.

church, in a certain town is good at common law; the parish is the *cestui que trust* and the title vests in the pastor and his successors, rather than the congregation.[80] Its successor, if it ceases to exist, will be any other society holding the same faith which may succeed it.[81] So far as a denominational name is material such fundamental distinctions as exist between Trinitarians and Unitarians may be resorted to to define and limit the trust, but not usually lesser and more refined shades of doctrine existing in different branches of the same church.[82] A gift for the use of the ministry is valid even when there is no definite body capable of receiving and holding as trustee;[83] but when there is a definite number of persons ascertainable and clearly indicated for its benefits by the terms of the gift, it is not a public charity, however carefully restricted to religious uses only.[84] In those states where charitable trusts are not favored, a bequest or devise to an unincorporated religious society is invalid for want of a definite person to take the legal title.[85] This applies to a donation to the Church of England, that not being a corporate body.[86] In other jurisdictions it is immaterial that the church is not incorporated;[87] and a gift to trustees for such a society is often held valid when a like

80. Lockwood *v.* Weed, 2 Conn. 287; St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Baker *v.* Fales, 16 Mass. 488; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

Colonial churches.— Even before the Dartmouth college case was decided, it was held that grants of land made by the crown to colonial churches were irrevocable, and that property purchased by or devised to them, prior to the constitution, could not be diverted to other purposes by the states which succeeded to the sovereign power of the colonies after the Revolution. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 40 L. ed. 838; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650.

81. Potter *v.* Thornton, 7 R. I. 252.

82. Ayres *v.* Weed, 16 Conn. 291; Hinckley *v.* Thatcher, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719; Miller *v.* Gable, 2 Den. (N. Y.) 492.

83. Johnson *v.* Mayne, 4 Iowa 180; St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Jackson *v.* Phillips, 14 Allen (Mass.) 539; Baker *v.* Fales, 16 Mass. 488; Congregational Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396, 51 N. Y. Suppl. 704; Stone *v.* Griffin, 3 Vt. 400.

84. Old South Soc. *v.* Crocker, 119 Mass. 1, 20 Am. Rep. 299. See Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

85. *Connecticut.*— Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58.

Iowa.— Johnson *v.* Mayne, 4 Iowa 180.

Maryland.— Methodist Episcopal Church *v.* Smith, 56 Md. 362.

New York.— Marx *v.* McGlynn, 88 N. Y. 357; White *v.* Howard, 46 N. Y. 144; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Owens *v.* Methodist Episcopal Church Missionary Soc., 14 N. Y. 380, 67 Am. Dec. 160; Chili First Presb. Soc. *v.* Bowen, 21 Hun (N. Y.) 389; Banks *v.* Phelan, 4 Barb. (N. Y.) 80; Leonard *v.* Davenport, 58 How. Pr. (N. Y.) 384; McKeon *v.* Kearney, 57 How. Pr. (N. Y.) 349; Jackson *v.* Hammond, 2 Cai. Cas. (N. Y.) 337; King *v.* Woodhull, 3 Edw. (N. Y.) 79; Hornbeck *v.* American Bible Soc., 2 Sandf. Ch. (N. Y.) 133.

Pennsylvania.— Kirk *v.* King, 3 Pa. St. 436.

Tennessee.—Reeves *v.* Reeves, 5 Lea (Tenn.) 644; Cobb *v.* Denton, 6 Baxt. (Tenn.) 235; Frierson *v.* U. S. Presbyterian Church, 7 Heisk. (Tenn.) 683.

Vermont.— Smith *v.* Nelson, 18 Vt. 511; Burr *v.* Smith, 7 Vt. 241, 29 Am. Dec. 154; Stone *v.* Griffin, 3 Vt. 400.

United States.— Kain *v.* Gibboney, 101 U. S. 362, 25 L. ed. 813; Inglis *v.* Sailors' Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617; Meade *v.* Beale, Taney (U. S.) 339, 16 Fed. Cas. No. 9,371.

See 9 Cent. Dig. tit. "Charities," § 26.

86. Wright's Estate, Myr. Prob. (Cal.) 213; Mong *v.* Roush, 29 W. Va. 119, 11 S. E. 906; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735. See Doe *v.* Clark, 7 U. C. Q. B. 44.

As to de facto corporations see Glendale Union Christian Soc. *v.* Brown, 109 Mass. 163; Bundy *v.* Birdsall, 29 Barb. (N. Y.) 31. And also Cruse *v.* Axtell, 50 Ind. 49; Chittenden *v.* Chittenden, 1 Am. L. Reg. O. S. 538.

87. *Connecticut.*— Chatham *v.* Brainerd, 11 Conn. 60.

Iowa.— Seda *v.* Huble, 75 Iowa 429, 39 N. W. 685, 9 Am. St. Rep. 495; Byers *v.* McCartney, 62 Iowa 339, 17 N. W. 571.

Maine.—Anderson *v.* Brock, 3 Me. 243.

Massachusetts.— Silsby *v.* Barlow, 16 Gray (Mass.) 329.

Michigan.—Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159.

Ohio.—American Tract Soc. *v.* Atwater, 30 Ohio St. 77, 27 Am. Rep. 422.

Oregon.—Jefferson M. E. Protestant Church *v.* Adams, 4 Oreg. 76.

Pennsylvania.— Evangelical Assoc.'s Appeal, 35 Pa. St. 316; Knight's Estate, 10 Pa. Co. Ct. 225.

United States.— Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly (Pa.) 346, 14 Haz. Reg. (Pa.) 305.

See 9 Cent. Dig. tit. "Charities," § 26.

gift directly to the society would fail for indefiniteness of beneficiaries.[88] Religious societies are necessarily allowed a wide discretion in dealing with their own funds, received in great part from voluntary contributions, which cannot be adapted to the criterions of a valid trust, or support a charity in perpetuity; such as procuring portraits of their ministers, erecting tablets or monuments to their memory, or providing excursions for the children.[89] A fund given to be invested in making Christmas presents to the scholars of a certain Sunday school has been held not a charitable gift;[90] but the general rule in such cases is that all the objects to which a society, by the usages of a denomination, may appropriate its funds are to be regarded as charitable, though similar objects would not be treated as charitable under a secular trust.[91] And when ecclesiastical duties are enjoined under a charitable foundation, the court of chancery will not determine whether they are properly performed, but will leave such questions to the ecclesiastical authorities.[92] Gifts to missionary societies, foreign or domestic, are charitable;[93]

88. See cases cited *supra*, note 87; and the following cases:

Connecticut.— Tappan's Appeal, 52 Conn. 412.

Illinois.—Alden *v.* St. Peter's Parish, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232; Ferraria *v.* Vasconcellos, 31 Ill. 25.

New York.— Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613.

North Carolina.— Kirkpatrick *v.* Rogers, 41 N. C. 130.

Pennsylvania.— Zimmerman *v.* Anders, 6 Watts & S. (Pa.) 218, 40 Am. Dec. 552.

Tennessee.— See Cobb *v.* Benton, 6 Baxt. (Tenn.) 235; White *v.* Hale, 2 Coldw. (Tenn.) 77.

Texas.— Laird *v.* Bass, 50 Tex. 412.

Virginia.— Protestant Episcopal Education Soc. *v.* Churchman, 80 Va. 718.

See 9 Cent. Dig. tit. "Charities," § 26 *et seq.*

89. Kelly *v.* Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413. And see Loring *v.* Wilson, 174 Mass. 132, 54 N. E. 502.

90. Goodell *v.* Union Assoc., 29 N. J. Eq. 32.

91. Atty.-Gen. *v.* Old South Soc., 13 Allen (Mass.) 474; Dexter *v.* Gardner, 7 Allen (Mass.) 243; Holmes *v.* Wesley M. E. Church, 58 N. J. Eq. 327, 42 Atl. 582; and cases cited *supra*, note 89.

92. Atty.-Gen. *v.* Smithies, 1 Keen 289, 5 L. J. Ch. 247, 15 Eng. Ch. 289.

Civil courts acting on ecclesiastical questions.— The civil courts act upon the theory that the ecclesiastical tribunals are the best judges of ecclesiastical questions, and of all matters which concern the doctrines and discipline of their respective denominations; a church member has no right to invoke the supervisory power of a civil court so long as none of his civil rights are invaded. Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; O'Donovan *v.* Chatard, 97 Ind. 421, 49 Am. Rep. 462; White Lick Quarterly Meeting *v.* White Lick Quarterly Meeting, 89 Ind. 136; Connitt *v.* Reformed Protestant Dutch Church, 54 N. Y. 551; Prattsville Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228; Atty.-Gen. *v.* Reformed Protestant Dutch Church, 33 Barb. (N. Y.) 303 [*affirmed* in 36 N. Y. 452, 2 Transcr. App. (N. Y.) 145]; Harrison *v.* Hoyle, 24 Ohio St. 254; Smith *v.* Nelson, 18 Vt. 511. The same is true of charitable societies whose internal regulations provide for tribunals of their own and afford means of redress. Essery *v.* Court Pride, 2 Ont. 596. In a controversy as to the property of a church governed by a majority, if there is no allegation or proof that either faction of the church has departed from the fundamental doctrines of the denomination, the rights of the conflicting bodies to the use of the property are determined by the ordinary principles which govern voluntary associations; and the question whether a meeting was a legal conference of the church is one of law, to be determined by the court on facts found by the jury. Paris First Baptist Church *v.* Fort, 93 Tex. 215, 54 S. W. 892, 49 L. R. A. 617; Gipson *v.* Morris, (Tex. Civ. App. 1902) 67 S. W. 433; Watson *v.* Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666.

93. *Connecticut.*— See American Bible Soc. *v.* Wetmore, 17 Conn. 181.

Kentucky.— See Kinney *v.* Kinney, 86 Ky. 610, 9 Ky. L. Rep. 753, 6 S. W. 593.

Maryland.— See Rizer *v.* Perry, 58 Md. 112.

Massachusetts.— Methodist Episcopal Church Missionary Soc. *v.* Chapman, 128 Mass. 265; Fairbanks *v.* Lamson, 99 Mass. 533; Bartlet *v.* King, 12 Mass. 536, 7 Am. Dec. 99.

Vermont.— See Burr *v.* Smith, 7 Vt. 241, 29 Am. Dec. 154.

West Virginia.— See Carpenter *v.* Miller, 3 W. Va. 174, 100 Am. Dec. 744.

United States.— See Domestic, etc., Missionary Soc. *v.* Gaither, 62 Fed. 422; Presbyterian Bd. of Foreign Missions *v.* McMaster, 3 Fed. Cas. No. 1,586, 4 Am. L. Reg. 526.

England.— See Scott *v.* Brownrigg, 9 L. R. Ir. 246.

See 9 Cent. Dig. tit. "Charities," § 19 *et seq.*

As to lands in Oregon occupied for missions among the Indians see Nesqually Catholic Bishop *v.* Gibbon, 158 U. S. 155, 15 S. Ct.

so are gifts to a bible or tract society,[94] or to the missionary cause of a particular denomination,[95] or to a preachers' aid society, though incorporated in another state.[96] In all such cases the implication of an intent to create a public charity arises either from the character of the body to which the gift is made or from the publicly avowed purposes of its organization and action.[97] A trust for a parish school or for the poor of the church is germane to the objects of a church;[98] and so of a bequest to a church for establishing a support for a city missionary;[99] but an ecclesiastical society cannot by agreement apply a bequest intended for the support of its pastor to the support of a free school, nor can it thus divert a fund left for a school to the support of the ministry.[1]

c. Gifts For the Ministry. Gifts to maintain a preaching minister,[2] for a pension for a perpetual curate,[3] or for unbeneficed curates[4] are charitable. Immediate gifts to ministers of religion personally, or to those ministers who shall be selected by a designated person, are private gifts;[5] but a general gift for the benefit of the ministers of any place or denomination, or a perpetual gift for any of such ministers, is charitable.[6] So is a gift for the endowment of a professorship in a theological seminary;[7] for the education of students of a

779, 39 L. ed. 931 [*affirming* 44 Fed. 321]; Methodist Episcopal Church Missionary Soc. *v.* Dalles City, 107 U. S. 336, 2 S. Ct. 672, 27 L. ed. 545 [*affirming* 6 Fed. 356].

94. Bartlett *v.* Nye, 4 Metc. (Mass.) 378. And see Matter of Look, 4 Silv. Supreme (N. Y.) 233, 7 N. Y. Suppl. 298, 26 N. Y. St. 745; Matter of Goodrich, 2 Redf. Surr. (N. Y.) 45; Taylor *v.* American Bible Soc., 42 N. C. 201; Frierson *v.* U. S. Presbyterian Church, 7 Heisk. (Tenn.) 683.

95. Methodist Episcopal Church Missionary Soc. *v.* Chapman, 128 Mass. 265; Sheldon *v.* Chappell, 47 Hun (N. Y.) 59. And see Brewster *v.* McCall, 15 Conn. 274; Hanson *v.* Little Sisters of Poor, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293; Dye *v.* Beaver Creek Church, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724; Shields *v.* Jolly, 1 Rich. Eq. (S. C.) 99, 42 Am. Dec. 349; Methodist Episcopal Church Missionary Soc. *v.* Calvert, 32 Gratt. (Va.) 357.

96. Preachers' Aid Soc. *v.* England, 106 Ill. 125; Thompson *v.* Swoope, 24 Pa. St. 474.

97. Old South Soc. *v.* Crocker, 119 Mass. 1, 20 Am. Rep. 299; *In re* Lea, 34 Ch. D. 528, 56 L. J. Ch. 671, 56 L. T. Rep. N. S. 482, 35 Wkly. Rep. 572.

98. Conklin *v.* Davis, 63 Conn. 377, 28 Atl. 537; Auch's Succession, 39 La. Ann. 1043, 3 So. 227; Sohier *v.* St. Paul's Church, 12 Metc. (Mass.) 250.

99. McAlister *v.* Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; Sohier *v.* St. Paul's Church, 12 Metc. (Mass.) 250.

1. Bailey *v.* Lewis, 3 Day (Conn.) 450. A gift to "public Protestant charities" includes an incorporated asylum for the aged and infirm and controlled by the Church of England. Ross *v.* Ross, 25 Can. Supreme Ct. 307.

2. Andrews *v.* Andrews, 110 Ill. 223; Cory Universalist Soc. *v.* Beatty, 28 N. J. Eq. 570; Butler *v.* Protestant Episcopal Church, 92 Hun (N. Y.) 96, 36 N. Y. Suppl. 562, 71 N. Y. St. 758; Tucker *v.* St. Clement's Church, 3 Sandf. (N. Y.) 242; Pember *v.* Knighton, Duke 82, 381, Popham 139, Tothill 34, 21 Eng. Reprint 115; Penstred *v.* Payer, Duke 82, 1 Eq. Cas. Abr. 95; Gibbons *v.* Maltyard, Popham 6.

3. Atty.-Gen. *v.* Newcombe, 14 Ves. Jr. 1; Atty.-Gen. *v.* Parker, 1 Ves. 43.

4. Pennington *v.* Buckley, 6 Hare 451, 31 Eng. Ch. 451.

5. Methodist Episcopal Church *v.* Smith, 56 Md. 362; Thomas *v.* Howell, L. R. 18 Eq. 198, 43 L. J. Ch. 799, 30 L. T. Rep. N. S. 244, 22 Wkly. Rep. 676.

6. *Connecticut.*— Eliot's Appeal, (Conn. 1902) 51 Atl. 558.

Kentucky.— Crawford *v.* Thomas, 21 Ky. L. Rep. 1100, 54 S. W. 197.

Maryland.—Trinity M. E. Church *v.* Baker, 91 Md. 539, 46 Atl. 1020.

Massachusetts.—Old South Soc. *v.* Crocker, 119 Mass. 1, 20 Am. Rep. 299.

New Hampshire.— Wilton Baptist Soc. *v.* Wilton, 2 N. H. 508; Union Baptist Soc. *v.* Candia, 2 N. H. 20.

England.— Waller *v.* Childs, Ambl. 524; Atty.-Gen. *v.* Gladstone, 6 Jur. 498, 11 L. J. Ch. 361, 13 Sim. 7, 36 Eng. Ch. 7; Loyd *v.* Spillet, 3 P. Wms. 344; Atty.-Gen. *v.* Cock, 2 Ves. 273.

As to meaning of "minister of the Congregational persuasion" see Atty.-Gen. *v.* Dublin, 38 N. H. 459.

7. Auburn Theological Seminary *v.* Kellogg, 16 N. Y. 83. See American Church Missionary Soc. *v.* Griswold College, 27 Misc. (N. Y.) 42, 58 N. Y. Suppl. 3; Kerr *v.* Dougherty, 59 How. Pr. (N. Y.) 44.

"Endowment" defined.— "Endowment" in section sixty-two of the English Charitable Trusts Act of 1853 (16 & 17 Vict. c. 137) refers to an endowment made for a specified and particular purpose or trust, and does not include the investment by a charity of its voluntary contributions in land or other permanent securities. Governors of Charity *v.* Sutton, 27 Beav. 651; *In re* Clergy Orphan Corp. [1894] 3 Ch. 145, 64 L. J. Ch. 66, 71 L. T. Rep. N. S. 450, 7 Reports 549, 43 Wkly. Rep. 150; *In re* St. John St. Wesleyan Meth-

particular locality in the ministry of a specified congregation;[8] or for the support of a course of eight sermons to be preached annually in Lent, in a certain church, on specified subjects.[9] A gift to the minister of a certain Roman Catholic chapel, "and his successors, ministers of the same chapel, for ever, as an addition to his stipend of such chapel," has been held in England to be intended for the benefit of the office and the church, and not of the individual ministers, and to be void as a perpetual trust;[10] so a bequest to "the then minister" of a certain church is void;[11] and a bequest to an individual minister of religion is not made charitable by the expression of a wish that he apply it generally for the benefit of others.[12] A gift for the purchase of advowsons or presentations is not charitable.[13] In West Virginia, where the law of charitable trusts is not adopted, and the beneficiaries must be certain, a bequest of income to be applied annually to the pastor's salary of a certain church was held void for uncertainty,[14] but a bequest in trust for such a purpose of a fund which the testator himself held as trustee is valid.[15]

d. Gifts For Burial-Grounds or Monuments. A grant for the maintenance of a churchyard or burial-ground in connection with a church or religious society, or of a public burial-ground, or a burial-ground for all persons of a certain race, class, or neighborhood, is doubtless in the nature of a dedication for a pious or charitable use.[16] But in the absence of statute a trust for the support of graves, or of tombs or monuments outside of churches, when not intended for a public benefit, is not a charitable use but a private trust.[17] And it is at least doubtful whether

odist Chapel, [1893] 2 Ch. 618, 62 L. J. Ch. 927, 69 L. T. Rep. N. S. 105.

8. *Connecticut.*—Storrs Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141; White *v.* Fisk, 22 Conn. 31.

Maine.— Swasey *v.* American Bible Soc., 57 Me. 523.

New York.— Rainey *v.* Laing, 58 Barb. (N. Y.) 453; Kerr *v.* Dougherty, 59 How. Pr. (N. Y.) 44.

Ohio.— O'Neal *v.* Caulfield, 8 Ohio S. & C. Pl. Dec. 248, 5 Ohio N. P. 149.

Pennsylvania.— Witman *v.* Lex, 17 Serg. & R. (Pa.) 88, 17 Am. Dec. 644.

United States.— Field *v.* Drew Theological Seminary, 41 Fed. 371.

9. Atty.-Gen. *v.* Trinity Church, 9 Allen (Mass.) 422.

10. Thornber *v.* Wilson, 3 Drew. 245, 24 L. J. Ch. 667.

11. Thornber *v.* Wilson, 4 Drew. 350, holding also that a gift "to the person now minister" would be different.

12. Doe *v.* Copestake, 6 East 328; Doe *v.* Aldridge, 4 T. R. 264.

13. Hunter *v.* Atty.-Gen. [1899] A. C. 309, 68 L. J. Ch. 449, 80 L. T. Rep. N. S. 732, 47 Wkly. Rep. 673; *In re* Hunter, [1897] 2 Ch. 105, 66 L. J. Ch. 545, 76 L. T. Rep. N. S. 725, 45 Wkly. Rep. 610; *In re* St. Stephen, 39 Ch. D. 492, 57 L. J. Ch. 917, 59 L. T. Rep. N. S. 393, 36 Wkly. Rep. 837.

14. Pack *v.* Shanklin, 43 W. Va. 304, 27 S. E. 389. See Bible Soc. *v.* Pendleton, 7 W. Va. 79.

15. Morris *v.* Morris, 48 W. Va. 430, 37 S. E. 570.

16. *Massachusetts.*— Dexter *v.* Gardner, 7 Allen (Mass.) 243.

Ohio.— Hullman *v.* Honcomp, 5 Ohio St. 237.

Rhode Island.— Kelly *v.* Nichols, 17 R. I. 306, 21 Atl. 906, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

Washington.— Tacoma *v.* Tacoma Cemetery, (Wash. 1902) 68 Pac. 723.

United States.— Hopkins *v.* Grimshaw, 105 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739.

England.— *In re* Vaughan, 33 Ch. D. 187, 51 J. P. 70, 55 L. T. Rep. N. S. 547, 35 Wkly. Rep. 104.

See 9 Cent. Dig. tit. "Charities," § 39.

17. *Alabama.*— Holifield *v.* Robinson, 79 Ala. 419.

Kentucky.—A devise for such purpose is here valid under the statute allowing devises for any "charitable or humane purpose." Ford *v.* Ford, 91 Ky. 572, 13 Ky. L. Rep. 183, 16 S. W. 451.

Maine.— Piper *v.* Moulton, 72 Me. 155.

Massachusetts.— Bates *v.* Bates, 134 Mass. 110, 45 Am. Rep. 305, 27 Alb. L. J. 243.

New Jersey.— Detwiller *v.* Hartman, 37 N. J. Eq. 347 and note.

New York.— Matter of Fisher, 8 N. Y. Suppl. 10, 2 Connoly Surr. (N. Y.) 75.

Pennsylvania.— Smith's Estate, 5 Pa. Dist. 327; Wells M. E. Church *v.* Gifford, 5 Pa. Co. Ct. 92.

Tennessee.— Fite *v.* Beasley, 12 Lea (Tenn.) 328.

United States.— Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739.

England.— See Hoare *v.* Osborne, L. R. 1 Eq. 585, 12 Jur. N. S. 243, 35 L. J. Ch. 345, 14 L. T. Rep. N. S. 9, 14 Wkly. Rep. 383; Fowler *v.* Fowler, 33 Beav. 616, 10 Jur. N. S. 648, 33 L. J. Ch. 674, 10 L. T. Rep. N. S. 682; Rickard *v.* Robson, 31 Beav. 244, 8 Jur. N. S. 655, 31 L. J. Ch. 897, 7 L. T. Rep. N. S. 87, 10 Wkly. Rep. 657; *In re* Rogerson, [1901] 1 Ch. 715, 70 L. J. Ch. 444, 84 L. T. Rep. N. S. 200; *In re* Rigley, 15 Wkly. Rep. 190; Toole *v.* Hamilton, [1901] 1 Ir. R. 383. And

the cemetery of a burial society whose articles of association contemplate the burial there of its own members only, but which has long permitted the interment of other inhabitants of the community, upon the payment of certain fees, not from a charitable motive, but as a source of private profit, can in the absence of express statute be regarded as held for a public charitable use.[18] An unlimited bequest to a corporation authorized to acquire property by bequest or devise and incorporated to cremate the dead in the quickest, best, and most economical manner appears to be charitable and valid.[19]

e. Gifts For Bibles and Religious Education. Gifts for the circulation and distribution of bibles and other religious books and tracts are charitable.[20] So any gift or bequest of money for the purpose of printing and circulating works of a religious tendency, or of extending the knowledge and influence of a particular religion,[21] is a charitable gift or bequest which a court of equity will sanction and uphold by settling, when possible, a scheme therefor, without making distinctions between one kind of religion and another.[22] If the tenets of the sect to be aided inculcate doctrines adverse to all religion, or subversive to all morality, the court will not assist the execution of the bequest, but will declare it void; but it will not avoid the bequest when the tendency of the tenets is not immoral, though it may consider them foolish or devoid of foundation,[23] as in the case of a bequest for the purchase of a library on spiritualism,[24] or the circulation of the works of Henry George on the land question.[25]

f. Validity of Gifts Derogatory to Christianity. In the Girard Will case,[26] where the will excluded ecclesiastics or ministers of any sect from holding or exercising any station or duty in the college in Philadelphia thereby founded, but did not exclude the teaching of Christianity therein, this was held not derogatory to the Christian religion as a part of the common law in Pennsylvania; but under a devise to "The Infidel Society of Philadelphia, hereafter to be incorporated . . . for the purpose of building a hall for the free discussion of religion, politics, &c," it was held in that state that such a society would probably never be incorporated there, and that a court of equity would not enforce such a gift as

see Roche *v.* McDermott, [1901] 1 Ir. R. 394; *In re* Tyler, [1891] 3 Ch. 252, 60 L. J. Ch. 686, 65 L. T. Rep. N. S. 367, 40 Wkly. Rep. 7.

See 9 Cent. Dig. tit. "Charities," § 39; and 15 Harv. L. Rev. 515.

18. See Donnelly *v.* Boston Catholic Cemetery Assoc., 146 Mass. 163, 15 N. E. 505; King *v.* Parker, 9 Cush. (Mass.) 71; Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278; Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739; Anonymous, 3 Atk. 277; *In re* Buck, [1896] 2 Ch. 727, 60 J. P. 775, 65 L. J. Ch. 881, 75 L. T. Rep. N. S. 312, 45 Wkly. Rep. 106; Cunnack *v.* Edwards, [1896] 2 Ch. 679, 65 L. J. Ch. 801, 75 L. T. Rep. N. S. 122, 45 Wkly. Rep. 99; Pease *v.* Pattinson, 32 Ch. D. 154, 55 L. J. Ch. 617, 54 L. T. Rep. N. S. 209, 34 Wkly. Rep. 361.

19. Spencer *v.* De Witt C. Hay Library Assoc., 36 Misc. (N. Y.) 393, 73 N. Y. Suppl. 712.

Cemetery lots — Permanent care.—The permanent care of cemetery lots is now usually provided for by the statute. See e. g., Bronson *v.* Strouse, 57 Conn. 147, 17 Atl. 699; Morse *v.* Natick, 176 Mass. 510, 57 N. E. 996; Bartlett, Petitioner, 163 Mass. 509, 40 N. E. 899; Green *v.* Hogan, 153 Mass. 462, 27 N. E. 413; Donnelly *v.* Boston Catholic Cemetery Assoc., 146 Mass. 163, 15 N. E. 505; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401.

20. Simpson *v.* Welcome, 72 Me. 496, 39 Am. Rep. 349; Bliss *v.* American Bible Soc., 2 Allen (Mass.) 334; Winslow *v.* Cummings, 3 Cush. (Mass.) 358; Pickering *v.* Shotwell, 10 Pa. St. 23; Magill *v.* Brown, 16 Fed. Cas. No. 8,952, 14 Haz. Reg. (Pa.) 305; Atty.-Gen. *v.* Stepney, 10 Ves. Jr. 22, 7 Rev. Rep. 325.

21. *In re* Hunter, [1897] 2 Ch. 105, 66 L. J. Ch. 545, 76 L. T. Rep. N. S. 725, 45 Wkly. Rep. 610.

22. Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130; Kelly *v.* Nichols, 17 R. I. 306, 21 Atl. 906, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

23. Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

24. Jones *v.* Watford, 62 N. J. Eq. 339, 50 Atl. 180; Thornton *v.* Howe, 31 Beav. 14, 8 Jur. N. S. 663, 31 L. J. Ch. 767, 6 L. T. Rep. N. S. 525, 10 Wkly. Rep. 642.

25. George *v.* Braddock, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511. See Hutchins *v.* George, 44 N. J. Eq. 124, 14 Atl. 108.

26. Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205. See *In re* Blenon, 2 Pa. L. J. 250, Brightly (Pa.) 338; Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478.

charitable in any sense.[27] In England, while penalties formerly attached to the observance of any forms of religion except those of the Established Church, trusts for the promotion of all forms of religion appear to be now lawful, as the result of the toleration acts.[28] The legality at common law of teachings impugning the doctrine of the Trinity and of bequests to assist them was at one time doubted;[29] but later a bequest for the aid of Unitarian congregations was held valid, and this is now the accepted doctrine in both England and America.[30]

3. Pious and Superstitious Uses — a. In General. In early times the meaning of such words as "pious" and "godly" was not limited to objects of a religious or eleemosynary character, but embraced all purposes originating in motives of philanthropy, including the repair of bridges or harbors as well as the repair of churches or relief of the poor.[31] In England, until the Reformation, and more particularly until the reign of Edward VI, pious and charitable gifts were not confined to aiding schools, churches, or living persons, but extended to masses, prayers, perpetual obits, and lights for the souls of the founders, their families, and friends;[32] but by force of statutes enacted in that reign and later, gifts for the latter purpose were abolished in England and became known as "superstitious uses" and as pertaining to a false religion.[33]

b. Gifts in Aid of the Roman Catholic Religion For Masses, Etc. In England a gift to aid in restoring the papal supremacy was held void, as contrary to public policy;[34] and the following were also invalid: a bequest for the purpose of bringing up children in the Roman Catholic faith;[35] or to "Roman Catholic bishops" and their successors in Ireland, where they are not particularly named, and at a time when such offices were not known to the law in Ireland;[36] or to such purposes as the superior of a convent or her successors might judge expedient;[37] although it was also held that such illegal gifts were not void for the benefit of the heir or executor, but were to be applied *cy-pres* as the king might appoint under the sign manual.[38] And there, as in Alabama and Wisconsin, gifts for prayers or masses for the departed are invalid,[39] chiefly on the ground of want

27. Zeisweiss *v.* James, 63 Pa. St. 465, 3 Am. Rep. 558.

28. See Waller *v.* Childs, Ambl. 524; *In re* Delmar Charitable Trust, [1897] 2 Ch. 163, 66 L. J. Ch. 555, 76 L. T. Rep. N. S. 594, 45 Wkly. Rep. 630; Atty.-Gen. *v.* Hall, [1896] 2 Ir. R. 291, 307. Lord Brougham held The Roman Catholic Charities Act of 1832 (2 & 3 Will. IV, c. 115) to be retrospective in Bradshaw *v.* Tasker, 3 L. J. Ch. 183, 2 Myl. & K. 221, 7 Eng. Ch. 221. But this was doubted in Atty.-Gen. *v.* Drummond, 1 Dru. & Warr. 353, 3 Dru. & Warr. 165. By the act of 1860 (23 & 24 Vict. c. 134), to amend the law regarding Roman Catholic charities in England and Wales, those purposes which are lawful are not invalidated by trusts for superstitious or prohibited uses, but the property may be apportioned, and the whole applied to lawful purposes.

29. Atty.-Gen. *v.* Pearson, 3 Mer. 353, 17 Rev. Rep. 100.

30. Scott *v.* Curle, 9 B. Mon. (Ky.) 17; Atty.-Gen. *v.* Dublin, 38 N. H. 459; Miller *v.* Gable, 10 Paige (N. Y.) 627 [*reversed* in 2 Den. (N. Y.) 492]; Shrewsbury *v.* Hornby, 5 Hare 406, 36 Eng. Ch. 406.

31. See Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265.

32. See Atty.-Gen. *v.* Fishmongers' Co., 2 Beav. 151, 17 Eng. Ch. 151, 5 Myl. & C. 11, 46 Eng. Ch. 11; 1 Spence Eq. Jur. 587; 1 Eq. Abr. 95 (B).

33. See authorities cited *supra*, note 32; and 2 Bacon Abr. 195. See Doe *v.* Read, 3 U. C. Q. B. 244. The Acts of Edw. VI, c. 14 (1547) and 1 Eliz. c. 24 (1559) vested in the crown all property previously given for superstitious purposes; such gifts made thereafter were void, and did not vest in the crown. *In re* Blundell, 30 Beav. 360, 5 L. T. Rep. N. S. 337, 10 Wkly. Rep. 34. After the Reformation a charitable foundation for saying masses, praying for the dead, etc., was adjudged to be performed by saying the service according to the Litany. Coke Litt. 95*b*.

34. De Themmines *v.* De Bonneval, 7 L. J. Ch. 35, 5 Russ. 288, 29 Rev. Rep. 17, 5 Eng. Ch. 288.

35. Cary *v.* Abbot, 7 Ves. Jr. 490, 6 Rev. Rep. 161.

36. Atty.-Gen. *v.* Power, 1 Ball & B. 145.

37. Smart *v.* Prujean, 6 Ves. Jr. 560, 5 Rev. Rep. 395.

38. Atty.-Gen. *v.* Todd, 1 Keen 803, 6 L. J. Ch. 205, 15 Eng. Ch. 803; Atty.-Gen. *v.* Guise, 2 Vern. 266; Cary *v.* Abbot, 7 Ves. Jr. 490, 6 Rev. Rep. 161. So when the charitable object was uncertain. Atty.-Gen. *v.* Herrick, Ambl. 712.

39. Festorazzi *v.* St. Joseph's Catholic Church, 104 Ala. 327, 18 So. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360; Gass *v.* Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446; McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631, 40

of living beneficiaries; while in Massachusetts, New Hampshire, Rhode Island, Kansas, Iowa, New Jersey, Pennsylvania, the Province of Ontario, and Ireland such gifts are upheld, at least when intended for the benefit of the testator or other named persons.[40] In New York a bequest for prayers for the souls in purgatory was held to be too indefinite;[41] but a like bequest for the testator personally was there held valid, the strict English doctrine as to superstitious uses being at the same time treated as contrary to the spirit of our institutions.[42] A trust in a Catholic bishop and his successors for the use of his churches is held not to violate the rule against perpetuities,[43] and to be a trust, of which the courts will take cogizance and assume control, as a charitable and pious use, to prevent abuse, perversion, or destruction.[44] A bequest for building a Catholic convent in a certain town is a gift in trust to persons vested with power under the church laws to direct as to the erection of such buildings.[45]

4. Religious Purpose Must Be General — Gifts to Religious Orders. Religious purposes have been said to be charitable only when they tend directly or indirectly toward the instruction or edification of the public, or bettering their condition.[46] An annuity to an individual, so long as he spends his time in retirement, devotion, and self-denial, is not charitable, nor is a gift to a voluntary association of persons, so long as they live together in retirement and perform acts of devotion.[47] Where the main object of a will was the education for the

L. R. A. 724; Yeap Cheah Neo *v.* Ong Cheng Neo, L. R. 6 P. C. 381; *In re* Blundell, 30 Beav. 360, 5 L. T. Rep. N. S. 337, 10 Wkly. Rep. 34; Atty.-Gen. *v.* Fishmongers' Co., 2 Beav. 151, 17 Eng. Ch. 151, 5 Myl. & C. 11, 46 Eng. Ch. 11; Heath *v.* Chapman, 2 Drew. 417, 23 L. J. Ch. 947; West *v.* Shuttleworth, 4 L. J. Ch. 115, 2 Myl. & K. 684, 7 Eng. Ch. 684.

40. *Illinois.*—Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730.

Iowa.— Moran *v.* Moran, 104 Iowa 216, 73 N. W. 617, 65 Am. St Rep. 443, 39 L. R. A. 204.

Kansas.— Harrison *v.* Brophy, 59 Kan. 1, 51 Pac. 883, 40 L. R. A. 721.

Massachusetts.— Teele *v.* Derry, 168 Mass. 341, 47 N. E. 422, 60 Am. St. Rep. 401, 38 L. R. A. 629; Schouler, Petitioner, 134 Mass. 426.

New Hampshire.— Webster *v.* Sughrow, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100.

New Jersey.— Kerrigan *v.* Conelly, (N. J. 1900) 46 Atl. 227; Kerrigan *v.* Tabb, (N. J. 1898) 39 Atl. 701.

Pennsylvania.— Seibert's Appeal, 18 Wkly. Notes Cas. (Pa.) 276, 6 Atl. 105; Browers *v.* Fromm, Add. (Pa.) 362.

Rhode Island.— Sherman *v.* Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717.

England.— Atty.-Gen. *v.* Hall, [1896] 2 Ir. R. 291; Bannigan *v.* Murphey, [1896] 1 Ir. R. 418, 424; Blount *v.* Viditz, [1895] 1 Ir. R. 42; Reichenbach *v.* Quin, 21 L. R. Ir. 138; Read *v.* Hodgens, 7 Ir. Eq. 17; Charitable Donation Com'rs *v.* Walsh, 7 Ir. Ch. 24 note.

Canada.— Elmsley *v.* Madden, 18 Grant Ch. (U. C.) 386.

See 9 Cent. Dig. tit. "Charities," § 40.

41. Holland *v.* Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420. In this state definite gifts for this purpose are not now invalid under N. Y. Laws (1893), c. 701. See Matter of Zimmerman, 22 Misc. (N. Y.) 411, 50 N. Y. Suppl. 395; Matter of Backes, 9 Misc. (N. Y.), 504, 30 N. Y. Suppl. 394, 61 N. Y. St. 739. And also O'Conner *v.* Gifford, 117 N. Y. 275, 22 N. E. 1036, 26 N. Y. St. 453; Owens *v.* Methodist Episcopal Church Missionary Soc., 14 N. Y. 380, 67 Am. Dec. 160; Holland *v.* Smyth, 40 Hun (N. Y.) 372; Andrew *v.* New York Bible Soc., 4 Sandf. (N. Y.) 156; Gilman *v.* McArdle, 65 How. Pr. (N. Y.) 330, 12 Abb. N. Cas. (N. Y.) 414.

42. Matter of Hagenmeyer, 12 Abb. N. Cas. (N. Y.) 432. See Howard's Estate, 5 Misc. (N. Y.) 295, 25 N. Y. Suppl. 1111; Schwartz *v.* Bruder, 3 N. Y. Suppl. 134, 20 N. Y. St. 363, 6 Dem. Surr. (N. Y.) 169; O'Connor *v.* Gifford, 3 N. Y. Suppl. 207, 20 N. Y. St. 140, 6 Dem. Surr. (N. Y.) 71; Hagenmeyer *v.* Hanselman, 2 Dem. Surr. (N. Y.) 87; Dougherty's Estate, 12 Phila. (Pa.) 70, 35 Leg. Int. (Pa.) 153.

43. Lamb *v.* Lynch, 56 Nebr. 135, 76 N. W. 428.

44. *Illinois.*— Germain *v.* Baites, 113 Ill. 29.

Kentucky.— Tichenor *v.* Brewer, 98 Ky. 349, 17 Ky. L. Rep. 936, 33 S. W. 86.

Missouri.— See Kenrick *v.* Cole, 61 Mo. 572.

New York.— See McCaughal *v.* Ryan, 27 Barb. (N. Y.) 376.

Ohio.— Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753. See also Leydon *v.* Malloy, 10 Ohio Cir. Ct. 442, 6 Ohio Cir. Dec. 820.

United States.— See Kain *v.* Gibboney, 101 U. S. 362, 25 L. ed. 813.

45. Hughes *v.* Daly, 49 Conn. 34.

46. Cocks *v.* Manners, L. R. 12 Eq. 574, 40 L. J. Ch. 640, 24 L. T. Rep. N. S. 869, 19 Wkly. Rep. 1055; Bradshaw *v.* Jackman, 21 L. R. Ir. 12. See Miller *v.* Porter, 53 Pa. St. 292.

47. See cases cited *supra*, note 46.

Presbyterian ministry of the testatrix's nephew, if he so chose, in which event the final balance of her estate was to be paid to him when ordained, otherwise the whole of her estate to go to a college for the education of Presbyterian ministers, this was held to be a private benefit to him and not a religious use, though the Presbyterian church might be incidentally benefited.[48] Religious orders of men bound by monastic vows are forbidden by statute in England, making void gifts for their support or aid.[49] So far as brotherhoods and sisterhoods aim at relief of distress they are lawful and probably charitable;[50] if they have no charitable objects beyond self-improvement or companionship they are like clubs; an immediate gift to such an institution is a valid private gift to its members,[51] but as a perpetual trust it is void for remoteness.[52] A Young Men's Christian Association whose work is partly charitable but whose purposes are also social, including the giving of lectures and entertainments for its members, athletic exercises, and the sale of food at a coffee or lunch counter, is not a public charitable association.[53]

E. Other Purposes Enumerated in Statute of Elizabeth — 1. Aged and Impotent. Under the enumeration in the preamble to the Statute of Elizabeth of the "aged" and "impotent" a gift to widows and orphans of a parish is a valid charity;[54] in such case, and in the case of a gift to the "aged," it is not necessary to express that they are also poor,[55] or to limit the benefit of the public purpose to a particular area, such as a parish or county, though it may be so limited.[56] A gift of a fund to pension off the "old and worn-out clerks" of a firm is a good charitable gift, and comes within the enumeration of "impotent" as well as "aged."[57]

2. Disabled Soldiers, Mariners, or Orphans. As maimed soldiers and mariners as well as orphans are expressly mentioned in the Statute of Elizabeth, a bequest "for the benefit of disabled soldiers and seamen who served in the Union army in the late war of the Rebellion in the United States, their widows and orphans," is a good public charity.[58]

3. Gifts to the Government — Relief of Public Burdens. A gift to the government,[59] or to build a house of correction or sessions house,[60] or a town

48. McMillen's Appeal, 11 Wkly. Notes Cas. (Pa.) 440. See Swasey *v.* American Bible Soc., 57 Me. 523.

49. 10 Geo. IV, c. 7.

50. Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110; Cocks *v.* Manners, L. R. 12 Eq. 574, 40 L. J. Ch. 640, 24 L. T. Rep. N. S. 869, 19 Wkly. Rep. 1055; *In re* Wilkinson, 19 L. R. Ir. 531; O'Leary Charities, 90.

51. Matter of Lynch, 4 Dem. Surr. (N. Y.) 312; Cocks *v.* Manners, L. R. 12 Eq. 574, 40 L. J. Ch. 640, 24 L. T. Rep. N. S. 869, 19 Wkly. Rep. 1055; *In re* Clark, 1 Ch. D. 497, 45 L. J. Ch. 194, 24 Wkly. Rep. 233. See Pratz *v.* Weigall, 7 Vict. L. Rep. 156.

52. Carne *v.* Long, 2 De G., F. & J. 75, 6 Jur. N. S. 639, 29 L. J. Ch. 503, 8 Wkly. Rep. 570, 63 Eng. Ch. 59; Matter of Dutton, 4 Ex. D. 54; Thomson *v.* Shakespear, Johns. Ch. (Eng.) 612, 1 De G., F. & J. 399, 62 Eng. Ch. 306; Morrow *v.* McConville, 11 L. R. Ir. 236. And see *In re* Amos, 39 Wkly. Rep. 550; *In re* Sheraton, [1884] W. N. 174.

53. Chapin *v.* Holyoke Young Men's Christian Assoc., 165 Mass. 280, 42 N. E. 1130. See Goodell *v.* Union Assoc., 29 N. J. Eq. 32.

54. Atty.-Gen. *v.* Comber, 2 Sim. & St. 93, 25 Rev. Rep. 163.

55. Thompson *v.* Corbey, 27 Beav. 649, 8 Wkly. Rep. 267; Powell *v.* Atty.-Gen., 3 Meriv. 48, 17 Rev. Rep. 8; Atty.-Gen. *v.* Comber, 2 Sim. & St. 93, 25 Rev. Rep. 163. See Nash *v.* Morley, 5 Beav. 177, 6 Jur. 520, 11 L. J. Ch. 336; *In re* Perry Almshouse, [1899] 1 Ch. 21, 63 J. P. 52, 68 L. J. Ch. 66, 79 L. T. Rep. N. S. 366, 47 Wkly. Rep. 197; *In re* Wall, 42 Ch. D. 510, 59 L. J. Ch. 172, 61 L. T. Rep. N. S. 357, 37 Wkly. Rep. 779; Atty.-Gen. *v.* Haberdashers' Co., 2 L. J. Ch. 33, 1 Myl. & K. 420, 7 Eng. Ch. 420, 5 Sim. 478, 9 Eng. Ch. 478.

56. *In re* Gosling, 48 Wkly. Rep. 300.

57. *In re* Gosling, 48 Wkly. Rep. 300. See Cresson's Appeal, 30 Pa. St. 437; Cresson *v.* Cresson, 6 Fed. Cas. No. 3,389, 6 Am. L. Reg. 42, 5 Pa. L. J. Rep. 431.

58. Holmes *v.* Coates, 159 Mass. 226, 34 N. E. 190; Russell *v.* Providence, 7 R. I. 566.

59. Matter of Fox, 52 N. Y. 530, 11 Am. Rep. 751; Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265; Nightingale *v.* Goulburn, 5 Hare 484, 26 Eng. Ch. 484, 12 Jur. 317, 17 L. J. Ch. 296, 2 Phil. 594, 22 Eng. Ch. 594; Atty.-Gen. *v.* Ward, 3 Ves. Jr. 327.

60. Jackson *v.* Phillips, 14 Allen (Mass.) 539; Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265; Atty.-Gen. *v.* Heelis, 2 L. J. Ch. O. S. 189, 2 Sim. & St. 67, 25 Rev. Rep. 153.

house,[61] in aid of the poor-rate,[62] or for police and other rates, and defraying the expenses of registering voters[63] are also for charitable purposes; but a bequest for the building of "a Catholic reformatory for boys" in a certain state is held *prima facie* void for uncertainty, though capable of being made certain by evidence.[64]

4. In Aid of Captives, Prisoners, or Slaves. The words "Relief or redemption of prisoners or captives," in the Statute of Elizabeth, include those in prison under condemnation of crime, as well as persons confined for debt, and support gifts for distributing bread and meat among them annually, or for enabling poor imprisoned debtors to compound with creditors.[65] An ancient trust, established when insolvency was a crime, in favor of "poor prisoners" in London, meaning adult prisoners for debt, after it had lapsed because of the abolition of imprisonment for debt and the closing of debtors' prisons, cannot, it seems, under any scheme, be applied to the education of convicts' children.[66] A gift of land to raise money to prosecute offenders is not good as a charitable use;[67] and on the other hand a bequest tending to encourage offenders, such as purchasing the discharge of poachers for non-payment of fines or expenses under the game laws, is against public policy and void.[68] The words "ports and havens" appear to include within their equity common ponds or watering-places.[69] Prior to the Civil war in the United States it was held in Mississippi that a bequest in trust to send the testator's slaves to Liberia, there to remain free, was a valid trust;[70] but later it was held that the American Colonization Society, incorporated in Maryland for the emancipation and colonization in Africa of American slaves, could not take a legacy to interfere with slavery by the emancipation of slaves, at least not in the United States,[71] or for supporting slaves in Liberia.[72] In Massachusetts it was held that, as a fugitive slave was not a criminal by the laws of that state or of the United States, a bequest to trustees to be expended in their discretion for the benefit of fugitive slaves might be used by them to relieve the distress of such slaves or to buy their freedom.[73]

F. Purposes Not Enumerated in Statute of Elizabeth. Many other gifts for purposes beneficial to the community are held to be charitable, though not falling under any of the twenty-one classes of trusts named in this statute.[74] Thus, although the statute expressly mentions only "repair of bridges, ports, havens, causeways, churches, seabanks, and highways," yet the improvement of a town or city and the support of public buildings therein are held to be within its

61. Coggeshall *v.* Pelton, 7 Johns. Ch. (N. Y.) 292, 11 Am. Dec. 471; Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146.

62. *Re* Hall's Charity, 14 Beav. 115, 15 Jur. 940.

63. Atty.-Gen. *v.* Webster, L. R. 20 Eq. 483, 44 L. J. Ch. 766; Atty.-Gen. *v.* Blizard, 21 Beav. 233, 1 Jur. N. S. 1195, 25 L. J. Ch. 171.

64. Hughes *v.* Daly, 49 Conn. 34.

65. Jackson *v.* Phillips, 14 Allen (Mass.) 539; Atty.-Gen. *v.* Ironmongers' Co., 2 Beav. 313, 10 Cl. & F. 908, 8 Eng. Reprint 983, 2 Myl. & K. 576, 7 Eng. Ch. 576; Atty.-Gen. *v.* Painter-stainers Co., 2 Cox Ch. 51.

66. *In re* Charitable Gifts for Prisoners, L. R. 8 Ch. 199, 42 L. J. Ch. 391, 21 Wkly. Rep. 213; *In re* Prison Charities, L. R. 16 Eq. 129, 42 L. J. Ch. 748.

67. Reg. *v.* Savin, 2 Salk. 605.

68. Thrupp *v.* Collett, 26 Beav. 125, 5 Jur. N. S. 111.

69. Drury *v.* Natick, 10 Allen (Mass.) 169.

70. Ross *v.* Vertner, 5 How. (Miss.) 305. See Charles *v.* Hunnicutt, 5 Call (Va.) 311.

71. American Colonization Soc. *v.* Gartrell, 23 Ga. 448; Garnett *v.* Cowles, 39 Miss. 60; Lewis *v.* Lusk, 35 Miss. 401; Lusk *v.* Lewis, 32 Miss. 297.

72. Walker *v.* Walker, 25 Ga. 420.

73. Jackson *v.* Phillips, 14 Allen (Mass.) 539.

74. Jones *v.* Williams, Ambl. 651. See Keith *v.* Scales, 124 N. C. 497, 32 S. E. 809; Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265.

Test of charitable quality.— "What is the tribunal which is to decide whether the object is a beneficial one? It cannot be the individual mind of a judge for he may disagree, *toto coelo*, from the testator as to what is or is not beneficial. On the other hand, it cannot be the *vox populi*, for charities have been upheld for the benefit of insignificant sects, and of peculiar people. The answer must be that the benefit must be one which the founder believes to be of public advantage, and his belief must be at least rational, and not contrary either to the general law of the land, or to the principles of morality." Per Fitz Gibbon, L. J., in *In re* Cranston, [1898] 1 Ir. R. 431, 446.

spirit and intent;[75] and this includes a gift of real or personal property for a public park or garden,[76] even when the land given to a city therefor is beyond the corporate limits;[77] improvement of the streets, or the planting of shade or ornamental trees on waysides or within school-house grounds or other public places,[78] or the "paving, lighting, cleansing and improving" a town,[79] or the erection of public monuments to military men of rank.[80] So a bequest of residue to the chancellor of the exchequer for the time being "to be by him appropriated to the benefit and advantage of my beloved country Great Britain," is a valid charity bequest.[81] Although such objects as public libraries,[82] societies for improving the cultivation of vegetables and extending their use,[83] for curing maladies of quadrupeds or birds,[84] or for the prevention of the slaughter of living creatures for food or for vivisection[85] are chiefly matters of modern growth, yet all these are held to be charitable purposes; and so is a gift to continue a periodical for the protection of animals,[86] or to a society for the prevention of cruelty to children,[87] or for the promotion of temperance by suppressing the liquor traffic;[88] or a gift to trustees to be "applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes, at their discretion;"[89] or a gift to a city or town of waterworks when the water is to be supplied to both rich and poor without charge;[90] or for beautifying and improving the grounds of its waterworks.[91] A parliamentary grant of a duty on coal imported into a town to aid the pecuniary inability of its inhabitants to protect it from the encroaching sea was held to be a gift to a charitable use;[92] and so of a gift by parliament of a duty on coal imported into London, for the purpose of rebuilding St. Paul's church after the great fire in

75. Hamden *v.* Rice, 24 Conn. 350; Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146 [*affirmed* in 170 U. S. 383, 18 S. Ct. 650, 42 L. ed. 1078]; *Re* Hall's Charity, 14 Beav. 115, 15 Jur. 940; Atty.-Gen. *v.* Shrewsbury, 6 Beav. 220, 7 Jur. 757, 12 L. J. Ch. 465; Gort *v.* Atty.-Gen., 6 Dowl. 136.

76. Bartlett, Petitioner, 163 Mass. 509, 40 N. E. 899; Atty.-Gen. *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251; Burbank *v.* Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748. See Townley *v.* Bedwell, 6 Ves. Jr. 194.

77. Lester *v.* Jackson, 69 Miss. 887, 11 So. 114, decided prior to the Mississippi constitution of 1890, as to the effect of which see Brame & Alexander Miss. Dig. p. 1244, pars. 14, 15.

78. Bartlett, Petitioner, 163 Mass. 509, 40 N. E. 899; Burbank *v.* Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; Cresson's Appeal, 30 Pa. St. 437.

79. Staines *v.* Burton, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788; Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265.

80. Gilmer *v.* Gilmer, 42 Ala. 9.

81. Nightingale *v.* Goulburn, 5 Hare 484, 26 Eng. Ch. 484, 12 Jur. 317, 17 L. J. Ch. 296, 2 Phil. 594, 22 Eng. Ch. 594.

82. Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; New Haven Young Men's Institute *v.* New Haven, 60 Conn. 32, 22 Atl. 447; Crerar *v.* Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Duggan *v.* Slocum, 83 Fed. 244 [*affirmed* in 92 Fed. 806, 63 U. S. App. 149, 34 C. C. A. 676]; and *supra*, II, C, 1.

83. Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414; *In re* Cranston, [1898], 1 Ir. R. 431.

84. London University *v.* Yarrow, 1 De G. & J. 72, 26 L. J. Ch. 430, 58 Eng. Ch. 57 [*affirming* 23 Beav. 159].

A bequest for the maintenance of horses and dogs is valid as a trust but is not valid as a charity. *In re* Dean, 41 Ch. D. 552, 58 L. J. Ch. 693, 60 L. T. Rep. N. S. 813.

85. *In re* Foveaux, [1895] 2 Ch. 501, 64 L. J. Ch. 856, 13 Reports 730, 73 L. T. Rep. N. S. 202, 42 Wkly. Rep. 661; *In re* Douglas, 35 Ch. D. 472, 56 L. J. Ch. 913, 56 L. T. Rep. N. S. 786, 35 Wkly. Rep. 740; *In re* Cranston, [1898] 1 Ir. R. 431; Armstrong *v.* Reeves, 25 L. R. Ir. 325.

86. Nightingale *v.* Goulburn, 5 Hare 484, 26 Eng. Ch. 484, 12 Jur. 317, 17 L. J. Ch. 296, 2 Phil. 594, 22 Eng. Ch. 594; Marsh *v.* Means, 3 Jur. N. S. 790; Tatham *v.* Drummond, 34 L. J. Ch. 1.

87. People *v.* New York Soc., etc., 42 N. Y. App. Div. 83, 58 N. Y. Suppl. 953.

88. Haines *v.* Allen, 78 Ind. 100, 41 Am. Rep. 555; Saltonstall *v.* Sanders, 11 Allen (Mass.) 446; Grandom's Estate, 6 Watts & S. (Pa.) 537; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

89. Rotch *v.* Emerson, 105 Mass. 431.

90. Doughten *v.* Vandever, 5 Del. Ch. 51; Jones *v.* Williams, Ambl. 651.

91. Penny *v.* Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858.

92. Atty.-Gen. *v.* Brown, 1 Swanst. 265.

London.[93] So a condition that the free inhabitants of ancient tenements in a borough should have a right of dredging for oysters in an estuary of the sea has been sustained as charitable because, in the language of Lord Cairns, it is "a public trust or interest."[94] So of a bequest for the benefit of a volunteer corps, though if it is conditional on the appointment of the next lieutenant-colonel it is void for remoteness, as he may never be appointed;[95] or for the increase and encouragement of good servants;[96] a gift for deserving but unsuccessful literary persons;[97] a "Rest Home for worthy working girls," or an "Old Ladies Home";[98] or "a retreat and home for disabled, aged or infirm and deserving American mechanics,"[99] or for establishing life-boats,[1] or for assisting emigrants;[2] or poor immigrants and travelers passing through such a city as St. Louis to settle in the west;[3] or a theatrical fund association,[4] or for a fire-department relief association,[5] or a fire-engine and house.[6] A gift to further advocacy of a change in a state constitution, and for "the attainment of woman suffrage in the United States" has also been recently held in Illinois to be charitable,[7] contrary to the view taken earlier in Massachusetts.[8] A gift to protect citizens of African descent in their civil rights and to prevent discrimination against them is a valid charity;[9] as is also a gift for the civilization and improvement of certain Indian tribes,[10] or for ameliorating the condition of the Jews in Jerusalem.[11] Under a bequest of income to a town, conditioned under penalty of forfeiture for its violation, which is to "be invested yearly in 'United States flags,' to be used within the said town on all proper occasions," the town may apply a reasonable part of the income to flag-staffs, halliards, and the like.[12] Masonic lodges, when classed as charitable institutions in state statutes, will be recognized as such by the courts;[13] and generally such lodges are held charities as to the funds they receive for charitable uses, though not as to those received for the entertainment of their members.[14]

93. Atty.-Gen. *v.* Heelis, 2 L. J. Ch. O. S. 189, 2 Sim. & St. 76, 25 Rev. Rep. 153.

94. Goodman *v.* Saltash, 7 App. Cas. 633, 47 J. P. 276, 52 L. J. Q. B. 193, 48 L. T. Rep. N. S. 239, 31 Wkly. Rep. 293. In Jones *v.* Williams, Ambl. 651, charity is defined to be "a general public use."

95. *In re* Stratheden, [1894] 3 Ch. 265, 63 L. J. Ch. 872, 71 L. T. Rep. N. S. 225, 8 Reports 511, 42 Wkly. Rep. 647.

96. Loscombe *v.* Wintringham, 13 Beav. 87.

97. Thompson *v.* Thompson, 1 Coll. 381, 8 Jur. 839, 28 Eng. Ch. 381.

98. Amory *v.* Atty.-Gen., 179 Mass. 89, 60 N. E. 391; Sherman *v.* Congregational Home Missionary Soc., 176 Mass. 349, 57 N. E. 702. See Wheelock *v.* American Tract Soc., 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578.

99. Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279. As to soldiers' homes and federal jurisdiction over them see Ohio *v.* Thomas, 173 U. S. 276, 10 S. Ct. 453, 43 L. ed. 699; *In re* Kelly, 71 Fed. 545.

1. *In re* Richardson, 56 L. J. Ch. 784, 57 L. T. Rep. N. S. 17, 58 L. T. Rep. N. S. 45, 35 Wkly. Rep. 710; Johnston *v.* Swann, 3 Madd. 457, 18 Rev. Rep. 270; Lewis *v.* Boetefeur, [1878] W. N. 21, [1879] W. N. 11.

2. Barclay *v.* Maskelyne, 4 Jur. N. S. 1294. See *In re* Cullimore, 27 L. R. Ir. 18.

3. Chambers *v.* St. Louis, 29 Mo. 543. See Boyce *v.* St. Louis, 29 Barb. (N. Y.) 650, 18 How. Pr. (N. Y.) 125.

4. *In re* Lacy, [1899] 2 Ch. 149, 68 L. J. Ch. 488, 80 L. T. Rep. N. S. 706, 47 Wkly. Rep. 664.

5. Jeanes' Estate, 3 Pa. Dist. 314, 34 Wkly. Notes Cas. (Pa.) 190. See Bates *v.* Worcester Protective Dept., 177 Mass. 130, 58 N. E. 274; Newcomb *v.* Boston Protective Dept., 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778.

6. Bethlehem *v.* Perseverance Fire Co., 81 Pa. St. 445; Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly (Pa.) 346, 14 Haz. Reg. (Pa.) 305.

7. Garrison *v.* Little, 75 Ill. App. 402.

8. Jackson *v.* Phillips, 14 Allen (Mass.) 539. See Bacon *v.* Ransom, 139 Mass. 117, 29 N. E. 473; *In re* Foveaux, [1895] 2 Ch. 501, 64 L. J. Ch. 856, 13 Reports 730, 73 L. T. Rep. N. S. 202, 42 Wkly. Rep. 661.

9. Lewis' Estate, 152 Pa. St. 477, 31 Wkly. Notes Cas. (Pa.) 460, 25 Atl. 878.

10. Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly (Pa.) 346, 14 Haz. Reg. (Pa.) 305. See Treat's Appeal, 30 Conn. 113.

11. Riker *v.* Leo, 133 N. Y. 519, 30 N. E. 598 [*affirming* 15 N. Y. Suppl. 966], 115 N. Y. 93, 21 N. E. 719 [*reversing* 1 N. Y. Suppl. 128, 15 N. Y. St. 932].

12. Sargent *v.* Cornish, 54 N. H. 18.

13. Savannah *v.* Solomon's Lodge No. 1 F. & A. M., 53 Ga. 93; Everett *v.* Carr, 59 Me. 325; Heiskell *v.* Chickasaw Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699.

14. *Indiana.*— See Cruse *v.* Axtell, 50 Ind. 49; Indianapolis *v.* Grand Master, 25 Ind. 518.

G. Purposes Not Charitable. A legacy for the public encouragement of yacht racing, though aiding toward good seamanship, is not a public charity.[15] So of a private society for practising vocal music;[16] of trusts to feed sparrows,[17] or for keeping the testator's clock in repair at his home,[18] or to aid a company obliged to keep a stock of corn for the London market, and to sell it when the lord mayor directed.[19] As the gift must be expressly or by necessary implication for the public benefit, a private museum, or a library established by private subscription for the use of the subscribers, is not a charity.[20] An appropriation by congress for the benefit of a local corporation created by state laws, such as the World's Columbian Exposition, to help it out of financial difficulty, and enable it to complete its undertaking at Chicago, though aiding a great public enterprise, is not a charitable trust.[21] A legacy toward contributions for the political restoration of the Jews to Jerusalem was early held not charitable.[22] The same is true of a gift for the advancement of civilization generally, or for improving the "social welfare" of the people.[23] A provision by will for a brass band to march to the testator's grave on holidays and "other proper occasions" and play funeral marches is void as a charity.[24] Charities, being permanent foundations, do not include country schools under the voluntary system in Pennsylvania, which are temporary in their object and formation.[25]

III. OTHER STATUTES AFFECTING CHARITIES.

A. Statutes of Mortmain — 1. IN GENERAL. The rule of public policy, which forbids estates to be inalienable indefinitely in the hands of individuals, does not apply to charities established for objects of public and lasting benefit, and courts will in favor of charities readily infer an intention in the donor that they should be perpetual, even when no trust is expressly declared.[26] The earliest form of charity consisted of gifts of land to religious houses, and as one effect of such gifts was that the crown or any intermediate lord lost the military and other services due from the tenant, statutes were early passed in England forbidding land to be so conveyed, under penalty of forfeiture to the lord of the fee or to the crown.[27] In England many charitable devises have been defeated

Maine.— Bangor *v.* Rising Virtue Lodge No. 10, 73 Me. 428, 40 Am. Rep. 369; Everett *v.* Carr, 59 Me. 325.

New Hampshire.— Duke *v.* Fuller, 9 N. H. 536, 32 Am. Dec. 392.

New York.— Vander Volgen *v.* Yates, 3 Barb. Ch. (N. Y.) 242.

Rhode Island.— Mason *v.* Perry, 22 R. I. 475, 48 Atl. 671.

15. *In re* Nottage, [1895] 2 Ch. 649, 64 L. J. Ch. 695, 73 L. T. Rep. N. S. 269, 12 Reports 571, 44 Wkly. Rep. 22.

16. *In re* Allsop, [1884] W. N. 196. A society for accomplishing an object by prayer is also, it seems, not charitable. *In re* Jay, London Times of Dec. 8, 1888.

17. Atty.-Gen. *v.* Whorwood, 1 Ves. 534.

18. Kelly *v.* Nichols, 17 R. I. 306, 21 Atl. 906.

19. Atty.-Gen. *v.* Haberdashers' Co., 2 L. J. Ch. 33, 1 Myl. & K. 420, 7 Eng. Ch. 420, 5 Sim. 478, 9 Eng. Ch. 478.

20. Drury *v.* Natick, 10 Allen (Mass.) 169; Carne *v.* Long, 2 De G., F. & J. 75, 6 Jur. N. S. 639, 29 L. J. Ch. 503, 8 Wkly. Rep. 570, 63 Eng. Ch. 59; Thompson *v.* Shakespeare, Johns. Ch. (Eng.) 612, 1 De G., F. & J. 399, 62 Eng. Ch. 306.

21. World's Columbian Exposition *v.* U. S., 56 Fed. 654, 18 U. S. App. 42, 6 C. C. A. 58.

22. Habershon *v.* Vardon, 4 De G. & Sm. 467, 15 Jur. 961, 20 L. J. Ch. 549. As to gifts for aiding indigent Jews in Jerusalem see Riker *v.* Leo, 115 N. Y. 93, 21 N. E. 719, 133 N. Y. 519, 30 N. E. 598.

23. Livesey *v.* Jones, 55 N. J. Eq. 204, 35 Atl. 1064 [*affirmed* in 56 N. J. Eq. 453, 41 Atl. 1116]. See Lowell, Appellant, 22 Pick. (Mass.) 215.

24. Detwiller *v.* Hartman, 37 N. J. Eq. 347.

25. Kirk *v.* King, 3 Pa. St. 436.

26. Dexter *v.* Gardner, 7 Allen (Mass.) 243; King *v.* Parker, 9 Cush. (Mass.) 71; Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701; Smith *v.* Kerr, [1900] 2 Ch. 511, 64 J. P. 772, 69 L. J. Ch. 755, 82 L. T. Rep. N. S. 795; St. Mary Magdalen College *v.* Atty.-Gen., 6 H. L. Cas. 189, 3 Jur. N. S. 675, 26 L. J. Ch. 620; Bristol *v.* Whitton, Dwight Charity Cas. 171; 1 Spence Eq. 588. See 7 Harv. L. Rev. 406; 8 Harv. L. Rev. 211.

27. The earliest complete statute was 7 Edw. I, c. 2, passed in 1279. As various evasions of this statute were devised by the ecclesiastics, further acts were passed to defeat them, namely, 13 Edw. I, cc. 32, 33; 18 Edw. III, c. 3; 15 Rich. II, c. 5, which statutes imposed forfeiture of the lands on all direct or indirect gifts of lands to or for religious houses, and extended the law to

under the Mortmain Act of 9 Geo. II, c. 36, enacted in 1736, and substantially reënacted in 1888,[28] prohibiting dispositions of land to charitable uses, unless by deed made twelve months and enrolled in chancery six months before the donor's death. But that statute, like some of the earlier mortmain acts, was wholly English, being dictated by local policy, and did not extend to Scotland, Ireland, or the Colonies.[29] It differed from the earlier acts in that the crown could not defeat the right of the donor's representative to recover a gift of land, if followed by the donor's death within a year.[30] In America this statute is always treated as never adopted here as part of our common law.[31] In England the matter is now

guilds, fraternities, and municipal corporations. See 4 Bl. Comm. 426; 2 Bl. Comm. 268; 1 Bl. Comm. 479; 2 Encycl. Laws England, p. 457; Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387.

28. By the Mortmain and Charitable Uses Act of 1888 (51 & 52 Vict. c. 42) this statute extended to all property that savors of realty, as mortgages, leases, etc. (Atty.-Gen. *v.* Caldwell, Ambl. 635; *In re* David, 43 Ch. D. 27, 59 L. J. Ch. 87, 62 L. T. Rep. N. S. 141, 38 Wkly. Rep. 162; Shepheard *v.* Beetham, 6 Ch. D. 597, 46 L. J. Ch. 763, 36 L. T. Rep. N. S. 909, 25 Wkly. Rep. 764; Philpott *v.* St. George's Hospital, 6 H. L. Cas. 338, 3 Jur. N. S. 1269, 27 L. J. Ch. 70, 5 Eng. Rul. Cas. 580); and its design was to restrain every method of inalienability of land, except as it prescribed (Atty.-Gen. *v.* Meyrick, 2 Ves. Jr. 44. See 2 Encycl. Laws England, p. 459). While charitable trusts were originally molded into shape chiefly by ecclesiastical tribunals this statute, like the Statute of Elizabeth, was enacted by a legislature in which the lay element predominated, and its declared intent was whereas "gifts or alienations of lands, tenements, or hereditaments in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this 'public mischief' has of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, to uses called 'charitable uses,' to take place after their death, to the disherison of their lawful heirs." This act avoided the gift or conveyance only so far as related to the charitable use. Young *v.* Groves, 4 C. B. 668, 56 E. C. L. 668; Doe *v.* Pitcher, 2 Marsh 61, 3 M. & S. 407, 6 Taunt. 359, 1 E. C. L. 653. See Smith *v.* Methodist Church, 16 Ont. 199; Murray *v.* Malloy, 10 Ont. 46; Becher *v.* Hoare, 8 Ont. 328; Labatt *v.* Campbell, 7 Ont. 250; Walker *v.* Murray, 5 Ont. 638; Gillies *v.* McConochie, 3 Ont. 203; Stewart *v.* Gesner, 29 Grant Ch. (U. C.) 329; *Re* McDonald, 29 Grant Ch. (U. C.) 241; Thomson *v.* Torrance, 28 Grant Ch. (U. C.) 253; McIsaac *v.* Heneberry, 20 Grant Ch. (U. C.) 348; Anderson *v.* Paine, 14 Grant Ch. (U. C.) 110; 1 Chitty Stat. (5th ed.), tit. Charities, p. 2 and notes. Since its enactment courts of equity have usually refused to marshal assets in favor of charities. Hillyard *v.* Taylor, Ambl. 713; Mogg *v.* Hodges, 2 Ves. 52, 5 Eng. Rul. Cas. 606; Becher *v.* Hoare, 8 Ont. 328; 1 Story Eq. Jur. (13th ed.) § 569; Anderson *v.* Kilborn, 13 Grant Ch. (U. C.) 219, 22 Grant Ch. (U. C.) 385.

29. Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701; Jex *v.* McKinney, 14 App. Cas. 77, 58 L. J. P. C. 67, 60 L. T. Rep. N. S. 287, 37 Wkly. Rep. 577; Campbell *v.* Radnor, 1 Bro. Ch. 272; Atty.-Gen. *v.* Stewart, 2 Meriv. 143, 16 Rev. Rep. 162; Mitford *v.* Reynolds, 1 Phil. 185, 19 Eng. Ch. 185; 4 Dane Abr. 5, 238, 239; 2 Kent Comm. (14th ed.) 282. 51 & 52 Vict. c. 42, which consolidated the mortmain statutes, and in effect prohibited gifts of money by English wills to be invested in land in England for charitable purposes, does not apply to colonial wills. Canterbury *v.* Wyburn, [1895] A. C. 89, 64 L. J. P. C. 36, 71 L. T. Rep. N. S. 554, 11 Reports 331, 43 Wkly. Rep. 430.

The similar provision in the provincial statute of 28 Geo. II, c. 9, passed in the province of Massachusetts Bay when the influence of England was strongest, was repealed immediately after the Revolution and has not been reënacted in Massachusetts. Odell *v.* Odell, 10 Allen (Mass.) 1; Bartlet *v.* King, 12 Mass. 536, 7 Am. Dec. 99; Mass. Stat. (1785), c. 51.

In Canada.— 9 Geo. II, c. 36, is in force in Upper Canada. See Canada cases *supra*, note 28; and Holmes *v.* Murray, 13 Ont. 756; Toomey *v.* Tracey, 4 Ont. 708; Anderson *v.* Todd, 2 U. C. Q. B. 82; Mercer *v.* Hewston, 9 U. C. C. P. 349; Hambly *v.* Fuller, 22 U. C. C. P. 141; Hallock *v.* Wilson, 7 U. C. C. P. 28; Edwards *v.* Smith, 25 Grant Ch. (U. C.) 159; Whitby *v.* Liscombe, 23 Grant Ch. (U. C.) 1 [*affirming* 22 Grant Ch. (U. C.) 203]; Ferguson *v.* Gibson, 22 Grant Ch. (U. C.) 36; Anderson *v.* Dougall, 13 Grant Ch. (U. C.) 164; Church Soc. *v.* Crandell, 8 Grant Ch. (U. C.) 34. It there applies to municipal corporations. Brown *v.* McNab, 20 Grant Ch. (U. C.) 179. The statutes of mortmain are not in force in New Brunswick. See Ray *v.* Annual Conference, 6 Can. Supreme Ct. 308.

30. See 2 Encycl. Laws England, 461.

31. *Delaware.*— Griffith *v.* State, 2 Del. Ch. 421.

Kentucky.— Lathrop *v.* Scioto Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417.

Pennsylvania.— Miller *v.* Porter, 53 Pa. St.

chiefly regulated by the Mortmain and Charitable Uses Act of 1891, which does not extend to Scotland or Ireland,[32] and the Local Government Act of 1894.[33] In Ohio it is held that a state statute, avoiding a bequest for charitable purposes if the testator dies within twelve months leaving issue, is constitutional.[34] It is against the policy of the mortmain acts and the practice of the English chancery to invest charity money in land, at least prior to the Mortmain and Charitable Uses Act of 1891;[35] but it is only in a very special case that the court will sell a charity estate.[36]

2. Affecting Corporations. Corporations were formerly held incapable, under the statute of wills, of taking by devise,[37] but in equity they were permitted to accept a gift for charitable uses.[38] A corporation may now be the trustee of a charity when the trust is not inconsistent with the purposes of its organization.[39] In New York, under the early statute of wills authorizing a devise of inheritable estates to any person except bodies corporate and politic, it was held that charitable corporations were within the exception,[40] but a devise to a natural

292; Pittsburgh Methodist Church *v.* Remington, 1 Watts (Pa.) 219, 26 Am. Dec. 61.

Rhode Island.— Potter *v.* Thornton, 7 R. I. 252.

Wisconsin.— Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

United States.— Perin *v.* Carey, 24 How. (U. S.) 465 16 L. ed. 701; Miller *v.* Lerch, Wall. Jr. (U. S.) 210, 17 Fed. Cas. No. 9,579; Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly (Pa.) 346, 14 Haz. Reg. (Pa.) 305.

See 9 Cent. Dig. tit. "Charities," § 4; and 2 Encycl. Laws England, 461.

Mississippi statutes.— Under Miss. Code (1857), p. 302, arts. 55, 56, a devise for a charitable or religious purpose was void, and the testator's heirs took in lieu of the devisee. Tatum *v.* McLellan, 50 Miss. 1. That statute, though not brought forward in the codes of 1871 and 1880, was with some modifications incorporated in the constitution of 1890. See Brame & Alexander Miss. Dig. p. 1244, par. 14.

32. 54 & 55 Vict. c. 73. Upon this act see 1 Chitty Stat. (5th ed. 1894), tit. Charities, p. 73; 2 Encycl. Laws England, p. 462; *In re* Sutton, [1901] 2 Ch. 640, 70 L. J. Ch. 747, 85 L. T. Rep. N. S. 411; *In re* Sidebottom, [1901] 2 Ch. 1, 70 L. J. Ch. 448, 85 L. T. Rep. N. S. 366; *In re* Crossley, [1897] 1 Ch. 928; *In re* Hume, [1895] 1 Ch. 422, 64 L. J. Ch. 267, 72 L. T. Rep. N. S. 68, 12 Reports 101, 43 Wkly. Rep. 291.

33. 56 & 57 Vict. c. 73. See *In re* Ross, [1899] 1 Ch. 21, 63 J. P. 52, 68 L. J. Ch. 66, 79 L. T. Rep. N. S. 366, 47 Wkly. Rep. 197 [*affirming* [1897] 2 Ch. 397, 61 J. P. 742, 66 L. J. Ch. 662, 77 L. T. Rep. N. S. 89, 46 Wkly. Rep. 27]; Atty.-Gen. *v.* Hughes, 81 L. T. Rep. N. S. 679, 48 Wkly. Rep. 150.

34. Patton *v.* Patton, 39 Ohio St. 590.

35. Atty.-Gen. *v.* Wilson, 2 Jur. 772, 2 Keen, 680, 684, note *a*, 15 Eng. Ch. 680; 2 Seton Judgm. (5th ed.) 1089, 1137.

36. Atty.-Gen. *v.* York, 17 Beav. 495; Atty.-Gen. *v.* Newark-Upon-Trent, 1 Hare 395, 6 Jur. 387, 11 L. J. Ch. 270, 23 Eng. Ch. 395.

37. See Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Sherwood *v.* American Bible Soc., 4 Abb. Dec. (N. Y.) 227, 1 Keyes (N. Y.) 561; Lawrence *v.* Elliott, 3 Redf. Surr. (N. Y.) 235; Philadelphia Baptist Assoc. *v.* Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499; 1 Bl. Comm. 479; 2 Kent Comm. 285.

38. Atty.-Gen. *v.* Tancred, Ambl. 351, 1 Eden 10, 1 W. Bl. 91.

39. *Connecticut.*—Southington First Cong. Soc. *v.* Atwater, 23 Conn. 34.

Kentucky.— Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642.

Maine.— Bailey *v.* Freeport M. E. Church, 71 Me. 472.

Maryland.— Hanson *v.* Little Sisters of Poor, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293; Halsey *v.* Protestant Episcopal Church, 75 Md. 275, 23 Atl. 781.

Massachusetts.— Phillips Academy *v.* King, 12 Mass. 546.

Michigan.— White *v.* Rice, 112 Mich. 403, 70 N. W. 1024.

New Hampshire.— Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445.

New Jersey.— Mason *v.* Tuckerton M. E. Church, 27 N. J. Eq. 47.

New York.— Wetmore *v.* Parker, 52 N. Y. 450; Harris *v.* American Bible Soc., 2 Abb. Dec. (N. Y.) 316, 4 Transcr. App. (N. Y.) 485, 4 Abb. Pr. N. S. (N. Y.) 421; Andrew *v.* New York Bible, etc., Soc., 4 Sandf. (N. Y.) 156; Matter of Howe, 1 Paige (N. Y.) 125.

South Carolina.— Dye *v.* Beaver Creek Church, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724.

Vermont.— Page *v.* Heineberg, 40 Vt. 81, 94 Am. Dec. 378 and note.

United States.— Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205.

See 9 Cent. Dig. tit. "Charities," § 19.

40. Holmes *v.* Mead, 52 N. Y. 332; Levy *v.* Levy, 33 N. Y. 97; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Beekman *v.* People, 27 Barb. (N. Y.) 260; Yates *v.* Yates, 9 Barb. (N. Y.) 324. See Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46.

Now in New York corporations not of a charitable nature may take and administer charitable gifts. People *v.* New York Soc., etc., 161 N. Y. 233, 55 N. E. 1063, 162 N. Y. 429, 56 N. E. 1004.

person in trust for such a corporation was good, though the corporation itself could not have taken.[41]

B. Statute of Uses. Uses having been introduced into England by the ecclesiastics to avoid the statutes of mortmain, the effect of this statute was to convert the beneficiary's interest into a legal in place of an equitable estate;[42] and, as land was not devisable at common law, a gift, when the system of uses was introduced, of the use of land to a corporation was rendered void by the Mortmain Act.[43] But the Statute of Uses applied only to private trusts; and, as the beneficiaries in charitable trusts need not be capable of taking the legal title,[44] the statute does not apply to these trusts which in their nature are so continuing and executory that they cannot be terminated and executed without violence to the donor's intention, especially when the trustee appointed by the donor has a discretion as to the method of promoting the objects intended.[45] If land is conveyed in trust for a church in a certain town, under certain regulations and contingencies, and the church is never organized or the regulations observed, the use does not pass but remains in the grantor and his heirs.[46] A devise of land to an unincorporated charitable society is not necessarily void because of the devisee's nonexistence, but the legal title descends to the heir at law in trust for the society.[47] In New York,[48] Wisconsin,[49] Michigan,[50] and Minnesota[51] uses and trusts were both early abolished by statute.

C. Statutory Limitations Upon Amount. Grants and gifts to charities are often subject to statutory limitations, such as the provision in Georgia that devises shall not be made to charitable or civil institutions of more than one third of the testator's estate to the exclusion of his wife or descendants;[52] which provision is violated by a devise in remainder to charity of the testator's entire property, depriving a child of the power of disposition and reducing its interest to a life-estate;[53] and, when the statute is thus violated, the devise is not valid to the extent of one third of the estate, although other statutes enable the court of chancery to effectuate a testator's purpose by approximation, by giving effect to his charitable intent "in a manner next most consonant with the specified mode prescribed."[54] Under the New York statute of 1860,[55] by which only one half of a testator's estate is devisable to charitable or educational institutions, debts and the widow's dower are first to be deducted in determining the value of his estate, and he cannot give to different purposes in the aggregate more than he could give to one;[56] the act applies only to gifts to a class of certain private corporations, and

41. McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

42. 27 Hen. VIII, c. 10 (enacted in 1535); 2 Bl. Comm. 333, 338; 4 Kent Comm. (14th ed.) 290.

43. See 1 Bl. Comm. 479; 2 Encycl. Laws England 457; Benet College *v.* London, 2 W. Bl. 1182.

Lands in the city of London were always devisable, even in mortmain, by its customs, which were confirmed by Magna Charta; important charities in London depended upon these customs. See 2 Bl. Comm. 518; 2 Encycl. Laws England 457.

44. Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735; Porter's Case, 1 Coke 22*a*.

45. Beckwith *v.* St. Philip's Parish, 69 Ga. 564; *In re* Stewart, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

46. Marshall *v.* Chittenden, 3 Greene (Iowa) 382.

47. American Bible Soc. *v.* American Tract Soc., 62 N. J. Eq. 219, 50 Atl. 67; State *v.* Gerard, 37 N. C. 210.

48. See Schierloh *v.* Schierloh, 148 N. Y. 103, 42 N. E. 409; N. Y. Rev. Stat. §§ 45–55; 4 Kent Comm. (14th ed.) 300, 309. And see N. Y. Laws (1893), c. 701.

49. Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724.

50. First Soc. M. E. Church *v.* Clark, 41 Mich. 730, 3 N. W. 207.

51. Little *v.* Willford, 31 Minn. 173, 17 N. W. 282.

52. Ga. Civ. Code, § 3277.

53. Kine *v.* Becker, 82 Ga. 563, 9 S. E. 828.

54. Kelley *v.* Welborn, 110 Ga. 540, 35 S. E. 636. The Georgia statute does not apply to a testator who leaves no wife, child, or descendant of a child. Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401.

55. N. Y. Laws (1860), c. 360.

56. Amherst College *v.* Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; Chamberlain *v.* Chamberlain, 43 N. Y. 424; McKeown

not to gifts to municipal corporations,[57] or to a permanent charitable devise to trustees.[58] More frequently the limitation is as to the amount which charitable institutions may take and hold; and such a limitation is not violated by a gift which carries the total beyond it, but the title to the valid part of the gift only vests in the beneficiary and is void as to the excess; or if delivered and accepted, and it is a trust that is not indivisible, it is subject to being divested as to the excess.[59] It seems, by the weight of authority, that such a bequest may be made valid as to such total by a legislative increase after the testator's death.[60] A limitation upon the amount of land that can be held by a religious corporation does not apply to a Young Men's Christian Association.[61] A charter limiting a charitable corporation's property to a fixed sum is not modified by a general law authorizing such corporations to take property in trust without any expressed limit.[62] In the absence of a statute fixing the limit to which a charitable corporation can receive and hold real estate, the donor's heirs cannot question the grant by showing that the corporation has real estate sufficient for its corporation ends; the state only can raise such objection, unless the heirs are so authorized by statute expressly or by necessary implication,[63] although heirs and devisees, whose interests are directly affected, have in some states been permitted to impugn gifts to corporations not competent to receive and hold such gifts.[64]

D. Statutory Restrictions Upon Charitable Gifts to Churches, Etc. In America legislation avoiding devises and bequests to religious societies is construed as aimed against the evils attending the accumulation of vast estates by the

v. Officer, 2 Silv. Supreme (N. Y.) 552, 6 N. Y. Suppl. 201, 25 N. Y. St. 319; Matter of Evans, 27 Misc. (N. Y.) 475, 59 N. Y. Suppl. 164; Salt's Estate, 8 Pa. Dist. 325.

57. Matter of Crane, 12 N. Y. App. Div. 271, 42 N. Y. Suppl. 904 [*affirmed* in 159 N. Y. 557, 54 N. E. 1089].

58. Allen *v.* Stevens, 161 N. Y. 122, 55 N. E. 568.

By N. Y. Laws (1848), c. 319, § 6, bequests to benevolent corporations are void if the will was not executed more than two months before the testator's death. Matter of Fitzsimmons, 29 Misc. (N. Y.) 731, 62 N. Y. Suppl. 1009; Matter of Fitzsimons, 29 Misc. (N. Y.) 204, 61 N. Y. Suppl. 485; Matter of Hardy, 28 Misc. (N. Y.) 307, 59 N. Y. Suppl. 912; Clements *v.* Babcock, 26 Misc. (N. Y.) 90, 56 N. Y. Suppl. 527. See Matter of Rounds, 25 Misc. (N. Y.) 101, 54 N. Y. Suppl. 710.

In Pennsylvania and California the time is thirty days. See *In re* Luebbe, 179 Pa. St. 447, 36 Atl. 322; Reimensnyder *v.* Gans, 110 Pa. St. 17, 2 Atl. 425; Hupfeld's Estate, 5 Phila. (Pa.) 219, 20 Leg. Int. (Pa.) 205; Bowdoin College *v.* Merritt, 75 Fed. 480; Shields *v.* McAuley, 37 Fed. 302.

59. *Kentucky.*— Cromie *v.* Louisville Orphans' Home Soc., 3 Bush (Ky.) 365.

New York.— Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387; Hornberger *v.* Miller, 28 N. Y. App. Div. 199, 50 N. Y. Suppl. 1079.

North Carolina.— Davidson College *v.* Chambers, 56 N. C. 253.

Rhode Island.— Coggeshall *v.* Home for Friendless Children, 18 R. I. 696, 31 Atl. 694; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

Virginia.— See Coni *v.* Levy, 23 Gratt. (Va.) 21.

If a charitable corporation receives money in excess of its powers on condition that it be returned unless it receives more within a certain time, and such condition is broken, an action lies against it to recover the money. Morville *v.* American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40.

60. Baker *v.* Clarke Deaf Mutes Inst., 110 Mass. 88; Coggeshall *v.* Home for Friendless Children, 18 R. I. 696, 31 Atl. 694; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

Contra, in New York. See White *v.* Howard, 46 N. Y. 144; Plymouth Soc. *v.* Hepburn, 57 Hun (N. Y.) 161, 10 N. Y. Suppl. 817, 32 N. Y. St. 943; Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128.

61. Hamsher *v.* Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556.

62. Chamberlain *v.* Chamberlain, 43 N. Y. 424.

63. *Connecticut.*— White *v.* Howard, 38 Conn. 342.

Illinois.— Hamsher *v.* Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556.

Maine.— Farrington *v.* Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339.

Maryland.— *In re* Stickney, 85 Md. 79, 36 Atl. 654, 60 Am. St. Rep. 308, 35 L. R. A. 693; Hanson *v.* Little Sisters of Poor, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293.

New Jersey.— De Camp *v.* Dobbins, 31 N. J. Eq. 671.

Tennessee.— Cheatham *v.* Nashville Trust Co., (Tenn. Ch. 1899) 57 S. W. 202.

United States.— Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401.

64. *Massachusetts.*— Burbank *v.* Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312.

Mississippi.—Barton *v.* King, 41 Miss. 288.

church, and not against the power of testamentary disposition.[65] Such legislation was a marked feature of the early history of this country, it being held under the early state statutes in New York, by whose statutes land could only be devised to natural persons, that churches could not take lands by devise;[66] nor could the state, or the United States, or "the people of the United States," as trustee;[67] and in Connecticut, that the churches could so take only when expressly authorized to do so by charter.[68] In Delaware they could take lands only by deed,[69] and a bequest to a church of the proceeds to arise from the sale of land is void as being a gift of realty.[70] In Illinois, by the act of 1845, substantially reënacted so late as 1872, they were restricted to ten acres of land.[71] In Kentucky the limit was made fifty acres;[72] in Tennessee five acres at one place.[73] The inability of a foreign religious corporation to hold real estate does not extend to realty which is directed by will to be converted into personalty.[74] In Maryland, article 38 of the Bill of Rights declared void bequests to or for ministers of the gospel made without the prior or subsequent sanction of the legislature.[75] Charter authority to take land by purchase does not exempt the corporation from the mortmain statutes by which it cannot take by devise,[76] or enable it to take a bequest of personal property.[77] A statute which authorizes religious societies to take gifts of land "for purposes of public worship" does not apply to a devise to a church of a parsonage, library, and other personal property;[78] nor does an act which authorizes the conveyance of land for the residence of a minister authorize a devise of land, or a bequest of money, for that purpose.[79]

IV. TRUSTEES, BENEFICIARIES, AND OBJECTS OF THE TRUST.

A. Trustees — 1. In General. Trustees for charities are, in general, amenable to all the rules which apply to other trusts, and also to special rules applicable

New York.— Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirmed* in 136 U. S. 152, 10 S. Ct. 775, 34 L. ed. 427]; Church of Redemption *v.* Grace Church, 68 N. Y. 570; McKeown *v.* Officer, 2 Silv. Supreme (N. Y.) 552, 6 N. Y. Suppl. 201, 25 N. Y. St. 319; Goddard *v.* Pomeroy, 36 Barb. (N. Y.) 546.

Rhode Island.— Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 32[illegible] Atl. 198.

Tennessee.— Meiskell *v.* Chickasaw Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699.

Wisconsin.— Ruth *v.* Oberbrunner, 40 Wis. 238.

65. Barton *v.* King, 41 Miss. 288. See Blackbourn *v.* Tucker, 72 Miss. 735, 17 So. 737; First Baptist Church *v.* Robberson, 71 Mo. 326; Boyce *v.* Christian, 69 Mo. 492; Contentnea Quaker Soc. *v.* Dickenson, 12 N. C. 189; White *v.* Keller, 68 Fed. 796, 30 U. S. App. 275, 15 C. C. A. 683; Newton *v.* Carbery, 5 Cranch C. C. (U. S.) 632, 18 Fed. Cas. No. 10,190.

66. Jackson *v.* Hammond, 2 Cai. Cas. (N. Y.) 337. See Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Currin *v.* Fanning, 13 Hun (N. Y.) 458; Goddard *v.* Pomeroy, 36 Barb. (N. Y.) 546; King *v.* Rundle, 15 Barb. (N. Y.) 139; Auburn Theological Seminary *v.* Childs, 4 Paige (N. Y.) 419; Wright *v.* New York M. E. Church, Hoffm. (N. Y.) 202.

67. Matter of Fox, 52 N. Y. 530, 11 Am. Rep. 751; Levy *v.* Levy, 33 N. Y. 97; U. S. *v.* Fox, 94 U. S. 315, 24 L. ed. 192. See Dickson *v.* U. S., 125 Mass. 311, 28 Am. Rep. 230; McDonogh *v.* Murdoch, 15 How. (U. S.) 367, 14 L. ed. 732.

68. Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58. Charter authority to hold property "free from taxation," not exceeding a specified amount, is not limited to the taxation clause, but relates generally to capacity to hold; if a gift is larger than a legatee so limited can receive, the case is simply one of the failure of a trustee, which in equity never involves a failure of the trust. Eliot's Appeal, (Conn. 1902) 51 Atl. 558.

69. State *v.* Walter, 2 Harr. (Del.) 151; State *v.* Bates, 2 Harr. (Del.) 18; Ferguson *v.* Hedges, 1 Harr. (Del.) 524; Murphy *v.* Dallam, 1 Bland (Md.) 529. See American Tract Soc. *v.* Ferris, 3 Houst. (Del.) 625.

70. State *v.* Bates, 2 Harr. (Del.) 18.

71. See St. Peter's Roman Catholic Congregation *v.* Germain, 104 Ill. 440.

72. Kinney *v.* Kinney, 86 Ky. 610, 9 Ky. L. Rep. 753, 6 S. W. 593.

73. Nance *v.* Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

74. Methodist Episcopal Church *v.* Smith, 56 Md. 362.

75. Methodist Episcopal Church *v.* Smith, 56 Md. 362.

76. McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

77. Rhodes *v.* Rhodes, 88 Tenn. 637, 13 S. W. 590.

78. Reeves *v.* Reeves, 5 Lea (Tenn.) 644.

79. Seaburn *v.* Seaburn, 15 Gratt. (Va.) 423; Bible Soc. *v.* Pendleton, 7 W. Va. 79.

only to themselves. When a testator, in appointing trustees, designates them by official titles instead of by name they take as if they had been designated by their proper names.[80] In England, when trustees are directed to be appointed for a charity, evidence of the fitness of such of them as are not appointed *ex officio* is required, and their written consent to act must be produced.[81] A bequest to the consistory of a church is, in effect, a bequest to the corporation itself, and the church members are to have the benefit of the bequest as controlled by the consistory.[82] So a bequest "to the trustees" of an institution is a bequest to and for the benefit of the institution, though those having charge of it are called managers in the charter.[83] Whenever a person gives property by will, and points out the object, the property, and the way it shall go, a trust is created, unless the will clearly shows that his expressed desire is to be controlled by the trustee, and that the trustee shall have an option to defeat it.[84]

2. Corporations — a. In General. A corporation may now be the trustee of a charity.[85] A municipal corporation may in its corporate capacity accept a gift of real or personal property left to it in trust for charitable purposes, such as the erection of a court-house or town house for public use,[86] or the repair of highways and bridges,[87] and may as trustee hold and execute the trust.[88] When duly authorized to accept a charity fund, it can appoint agents or trustees to manage the trust, being itself responsible for them and its security.[89] If it is afterward incorporated, the identity of the municipal corporation is not lost, and the property held by the inhabitants of the town in trust passes to the city on the same trust, without the action of any court, and trustees cannot be appointed for such cause alone, to manage the funds in place of the city.[90] So, where a city charter was repealed, and a new one granted, its area being enlarged from two square miles to nearly one hundred and thirty, the city's title under a trust for charity was not affected.[91] And where a town in New York was not capable of taking when a bequest for its benefit was made in Massachusetts, but was afterward empowered to do so in New York, the fund was ordered to be paid to it.[92] As municipal corporations only have power to receive money when so authorized by charter or statute, they can only take property in trust for charitable purposes which are within their enumerated powers and duties,[93] and be required in equity

80. Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617.

81. 2 Daniell Ch. Pr. (6th Am. ed.) 1856.

82. Prattsville Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228.

83. Van Wagenen *v.* Baldwin, 7 N. J. Eq. 211; New York Inst. for Blind *v.* How, 10 N. Y. 84; Currin *v.* Fanning, 13 Hun (N. Y.) 458; Prattsville Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228.

84. Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617.

85. See *supra*, III, A, 2.

86. Coggeshall *v.* Pelton, 7 Johns. Ch. (N. Y.) 292, 11 Am. Dec. 471; Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146.

87. Hamden *v.* Rice, 24 Conn. 350.

88. Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765 and note; Drury *v.* Natick, 10 Allen (Mass.) 169; Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205. See also 2 Dillon Mun. Corp. §§ 567–573.

89. Bangor *v.* Beal, 85 Me. 129, 26 Atl. 1112.

90. *Alabama.*— Amy *v.* Selma, 77 Ala. 103.
Louisiana.— State *v.* Natal, 39 La. Ann. 439, 1 So. 923.
Massachusetts.— Higginson *v.* Turner, 171 Mass. 586, 51 N. E. 172.
Missouri.— Chambers *v.* Louis, 29 Mo. 543.
United States.— Shapleigh *v.* San Angelo, 167 U. S. 646, 17 S. Ct. 957, 42 L. ed. 310; Mobile *v.* Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. ed. 620; Broughton *v.* Pensacola, 93 U. S. 266, 23 L. ed. 896.
See 9 Cent. Dig. tit. "Charities," §§ 19, 30.

91. Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53.

92. Fellows *v.* Miner, 119 Mass. 541.

93. *California.*— Matter of Robinson, 63 Cal. 620; Herzo *v.* San Francisco, 33 Cal. 134.
Louisiana.— State *v.* McDonogh, 8 La. Ann. 171; Girard *v.* New Orleans, 2 La. Ann. 897.
Massachusetts.— Green *v.* Hagan, 153 Mass. 462, 27 N. E. 413; Fellows *v.* Miner, 119 Mass. 541; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.
Missouri.— Barkley *v.* Donnelly, 112 Mo. 561, 19 S. W. 305; Chambers *v.* St. Louis, 29 Mo. 543.
New York.— Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 35 N. Y. St. 863, 11 L. R. A. 715.

to administer the trust.[94] Hence, if not expressly authorized by statute, a municipal corporation cannot, by the apparent weight of authority, accept a trust for aiding the worthy poor;[95] nor can it accept a bequest on condition that it support a clergyman.[96] But in Massachusetts, Pennsylvania, New Jersey, and California a municipal corporation may be a trustee for public purposes germane to its duties, without express authority given by statute, such as aiding its poor;[97] by erecting hospitals for the indigent, the blind, or the lame;[98] by starting young artificers in business;[99] and in Missouri by relieving emigrants passing through such a city as St. Louis on their way to settle in the west.[1] Parishes, as well as towns, cities, or counties, may take and hold in trust lands or funds given for purposes of education,[2] and school districts may take a bequest for the support of schools.[3] But a city, having no legal power to support or aid "indigent deserving persons not paupers," cannot legally be made trustee of a gift for such a purpose.[4] A gift to a state in trust to apply the fund in executing a lawful governmental function is valid; but if the state refuses to accept the trust no substitute trustee can succeed to its sovereign powers in administering it.[5]

b. Corporations Not Yet Formed. By the common law a charitable gift to a corporation as trustee is held good, though it is not to be incorporated until after the donor's death, in the case of a will;[6] or in the case of a deed, until after the

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Washington.— Aberdeen *v.* Honey, 8 Wash. 251, 35 Pac. 1097.

United States.— Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701; McDonogh *v.* Murdoch, 15 How. (U. S.) 367, 14 L. ed. 732.

See 2 Kent Comm. (14th ed.) 279; and 9 Cent. Dig. tit. "Charities," § 30.

94. Barkley *v.* Donnelly, 112 Mo. 561, 19 S. W. 305.

95. *Connecticut.*—Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

Georgia.— Augusta *v.* Walton, 77 Ga. 517, 1 S. E. 214.

Illinois.— Prickett *v.* People, 88 Ill. 115; Heuser *v.* Harris, 42 Ill. 425.

Indiana.— Rush County *v.* Dinwiddie, 139 Ind. 128, 37 N. E. 795.

Iowa.— Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

New York.— Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 35 N. Y. St. 863, 11 L. R. A. 715.

See 9 Cent. Dig. tit. "Charities," § 30.

96. Sears *v.* Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Bullard *v.* Shirley, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110.

97. Matter of Robinson, 63 Cal. 620; Mason *v.* Tuckertown M. E. Church, 27 N. J. Eq. 47; Webb *v.* Neal, 5 Allen (Mass.) 575.

98. Lawrence County *v.* Leonard, 83 Pa. St. 206, 34 Leg. Int. (Pa.) 104; Philadelphia *v.* Elliott, 3 Rawle (Pa.) 170.

99. Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa. Co. Ct. 241.

1. Chambers *v.* St. Louis, 29 Mo. 543.

2. *Illinois.*— Prickett *v.* People, 88 Ill. 115.

Indiana.— Skinner *v.* Harrison Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; Lagrange County *v.* Rogers, 55 Ind. 297; Craig *v.* Secrist, 54 Ind. 419.

Maine.— Piper *v.* Moulton, 72 Me. 155.

Massachusetts.— Drury *v.* Natick, 10 Allen (Mass.) 169; Sutton *v.* Cole, 3 Pick. (Mass.) 232.

New York.— Le Couteulx *v.* Buffalo, 33 N. Y. 333. But see Jackson *v.* Hartwell, 8 Johns. (N. Y.) 422.

Texas.— Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

Vermont.— Castleton *v.* Langdon, 19 Vt. 210.

United States.— Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701.

See 9 Cent. Dig. tit. "Charities," § 30 *et seq.*

3. Maynard *v.* Woodard, 36 Mich. 423; Hatheway *v.* Sackett, 32 Mich. 97; Iseman *v.* Myres, 26 Hun (N. Y.) 651. See Sheldon *v.* Stockbridge, 67 Vt. 299, 31 Atl. 414.

4. Yale College's Appeal, 67 Conn. 237, 34 Atl. 1036; Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

5. Yale College's Appeal, 67 Conn. 237, 34 Atl. 1036; Bedford *v.* Bedford, 99 Ky. 273, 18 Ky. L. Rep. 193, 35 S. W. 926.

6. *Connecticut.*— Tappan's Appeal, 52 Conn. 412; Coit *v.* Comstock, 51 Conn. 352, 50 Am. Rep. 29; White School House *v.* Post, 31 Conn. 240.

Illinois.— Holden *v.* Cook County, 87 Ill. 275; Willard *v.* Rockville Centre M. E. Church, 66 Ill. 55.

Louisiana.— Franklin's Succession, 7 La. Ann. 395; Milne *v.* Milne, 17 La. 46.

Maine.— Dascomb *v.* Marston, 80 Me. 223, 13 Atl. 888.

New Jersey.— See Voorhees *v.* Voorhees, 6 N. J. Eq. 511.

New York.— Longheed *v.* Dykeman's Baptist Church, 129 N. Y. 211, 29 N. E. 249, 41 N. Y. St. 373, 14 L. R. A. 410; Underhill *v.* Wood, 53 N. Y. App. Div. 640, 65 N. Y. Suppl. 1105; Philson *v.* Moore, 23 Hun (N. Y.) 152; Shipman *v.* Fanshaw, 15 Abb. N. Cas. (N. Y.) 288; Jones *v.* Methodist Episcopal Sunday School, 4 Dem. Surr. (N. Y.) 271.

deed is delivered.[7] This is the doctrine even in some of those states,[8] like Virginia, where the beneficiaries must be certain, it being there held that, while a devise *in presenti*, to take effect immediately on the testator's death, is void when the beneficiaries are numerous and uncertain, yet an executory devise to take effect upon condition that incorporation follow within a reasonable time, that is, within a life or lives in being, and twenty-one years thereafter, is valid.[9] So a dedication of land to a public or charitable use may remain in abeyance until the proper grantee or city comes *in esse*, when it will vest in such grantee or city;[10] and the trustees of a charity may be impliedly authorized to apply for and accept an act of incorporation to carry out the testator's plans.[11] But a legacy to a charitable institution described as in being cannot be treated as made to an institution to be created;[12] nor can an institution already established at the date of the will receive a bequest to such as "may be established."[13] By the early decisions in New York, Indiana, and Connecticut there must be an existing trustee capable of taking at the testator's death;[14] and if a will prescribes certain rules and methods of government for a proposed institution not in being, it will not be sustained upon the ground that, without applying for a special act, the institution may be incorporated under the general law which provides for a plan of incorporation different from that presented in the will.[15] A charitable gift to a foreign incorporated association is also valid;[16] but incorporation after the gift has not always been permitted to act retroactively and validate the gift.[17] A misnomer in designating a corporation, when the object intended can be ascertained by evidence, or a change of name or place, or an increase in the number of its corporators, or naming a county where it is not located does not invalidate a charitable gift thereto.[18] If a corporation takes property for purposes which are in them-

North Carolina.—Keith *v.* Scales, 124 N. C. 497, 32 S. E. 809.

Ohio.— McIntire Poor School *v.* Zanesville Canal, etc., Co., 9 Ohio 203, 34 Am. Dec. 436, holding that a bequest for charitable uses, when the objects are sufficiently defined, and the person designated as trustee acquires capacity to hold by subsequent act of incorporation, takes effect as an executory devise.

Oregon.— Pennoyer *v.* Wadhams, 20 Oreg. 274, 283, 25 Pac. 720, 11 L. R. A. 210.

Pennsylvania.— Domestic, etc., Missionary Soc.'s Appeal, 30 Pa. St. 425.

Tennessee.— Johnson *v.* Johnson, 92 Tenn. 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

United States.— Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 331, 27 L. ed. 401; Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397, 27 Alb. L. J. 289; Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617; White *v.* Keller, 68 Fed. 796, 30 U. S. App. 275, 15 C. C. A. 683; Field *v.* Drew Theological Seminary, 41 Fed. 371.

England.— See *In re* Manchester Royal Infirmary, 43 Ch. D. 420, 59 L. J. Ch. 370, 62 L. T. Rep. N. S. 419, 38 Wkly. Rep. 460; Bene't College *v.* London, 2 W. Bl. 1182.

See 9 Cent. Dig. tit. "Charities," § 29.

7. Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84.

8. In New York, Maryland, and Missouri the donee's incorporation after the testator's death was held insufficient to sustain the bequest. Yingling *v.* Miller, 77 Md. 104, 26 Atl. 491; State *v.* Warren, 28 Md. 338; Catholic Church *v.* Tobbein, 82 Mo. 418; White *v.* Howard, 46 N. Y. 144.

9. Stonestreet *v.* Doyle, 75 Va. 356, 40 Am. Rep. 731; Literary Fund *v.* Dawson, 10 Leigh (Va.) 153. See Miller *v.* Chittenden, 2 Clarke (Iowa) 315; Hadley *v.* Hopkins Academy, 14 Pick. (Mass.) 240.

10. Fellows *v.* Miner, 119 Mass. 541; Werlein *v.* New Orleans, 177 U. S. 390, 20 S. Ct. 682, 44 L. ed. 817. See *In re* Davis, [1902] 1 Ch. 876.

11. Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591.

12. New Orleans *v.* Hardie, 43 La. Ann. 251, 9 So. 12.

13. Pepper's Estate, 1 Pa. Dist. 148, 11 Pa. Co. Ct. 257.

14. Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58; McCord *v.* Ochiltree, 8 Blackf. (Ind.) 15; King *v.* Woodhull, 3 Edw. (N. Y.) 79. And see Stone *v.* Griffin, 3 Vt. 400.

15. People *v.* Simonson, 126 N. Y. 299, 27 N. E. 380, 37 N. Y. St. 371. See Cory Universalist Soc. *v.* Beatty, 28 N. J. Eq. 570.

16. Sewall *v.* Cargill, 15 Me. 414; Barker *v.* Wood, 9 Mass. 419; Matter of Huss, 126 N. Y. 537, 27 N. E. 784, 37 N. Y. St. 789, 12 L. R. A. 620; Wood *v.* Paine, 66 Fed. 807.

17. See Tappan's Appeal, 52 Conn. 412; Henderson *v.* Rost, 7 La. Ann. 692; Fellows *v.* Miner, 119 Mass. 541.

18. *Massachusetts.*— Bartlett *v.* Nye, 4 Metc. (Mass.) 378; Washburn *v.* Sewall, 9 Metc. (Mass.) 280; Burbank *v.* Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312.

selves valid, but which the corporation is incompetent to execute, the donor's heirs cannot take advantage of such inability, but the objection must be raised by the state, unless other provision is made by statute expressly or by necessary implication.[19] A gift to an unincorporated association becomes the property of the association as a body, and not of its members.[20] When real estate is devised to such an association and no person exists in whom the title may vest, the title descends to the heir at law for its benefit, and upon its incorporation it will be entitled to receive the property.[21]

3. Trustees For Charities Based Upon Voluntary Contributions. The jurisdiction of chancery over charities extends to such as are founded or supported by voluntary contributions or subscriptions when there is property impressed with a charitable trust;[22] but the members of a committee formed to receive such gifts are not trustees but agents; some of them cannot require the others to account, and even if the subscribers were suing for that purpose the attorney-general would be a necessary party to the suit.[23] A relief fund raised by donations of the people for the immediate relief of the sufferers from a large conflagration in a town is a private and not permanent or general charity; it is limited to a specified class of persons in being, and if an unexpended balance remains after the immediate object is fulfilled, and the donors are unknown, such balance cannot properly be applied by those having the fund in charge, in aid of the poor rates of the town, or continued in trust, but a scheme will be devised by a court of equity to repair the losses of the sufferers by the fire.[24]

4. Trust Does Not Fail For Want of Trustee. Under the common-law rule, though no donee, or a donee incapable of taking and holding the property, is named for a gift or dedication of property to charitable uses, it will not fail, as a court of equity or the legislature may appoint trustees, and a charitable trust is not permitted to fail for want of a trustee.[25] So equity will supply any defect

New Jersey.— Lanning *v.* Sisters of St. Francis, 35 N. J. Eq. 392; Goodell *v.* Union Assoc., 29 N. J. Eq. 32.

New York.— Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 19 N. Y. St. 392, 2 L. R. A. 387 [*affirmed* in 136 U. S. 152, 10 S. Ct. 775, 34 L. ed. 427].

Rhode Island.—Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

Tennessee.— Heiskell *v.* Chickasaw Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699; State *v.* Smith, 16 Lea (Tenn.) 662.

19. *Maryland.*— Trinity M. E. Church *v.* Baker, 91 Md. 539, 46 Atl. 1020.

New Jersey.— Kerrigan *v.* Conelly, (N. J. 1900) 46 Atl. 227; Congregational Home Missionary Soc. *v.* Van Arsdale, 58 N. J. Eq. 293, 42 Atl. 1047 [*affirmed* in 59 N. J. Eq. 658]; Moore *v.* Moore, 50 N. J. Eq. 554, 25 Atl. 403.

New York.— Lefevre *v.* Lefevre, 59 N. Y. 434; Hull *v.* Pearson, 36 N. Y. App. Div. 224, 55 N. Y. Suppl. 324.

West Virginia.—Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

Wisconsin.— Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986.

United States.— Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 331, 27 L. ed. 401; Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547; Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 19 L. ed. 53.

20. *In re* Owens, 33 N. Y. Suppl. 422, 1131, 24 N. Y. Civ. Proc. 256; Robertson *v.* Walker, 3 Baxt. (Tenn.) 316.

21. American Bible Soc. *v.* American Tract Soc., 62 N. J. Eq. 219, 50 Atl. 67; Browers *v.* Fromm, Add. (Pa.) 362.

22. Atty.-Gen. *v.* Manchester, L. R. 3 Eq. 436, 15 L. T. Rep. N. S. 646, 15 Wkly. Rep. 673; Matter of Endowed Schools Act, 10 App. Cas. 304, 56 L. J. P. C. 30, 51 L. T. Rep. N. S. 305, 33 Wkly. Rep. 756; Atty.-Gen. *v.* Kell, 2 Beav. 575, 17 Eng. Ch. 575; *Ex p.* Pearson, 6 Price 214, 20 Rev. Rep. 628; Tudor Charitable Trusts (3d ed.), 97.

As to the consideration for subscriptions to charities see 15 Harv. L. Rev. 312.

23. Strickland *v.* Weldon, 28 Ch. D. 426, 54 L. J. Ch. 452, 52 L. T. Rep. N. S. 247, 33 Wkly. Rep. 545.

24. Doyle *v.* Whalen, 87 Me. 414, 32 Atl. 1022, 31 L. R. A. 118. See Hallinan *v.* Hearst, 133 Cal. 645, 66 Pac. 17, 55 L. R. A. 216.

25. *Alabama.*— Williams *v.* Pearson, 38 Ala. 299.

California.— Carpenteria School Dist. *v.* Heath, 56 Cal. 478.

Connecticut.—Eliot's Appeal, (Conn. 1902) 51 Atl. 558; Treat's Appeal, 30 Conn. 113; American Bible Soc. *v.* Wetmore, 17 Conn. 181.

Georgia.— Beall *v.* Fox, 4 Ga. 404.

Indiana.— Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

Iowa.— Johnson *v.* Mayne, 4 Iowa 180.

Kentucky.— Penick *v.* Thom, 90 Ky. 665, 12 Ky. L. Rep. 613, 14 S. W. 830.

Maine.— Preachers' Aid Soc. *v.* Rich, 45 Me. 552.

arising from the trustee's death, disability, removal, or failure to accept the trust.[26] Trustees should not be appointed who are hostile to those for whom a charitable gift was made.[27] In states which do not follow these rules there must be defined trustees, so indicated that they shall be as clearly ascertained as in the case of a grantee in a deed.[28] A bequest to the "acting treasurer" of a certain association or society sufficiently designates the trustee intended.[29] A bequest does not fail if the agencies for carrying it out cease to exist, or are changed by the legislature.[30] So, upon the death, in the testator's lifetime, of a trustee named by him, the gift survives for the benefit of the charity which is the *cestui que trust*, though at law the legacy would lapse.[31] When the discretion reposed in the trustee is of a personal nature the gift lapses, inasmuch as the means of certainty as to the execution of the donor's wishes are lost by his death.[32]

5. Gifts to Non-Existent Trustee or Donee and Effect of Misnomer. Charitable gifts are not invalid because the trustee or donee is erroneously or uncertainly designated, when it can be made clear who is intended from the context of

Massachusetts.— Bliss *v.* American Bible Soc., 2 Allen (Mass.) 334; North Adams First Universalist Soc. *v.* Fitch, 8 Gray (Mass.) 421; Easterbrooks *v.* Tillinghast, 5 Gray (Mass.) 17. See Atty.-Gen. *v.* Goodell, 180 Mass. 538, 62 N. E. 962; Winslow *v.* Cummings, 3 Cush. (Mass.) 358; Brown *v.* Kelsey, 2 Cush. (Mass.) 243.

New Hampshire.— Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445.

New Jersey.— Goodell *v.* Union Assoc., 29 N. J. Eq. 32; McBride *v.* Elmer, 6 N. J. Eq. 107.

New York.— Beekman *v.* Bonsor, 23 N. Y. 298, 80 Am. Dec. 269; Williams *v.* Williams, 8 N. Y. 525; Goddard *v.* Pomeroy, 36 Barb. (N. Y.) 546; McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Reformed Protestant Dutch Church *v.* Bradford, 8 Cow. (N. Y.) 457; Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46.

Ohio.— Landis *v.* Wooden, 1 Ohio St. 160, 59 Am. Dec. 615.

Pennsylvania.— Frazier *v.* St. Luke's Church, 147 Pa. St. 256, 23 Atl. 442; Sellers M. E. Church Petition, 139 Pa. St. 61, 27 Wkly. Notes Cas. (Pa.) 383, 21 Atl. 145, 11 L. R. A. 282; Seagrave's Appeal, 125 Pa. St. 362, 17 Atl. 412; Seitz *v.* Seitz, (Pa. 1889) 17 Atl. 229; Pepper's Estate, 1 Pa. Dist. 148, 11 Pa. Co. Ct. 257.

South Carolina.—Gibson *v.* McCall, 1 Rich. (S. C.) 174; Calhoun *v.* Furgeson, 3 Rich. Eq. (S. C.) 160.

United States.—Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739; Potter *v.* Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. ed. 721; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401 [*affirming* 3 Woods (U. S.) 443, 13 Fed. Cas. No. 7,465]; Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

See 9 Cent. Dig. tit. "Charities," §§ 18, 85.

26. *Indiana.*— Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690; Richmond *v.* State, 5 Ind. 334.

Iowa.— Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

Kentucky.—Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611.

Massachusetts.— Bliss *v.* American Bible Soc., 2 Allen (Mass.) 334; Hadley *v.* Hopkins Academy, 14 Pick. (Mass.) 240. See Massachusetts General Hospital *v.* Amory, 12 Pick. (Mass.) 445.

Pennsylvania.— Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa. Co. Ct. 241.

Rhode Island.— Meeting St. Baptist Soc. *v.* Hail, 8 R. I. 234.

Tennessee.— State *v.* Ausmus, (Tenn. Ch. 1895) 35 S. W. 1021.

Texas.— Tunstall *v.* Wormley, 54 Tex. 476.

See 9 Cent. Dig. tit. "Charities," § 85.

27. Smith *v.* Nelson, 18 Vt. 511.

28. *Iowa.*— Lepage *v.* McNamara, 5 Iowa 124.

New York.— Bascom *v.* Albertson, 34 N. Y. 584; Rushmore *v.* Rushmore, 12 N. Y. Suppl. 776, 35 N. Y. St. 845; Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46.

Pennsylvania.— Lawrence County *v.* Leonard, 83 Pa. St. 206.

Tennessee.—Gass *v.* Ross, 3 Sneed (Tenn.) 210. See State *v.* Smith, 16 Lea (Tenn.) 662.

Texas.— Nolte *v.* Meyer, 79 Tex. 351, 15 S. W. 276.

Virginia.— Janey *v.* Latane, 4 Leigh (Va.) 327.

West Virginia.— Bible Soc. *v.* Pendleton, 7 W. Va. 79.

See 9 Cent. Dig. tit. "Charities," § 42.

29. Goodrich's Appeal, 57 Conn. 275, 18 Atl. 49; Tucker *v.* Seaman's Aid Soc., 7 Metc. (Mass.) 188; Greer *v.* Belknap, 63 How. Pr. (N. Y.) 390; Effray *v.* Foundling Asylum, 5 Redf. Surr. (N. Y.) 557. See Johnson *v.* Mayne, 4 Iowa 180; King *v.* Woodhull, 3 Edw. (N. Y.) 79; Hornbeck *v.* American Bible Soc., 2 Sandf. Ch. (N. Y.) 133.

30. Kinnaird *v.* Miller, 25 Gratt. (Va.) 107.

31. Griffith *v.* State, 2 Del. Ch. 421.

32. Beekman *v.* Bonsor, 23 N. Y. 298, 80 Am. Dec. 269; Fontain *v.* Ravenel, 17 How. (U. S.) 369, 15 L. ed. 80. See Brown *v.* Pancoast, 34 N. J. Eq. 321; Pownal *v.* Myers, 16 Vt. 408.

the instrument of gift, or by parol evidence as to the surrounding circumstances.[33] Thus, the "Trustees of the Theological Seminary of the Presbyterian Church" may take under a devise "to the trustees or those who hold the funds of 'the Theological Seminary of Princetown, New Jersey,'" where the former corporation is shown to have been generally known as the "Theological Seminary at Princetown," and no other body answers the description in the will.[34] So a legacy to the "Fund for Disabled Ministers of the Presbyterian Church" will go to the "Presbyterian Board of Relief for Disabled Ministers, and the Widows and Orphans of Deceased Ministers," where it appears that the latter is the only corporation engaged in relieving such ministers when disabled; that the testatrix knew and approved of this Board, and that no such body existed as that named in the will.[35] So, as to donees and beneficiaries, though no such organization exists as the Sisters of Charity, the court in Massachusetts will not permit a charitable trust therefor to fail for want of a trustee, but will itself undertake its administration.[36] So a legacy to the "Hahnemann Hospital at Chicago, Illinois," will go to the Board of Trustees of "the Hahnemann Medical College," for the benefit of its hospital, where it appears that "Hahnemann" was not applied to any other body in Chicago, and the testatrix frequently visited the hospital.[37] And a legacy to the "Chicago Training School for Nurses" will go to the "Illinois Training School for Nurses," where it is shown that the latter, being in Chicago, is the only like institution there, and that the testatrix was interested in that school, and contributed to its support.[38] A bequest to the "Methodist Episcopal Missionary Society of Maine" may be received by the "Trustees of the East Maine Conference of the Methodist Episcopal Church," if the former does not exist, and the later was incorporated to maintain the cause of domestic missions in Eastern Maine, where the testatrix lived when she died.[39] Error in the name of a designated institution, causing a certain institution among several to be selected by the court, involves, when depending upon parol evidence, a finding of fact which will be disturbed only for palpable error.[40]

6. GIFTS TO MAIN OR SUBORDINATE BODIES OR OBJECTS. When a charity is given to a subordinate object or body of a charitable religious institution the trust vests in the main society in aid of which it is granted.[41] This applies when the bequest is to the unincorporated department of a corporation;[42] but the gift to the latter must appear to be in ease of the former.[43] In those states, like Maryland, where a trust is valid only when it can be enforced by a court of equity, a

33. *Delaware.*— Doughten *v.* Vandever, 5 Del. Ch. 51.

Maine.— Nason *v.* First Bangor Christian Church, 66 Me. 100.

Massachusetts.—Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110; Stratton *v.* Physio-Medical College, 149 Mass. 505, 21 N. E. 874, 14 Am. St. Rep. 442, 5 L. R. A. 33; Winslow *v.* Cummings, 3 Cush. (Mass.) 358; Minot *v.* Boston Asylum, etc., 7 Metc. (Mass.) 416.

New Hampshire.—South Newmarket Methodist Seminary *v.* Peaslee, 15 N. H. 317.

New York.— Lefevre *v.* Lefevre, 59 N. Y. 434; Tallman *v.* Tallman, 3 Misc. (N. Y.) 465, 23 N. Y. Suppl. 734; Wetmore *v.* New York Inst. for Blind, 3 N. Y. Suppl. 179, 18 N. Y. St. 732; Kimball *v.* Chappel, 27 Abb. N. Cas. (N. Y.) 437, 18 N. Y. Suppl. 30.

North Carolina.—North Carolina Deaf, etc., Institute *v.* Norwood, 45 N. C. 65.

Rhode Island.— Peckham *v.* Newton, 15 R. I. 321, 4 Atl. 758.

Vermont.— McAllister *v.* McAllister, 46 Vt. 272.

See 9 Cent. Dig. tit. "Charities," § 42.

34. Newell's Appeal, 24 Pa. St. 197.

35. Woman's Union Missionary Soc. of America *v.* Mead, 131 Ill. 338, 23 N. E. 603.

36. Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110.

37. Woman's Union Missionary Soc. of America *v.* Mead, 131 Ill. 338, 23 N. E. 603.

38. Woman's Union Missionary Soc. of America *v.* Mead, 131 Ill. 33, 23 N. E. 603.

39. Straw *v.* East Maine Conference, 67 Me. 493; Vansant *v.* Roberts, 3 Md. 119.

40. Pepper's Estate, 1 Pa. Dist. 148, 11 Pa. Co. Ct. 257.

41. Matter of Isbell, 1 N. Y. App. Div. 158, 37 N. Y. Suppl. 919, 73 N. Y. St. 22; American Bible Soc. *v.* American Colonization Soc., 50 Hun (N. Y.) 194, 2 N. Y. Suppl. 774, 19 N. Y. St. 216; Matter of Wehrhane, 40 Hun (N. Y.) 542; Wright *v.* New York M. E. Church, Hoffm. (N. Y.) 20; Lennig's Estate, 154 Pa. St. 209, 25 Atl. 1049; Yard's Appeal, 64 Pa. St. 95.

42. *In re* Hallgarten, 2 N. Y. St. 82.

43. Evangelical Assoc.'s Appeal, 35 Pa. St. 316.

bequest to a religious corporation in trust to invest the fund and pay the income to an unincorporated, voluntary association, such as the "Auxiliary of the Women's Foreign Missionary Society of the M. E. Church," the trust is void.[44] A bequest to the Methodist church of which his wife might be a member when she died, for such purposes as "the conference might deem most advantageous for said church; more especially," belongs to such church only when ascertained upon his wife's death.[45] A gift to a diocese which is subdivided before the testator's death, but without schism or change of doctrine, may be divided between the two new dioceses.[46]

7. Discretion of Trustees. A gift to a charity may, by the common law, leave the selection of its objects and purposes to trustees.[47] And even a testamentary gift in remainder to such charities as shall be deemed most useful by the legal representative of the tenant for life is a valid charity.[48] When such discretion is exercised fairly and honestly, the action of the trustees within the limits of the discretion confided to them is not subject to control by the courts.[49] A bequest to the testator's executors for education, enjoining upon the school commissioners of the county to see that the fund is properly applied, and that "they get their rightful share of my estate," does not enable the commissioners to interfere with the trust fund.[50] But where the testator's executors were directed by his will to erect and transfer a church to the Presbyterian church, provided the nucleus of a congregation could be found in the neighborhood, it was held that the church trustees, and not the executors, were to judge whether there were enough persons to organize a church.[51] To constitute a charitable trust, the trustee's discretion must be confined to charitable objects;[52] and such discretion can never be so wide and indefinite that the trustee's conscience cannot be held to the carrying out of some purpose by a court of equity.[53] A gift to the trustees of a church to devote the income to such destitute and needy churches in the state as they may select, so as to promote the cause of religion, is not void for uncertainty.[54] But a discretion vested in trustees will not, it is held, sustain such broad purposes as "the increase and prosperity of the gospel,"[55] or "for the benefit of institutions of learning under the superintendence" of a conference of the Methodist church.[56]

44. Trinity M. E. Church *v.* Baker, 91 Md. 539, 46 Atl. 1020.

45. Atty.-Gen. *v.* Jolly, 2 Strobh. Eq. (S. C.) 379.

46. East Carolina Diocese *v.* North Carolina Diocese, 102 N. C. 442, 9 S. E. 310. See Trustees *v.* Sturgeon, 9 Pa. St. 321.

47. *Indiana.*— Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

Massachusetts.— Weber *v.* Bryant, 161 Mass. 400, 37 N. E. 203; Sears *v.* Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Rotch *v.* Emerson, 105 Mass. 431; Jackson *v.* Phillips, 14 Allen (Mass.) 539.

Pennsylvania.— McLain *v.* School Directors, 51 Pa. St. 196.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Olney, 16 R. I. 184, 13 Atl. 118.

Tennessee.— Smith *v.* Thomas, 4 Heisk. (Tenn.) 116.

See 9 Cent. Dig. tit. "Charities," § 52.

Contra.— Wilderman *v.* Baltimore, 8 Md. 551.

48. Wells *v.* Doane, 3 Gray (Mass.) 201.

49. Hayman *v.* Rugby School, L. R. 18 Eq. 28, 43 L. J. Ch. 834, 30 L. T. Rep. N. S. 217, 22 Wkly. Rep. 587; Atty.-Gen. *v.* Mosely, 2 De G. & Sm. 398, 12 Jur. 889, 17 L. J. Ch. 446; *In re* Wilkes, 20 L. J. Ch. 558, 3 MacN. & G. 440, 49 Eng. Ch. 341; *Ex p.* Inge, 2 Russ. & M. 590, 11 Eng. Ch. 590; Matter of Bedford Charity, 5 Sim. 578, 9 Eng. Ch. 578; Atty.-Gen. *v.* Harrow School, 2 Ves. 551.

50. Hawes Place Cong. Soc. *v.* Hawes Fund, 5 Cush. (Mass.) 454; Atty.-Gen. *v.* Moore, 18 N. J. Eq. 256; Cincinnati Soc.'s Appeal, 154 Pa. St. 621, 32 Wkly. Notes Cas. (Pa.) 249, 26 Atl. 647, 20 L. R. A. 323; Williams' Appeal, 73 Pa. St. 249.

51. Fidelity Ins., etc., Co.'s Appeal, 99 Pa. St. 443 [*affirming* 15 Phila. (Pa.) 17, 38 Leg. Int. (Pa.) 156].

52. Atty.-Gen. *v.* Soule, 28 Mich. 153; Livesey *v.* Jones, 55 N. J. Eq. 204, 35 Atl. 1064.

53. Weber *v.* Bryant, 161 Mass. 400, 37 N. E. 203; Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 41 N. Y. St. 951, 27 Am. St. Rep. 487, 14 L. R. A. 33, 31 Am. L. Reg. N. S. 75, 123, 235, 522; Beekman *v.* People, 27 Barb. (N. Y.) 260; Willets *v.* Willets, 20 Abb. N. Cas. (N. Y.) 471; John *v.* Smith, 91 Fed. 827 [*affirmed* in 102 Fed. 218, 42 C. C. A. 275].

54. Jones *v.* Habersham, 107 U. S. 172, 2 S. Ct. 336, 27 L. ed. 401.

55. Holland *v.* Peck, 37 N. C. 255. But see Going *v.* Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645.

56. Green *v.* Allen, 5 Humphr. (Tenn.) 169.

If no rule or order of selection of the beneficiaries is provided by the founder of a charity, there is a necessary power of selection in the trustees.[57] When the founder clearly fixes or prefers a particular mode of administration and selection, that mode must be preferred and followed. Where, for instance, a testatrix declared in her will a preference for one method of administration, "if the same can be made practicable and legal"; and, if not, then for other methods in a certain order, the first method is to be preferred, and, if that is impracticable, then the others must be pursued in their designated order.[58] Under a gift "to such charitable institutions and objects as his trustees may determine, and in such manner as they may think fit," the English practice is to direct the trustees to submit, for the approval of the judge at chambers, a proposal showing to what charitable institutions and objects, and in what sums respectively, they propose to apply the funds in their hands.[59] In the case of a public trust, unlike that of a private trust, many powers of the trustees may be exercised by a majority, but the powers thus exercised are usually those of administration only.[60] The trustees' misapplication of the income of a charity, if made in good faith and continued for many years, will not be lightly disturbed;[61] and charitable trusts, when obscure and ambiguous, have frequently been construed by usage.[62]

8. Trustee's Refusal or Resignation. As in the case of other trusts, the trustee of a charity may so distinctly repudiate and disavow the trust, and hold the property adversely as to acquire a complete legal and equitable title.[63] A charity does not fail, nor does a charitable gift revert to the donor, when the trustees named by him decline to accept and execute the trust.[64] Usually a designated trustee can refuse to accept a charitable trust; but a town after accepting such a trust cannot renounce it.[65] The donor, after conveying in trust for a charity to trustees, cannot appoint new trustees, if he has not reserved the power, but it is for the court to appoint the new trustees.[66] If trustees appointed to hold land for a charity decline the trust or fail to execute it, the heirs at law may hold it in trust or other trustees may be appointed by a court of equity.[67]

B. Beneficiaries and Objects — 1. Certainty and Definiteness — a. In General. A donation to charity must always be reasonably certain in its material terms; this applies not only to a clear designation of the class of persons in whose behalf it is created and the nature and quality of their interests, but also to the property donated, and the manner in which the trust is to be performed.[68] When

57. Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

58. Tappan's Appeal, 52 Conn. 412. See Atty.-Gen. *v.* Axford, 13 Can. Supreme Ct. 294.

59. Lewis *v.* Allenby, L. R. 10 Eq. 668, 18 Wkly. Rep. 1127; *In re* Piercy, 65 L. J. Ch. 364, 73 L. T. Rep. N. S. 732.

60. Morville *v.* Fowle, 144 Mass. 109, 10 N. E. 766; Perry *v.* Shipway, 4 De G. & J. 353, 5 Jur. N. S. 1015, 28 L. J. Ch. 606, 61 Eng. Ch. 277 [*affirming* 1 Giff. 1, 5 Jur. N. S. 535, 7 Wkly. Rep. 406]; Ward *v.* Hipwell, 3 Giff. 547; Spurgin *v.* White, 2 Giff. 473, 7 Jur. N. S. 15, 3 L. T. Rep. N. S. 609, 9 Wkly. Rep. 266. See Marsh *v.* Renton, 99 Mass. 132; 2 Seton Judgm. (5th ed.) 1092.

61. Atty.-Gen. *v.* Old South Soc., 13 Allen (Mass.) 474; Atty.-Gen. *v.* Dublin, 38 N. H. 459.

62. Atty.-Gen. *v.* St. Cross Hospital, 17 Beav. 435; 2 Seton Judgm. (5th ed.) 1093.

63. Newington Cong. Soc. *v.* Newington, 53 N. H. 595. See also, generally, Trusts.

64. Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434; Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611; Hadley *v.* Hopkins Academy, 14 Pick. (Mass.) 240.

65. Yale College's Appeal, 67 Conn. 257, 34 Atl. 1036; Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; Storr's Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141; Langdon *v.* Plymouth Cong. Soc., 12 Conn. 113; Augusta *v.* Walton, 77 Ga. 517, 1 S. E. 214; Drury *v.* Natick, 10 Allen (Mass.) 169. See American Colonization Soc. *v.* Smith Charities, 2 Allen (Mass.) 302; Beaver *v.* Filson, 8 Pa. St. 327.

66. Pierce *v.* Weaver, 65 Tex. 44.

67. Stone *v.* Griffin, 3 Vt. 400.

68. *California.*— People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270.

Georgia.— Newson *v.* Starke, 46 Ga. 88.

Louisiana.—McCloskey's Succession, 52 La. Ann. 1122, 27 So. 705.

North Carolina.— Haywood *v.* Craven, 4 N. C. 360.

United States.— Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397; Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450.

the class has been designated, uncertainty and indefiniteness as to the individuals and numbers to be benefited are necessary and essential elements to the creation of a valid charitable trust;[69] and such a trust will not, by the common law, be permitted to fail either for want of a trustee or because its particular purposes are uncertain.[70] The endowment of a certain hospital "for the support of charity patients" shows a sufficiently definite class of persons to be benefited.[71] A bequest in trust to pay a certain sum as income to the "proper authorities" of an incorporated church, to assist for the ministry young men of the church to be selected by the pastor and church council, is not void for uncertainty.[72] But a bequest to enable the families of the testator's late workmen at B or their children to become apprenticed, or to emigrate abroad, is not a charitable trust, and fails as a gift to individuals because of uncertainty.[73] So a devise of realty which only describes the devisees as "those members . . . of the Society of the Most Precious Blood who are under my control, and subject to my authority, at the time of my death" is void for uncertainty in the beneficiaries.[74] And where a testator left his property "to be distributed to such persons, societies or institutions as they may consider most deserving," the trust was held too indefinite to be carried into effect, as the beneficiaries were not defined by name or class.[75] In general a gift in trust to be distributed to the poor of a particular town, parish, or county, according to the discretion of a trustee, the rector of a church, or a court of equity, is not void for uncertainty in the beneficiaries.[76] A charitable institution may take, when capable of identification, though it is only indicated by the descriptive name of a particular charity.[77] The Connecticut statute is stricter than the common-law rule in

Canada.— Davidson *v.* Boomer, 15 Grant Ch. (U. C.) 1.

See 9 Cent. Dig. tit. "Charities," § 44 *et seq.*; and 15 Harv. L. Rev. 509.

69. Morice *v.* Dunham, 9 Ves. Jr. 399, 10 Ves. Jr. 521, 7 Rev. Rep. 232. See People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270; Hinckley's Estate, 58 Cal. 457; McAlister *v.* Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; Jackson *v.* Phillips, 14 Allen (Mass.) 539; Schleicher's Estate, 201 Pa. St. 612, 51 Atl. 329; Dickson *v.* Montgomery, 1 Swan (Tenn.) 348; 5 Eng. Rul. Cas. 548, 571, 575; 15 Harv. L. Rev. 509; 5 Harv. L. Rev. 389; 31 Am. L. Reg. N. S. 522.

70. John *v.* Smith, 91 Fed. 827, 102 Fed. 218, 42 C. C. A. 275; Wood *v.* Paine, 66 Fed. 807.

Contra.—See Halsey *v.* Protestant Episcopal Church, 75 Md. 275, 23 Atl. 781; Fifield *v.* Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745.

71. Atwater *v.* Russell, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26.

72. Young *v.* St. Mark's Lutheran Church, 200 Pa. St. 332, 49 Atl. 887; Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46.

In Connecticut see Strong's Appeal, 68 Conn. 527, 37 Atl. 395; White *v.* Fisk, 22 Conn. 31.

73. *In re* Cullimore, 27 L. R. Ir. 18.

74. Most Precious Blood Soc. *v.* Moil, 51 Minn. 277, 53 N. W. 648.

75. *Alabama.*— Williams *v.* Pearson, 38 Ala. 299.

Connecticut.— Bristol *v.* Bristol, 53 Conn. 242, 5 Atl. 687.

Illinois.— Heuser *v.* Harris, 42 Ill. 425.

Massachusetts.—Nichols *v.* Allen, 130 Mass. 211, 39 Am. Rep. 445.

New Jersey.— See Norris *v.* Thomson, 19 N. J. Eq. 307.

New York.— See People *v.* Powers, 147 N. Y. 104, 41 N. E. 432, 69 N. Y. St. 403, 35 L. R. A. 502; Wetmore *v.* New York Inst. for Blind, 3 N. Y. Suppl. 179, 56 Hun (N. Y.) 313, 9 N. Y. Suppl. 753, 31 N. Y. St. 334; Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46; *In re* Jackson, 1 Pow. Surr. (N. Y.) 241, 20 N. Y. Suppl. 380, 47 N. Y. St. 443.

See 9 Cent. Dig. tit. "Charities," § 44 *et seq.*

76. *Alabama.*— Williams *v.* Pearson, 38 Ala. 299.

Connecticut.— Goodrich's Appeal, 57 Conn. 275, 18 Atl. 49; Camp *v.* Crocker, 54 Conn. 21, 5 Atl. 604; Beardsley *v.* Bridgeport, 53 Conn. 489, 3 Atl. 557, 55 Am. Rep. 152; Tappan's Appeal, 52 Conn. 412.

Delaware.— Griffith *v.* State, 2 Del. Ch. 421 [*affirming* 2 Del. Ch. 392].

Illinois.— Hunt *v.* Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491, to the worthy poor as a court of chancery may direct.

Louisiana.—Auch's Succession, 39 La. Ann. 1043, 3 So. 227; Fink *v.* Fink, 12 La. Ann. 301.

Maine.— Howard *v.* American Peace Soc., 49 Me. 288.

United States.— Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401 [*affirming* 3 Woods (U. S.) 443, 13 Fed. Cas. No. 7,465]; Barnes *v.* Barnes, 3 Cranch C. C. (U. S.) 269, 2 Fed. Cas. No. 1,014.

England.— Waller *v.* Childs, Ambl. 524.

See 9 Cent. Dig. tit. "Charities," § 46.

77. *Connecticut.*— Brewster *v.* McCall, 15 Conn. 274.

Illinois.— See Taylor *v.* Keep, 2 Ill. App. 368.

requiring certainty in the beneficiaries, or at least a definite class of persons, and an ascertained mode of selection;[78] but even in that state a bequest in trust for building and maintaining, in a certain town, a church of a particular denomination is not too uncertain as to the beneficiaries, whether they be regarded as those who attend the proposed services or as the inhabitants of the town.[79] Where the English law of charitable trusts is rejected by statute or decision, as was formerly the rule in New York,[80] and is still the case in Virginia,[81] Maryland,[82] Minnesota,[83] Michigan,[84] and probably also as to realty, though not personalty, in Wisconsin,[85] the beneficiaries must be certain and capable of enforcing the trust in a court of equity.[86] In Virginia the gift must be to definite beneficiaries, and in such form as will enable a court of equity to control the trustees' discretion and ascertain whether they have committed a breach of trust.[87] In Maryland and West Virginia a trust for the benefit of indefinite beneficiaries or objects is invalid whenever the same gift made directly to such beneficiaries or objects would not be sustained.[88] In Maryland a gift for the use of necessitous Methodist churches in the United States is held too indefinite;[89] as in New York is a devise in trust for the support of a missionary "in preaching the gospel in the destitute, distant regions

Iowa.— Quinn *v.* Shields, 62 Iowa 129, 17 N. W. 437, 49 Am. Rep. 141.

Massachusetts.— Brown *v.* Kelsey, 2 Cush. (Mass.) 243.

New York.—Leonard *v.* Davenport, 58 How. Pr. (N. Y.) 384; Hornbeck *v.* American Bible Soc., 2 Sandf. Ch. (N. Y.) 133.

Vermont.— Vermont Baptist State Convention *v.* Ladd, 59 Vt. 5, 9 Atl. 1.

See 9 Cent. Dig. tit. "Charities," § 44 *et seq.*

78. Strong's Appeal, 68 Conn. 527, 37 Atl. 395; Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; Fairfield *v.* Lawson, 50 Conn. 501, 47 Am. Rep. 669; Adye *v.* Smith, 44 Conn. 60, 26 Am. Rep. 424. See Hayden *v.* Connecticut Hospital, 64 Conn. 320, 30 Atl. 50; Bronson *v.* Strouse, 57 Conn. 147, 17 Atl. 699.

79. Mack's Appeal, 71 Conn. 122, 41 Atl. 242.

80. Allen *v.* Stevens, 161 N. Y. 122, 659, 55 N. E. 568, 57 N. E. 1103; Fairchild *v.* Edson, 154 N. Y. 199, 768, 48 N. E. 541, 49 N. E. 1096, 61 Am. St. Rep. 609; People *v.* Powers, 147 N. Y. 104, 41 N. E. 432, 69 N. Y. St. 403, 35 L. R. A. 502; Bascom *v.* Albertson, 34 N. Y. 584; Williams *v.* Williams, 8 N. Y. 525; Matter of Look, 4 Silv. Supreme (N. Y.) 233, 7 N. Y. Suppl. 298, 26 N. Y. St. 745; Simmons *v.* Burrall, 28 N. Y. Suppl. 625, 59 N. Y. St. 554; *In re* Jackson, 1 Pow. Surr. (N. Y.) 241, 20 N. Y. Suppl. 380, 47 N. Y. St. 443.

81. Seaburn *v.* Seaburn, 15 Gratt. (Va.) 423.

82. Erhardt *v.* Baltimore Monthly Meeting of Friends, 93 Md. 669, 49 Atl. 561.

The Maryland statute.— Md. Laws (1888), c. 249, does away with the former rule there existing, as to uncertainty of beneficiaries, by providing that a charitable devise shall not be void for this cause, when the will contains directions for the formation of a corporation to take the devise. See Chase *v.* Stockett, 72 Md. 235, 19 Atl. 761.

83. Lane *v.* Eaton, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669.

84. Wheelock *v.* American Tract Soc., 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578.

85. Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

86. Morris *v.* Morris, 48 W. Va. 430, 37 S. E. 570; Brown *v.* Caldwell, 23 W. Va. 187, 48 Am. Rep. 376. See also Carskadon *v.* Torreyson, 17 W. Va. 43.

87. Fifield *v.* Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; U. S. Presbyterian Church *v.* Guthrie, 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321; Literary Fund *v.* Dawson, 10 Leigh (Va.) 153; Gallego *v.* Atty.-Gen., 3 Leigh (Va.) 450, 24 Am. Dec. 650.

In Virginia a gift in trust to a named Roman Catholic bishop, or his successor, for the benefit of an unincorporated association known as the "Sisters of St. Joseph," is invalid because of the uncertain and fluctuating nature of the beneficiaries; but under the early legislation of that state charitable gifts in favor of the literary fund or of schools are sustained, which without the statutes would have been held invalid. Kain *v.* Gibboney, 101 U. S. 362, 25 L. ed. 813. See Banks *v.* Phelan, 4 Barb. (N. Y.) 80.

88. Erhardt *v.* Baltimore Monthly Meeting of Friends, 93 Md. 669, 49 Atl. 561; Gambell *v.* Trippe, 75 Md. 252, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235; Methodist Episcopal Church *v.* Smith, 56 Md. 362; Wilderman *v.* Baltimore, 8 Md. 551; Dashiell *v.* Atty.-Gen., 5 Harr. & J. (Md.) 392, 6 Harr. & J. (Md.) 1, 9 Am. Dec. 572; Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302; Brown *v.* Caldwell, 23 W. Va. 187, 48 Am. Rep. 376; Knox *v.* Knox, 9 W. Va. 124; Bible Soc. *v.* Pendleton, 7 W. Va. 79.

89. Methodist Episcopal Church *v.* Jackson Square Evangelical Church, 84 Md. 173, 35 Atl. 8; Eutaw Place Baptist Church *v.* Shively, 67 Md. 493, 10 Atl. 244, 1 Am. St. Rep. 412; Isaac *v.* Emory, 64 Md. 333, 1 Atl. 713; Methodist Episcopal Church *v.* Smith, 56 Md. 362; Wilderman *v.* Baltimore, 8 Md. 551. See Hanson *v.* Little Sisters of Poor, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293.

of the west;"[90] and, in North Carolina, bequests "for home missions,"[91] or for "foreign missions and to the poor saints."[92] In states favoring charitable trusts, a bequest for all the religious societies in a city,[93] or for the poor churches in a city,[94] or to a Catholic bishop "for Roman Catholic charitable institutions in his diocese;"[95] or a trust to aid "indigent young men" of a certain town or state in fitting for the evangelical ministry,[96] is valid. In Wisconsin, under the statute provision[97] that "express trusts may be created . . . for the beneficial interests of any person or persons, when such trust is fully expressed upon the face of the instrument creating it," a bequest for a charity is not invalid because its beneficiaries are uncertain;[98] and they are sufficiently designated by a conveyance to the trustees of an incorporated religious society for the use of its "members."[99] In New York every perpetual trust, in which an ascertained beneficiary was lacking, or in which the purpose was not clearly defined, was long treated as void;[1] but now, by the act of 1893,[2] no gift "to religious, charitable, or benevolent uses, in other respects valid, shall be deemed invalid by reason of the indefiniteness of the beneficiaries."[3]

90. Goddard *v.* Pomeroy, 36 Barb. (N. Y.) 546. See Fuller's Will, 75 Wis. 431, 44 N. W. 304.

91. Bridges *v.* Pleasants, 39 N. C. 26, 44 Am. Dec. 94. See White *v.* Atty.-Gen., 39 N. C. 19, 44 Am. Dec. 92.

92. Bridges *v.* Pleasants, 39 N. C. 26, 44 Am. Dec. 94. See Kinney *v.* Kinney, 86 Ky. 610, 9 Ky. L. Rep. 753, 6 S. W. 593; Rizer *v.* Perry, 58 Md. 112; Presbyterian Bd. Foreign Missions *v.* Culp, 151 Pa. St. 467, 31 Wkly. Notes Cas. (Pa.) 135, 25 Atl. 117; Domestic, etc., Missionary Soc.'s Appeal, 30 Pa. St. 425; Gibson *v.* McCall, 1 Rich. (S. C.) 174; Frierson *v.* U. S. Presbyterian Church, 7 Heisk. (Tenn.) 683.

93. Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434.

94. McAlister *v.* Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158.

95. Tichenor *v.* Brewer, 98 Ky. 349, 17 Ky. L. Rep. 936, 33 S. W. 86.

96. Storr's Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141. See White *v.* Fisk, 22 Conn. 31; Witman *v.* Lex, 17 Serg. & R. (Pa.) 88, 17 Am. Dec. 644.

97. Wis. Rev. Stat. (1849), c. 57, § 11, cl. 5; 1 Wis. Stat. (1898), p. 1564, § 2081, cl. 5.

98. Sawtelle *v.* Witham, 94 Wis. 412, 69 N. W. 72. See Fuller's Will, 75 Wis. 431, 44 N. W. 304.

99. Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84.

1. Edwards *v.* Woods, 131 N. Y. 350, 30 N. E. 237, 43 N. Y. St. 291; Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 41 N. Y. St. 951, 27 Am. St. Rep. 487, 14 L. R. A. 33; Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 35 N. Y. St. 863, 11 L. R. A. 715; Read *v.* Williams, 125 N. Y. 560, 26 N. E. 730, 35 N. Y. St. 909, 21 Am. St. Rep. 748; Holland *v.* Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; Prichard *v.* Thompson, 95 N. Y. 76, 47 Am. Rep. 9; Burrill *v.* Boardman, 43 N. Y. 254, 3 Am. Rep. 694; Levy *v.* Levy, 33 N. Y. 97; Dodge *v.* Pond, 23 N. Y. 69; Pratt *v.* Albany Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Suppl. 1035; Fairchild *v.* Edson, 77 Hun (N. Y.) 298, 28 N. Y. Suppl. 401, 59 N. Y. St. 163; Butler *v.* Green, 16 N. Y. Suppl. 888; Rushmore *v.* Rushmore, 12 N. Y. Suppl. 776, 35 N. Y. St. 845; Riker *v.* Leo, 1 N. Y. Suppl. 128, 15 N. Y. St. 932; Ayres *v.* New York M. E. Church, 3 Sandf. (N. Y.) 351; Matter of Ingersoll, 2 Connoly Surr. (N. Y.) 453, 12 N. Y. Suppl. 103, 34 N. Y. St. 148.

2. N. Y. Laws (1893), c. 701.

3. See Kelly *v.* Hoey, 35 N. Y. App. Div. 273, 55 N. Y. Suppl. 94; Matter of Fitzsimons, 29 Misc. (N. Y.) 204, 731, 61 N. Y. Suppl. 485, 62 N. Y. Suppl. 1009; Matter of Scott, 31 Misc. (N. Y.) 85, 64 N. Y. Suppl. 577.

The New York statute.— The narrow view long entertained in New York, and culminating in the decision in Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 41 N. Y. St. 951, 27 Am. St. Rep. 487, 14 L. R. A. 33, setting aside a large bequest in the will of that eminent jurist, Hon. Samuel J. Tilden, for a library and reading room in New York city, finally resulted in such general dissatisfaction as to occasion the enactment of N. Y. Laws (1893), 703, § 1, which provided: "No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court." See Allen *v.* Stevens, 161 N. Y. 122, 55 N. E. 568; Dammert *v.* Osborn, 140 N. Y. 30, 35 N. E. 407, 55 N. Y. St. 586; Hull *v.* Pearson, 36 N. Y. App. Div. 224, 55 N. Y. Suppl. 324. By section two of this act the supreme court has control of such gifts, and the attorney-general is to represent the beneficiaries and

b. Beneficiaries Indefinite or Restricted. A characteristic of a public charity also is that it must, consistently with existing laws, be applied for the benefit of an indefinite number of persons, which number may include the rich as well as the poor.[4] However numerous or uncertain those may be who are ultimately to be benefited by a charity, yet it will be sustained whenever they can be ascertained by the donor's general purpose, especially when they are sufficiently indicated to bind the conscience of the trustee to whom he has given a power of selection,[5] even in a jurisdiction where only courts of law exist, and the execution of the trust cannot be judicially compelled.[6] So dedications of land for charitable or public purposes are usually held good without definite donees to take title, as the legislature or a court of chancery may appoint trustees who may maintain actions in regard to the land.[7] The gift, if public and for the benefit of undetermined persons, need not be to a charitable institution.[8] A bequest to aid free public schools is valid, being as definite as to beneficiaries as the rules governing the subject require;[9] and the validity of such a bounty is not affected by the fact that the state has provided for the maintenance of such schools for all children of school age

enforce such trusts; and, as recently amended (by N. Y. Laws (1901), c. 291) the court may, when the circumstances have so changed as to render impracticable or impossible a literal compliance with the terms of the instrument, "upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, grant, bequest or devise shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation or direction contained therein; provided, however, that no such order shall be made until the expiration of at least twenty-five years after the execution of the instrument or without the consent of the donor or grantor of the property, if he be living."

The Pennsylvania statute.— In Pennsylvania it was provided by the Act of April 26, 1855 (Pub. Laws (1855) 331), that "no disposition of property hereafter made for any religious or charitable use, shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain, or ceasing." See Presbyterian Bd. Foreign Missions *v.* Culp, 151 Pa. St. 467, 31 Wkly. Notes Cas. (Pa.) 135, 25 Atl. 117.

4. *Alabama.*— Burke *v.* Roper, 79 Ala. 138.
California.— People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270.
Georgia.— Beckwith *v.* St. Philip's Parish, 69 Ga. 564.
Illinois.— Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; Grand Prairie Seminary *v.* Morgan, 171 Ill. 444, 49 N. E. 516.
Indiana.— Erskine *v.* Whitehead, 84 Ind. 357.
Massachusetts.— Jackson *v.* Phillips, 14 Allen (Mass.) 539.
Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.
Rhode Island.— Kelley *v.* Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.
Wisconsin.— Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; Sawtelle *v.* Witham, 94 Wis. 412, 69 N. W. 72.
United States.— Fontain *v.* Ravenel, 17 How. (U. S.) 369, 15 L. ed. 80.
England.— *In re* Brown, [1898] 1 Ir. R. 423.
See 9 Cent. Dig. tit. "Charities," § 16.

It is an essential feature of a public charity that the beneficiaries be uncertain, a class described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi-public character. Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33; Pennoyer *v.* Wadhams, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 210; 2 Perry Trusts (5th ed.), §§ 687, 732.

5. *California.*— Matter of Upham, 127 Cal. 90, 59 Pac. 315.
Connecticut.—Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346.
Kentucky.— Bedford *v.* Bedford, 99 Ky. 273, 18 Ky. L. Rep. 193, 35 S. W. 926.
Louisiana.— Burke's Succession, 51 La. Ann. 538, 25 So. 387.
New Hampshire.—Haynes *v.* Carr, 70 N. H. 463, 49 Atl. 638.
North Carolina.—Keith *v.* Scales, 124 N. C. 497, 32 S. E. 809.
Rhode Island.—Derby *v.* Derby, 4 R. I. 414.
United States.— John *v.* Smith, 91 Fed. 827.

6. Bartlet *v.* King, 12 Mass. 536, 7 Am. Dec. 99.

7. San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405; Carpenteria School Dist. *v.* Heath, 56 Cal. 478; Abbott *v.* Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Bryant *v.* McCandless, 7 Ohio, Pt. II, 135; Johnson County School Dist. No. 2 *v.* Hart, 3 Wyo. 563, 27 Pac. 919, 29 Pac. 741.

8. Matter of Willey, 128 Cal. 1, 60 Pac. 471.

9. Hatheway *v.* Sackett, 32 Mich. 97; *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 220, 36 L. R. A. 242; Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

within the territory intended to be benefited.[10] Public charities are said to begin where definite trusts end;[11] and the beneficiaries thereunder are never required to show that they contributed to, or have any personal interest in, the trust property, as their interest is measured by, and limited to, the uses for which the property is held.[12] A bequest for the aid or benefit of defined persons is not a charity, but a trust only, and subject to the rule against perpetuities; such as a gift to be distributed among certain poor families named, or certain persons identified in the bequest or gift.[13] A gift to charity may restrict admission to its advantages to a class of humanity, and still be public. It may be for the blind, the mute, those suffering from special diseases, for infants or the aged, for women or for men, or for different callings or trades. It is public when the classification is determined by some distinction which involuntarily affects any of the whole people, although only a small number may be directly benefited.[14] In the case of a school, it is no objection to its validity that the school exists for the benefit of a restricted class of persons.[15] The distribution of its income may also be private, to private persons, and by a private hand.[16] But distinct public quality in the trust is always required, and if the instrument creating it allows the fund to be applied to purposes not charitable, the gift fails as a charity.[17] Where a testator left a part of his estate, which he had himself maintained as a museum and pleasure-ground for the benefit of the public, who were admitted thereto under certain restrictions, to his son with an annuity for their continued maintenance in the same way, and the son accepted the gift with the assurance that this should be done, it was held that no charitable trust was created, as it was not intended that the public should acquire any rights.[18]

c. Doubtful Beneficiaries, How Ascertained. Under the common-law rule the beneficiaries may not only take when they are uncertain, but when ambiguity and difficulty is found in determining who they are, or what are the purposes intended, the court may decide this by considering the whole scope of the instrument,[19] or by admitting parol evidence as to the surrounding circumstances,[20] as

10. Green *v.* Blackwell, (N. J. 1896) 35 Atl. 375; and cases cited *supra*, note 9.

11. Wade *v.* American Colonization Soc., 7 Sm. & M. (Miss.) 663, 45 Am. Dec. 324.

12. Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

13. Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., Assoc., (Kan. 1901) 64 Pac. 33; Bullard *v.* Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; Thomas *v.* Howell, L. R. 18 Eq. 198, 43 L. J. Ch. 799, 30 L. T. Rep. N. S. 244, 22 Wkly. Rep. 676; Liley *v.* Hey, 1 Hare 580, 6 Jur. 756, 11 L. J. Ch. 415, 23 Eng. Ch. 580.

14. Philadelphia *v.* Penna. Masonic Home, 160 Pa. St. 572, 28 Atl. 954, 40 Am. St. Rep. 736, 23 L. R. A. 545; Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa. Co. Ct. 241; and cases cited *supra*, note 4.

15. Meeting St. Baptist Soc. *v.* Hail, 8 R. I. 234.

16. Bullard *v.* Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104.

17. Rotch *v.* Emerson, 105 Mass. 431; Philadelphia *v.* Fox, 64 Pa. St. 169; Pell *v.* Mercer, 14 R. I. 412; Ellis *v.* Selby, 5 L. J. Ch. 214, 1 Myl. & C. 286, 13 Eng. Ch. 286, 7 Sim. 352, 8 Eng. Ch. 352; Morice *v.* Durham, 9 Ves. Jr. 399.

18. *In re* Pitt Rivers, [1902] 1 Ch. 403.

19. Button *v.* American Tract Soc., 23 Vt. 336.

20. *Connecticut.*— Fairfield *v.* Lawson, 50 Conn. 501, 47 Am. Rep. 669; Brewster *v.* McCall, 15 Conn. 274.

Indiana.— Chappell *v.* Church of Christ Missionary Soc., 3 Ind. App. 356, 29 N. E. 924.

Iowa.— Bond *v.* Home for Aged Women, 94 Iowa 458, 62 N. W. 838; First Constitutional Presb. Church *v.* Congregational Soc., 23 Iowa 567.

Maine.— Hazeltine *v.* Vose, 80 Me. 374, 14 Atl. 733.

Massachusetts.—Faulkner *v.* National Sailors' Home, 155 Mass. 458, 29 N. E. 645; Hinckley *v.* Thatcher, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719; Hadley *v.* Hopkins Academy, 14 Pick. (Mass.) 240.

Ohio.— Gallipolis Tp. First Presb. Soc. *v.* Gallipolis Tp. First Presb. Soc., 25 Ohio St. 128.

Pennsylvania.— Croxall's Estate, 162 Pa. St. 579, 29 Atl. 750; Lennig's Estate, 154 Pa. St. 209, 25 Atl. 1049; Washington, etc., University's Appeal, 111 Pa. St. 572, 3 Atl. 664; Cresson's Appeal, 30 Pa. St. 437.

Rhode Island.— Cady *v.* Rhode Island Children's Hospital, etc., 17 R. I. 207, 21 Atl. 365; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

Vermont.— Button *v.* American Tract Soc., 23 Vt. 336.

Virginia.—Fifield *v.* Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745.

has often been done in determining what charitable corporation was intended by the terms employed;[21] or it may employ the fund, according to the testator's general intention, to another similar charity, under the *cy-pres* doctrine,[22] or it may sanction an agreement or compromise for dividing the fund between the different claimants.[23] A charitable gift cannot be sustained when no beneficiary is indicated, and no person is appointed to select the beneficiary.[24] Whenever a discretion is given by the founder of a charity to trustees to select the beneficiaries out of a class, it is not, under the common law, necessary that they be designated by name or specifically pointed out.[25] Thus a bequest in trust to the executive committee of the American Peace Society, to be expended in the cause of peace, is held sufficiently definite as to the beneficiaries.[26] So a bequest for the benefit of such charities as the testator's trustee or executor shall think proper has been repeatedly upheld.[27] In carrying into effect, by means of a scheme, a charitable bequest for religious purposes, when the terms of the gift are indefinite, the religious views of the donor have sometimes been regarded, but it is not a rule that they will be in more than a restricted sense.[28] If each denomination of

West Virginia.—Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

Wisconsin.— Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

England.— *In re* Fleetwood, 15 Ch. D. 594, 49 L. J. Ch. 514, 29 Wkly. Rep. 45; *In re* Doane, 9 Times L. R. 2; Middleton *v.* Clitherow, 3 Ves. Jr. 734; *In re* Huxtable, [1901] W. N. 230.

Canada.— Davidson *v.* Boomer, 15 Grant Ch. (U. C.) 1, 218.

See 9 Cent. Dig. tit. "Charities," § 64.

21. *Alabama.*—Carter *v.* Balfour, 19 Ala. 814; Walker *v.* Cuthbert, 10 Ala. 213.

California.— Matter of Gibson, 75 Cal. 329, 17 Pac. 438.

Connecticut.— King *v.* Grant, 55 Conn. 166, 10 Atl. 505; Jacobs *v.* Bradley, 36 Conn. 365; Southington First Cong. Soc. *v.* Atwater, 23 Conn. 34; Brewster *v.* McCall, 15 Conn. 274.

Illinois.— Preachers' Aid Soc. *v.* England, 106 Ill. 125.

Kentucky.— Tichenor *v.* Brewer, 98 Ky. 349, 17 Ky. L. Rep. 936, 33 S. W. 86; Taylorsville Catholic Church *v.* Offutt, 6 B. Mon. (Ky.) 535.

New Hampshire.— Greenland Church, etc., Soc. *v.* Hatch, 48 N. H. 393; Chapin *v.* Winchester School Dist. No. 2, 35 N. H. 445.

New York.— Riker *v.* Leo, 115 N. Y. 93, 21 N. E. 719, 26 N. Y. St. 978, 133 N. Y. 519, 30 N. E. 598, 44 N. Y. St. 63; Lefevre *v.* Lefevre, 59 N. Y. 434; St. Luke's Home *v.* Indigent Females' Relief Assoc., 52 N. Y. 191, 11 Am. Rep. 697; New York Inst. for Blind *v.* How, 10 N. Y. 84; Leonard *v.* Davenport, 58 How. Pr. (N. Y.) 384; Hornbeck *v.* American Bible Soc., 2 Sandf. Ch. (N. Y.) 133.

North Carolina.— See Taylor *v.* American Bible Soc., 42 N. C. 201.

Pennsylvania.— Cresson's Appeal, 30 Pa. St. 437; Newell's Appeal, 24 Pa. St. 197.

Tennessee.— State *v.* Smith, 16 Lea (Tenn.) 662.

Texas.— Elwell *v.* Universalist General Convention, 76 Tex. 514, 13 S. W. 552.

West Virginia.—Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

See 9 Cent. Dig. tit. "Charities," § 64.

22. See *infra*, VI, C.

23. *In re* Briscoe, [1872] W. N. 42, 76; Williams *v.* Roy, 9 Ont. 534; *In re* Haines, 18 Vict. L. Rep. 553.

24. Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; Fairfield *v.* Lawson, 50 Conn. 501, 47 Am. Rep. 669; Norcross *v.* Murphy, 44 N. J. Eq. 552, 14 Atl. 903; Williams *v.* Williams, 8 N. Y. 525.

25. *California.*—Hinckley's Estate, 58 Cal. 457.

Indiana.— Rush County *v.* Dinwiddie, 139 Ind. 128, 37 N. E. 795; Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690; Richmond *v.* State, 5 Ind. 334; McCord *v.* Ochiltree, 8 Blackf. (Ind.) 15.

Massachusetts.— Suter *v.* Hilliard, 132 Mass. 412, 42 Am. Rep. 444; Fairbanks *v.* Lamson, 99 Mass. 533.

Missouri.— Barkley *v.* Donnelly, 112 Mo. 561, 19 S. W. 305; Powell *v.* Hatch, 100 Mo. 592, 14 S. W. 49; Howe *v.* Wilson, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226.

New York.— Power *v.* Cassidy, 79 N. Y. 602, 35 Am. Rep. 550; Holmes *v.* Mead, 52 N. Y. 332.

North Carolina.— Miller *v.* Atkinson, 63 N. C. 537; Hester *v.* Hester, 37 N. C. 330; Griffin *v.* Graham, 8 N. C. 96, 9 Am. Dec. 619.

Ohio.— Landis *v.* Wooden, 1 Ohio St. 160, 59 Am. Dec. 615.

Pennsylvania.— Kinike's Estate, 155 Pa. St. 101, 25 Atl. 1016; Domestic, etc., Missionary Soc.'s Appeal, 30 Pa. St. 425.

Tennessee.— Johnson *v.* Johnson, 92 Tenn. 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179; Green *v.* Allen, 5 Humphr. (Tenn.) 169.

See 9 Cent. Dig. tit. "Charities," § 44.

26. Tappan *v.* Deblois, 45 Me. 122.

27. Everett *v.* Carr, 59 Me. 325; Wells *v.* Doane, 3 Gray (Mass.) 201; Brown *v.* Kelsey, 2 Cush. (Mass.) 243; Johnston *v.* Swann, 3 Madd. 457, 18 Rev. Rep. 270; Horde *v.* Suffolk, 2 Myl. & K. 59, 7 Eng. Ch. 59; Chapman *v.* Brown, 6 Ves. Jr. 404, 5 Rev. Rep. 351.

28. *Maryland.*—Domestic, etc., Missionary Soc. *v.* Reynold, 9 Md. 341.

Christians had one missionary society bearing its name, and a bequest were left simply to "the Missionary Society," the testator's professed religious belief would throw light upon the meaning, as it could not well be presumed that a zealous Catholic could intend thereby a Protestant missionary society, or that a zealous Trinitarian intended such a gift for a Unitarian society.[29] But where a fund was bequeathed by a Catholic to found "St. James' Roman Catholic Orphan Asylum" and a hospital, it was held that the founder's religious belief was not to be considered, and that the name did not show intent to make the charity denominational, or to subject it to the control of the Catholic church.[30] If, following a schism in a church or ecclesiastical organization, a legacy is claimed by each of two bodies which bear the same name, it will go to that claimant which retains the church edifice, if any, and which is recognized as the true organization by the church authorities under the ecclesiastical principles and usages accepted by the organization before the division took place.[31] If the beneficiaries are clearly indicated it is not necessary that they be in existence when the gift takes effect. Thus, it seems that a bequest in trust for the poor of an incorporated parish or city is valid, though there are no poor there at the date of the testator's death.[32] A gift to trustees for the benefit of a voluntary unincorporated association has been held valid where such an association could not itself take because of indefiniteness.[33]

d. Certainty as to Objects Intended. Certainty of objects and certainty of beneficiaries are so closely related that, in the main, the same rules apply to both as to definiteness in the gift. A distinction exists between a trust that is void for uncertainty, and an uncertainty that is simply indicative of an absence of intent to create a trust. When it is sought to show by implication, as from the use of precatory words following a gift, that a trust was intended, an uncertainty as to the object, or as to the subject of the trust, will be a reason, though not necessarily conclusive, for holding that no trust was designed by the testator; in the absence of convincing proof, it will never be assumed that the testator intended a void trust,[34] but the trust will be administered *cy-pres* by the court of chan-

Massachusetts.—Hinckley *v.* Thatcher, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719.

New Hampshire.— Atty.-Gen. *v.* Dublin, 38 N. H. 459.

New York.— St. Luke's Home *v.* Indigent Females' Relief Assoc., 52 N. Y. 191, 11 Am. Rep. 697; Robertson *v.* Bullions, 11 N. Y. 243; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

Pennsylvania.— Domestic, etc., Missionary Soc.'s Appeal, 30 Pa. St. 425.

England.—Charter *v.* Charter, L. R. 7 H. L. 364, 43 L. J. P. & M. 73.

See 9 Cent. Dig. tit. "Charities," § 64; and cases cited *supra*, note 20.

29. Field, J., in Hinckley *v.* Thatcher, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719. And see O'Callaghan *v.* Swan, 13 Vict. L. Rep. 676.

30. Atty.-Gen. *v.* Moore, 19 N. J. Eq. 503.

31. *Illinois.*— Lawson *v.* Kolbenson, 61 Ill. 405; Happy *v.* Morton, 33 Ill. 398.

Indiana.—White Lick Quarterly Meeting *v.* White Lick Quarterly Meeting, 89 Ind. 136.

Mississippi.— Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130.

New York.— De Witt *v.* Chandler, 11 Abb. Pr. (N. Y.) 459; Field *v.* Field, 9 Wend. (N. Y.) 394.

Pennsylvania.— See Trustees *v.* Sturgeon, 9 Pa. St. 321; App *v.* Lutheran Congregation, 6 Pa. St. 201.

South Carolina.— See Wilson *v.* St. John's Island Presb. Church, 2 Rich. Eq. (S. C.) 192.

As to the effect of a consolidation of churches see Cowan's Estate, 4 Pa. Dist. 435.

32. Goodrich's Appeal, 57 Conn. 275, 18 Atl. 49.

Contra.—Where a definite beneficiary, capable of taking, is held necessary, as in Wisconsin. Hoffen's Estate, 70 Wis. 522, 36 N. W. 407. See New Orleans *v.* Hardie, 43 La. Ann. 251, 9 So. 12; Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

33. *Iowa.*— Seda *v.* Huble, 75 Iowa 429, 39 N. W. 685, 9 Am. St. Rep. 495.

Michigan.— Allen *v.* Duffie, 43 Mich. 91, 4 N. W. 427, 38 Am. Rep. 159.

New York.— Reformed Dutch Church *v.* Harder, 12 N. Y. Suppl. 297, 34 N. Y. St. 645.

Pennsylvania.— Mann *v.* Mullin, 84 Pa. St. 297.

Tennessee.—Cobb *v.* Denton, 6 Baxt. (Tenn.) 235; Gass *v.* Ross, 3 Sneed (Tenn.) 210.

Texas.— Laird *v.* Bass, 50 Tex. 412.

See 9 Cent. Dig. tit. "Charities," § 17.

34. See the following cases:

Alabama.— Gilmer *v.* Gilmer, 42 Ala. 9.

Kentucky.— Spalding *v.* St. Joseph's Industrial School, 107 Ky. 386, 21 Ky. L. Rep. 1107, 54 S. W. 200.

Maryland.— Williams *v.* Baltimore Baptist Church, 92 Md. 497, 48 Atl. 930, 54 L. R. A.

cery.[35] A gift of money to trustees to be expended "in the purchase and distribution of such religious books or reading as they shall deem best" sufficiently defines the objects intended, as the word "religious" refers *prima facie* in this country to literature which tends to promote the Christian religion.[36] But Christianity is a part of the law of the land, so as to entitle the courts to base their judgments upon it, only so far as its precepts have been incorporated in the law as a component part thereof.[37] A devise of property in trust "to the cause of Christ, for the benefit and promotion of true evangelical piety and religion" to be distributed as the trustees "may think fit and proper," is sufficiently certain,[38] as is also a devise for "the dissemination of the gospel at home and abroad."[39] It has been held that a bequest for education should indicate its character;[40] but that appears not to be the prevailing view, especially when the mode of application is left to the discretion of trustees,[41] or when education at a particular institution or place is mentioned.[42] In Indiana a gift in trust to executors to be applied "to the education of colored children in the State of Indiana" is held not void for uncertainty;[43] but a devise "to the orthodox protestant clergymen of Delphi, and their successors," to be expended according to their discretion, "in the education of colored children, both male and female," the object being stated to be "the moral and religious improvement and well-being of the colored race," was there held too vague both as to the trustees and beneficiaries.[44] In Pennsylvania an early devise of real and personal property to the unincorporated Monthly Meeting of Friends of Philadelphia, to be applied under its direction "for the distribution of good books among poor people in the back part of Pennsylvania; or to the sup-

427; Pratt *v.* Sheppard, etc., Hospital, 88 Md. 610, 22 Atl. 51.

New Jersey.— Norcross *v.* Murphy, 44 N. J. Eq. 522, 14 Atl. 903.

Canada.— Gillies *v.* McConochie, 3 Ont. 203; Davidson *v.* Boomer, 15 Grant Ch. (U. C.) 1.

35. Griffith *v.* State, 2 Del. Ch. 421. See also, generally, *infra*, VI, C.

36. Simpson *v.* Welcome, 72 Me. 496, 39 Am. Rep. 349.

37. Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

38. Going *v.* Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Sowers *v.* Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418; American Tract Soc. *v.* Atwater, 30 Ohio St. 77, 27 Am. Rep. 422; Miller *v.* Teachout, 24 Ohio St. 525.

39. Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611; Phillips Academy *v.* King, 12 Mass. 546. See Owens *v.* Methodist Episcopal Church Missionary Soc., 14 N. Y. 380, 67 Am. Dec. 160; Reeves *v.* Reeves, 5 Lea (Tenn.) 644.

40. Beall *v.* Drane, 25 Ga. 430; Kurtz *v.* Beatty, 2 Cranch C. C. (U. S.) 699, 14 Fed. Cas. No. 7,950.

Contra in Maryland, and formerly in New York. Gambell *v.* Trippe, 75 Md. 252, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235; Dulany *v.* Middleton, 72 Md. 67, 19 Atl. 146; Maught *v.* Getzendanner, 65 Md. 527, 5 Atl. 471, 57 Am. Rep. 352; Barnum *v.* Baltimore, 62 Md. 275, 50 Am. Rep. 219; Needles *v.* Martin, 33 Md. 609; Rose *v.* Hatch, 125 N. Y. 427, 26 N. E. 467, 35 N. Y. St. 413; Phelps *v.* Phelps, 28 Barb. (N. Y.) 121; People *v.* Simonson, 7 N. Y. Suppl. 861, 28 N. Y. St. 97; Bascom *v.* Nichols, 1 Redf. Surr. (N. Y.) 340. See also Swasey *v.* American Bible Soc., 57 Me. 523; Barkley *v.* Donnelly, 112 Mo. 561, 19 S. W. 305.

41. See the following cases:

Connecticut.—Treat's Appeal, 30 Conn. 113.

Illinois.— Heuser *v.* Harris, 42 Ill. 425.

Indiana.— Richmond *v.* State, 5 Ind. 334.

Maryland.— Woman's Foreign Missionary Soc. *v.* Mitchell, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711; Rizer *v.* Perry, 58 Md. 112.

Massachusetts.—Jackson *v.* Phillips, 14 Allen (Mass.) 539.

New York.— Prichard *v.* Thompson, 29 Hun (N. Y.) 295.

Rhode Island.— Almy *v.* Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414.

See 9 Cent. Dig. tit. "Charities," § 48.

42. *Kentucky.*— Leeds *v.* Shaw, 82 Ky. 79.

Michigan.— Hatheway *v.* Sackett, 32 Mich. 97.

Oregon.— Raley *v.* Umatilla County, 15 Oreg. 172, 13 Pac. 890, 3 Am. St. Rep. 142.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Olney, 14 R. I. 449.

South Carolina.— Brennan *v.* Winkler, 37 S. C. 457, 16 S. E. 190.

Wisconsin.— Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

United States.— Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397; Field *v.* Drew Theological Seminary, 41 Fed. 371; Ireland *v.* Geraghty, 11 Biss. (U. S.) 465, 15 Fed. 35.

See 9 Cent. Dig. tit. "Charities," § 48.

43. *Ex p.* Lindley, 32 Ind. 367.

44. Craig *v.* Secrist, 54 Ind. 419; Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

In New York a bequest to the New York yearly meeting of Friends, called "orthodox," for the use of its straitened ministers, was early held not too vague. Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46.

port of a free school, or institution, in or near Philadelphia," was held not invalid for indefiniteness.[45] In Texas a devise to a county "for the benefit of public schools" is held sufficiently certain;[46] but a deed of land for an academy to "German citizens comprising the neighborhood six miles west of Brenham, in the east edge of the Labade Prairie, Washington County" and to "trustees yet to be appointed by said citizens" was void for uncertainty as to both the trustees and the beneficiaries.[47] Wherever charitable trusts are not favored, they will only be sustained when their objects are clearly and precisely defined.[48] Thus, in Virginia, a bequest to trustees for such purposes as they consider may promise to be most beneficial to the town and trade of Alexandria is void.[49] A devise to "a public seminary" is not too indefinite, but may be applied to the seminary of the testator's county, or to any seminary which his executor or a court of equity may select.[50] A gift for building a church or a Catholic convent in a certain place is not too indefinite;[51] but in a bequest "for a Catholic reformatory for boys" in a certain state, "reformatory" is a word of too wide and uncertain signification to support the gift.[52] In Wisconsin, where the beneficiaries must be certain, a bequest "to be used" by a certain bishop "for the benefit and behoof of the Roman Catholic Church" held to be too indefinite, it not being determinable whether the entire church or a particular church is intended;[53] although a general gift to a bishop would seem to be for the church at large, or for the diocese, according to the circumstances. When a fund is left for distribution among different charities or among the destitute, the mode of distribution must be definitely pointed out.[54]

2. PARTIAL INVALIDITY. If distribution is provided for to a class not the proper objects of charity, as well as to those who are so, the whole gift is rendered void.[55] So, when charitable purposes are so mixed up in an instrument with other purposes of so indefinite a nature, or so indefinite as to the division of the fund for different purposes,[56] that the court cannot execute them, or when the description includes purposes which are legal, but may or may not be charitable, the whole gift fails for uncertainty, even though a discretion is vested in the trustees.[57] On the other hand, when the legal and illegal provisions are separate and divisible, or when the trustees are given a discretion to apply the fund either to a legal or an illegal object, the trust is valid for the legal object, and its application will simply be restrained within the bounds of the law.[58] When so restrained, that part of the

45. Pickering *v.* Shotwell, 10 Pa. St. 23. See Evangelical Assoc.'s Appeal, 35 Pa. St. 316; Cresson's Appeal, 30 Pa. St. 437.

46. Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

47. Nolte *v.* Meyer, 79 Tex. 351, 15 S. W. 276.

48. Gambell *v.* Trippe, 75 Md. 252, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235; Dodge *v.* Pond, 23 N. Y. 69.

49. Wheeler *v.* Smith, 9 How. (U. S.) 55, 13 L. ed. 44. See Smith *v.* Thomas, 4 Heisk. (Tenn.) 116.

50. Curling *v.* Curling, 8 Dana (Ky.) 38, 33 Am. Dec. 475.

51. Hughes *v.* Daly, 49 Conn. 34; Halsey *v.* Protestant Episcopal Church, 75 Md. 275, 23 Atl. 781; Crisp *v.* Crisp, 65 Md. 422, 5 Atl. 421; Grove *v.* Disciples of Jesus Christ Congregation, 33 Md. 451; Rhodes *v.* Rhodes, 88 Tenn. 637, 13 S. W. 590.

52. Hughes *v.* Daly, 49 Conn. 34.

53. McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724.

54. Matter of Goodrich, 2 Redf. Surr. (N. Y.) 45; Derby *v.* Derby, 4 R. I. 414.

55. European, etc., R. Co. *v.* Dunn, 60 Me. 453; Nichols *v.* Allen, 130 Mass. 211, 39 Am. Rep. 445.

56. Kelly *v.* Nichols, 17 R. I. 306, 21 Atl. 906.

57. *Massachusetts.*— Nichols *v.* Allen, 130 Mass. 211, 39 Am. Rep.445; Chamberlain *v.* Stearns, 111 Mass. 267.

Michigan.— Wheelock *v.* American Tract Soc., 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578.

New Hampshire.—Haynes *v.* Carr, 70 N. H. 463, 49 Atl. 638.

New York.— Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 41 N. Y. St. 951, 27 Am. St. Rep. 487, 14 L. R. A. 33.

England.— Hunter *v.* Atty.-Gen., [1899] A. C. 309, 68 L. J. Ch. 449, 80 L. T. Rep. N. S. 732, 47 Wkly. Rep. 673; Hewitt *v.* Hudspeth, 53 L. J. Ch. 132, 49 L. T. Rep. N. S. 587.

Australia.— Atty.-Gen. *v.* Wilson, 8 Vict. L. Rep. 215.

58. *Georgia.*— Sinnott *v.* Moore, 113 Ga. 908, 39 S. E. 415.

Massachusetts.—St. Paul's Church *v.* Atty.-

fund as to which an invalid trust is created belongs to the donor.[59] Equity does not ordinarily assist a volunteer claiming the benefit of an imperfectly executed deed, but in the case of charities, defective instruments are often aided by the court;[60] they must, however, be merely defective, and not void or incomplete, for equity will not give life to a void or non-existing instrument, such as a will or deed.[61]

V. CONSTRUCTION AND VALIDITY OF CHARITABLE GRANTS.

A. Charities How Favored. The courts always give effect to charitable gifts when that can be done consistently with the established rules of law; and, without forcing any rule of construction they resort, if necessary, to the most liberal rules the nature of the case admits of.[62] Even if the charity is, at the time of the gift, incapable of taking or not in existence, equity will appoint a trustee, and the title will vest as soon as the charity acquires capacity to take.[63] In the construction of donations to charitable corporations the purpose for which the

Gen., 164 Mass. 188, 41 N. E. 231; Jackson *v.* Phillips, 14 Allen (Mass.) 539.

New York.— Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 41 N. Y. St. 951, 27 Am. St. Rep. 487, 14 L. R. A. 33; Levy *v.* Levy, 33 N. Y. 97; Williams *v.* Williams, 8 N. Y. 525; Andrew *v.* New York Bible, etc., Soc., 4 Sandf. (N. Y.) 156.

Utah.— Staines *v.* Burton, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788.

Virginia.— Com. *v.* Levy, 23 Gratt. (Va.) 21.

Wisconsin.— Beurhaus *v.* Cole, 94 Wis. 617, 69 N. W. 986; Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

England.— Lewis *v.* Allenby, L. R. 10 Eq. 668, 18 Wkly. Rep. 1127; *In re* Piercy, [1898] 1 Ch. 565; *In re* Hedgman, 8 Ch. D. 156, 26 Wkly. Rep. 674; Faversham *v.* Ryder, 5 De G., M. & G. 350, 18 Jur. 587, 23 L. J. Ch. 905, 54 Eng. Ch. 279; Sorresby *v.* Hollins, 9 Mod. 221; Atty.-Gen. *v.* Parsons, 8 Ves. Jr. 186.

Canada.— Doe *v.* Read, 3 U. C. Q. B. 244; Fulton *v.* Fulton, 24 Grant Ch. (U. C.) 422; Lewis *v.* Patterson, 13 Grant Ch. (U. C.) 223.

See 9 Cent. Dig. tit. "Charities," § 11.

59. St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Olliffe *v.* Wells, 130 Mass. 221; Nichols *v.* Allen, 130 Mass. 211, 39 Am. Rep. 445; Lassence *v.* Tierney, 2 Hall & T. 115, 14 Jur. 182, 1 Macn. & G. 551, 47 Eng. Ch. 551.

60. See Atty.-Gen. *v.* Burdet, 2 Vern. 755; Atty.-Gen. *v.* Rye, 2 Vern. 453. These decisions, as to aiding the defective execution of charitable gifts, do not apply to Ireland, as the English and Irish statutes relating to charitable uses are dissimilar. *In re* Carey, [1901] 1 Ir. R. 81.

61. Atty.-Gen. *v.* Barnes, Gilb. Eq. 5, Prec. Ch. 270, 2 Vern. 597; Jenner *v.* Hooper, Prec. Ch. 389, 1 Salk. 163; *Re* Smith, 64 L. T. Rep. N. S. 13.

62. *Illinois.*— Mills *v.* Newberry, 112 Ill. 123, 54 Am. Rep. 213.

Kentucky.— Penick *v.* Thom, 90 Ky. 665, 12 Ky. L. Rep. 613, 14 S. W. 830.

Louisiana.— State *v.* McDonogh, 8 La. Ann. 171.

New York.— Beekman *v.* Bonsor, 23 N. Y. 298, 80 Am. Dec. 269.

Ohio.— Zanesville Canal, etc., Co. *v.* Zanesville, 20 Ohio 483.

Pennsylvania.— Miller *v.* Porter, 53 Pa. St. 292.

Wisconsin.— Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

See 9 Cent. Dig. tit. "Charities," § 63 *et seq.*

Rules of construction.— In Rotch *v.* Emerson, 105 Mass. 431, 433, Wells, J., states the following among other rules for construing charitable bequests: "The terms used are not to be measured separately, but each is to be considered in its relation to the entire provision, and the general meaning of each restricted by its associations, and made subordinate to the main purpose. . . . If the main purpose is apparent, to institute or endow a charity, it will not fail by reason of a want of definiteness in the specification of the objects towards which its benefits are to be directed."

Statutes for charities may be enlarged.— When there is legislation intended to legalize the dedication of property to laudable public purposes, it is held in Canada to be the duty of the court to so construe the statute as to enlarge rather than limit its operation. Butland *v.* Gillespie, 16 Ont. 486.

63. *Maine.*— Shapleigh *v.* Pilsbury, 1 Me. 271.

Massachusetts.— Brown *v.* Porter, 10 Mass. 93; Milton *v.* Milton First Cong. Parish, 10 Pick. (Mass.) 447.

North Carolina.—Keith *v.* Scales, 124 N. C. 497, 32 S. E. 809.

Pennsylvania.— McGirg *v.* Aaron, 1 Penr. & W. (Pa.) 49, 21 Am. Dec. 361.

United States.— Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279; Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450.

England.— *In re* Manchester Royal Infirmary, 43 Ch. D. 420, 59 L. J. Ch. 370, 62 L. T. Rep. N. S. 419, 38 Wkly. Rep. 460.

See 9 Cent. Dig. tit. "Charities," § 85; and *supra*, IV, A, 2, b.

donee was incorporated may be considered;[64] and a second gift to a charity is properly interpreted as was that previously established.[65] A distinction is made in construing charitable gifts between those parts of the instrument which define the gift and its purposes and those which relate only to the mode of administration.[66] In construing such instruments courts of equity consider charity as the substance, while in other instruments the simple intent of the donor and the mode in which it is to take effect, are deemed of the substance.[67] A gift by will may be upheld, although the testator refers to some past or intended declaration of the particular charity, which declaration is not made or cannot be found, and although the selection of the objects of the charity, and the mode of application are left to the discretion of trustees; and even though the trustees refuse the gift, or die, or their appointment is revoked in the testator's lifetime, causing a lapse of the bequest at law.[68] Where, for instance, a will shows that a plan for carrying out the testator's object was afterward to be developed and left with his executor, a failure to do so will not by the common law override his general charitable intent and render the provision void.[69] This applies though the testator's plan, as communicated to his trustee by parol, proves to be only general and fragmentary.[70] The requirements of the statute of wills and the statute of frauds, by which the entire scheme of a charity should be in writing,[71] do not prevent an unincorporated charitable society from taking under a devise of realty for its benefit, if its by-laws sufficiently designate its objects as coinciding with the purposes of the devise.[72] Whenever a will making bequests to charity has to be judicially construed to clear up ambiguities, the expenses of the suit, including an attorney's fee for the defeated party, are to be paid out of the testator's estate.[73] Even when a charitable gift is adjudged void for uncertainty, yet, if it has been well and faithfully administered, all expenses of caring for the property should be paid from the estate, and reasonable compensation be made for its management.[74] As to income misapplied by the trustees of a charity, they will be required to account for it, without regard to the bar of the statute of limitations; but an application of income made in good faith and continued for many years will not be readily disturbed, especially after the lapse of a considerable time.[75] Upon the removal of the trustee of a charitable relief fund for fraud or malfeasance he may be allowed expenses incurred with the approval of its board of control, but not commissions as trustee, or counsel fees, or other disbursements made in resisting such board's claim to the trust fund.[76]

64. Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113.

65. St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231.

66. Hayden *v.* Connecticut Hospital, 64 Conn. 320, 30 Atl. 50; Ingraham *v.* Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; Philadelphia *v.* Girard, 45 Pa. St. 9, 84 Am. Dec. 470; Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478.

67. Rotch *v.* Emerson, 105 Mass. 431; 2 Story Eq. Jur. § 1167; Mills *v.* Farmer, 1 Meriv. 55, 19 Ves. Jr. 483, 13 Rev. Rep. 247.

68. Grandom's Estate, 6 Watts & S. (Pa.) 537; Mr. Justice Bradley, in Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478; Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100 [*affirming* 91 Fed. 948].

69. Sherman *v.* Congregational Home Missionary Soc., 176 Mass. 349, 57 N. E. 702; Gillan *v.* Gillan, 1 L. R. Ir. 114; Mills *v.* Farmer, 1 Meriv. 55, 19 Ves. Jr. 483, 13 Rev. Rep. 247; Atty.-Gen. *v.* Syderfen, 2 Vern. 266.

Contra, in Maryland. See Trinity M. E. Church *v.* Baker, 91 Md. 539, 46 Atl. 1020.

70. Jones *v.* Watford, 62 N. J. Eq. 339, 50 Atl. 180; Smith *v.* Smith, 54 N. J. Eq. 1, 32 Atl. 1069 [*affirmed* in 55 N. J. Eq. 821, 41 Atl. 1116].

71. Olliffe *v.* Wells, 130 Mass. 221.

72. American Bible Soc. *v.* American Tract Soc., 62 N. J. Eq. 219, 50 Atl. 67; Smith *v.* Smith, 54 N. J. Eq. 1, 32 Atl. 1069 [*affirmed* in 55 N. J. Eq. 821, 41 Atl. 1116]. See Claypool *v.* Norcross, 42 N. J. Eq. 545, 9 Atl. 112 [*reversed* in 44 N. J. Eq. 522, 14 Atl. 903].

73. Ingraham *v.* Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320.

74. Spalding *v.* St. Joseph's Industrial School, 107 Ky. 386, 21 Ky. L. Rep. 1107, 54 S. W. 200.

75. Atty.-Gen. *v.* Old South Soc., 13 Allen (Mass.) 474.

76. Walton *v.* Collins, 38 N. Y. App. Div. 624, 56 N. Y. Suppl. 1045 [*affirmed* in (N. Y. 1901) 60 N. E. 1121].

B. Property Included in Charitable Gifts and the Right, Title, or Interest Acquired. As charities are favored by the law, and are presumed to be perpetual, a deed to trustees for a charitable use, such as religious worship, passes *prima facie* a fee, though it does not run to their heirs and assigns.[77] So a devise of land to a corporation for charitable purposes passes a fee simple in the land, though it contains the words "so that the profits or interests arising therefrom be annually appropriated to the objects of said societies forever."[78] Where a testator ordered his real estate sold, and the proceeds divided among certain persons, excepting and reserving twenty acres of woodland "forever for the use of the members of the Methodist Episcopal Church to hold their camp-meetings on," the twenty acres were held to pass to his devisees subject to a perpetual easement in favor of the church members for camp-meetings.[79] A devise of the rents of a "house" given to charity carries the rents of not only that part of the lot on which the house stands, but of the whole lot.[80] A bequest of a fund to a town, to be used by it for the support of the poor, means *prima facie* that only the income of the fund is to be so expended.[81] The equitable interest of the beneficiaries under a charitable trust becomes fixed at the time of their selection or appointment.[82]

C. Conditions in Grants to Charities. A gift in trust for charity, when made conditional upon a future and uncertain event, is subject to the same rules and principles as any other estate dependent upon a condition precedent; if the condition is never fulfilled the estate never arises, and if it is too remote and indefinite, it fails *ab initio* under the rule against perpetuities.[83] So whenever an estate is given or granted, not upon condition, but as a conditional limitation, it is void if it does not take effect within the time limited by the law against perpetuities.[84] There is a wide distinction between deviation from the founder's intention as to the objects of the charity, and a deviation from the directions as to the management; between conditions, precedent or subsequent, and administrative limitations as to the control and management of the trust.[85] Conditions

77. *Illinois.*— Preachers' Aid Soc. *v.* England, 106 Ill. 125.

Massachusetts.— Packard *v.* Old Colony R. Co., 168 Mass. 92, 46 N. E. 433; Odell *v.* Odell, 10 Allen (Mass.) 1; Easterbrooks *v.* Tillinghast, 5 Gray (Mass.) 17. See Hadley *v.* Hopkins Academy, 14 Pick. (Mass.) 240.

Pennsylvania.— Sellers M. E. Church Petition, 139 Pa. St. 61, 27 Wkly. Notes Cas. (Pa.) 383, 21 Atl. 145, 11 L. R. A. 282; Brendle *v.* German Reformed Congregation, 33 Pa. St. 415; Griffitts *v.* Cope, 17 Pa. St. 96.

Rhode Island.— Meeting St. Baptist Soc. *v.* Hail, 8 R. I. 234.

Texas.— Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

United States.— Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739; Potter *v.* Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. ed. 721.

See 9 Cent. Dig. tit. "Charities," § 67.

78. Thompson *v.* Swoope, 24 Pa. St. 474.

79. Saxton *v.* Mitchell, 78 Pa. St. 479.

80. Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 33 N. E. 679; Richmond *v.* State, 5 Ind. 334.

81. Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 35 N. Y. St. 863, 11 L. R. A. 715.

82. State *v.* Griffith, 2 Del. Ch. 392.

Other decisions construing special provisions in gifts for charity and the interest passing under them are: Antones *v.* Eslava, 9 Port. (Ala.) 527; Dascomb *v.* Marston, 80 Me. 223, 13 Atl. 888; Merritt *v.* Bucknam, 78 Me. 504, 7 Atl. 383; Bluehill Academy *v.* Witham, 13 Me. 403; Dalles City *v.* Methodist Episcopal Church Missionary Soc., 6 Sawy. (U. S.) 126, 6 Fed. 356; Miller *v.* Lerch, Wall. Jr. (U. S.) 210, 17 Fed. Cas. No. 9,579.

83. Chamberlayne *v.* Brockett, L. R. 8 Ch. 206, 42 L. J. Ch. 368, 28 L. T. Rep. N. S. 248, 21 Wkly. Rep. 299; *In re* White, 33 Ch. D. 449, 50 J. P. 695, 55 L. J. Ch. 701, 55 L. T. Rep. N. S. 162, 34 Wkly. Rep. 771; *In re* Gyde, 79 L. T. Rep. N. S. 261. See Sappington *v.* Sappington School Fund, 123 Mo. 32, 27 S. W. 356; Bird *v.* Hawkins, 58 N. J. Eq. 229, 42 Atl. 588.

84. Theological Education Soc. *v.* Atty.-Gen., 135 Mass. 285; Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725.

85. *Connecticut.*— Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

Massachusetts.— Sears *v.* Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502.

Missouri.— Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414.

New Jersey.— Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113.

attached to grants for charitable purposes must be performed within a reasonable time, if no time is named. A gift of land to a town for a school-house "provided said schoolhouse is built by said town within one hundred rods of the place where the meeting-house now stands," is upon condition subsequent, and is forfeited by a delay of twenty years to comply with the condition.[86] So, under a grant of a lot on condition that a church be erected thereon, and that it shall "forever thereafter be used as a house of worship," there is a forfeiture if, after the church is erected, the property is sold and conveyed to secular uses.[87] A bequest to a Unitarian church and society, "so long as they maintain their present essential doctrines and principles of faith and practice," is forfeited by a change to a Trinitarian system of faith and practice.[88] If a church is endowed on condition that "the black gown shall be worn in the pulpit" so long as legal, the condition is a continuing and valid one which must be complied with in order to secure the continued benefit of the fund.[89] Conditions subsequent, especially as applied to charities, are not favored by the law;[90] and a condition subsequent, created by the use of such a word as "provided," does not prevent the vesting of the property in a charitable corporation, for its corporate purposes.[91] Under a devise of land for an old ladies' home, which the testator does not endow, but providing for a reverter, if sold or used for any other purpose, this condition subsequent is not broken by a delay of three years in opening and establishing it, or by letting the land to pay taxes, insurance, and repairs.[92] But an absolute legacy to a

Ohio.—Board of Education *v.* Ladd, 26 Ohio St. 210.

Oregon.— *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

Rhode Island.— Brown *v.* Meeting St. Baptist Soc., 9 R. I. 177.

United States.— Hopkins *v.* Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 L. ed. 739; Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397.

England.— Atty.-Gen. *v.* Wax Chandlers' Co., L. R. 6 H. L. 1, 42 L. J. Ch. 425, 28 L. T. Rep. N. S. 681, 21 Wkly. Rep. 361; Wright *v.* Wilkin, 2 B. & S. 232, 31 L. J. Q. B. 196, 6 L. T. Rep. N. S. 221, 10 Wkly. Rep. 403, 110 E. C. L. 232.

See 9 Cent. Dig. tit. "Charities," § 66.

86. Scott *v.* Stipe, 12 Ind. 74; Williams *v.* Hart, 116 Mass. 513; Hayden *v.* Stoughton, 5 Pick. (Mass.) 528; Domestic, etc., Missionary Soc.'s Appeal, 30 Pa. St. 425; Hamilton *v.* Elliott, 5 Serg. & R. (Pa.) 375.

87. Sumner *v.* Darnell, 128 Ind. 38, 45, 27 N. E. 162, 13 L. R. A. 173; Cook *v.* Leggett, 88 Ind. 211; Scott *v.* Stipe, 12 Ind. 74; Reed *v.* Stouffer, 56 Md. 236; Upington *v.* Corrigan, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794.

88. Princeton *v.* Adams, 10 Cush. (Mass.) 129.

89. *In re* Robinson, [1892] 1 Ch. 95.

90. *Connecticut.*— King *v.* Grant, 55 Conn. 166, 10 Atl. 505; Tappan's Appeal, 52 Conn. 412.

Iowa.— Phillips *v.* Harrow, 93 Iowa 92, 61 N. W. 434; Burlington University *v.* Barrett, 22 Iowa 60, 92 Am. Dec. 376.

Kansas.— Curtis *v.* Board of Education, 43 Kan. 138, 23 Pac. 98.

Kentucky.— Carroll County Academy *v.* Gallatin Academy Co., 104 Ky. 621, 20 Ky. L. Rep. 824, 47 S. W. 617.

Louisiana.— Orphan Society *v.* New Orleans, 12 La. Ann. 62.

Maryland.—Vansant *v.* Roberts, 3 Md. 119.

Massachusetts.— Holmes *v.* Coates, 159 Mass. 226, 34 N. E. 190; Weeks *v.* Hobson, 150 Mass. 377, 23 N. E. 215, 42 L. R. A. 642; Austin *v.* Cambridgeport Parish, 21 Pick. (Mass.) 215. As to waiver of breach of condition see Morville *v.* American Tract Soc., 123 Mass. 129, 25 Am. Rep. 40.

Mississippi.—Kilpatrick *v.* Graves, 51 Miss. 432.

New York.— Booth *v.* Baptist Church of Christ, 126 N. Y. 215, 28 N. E. 238, 37 N. Y. St. 79; Livingston *v.* Gordon, 84 N. Y. 136; Wetmore *v.* Parker, 52 N. Y. 450; Williams *v.* Williams, 8 N. Y. 525.

Pennsylvania.—Newell's Appeal, 24 Pa. St. 197; York Presb. Congregation *v.* Johnston, 1 Watts & S. (Pa.) 9.

Rhode Island.— Van Horne's Petition, 18 R. I. 389, 28 Atl. 341.

South Carolina.—Black *v.* Ligon, Harp. Eq. (S. C.) 205.

Texas.— Ryan *v.* Porter, 61 Tex. 106.

Vermont.— Sheldon *v.* Stockbridge, 67 Vt. 299, 31 Atl. 414.

West Virginia.— Brown *v.* Caldwell, 23 W. Va. 187, 48 Am. Rep. 376.

United States.— See Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401 [*affirming* 3 Woods (U. S.) 443, 13 Fed. Cas. No. 7,465]; McDonogh *v.* Murdoch, 15 How. (U. S.) 367, 14 L. ed. 732; Field *v.* Drew Theological Seminary, 41 Fed. 371.

Australia.— See *In re* Maclachan, 26 Vict. L. Rep. 548.

See 9 Cent. Dig. tit. "Charities," § 66.

91. De Pontalba *v.* New Orleans, 3 La. Ann. 660; Bennett *v.* Baltimore Humane Impartial Soc., 91 Md. 10, 45 Atl. 888; Bell County *v.* Alexander, 22 Tex. 350, 73 Am. Dec. 268.

92. Capen *v.* Skinner, 176 Mass. 84, 58 N. E. 473. See *In re* John C. Mercer Home, 162 Pa. St. 232, 29 Atl. 731.

church, accompanied by the words "I suggest" its use for completing the spire, if unfinished, or for the work at the church mission, or if that is abandoned for relief of the poor of the church, does not create either a condition or a trust.[93] And so of the expression of any desire, request, or hope, when, upon the whole instrument, it does not amount to a command.[94] So a mere specification of the use to which the property is to be applied, as "for common school purposes," without any provision for reëntry or forfeiture, is not upon condition.[95] A court of equity may relieve against conditions, when, in view of changed circumstances or otherwise, they become more burdensome than the trustee is willing to assume.[96]

D. Condition or Trust. A condition is distinct from a trust, though every trust implies a condition that the trustee will administer it faithfully.[97] A conveyance on condition may enable the grantor to enter for condition broken, but when the conveyance is in trust the only remedy is against the trustees.[98] In general a conveyance for a perpetual charitable use does not create a conditional estate, but a trust for the charitable use which is not liable to be defeated by non-user or alienation, without an express condition therefor.[99] The words, in a deed to a religious society, "in trust nevertheless, and upon condition always," may import a trust, but do not necessarily create a condition.[1] Where money was paid from the royal chest of Spain for land in Mobile conveyed to the king of Spain "for the purpose of building thereon a parochial church, and dwelling house for the officiating priest," the king was held not to be a trustee for the

93. Williams *v.* Baltimore Baptist Church, 92 Md. 497, 48 Atl. 930, 54 L. R. A. 427.

94. *Indiana.*— Orth *v.* Orth, 145 Ind. 184, 42 N. E. 277, 44 N. E. 17, 57 Am. St. Rep. 185, 32 L. R. A. 298.

Iowa.— Stivers *v.* Gardner, 88 Iowa 307, 55 N. W. 516.

Maryland.— Blackshere *v.* Samuel Ready School, 94 Md. 773, 51 Atl. 1056.

Massachusetts.— Aldrich *v.* Aldrich, 172 Mass. 101, 51 N. E. 449; Dickson *v.* U. S., 125 Mass. 311, 28 Am. Rep. 230.

Missouri.— Murphy *v.* Carlin, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699; Schmucker *v.* Reel, 61 Mo. 592.

New Jersey.— Eberhardt *v.* Perolin, 49 N. J. Eq. 570, 23 Atl. 501.

New York.— Clay *v.* Wood, 153 N. Y. 134, 47 N. E. 274.

Pennsylvania.— Boyle *v.* Boyle, 152 Pa. St. 108, 25 Atl. 494, 34 Am. St. Rep. 629; Manners *v.* Philadelphia Library Co., 93 Pa. St. 165, 39 Am. Rep. 741.

West Virginia.— Wilmoth *v.* Wilmoth, 34 W. Va. 426, 12 S. E. 731.

United States.—Colton *v.* Colton, 127 U. S. 300, 8 S. Ct. 1164, 32 L. ed. 138.

England.— Mussoorie Bank *v.* Raynor, 7 App. Cas. 321, 51 J. P. C. 72, 46 L. T. Rep. N. S. 633, 31 Wkly. Rep. 17; *In re* Williams, [1897] 2 Ch. 12, 66 L. J. Ch. 485, 76 L. T. Rep. N. S. 600, 45 Wkly. Rep. 519.

See 9 Cent. Dig. tit. "Charities," § 68 *et seq.*

95. *Indiana.*—Higbee *v.* Rodeman, 129 Ind. 244, 28 N. E. 442.

Kansas.— Curtis *v.* Board of Education, 43 Kan. 138, 23 Pac. 98.

Massachusetts.— Barker *v.* Barrows, 138 Mass. 578.

Oregon.— Raley *v.* Umatilla County, 15 Oreg. 172, 13 Pac. 890, 3 Am. St. Rep. 142.

Rhode Island.—Ecroyd *v.* Coggeshall, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741.

An announcement that an examination for a charity scholarship will be held implies no condition that the competitor obtaining the most marks will gain it, and hence there is no contract on which he can sue the trustees of the scholarship. Rooke *v.* Dawson, [1895] 1 Ch. 480, 59 J. P. 231, 64 L. J. Ch. 301, 72 L. T. Rep. N. S. 248, 13 Reports 269, 43 Wkly. Rep. 313.

96. Rollins *v.* Merrill, 70 N. H. 436, 48 Atl. 1088; 2 Story Eq. Jur. (13th ed.), § 1311.

97. Neely *v.* Hoskins, 84 Me. 386, 24 Atl. 882; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

98. Barr *v.* Weld, 24 Pa. St. 84; Howe *v.* Jericho School Dist. No. 3, 43 Vt. 282.

99. *Connecticut.*— Storrs' Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141.

Georgia.— Augusta *v.* Walton, 77 Ga. 517, 1 S. E. 214.

Kentucky.— Gartin *v.* Penick, 5 Bush (Ky.) 110.

Massachusetts.— Thompson *v.* Rehoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469.

New Jersey.— See Newark *v.* Stockton, 44 N. J. Eq. 179, 14 Atl. 630.

Pennsylvania.— Sellers M. E. Church Petition, 139 Pa. St. 61, 27 Wkly. Notes Cas. (Pa.) 383, 21 Atl. 145, 11 L. R. A. 282; McKissick *v.* Pickle, 16 Pa. St. 140.

West Virginia.— Brown *v.* Caldwell, 23 W. Va. 187, 48 Am. Rep. 376.

United States.— Stuart *v.* Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146.

1. Sohier *v.* Trinity Church, 109 Mass. 1. See Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113.

church.[2] Nor can there be a trust upon a direct gift to a clergyman or other person without restriction.[3] A conveyance of land, with a church thereon, to a bishop to be "forever held for the use of the Protestant Episcopal church" in a certain town, creates merely a trust, and is not upon a condition involving a forfeiture.[4] A conveyance of a site for a church, providing, as part of the consideration, that the "church, when on said site, shall, when not in use by the" corporate grantee congregation "be open for use to" other specified denominations, creates a trust in favor of the latter which equity will enforce.[5] A bequest to a college, to aid students by loans of free scholarships, is not a trust, but a valid gift directly to the college, to be used by it within the scope of its corporate functions.[6] So a residuary bequest to certain churches "to buy coal for the poor of said churches," without direction to invest the principal and expend the income, does not create a trust, but merely dictates the manner in which the property is to be used.[7] And a grant or gift to a religious society, "the interest thereof to be paid to their minister forever," is a gift to the society.[8] A devise to a certain church "absolutely, to be used by said church in aiding the cause of home and foreign missions equally," is an absolute and valid gift to the church, and not a trust, if the church is incorporated and authorized by statute to receive gifts for missions.[9] A gift to an incorporated missionary society, whose work includes both domestic and foreign missions, is not received by it as a trust because of the donor's direction to apply it to domestic missions.[10] In general any gift to a religious society is a gift in trust for its proper objects.[11]

E. Donor's General Charitable Intent — Gifts For "Benevolent" and "Philanthropic" Purposes. It is immaterial whether the purpose is called charitable in the gift, or what the donor's motive may have been, if the object sought to be attained is charitable and legal in its nature.[12] As a charitable gift, above all others, is to be construed *ut res magis valeat quam pereat*, it appears at one time to have been thought that, under the rule whereby when a word has two meanings, one of which will effectuate, and the other defeat, the donor's object, the court is bound to select that meaning which will carry out his intention, the word "benevolent" might be treated as equivalent to "charitable."[13] It may

2. Antones *v.* Eslava, 9 Port. (Ala.) 527.

3. Lockwood *v.* Weed, 2 Conn. 287; Isaac *v.* Emory, 64 Md. 333, 1 Atl. 713; Methodist Episcopal Church *v.* Smith, 56 Md. 362; Hodnett's Estate, 154 Pa. St. 485, 32 Wkly. Notes Cas. (Pa.) 302, 26 Atl. 623, 35 Am. St. Rep. 351.

4. Germain *v.* Baltes, 113 Ill. 29; Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113; Matter of Leo-Wolf, 25 Misc. (N. Y.) 469, 55 N. Y. Suppl. 650. See Greene *v.* O'Connor, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262; and cases cited *supra*, note 94.

5. White *v.* Rice, 112 Mich. 403, 70 N. W. 1024.

6. Lockwood *v.* Weed, 2 Conn. 287; Trinity M. E. Church *v.* Baker, 91 Md. 539, 46 Atl. 1020.

7. Dascomb *v.* Marston, 80 Me. 223, 13 Atl. 888; Nason *v.* First Bangor Christian Church, 66 Me. 100; Trinity M. E. Church *v.* Baker, 91 Md. 539, 46 Atl. 1020; Bird *v.* Merklee, 144 N. Y. 544, 39 N. E. 645, 64 N. Y. St. 243, 27 L. R. A. 423; Wetmore *v.* Parker, 52 N. Y. 450; Matter of Isbell, 1 N. Y. App. Div. 158, 37 N. Y. Suppl. 919, 73 N. Y. St. 22; Matter of Teed, 59 Hun (N. Y.) 63, 12 N. Y. Suppl. 642, 35 N. Y. St. 531; Matter of Look, 54 Hun (N. Y.) 635, 4 Silv. Supreme (N. Y.) 233, 7 N. Y. Suppl. 298, 26 N. Y. St. 745 [*affirmed* in 125 N. Y. 762, 27 N. E. 408, 36 N. Y. St. 1010]; Rhodes *v.* Rhodes, 88 Tenn. 637, 13 S. W. 590.

8. Smith *v.* Nelson, 18 Vt. 511.

9. Lane *v.* Eaton, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669; Bird *v.* Merklee, 144 N. Y. 544, 39 N. E. 645, 64 N. Y. St. 243, 27 L. R. A. 423.

10. Domestic, etc., Missionary Soc. *v.* Gaither, 62 Fed. 422.

11. American Bible Soc. *v.* American Tract Soc., 62 N. J. Eq. 219, 50 Atl. 67; Yard's Appeal, 64 Pa. St. 95.

12. Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; Jackson *v.* Phillips, 14 Allen (Mass.) 539; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417; Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 19 U. S. App. 612, 9 C. C. A. 14, 23 L. R. A. 581.

The instrument of gift must show a clear charitable intention.— Aston *v.* Wood, L. R. 6 Eq. 419; *In re* White, [1893] 2 Ch. 41, 62 L. J. Ch. 342, 68 L. T. Rep. N. S. 187, 2 Reports 380, 41 Wkly. Rep. 683; Gloucester *v.* Osborn, 1 H. L. Cas. 272; Gillan *v.* Gillan, 1 L. R. Ir. 114.

13. See Weber *v.* Bryant, 161 Mass. 400, 37 N. E. 203; Saltonstall *v.* Sanders, 11 Allen (Mass.) 446; Goodale *v.* Mooney, 60 N. H.

still be true, as was held formerly, that "benevolent," when coupled with "charitable," or any equivalent word, or used in such connection, or applied to such public institutions or corporations, as to manifest an intent to make it synonymous with "charitable," may have effect according to that intent.[14] Thus, a trust in favor of "human beneficence" and "charity" may be valid in view of the context.[15] So a bequest of a fund to be distributed "among and applied to such objects and purposes of benevolence and charity, public or private, including educational or charitable institutions and the relief of individual need, regardless of nationality or color, as the trustees for the time being shall deem worthy thereof," is a valid public charity.[16] A bequest "to charitable and deserving objects" has also been held good as a charity;[17] and so has a bequest "in trust, to be used purely and solely for charitable purposes,— for the greatest relief of human suffering, human wants, and for the good of the greatest number."[18] In general as many acts dictated by kindness or good will are benevolent which are not legally charitable,[19] a gift in trust to be applied "solely for benevolent purposes," in the trustees' discretion, is usually held void as a charity.[20] In New Hampshire "benevolent objects" may, upon the whole instrument of gift, be synonymous with "charitable objects."[21] In England a legacy for such "charitable or public purposes as my trustee thinks proper" has very recently been held too vague and uncertain.[22] It has also been held that "charitable and benevolent institutions" in a certain city, when designated as beneficiaries, must be both charitable and

528, 49 Am. Rep. 334; Parks *v.* American Home Missionary Soc., 62 Vt. 19, 20 Atl. 107; Ellis *v.* Selby, 5 L. J. Ch. 214, 1 Myl. & C. 286, 13 Eng. Ch. 286, 7 Sim. 352, 8 Eng. Ch. 352; James *v.* Allen, 3 Meriv. 17, 17 Rev. Rep. 4; Atty.-Gen. *v.* Comber, 2 Sim. & St. 93, 25 Rev. Rep. 163; Vezey *v.* Jamson, 1 Sim. & St. 69; Scott *v.* Brownrigg, 9 L. R. Ir. 246.

14. *Connecticut.*— Tappan's Appeal, 52 Conn. 412.

Maine.— Murdock *v.* Bridges, 91 Me. 124, 39 Atl. 475; Fox *v.* Gibbs, 86 Me. 87, 29 Atl. 940.

Massachusetts.— Weber *v.* Bryant, 161 Mass. 400, 37 N. E. 203; Suter *v.* Hilliard, 132 Mass. 412, 42 Am. Rep. 444; Rotch *v.* Emerson, 105 Mass. 431.

Rhode Island.— Pell *v.* Mercer, 14 R. I. 412.

England.— *In re* Jarman, 8 Ch. D. 584, 47 L. J. Ch. 675, 39 L. T. Rep. N. S. 89, 26 Wkly. Rep. 907; Miller *v.* Rowan, 5 Cl. & F. 99, 2 Shaw & Macl. 866, 7 Eng. Reprint 341; Ewen *v.* Bannerman, 2 Dow. & C. 74, 4 Wils. & Sh. 346, 6 Eng. Reprint 657; James *v.* Allen, 3 Meriv. 17, 17 Rev. Rep. 4; Morice *v.* Durham, 10 Ves. Jr. 522, 5 Eng. Rul. Cas. 547, 7 Rev. Rep. 232; Crichton *v.* Grierson, 3 Wils. & Sh. 329, 3 Bligh N. S. 424, 4 Eng. Reprint 1390; Hill *v.* Burns, 2 Wils. & Sh. 80.

See 9 Cent. Dig. tit. "Charities," § 65; and cases cited *supra*, note 12.

15. Hinckley's Estate, 58 Cal. 457. See Lowell, Appellant, 22 Pick. (Mass.) 215; Kendall *v.* Granger, 5 Beav. 300, 6 Jur. 919, 11 L. J. Ch. 415; *In re* Lloyd, 38 S. J. 50; *In re* Woodgate, 30 S. J. 517; Browne *v.* Yeall, 7 Ves. Jr. 50*n* [*cited* in Atty.-Gen. *v.* Stepney, 10 Ves. Jr. 22, 27, 7 Rev. Rep. 325].

16. Weber *v.* Bryant, 161 Mass. 400, 37 N. E. 203. See White *v.* Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 473. But see *In re* Murphy, 184 Pa. St. 310, 39 Atl. 70, 63 Am. St. Rep. 802.

17. *In re* Sutton, 28 Ch. D. 464, 54 L. J. Ch. 613, 33 Wkly. Rep. 519; Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713; Nichols *v.* Allen, 130 Mass. 211, 39 Am. Rep. 445; Sawtelle *v.* Witham, 94 Wis. 412, 69 N. W. 72; Atty.-Gen. *v.* Wilson, 8 Vict. L. Rep. 215.

18. Everett *v.* Carr, 59 Me. 325, 334.

19. Chadwick *v.* Livesey, 56 N. J. Eq. 453, 41 Atl. 1116; Livesey *v.* Jones, 55 N. J. Eq. 204, 35 Atl. 1064; Thomson *v.* Norris, 20 N. J. Eq. 489; *In re* Sutton, 28 Ch. D. 464, 54 L. J. Ch. 613, 33 Wkly. Rep. 519. See remarks of Lord Bramwell in Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265.

20. *Connecticut.*— Adye *v.* Smith, 44 Conn. 60, 26 Am. Rep. 424.

Massachusetts.— Chamberlain *v.* Stearns, 111 Mass. 267.

Missouri.— Schumucker *v.* Reel, 61 Mo. 592.

Rhode Island.— Mason *v.* Perry, 22 R. I. 475, 48 Atl. 671.

Tennessee.— Jones *v.* Green, (Tenn. Ch. 1895) 36 S. W. 729.

United States.— Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401 [*affirming* 3 Woods (U. S.) 443, 13 Fed. Cas. No. 7,465].

England.— Nash *v.* Morley, 5 Beav. 177, 6 Jur. 520, 11 L. J. Ch. 336; James *v.* Allen, 3 Meriv. 17, 17 Rev. Rep. 4.

21. Goodale *v.* Mooney, 60 N. H. 528, 49 Am. Rep. 334.

22. Blair *v.* Duncan, [1902] A. C. 37. See Vezey *v.* Jamson, 1 Sim. & St. 69; Moule *v.* Atty.-Gen., 20 Vict. L. Rep. 314.

benevolent;[25] and that a gift to "benevolent, religious, or charitable institutions" is void, because, by force of the term "benevolent," it embraces objects which are not charitable in a legal sense.[24] So a gift to be expended, according to the discretion of the trustee, "in acts of hospitality or charity," not being confined to charitable purposes only, is void for uncertainty.[25] A bequest "for religious and charitable purposes" is held in Maryland to be void for uncertainty;[26] and in Wisconsin even a gift "for charitable purposes" is held to be too indefinite.[27] A gift of money "for some one or more purposes, charitable, philanthropic, or ," while not bad because of the blank, can be used only for charitable or philanthropic purposes, and as thus limited is not valid as a charity.[28] Gifts for public purposes at specified localities are held good;[29] and so of purposes conducing to the benefit of a county.[30]

F. Surplus and Deficiency. When the whole of a fund is given to a charitable foundation, a surplus subsequently arising, but not specifically disposed of, will be applied to the same or like charitable objects.[31] In such cases, where there has been an unexpected surplus, courts of equity have frequently authorized the application of the surplus by increasing the number of charitable objects, or by increasing the amounts paid to the beneficiaries, or by founding new *cy-pres* charities.[32] Where property was devised for a grammar school at a certain place, whose inhabitants would be greatly benefited by extending the gift to general branches of education other than the learned languages, and a scheme was decreed accordingly, it was held, when thereafter it was found that there was still a large surplus income, that the court had full jurisdiction to extend the application to such income beyond the mere literal intention expressed by the testator, provided the income be applied to subjects connected with that intention.[33] So if a testator's estate is in excess of his legacies of definite sums of money, although his will declares that he disposes of his entire estate, there is an intestacy as to the excess, as the rule as to imperfect enumera-

23. People *v.* Powers, 147 N. Y. 104, 41 N. E. 432, 69 N. Y. St. 403, 35 L. R. A. 502 [*affirming* 83 Hun (N. Y.) 449, 29 N. Y. Suppl. 950, 31 N. Y. Suppl. 1131, 64 N. Y. St. 879]. See Fox *v.* Gibbs, 86 Me. 87, 29 Atl. 940; Hull *v.* Pearson, 36 N. Y. App. Div. 224, 55 N. Y. Suppl. 324.

24. Wilkinson *v.* Lindgren, L. R. 5 Ch. 570, 39 L. J. Ch. 722, 23 L. T. Rep. N. S. 375, 18 Wkly. Rep. 961; *In re* Douglas, 35 Ch. D. 472, 56 L. J. Ch. 913, 56 L. T. Rep. N. S. 786, 35 Wkly. Rep. 740; Williams *v.* Kershaw, 5 Cl. & F. 111, 1 Keen 232 note, 15 Eng. Ch. 233, 5 L. J. Ch. 84, 7 Eng. Reprint 346; Baker *v.* Sutton, 1 Keen 224, 5 L. J. Ch. 264, 15 Eng. Ch. 224. And see De Camp *v.* Dobbins, 31 N. J. Eq. 671 [*affirming* 29 N. J. Eq. 36]; Thomson *v.* Norris, 20 N. J. Eq. 489 [*affirming* 19 N. J. Eq. 307]. See also to same effect Atty.-Gen. *v.* Herrick, Ambl. 712.

25. Kelly *v.* Nichols, 17 R. I. 306, 21 Atl. 906; *In re* Jarman, 8 Ch. D. 584, 47 L. J. Ch. 675, 39 L. T. Rep. N. S. 89, 26 Wkly. Rep. 907; *In re* Hewitt, 53 L. J. Ch. 132, 49 L. T. Rep. N. S. 587.

26. Gambell *v.* Trippe, 75 Md. 252, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235; Dulany *v.* Middleton, 72 Md. 67, 19 Atl. 146; Maught *v.* Getzendanner, 65 Md. 527, 5 Atl. 471, 57 Am. Rep. 352. And see *In re* Darling, [1896] 1 Ch. 50, 65 L. J. Ch. 52, 73 L. T. Rep. N. S. 382, 13 Reports 834, 44 Wkly. Rep. 75; *In re* Lloyd, 38 S. J. 50; Budget *v.* Hulford, [1873] W. N. 175; Atty.-Gen. *v.* Wilson, 8 Vict. L. Rep. 14, 215.

27. Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

28. *In re* Macduff, [1896] 2 Ch. 451, 65 L. J. Ch. 700, 74 L. T. Rep. N. S. 706, 45 Wkly. Rep. 154.

29. Dolan *v.* Macdermot, L. R. 3 Ch. 676, 17 Wkly. Rep. 3 [*affirming* L. R. 5 Eq. 60]; Wilkinson *v.* Barber, L. R. 14 Eq. 96, 41 L. J. Ch. 721, 26 L. T. Rep. N. S. 937, 20 Wkly. Rep. 763; Vezey *v.* Jamson, 1 Sim. & St. 69.

30. Atty.-Gen. *v.* Lonsdale, 5 L. J. Ch. 99, 1 Sim. 105, 27 Rev. Rep. 176, 2 Eng. Ch. 105.

31. St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Atty.-Gen. *v.* Trinity Church, 9 Allen (Mass.) 422; Philpott *v.* St. George's Hospital, 27 Beav. 107; Atty.-Gen. *v.* Winchelsea, 3 Bro. Ch. 373; *In re* Lea, 34 Ch. D. 528, 56 L. J. Ch. 671, 56 L. T. Rep. N. S. 482, 35 Wkly. Rep. 572; Thetford School Case, 8 Coke 130; Atty.-Gen. *v.* Painter-Stainers Co., 2 Cox C. C. 51; Atty.-Gen. *v.* Coopers' Co., 19 Ves. Jr. 187, 12 Rev. Rep. 162; Atty.-Gen. *v.* Haberdasher's Co., 1 Ves. Jr. 295.

32. Atty.-Gen. *v.* Wansay, 15 Ves. Jr. 231; Atty.-Gen. *v.* Minshull, 4 Ves. Jr. 11; and cases cited *supra*, note 31. See Theological Education Soc. *v.* Atty-Gen., 135 Mass. 285; Atty.-Gen. *v.* Reformed Protestant Dutch Church, 33 Barh. (N. Y.) 303.

33. Atty.-Gen. *v.* Dixie, 2 Myl. & K. 342, 7 Eng. Ch. 342.

tion does not apply when a sum of money is named in a will.[34] If on the other hand there is a deficiency of assets and nothing to show what the testator intended to do in that event, all general pecuniary legacies abate equally, and no legal distinction is made in this regard between legacies to individuals and legacies to public charities.[35]

G. Equitable Conversion. The doctrine of equitable conversion of realty into personalty[36] is important as applied to charities in those states, like Wisconsin, where the statute of uses and trusts, and the prohibition of perpetuities apply to gifts of real property for charitable uses, but not to gifts of personal property. By that doctrine a provision in a will for the investment of the testator's real property in a fund for the maintenance of a charity is a direction to convert such property into money, and such direction is effective from the time when the will takes effect, that is, from the testator's death.[37] And the blending of real estate and personal property in one fund for all the purposes of the will is evidence, though not conclusive, of an intent to have the whole estate treated as personal property, even when there is no real necessity therefor.[38] If such conversion is directed for a particular but void purpose, the doctrine of equitable conversion does not apply;[39] and if one of several bequests is void, there is a resulting trust *pro tanto* for the heirs at law.[40] A simple power in executors to sell lands for the payment of debts chargeable therewith does not work a conversion, as the duty to sell must be imperative.[41]

VI. ADMINISTRATION AND MANAGEMENT.

A. Methods of Administration. The administration of charities by the English chancellor involved two distinct powers, one under the sign manual of the crown, and the other under the general equity jurisdiction over trusts.[42] The former, which was not a judicial power of expounding and carrying out a donor's intention, but was a prerogative power of disposal by the crown in opposition to such intention, and of ordaining what he had not expressed, appears to have been exercised in only two classes of cases, namely: 1st, bequests to particular uses charitable in their nature, but illegal, as for a superstitious use, such as for a form of religion not tolerated by law; 2d, gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it.[43] The chancery power of administration of charitable trusts is distinct and different from the jurisdiction exercised under either the prerogative, or the judicial,

34. McLennan *v.* Wishart, 14 Grant Ch. (U. C.) 512.

35. Porter *v.* Howe, 173 Mass. 521, 54 N. E. 255.

36. See, generally, CONVERSION.

37. *Illinois.*— Germain *v.* Baltes, 113 Ill. 29.

Massachusetts.— Perkins *v.* Coughlan, 148 Mass. 30, 18 N. E. 600.

New York.— King *v.* Woodhull, 3 Edw. (N. Y.) 79; Wright *v.* New York M. E. Church, Hoffm. (N. Y.) 202.

Pennsylvania.— Williamson's Estate, 153 Pa. St. 508, 26 Atl. 246; Miller *v.* Com., 111 Pa. St. 321, 2 Atl. 492; Hunt's Appeals, 105 Pa. St. 128; Roland *v.* Miller, 100 Pa. St. 47; Dundas' Appeal, 64 Pa. St. 325.

Wisconsin.— Hood *v.* Dorer, 107 Wis. 149, 82 N. W. 546; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; Milwaukee Protestant Home *v.* Becher, 87 Wis. 409, 58 N. W. 774; Dodge *v.* Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

United States.— Handley *v.* Palmer, 103 Fed. 39, 43 C. C. A. 100.

38. Allen *v.* Stevens, 161 N. Y. 122, 659, 55 N. E. 568 [*affirming* 22 Misc. (N. Y.) 158, 49 N. Y. Suppl. 431]; Given *v.* Hilton, 95 U. S. 591, 24 L. ed. 458.

39. Read *v.* Williams, 125 N. Y. 560, 26 N. E. 730, 35 N. Y. St. 909, 21 Am. St. Rep. 748; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307. See Fifield *v.* Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745.

40. Jones *v.* Kelly, 63 N. Y. App. Div. 614, 72 N. Y. Suppl. 24.

41. Matter of Fox, 52 N. Y. 530, 11 Am. Rep. 751.

42. Jackson *v.* Phillips, 14 Allen (Mass.) 539, 574.

43. Jackson *v.* Phillips, 14 Allen (Mass.) 539, 574.

power of *cy-pres*. The judicial power of administering a charity is not necessarily restrained because the instrument creating it restrains the powers of the trustees therein named; and when the controlling purpose appears to be the preservation of the charity, the directions for management are subject to the presumption that the founder knew that the judicial power existed, and implicitly agreed that it might be exercised when necessary.[44] So far as the chancellor's power and the *cy-pres* doctrine of the civil law were ultra-judicial, they are not recognized by the courts of equity in America, where the power, when a donor's particular intention fails, to execute his general intention as nearly as possible, is solely dependent upon the equity jurisdiction.[45] Most of the cases, English and American, which reject or condemn the doctrine of *cy-pres*, relate chiefly to that part of it exercised by the sign manual.[46] The general American rule now is that instruments creating charitable trusts are to be "so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed."[47] This doctrine applies only to gifts to charitable uses, and not to trusts in general.[48]

44. Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414.

45. *Connecticut.*— Hayden *v.* Connecticut Hospital, 64 Conn. 320, 30 Atl. 50.

Illinois.— Heuser *v.* Harris, 42 Ill. 425.

Indiana.— Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

Kentucky.— Curling *v.* Curling, 8 Dana (Ky.) 38, 33 Am. Dec. 475.

Massachusetts.— Jackson *v.* Phillips, 14 Allen (Mass.) 539.

Rhode Island.— Mason *v.* Perry, 22 R. I. 475, 48 Atl. 671.

Tennessee.— Johnson *v.* Johnson, 92 Tenn. 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179; Smith *v.* Thomas, 4 Heisk. (Tenn.) 116; Dickson *v.* Montgomery, 1 Swan (Tenn.) 348.

England.— Atty.-Gen. *v.* Boultbee, 2 Ves. Jr. 380, 2 Rev. Rep. 265.

See 9 Cent. Dig. tit. "Charities," § 78 *et seq.*

46. See cases cited *supra*, note 45. See also the following cases:

Connecticut.— Birchard *v.* Scott, 39 Conn. 63; White *v.* Fisk, 22 Conn. 31.

Delaware.— Doughten *v.* Vandever, 5 Del. Ch. 51.

Illinois.— Grand Prairie Seminary *v.* Morgan, 171 Ill. 444, 49 N. E. 516.

Indiana.— Erskine *v.* Whitehead, 84 Ind. 357.

Iowa.— Lepage *v.* McNamara, 5 Iowa 124.

Kentucky.— Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417.

Nebraska.— St. James Orphan Asylum *v.* Shelby, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553.

Pennsylvania.— Pittsburgh Methodist Church *v.* Remington, 1 Watts (Pa.) 219, 26 Am. Dec. 61.

Rhode Island.— St. Peter's Church *v.* Brown, 21 R. I. 367, 43 Atl. 642.

Wisconsin.— Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

United States.— Fontain *v.* Ravenel, 17 How. (U. S.) 369, 15 L. ed. 80.

England.— Moggridge *v.* Thackwell, 3 Bro. Ch. 517, 1 Ves. Jr. 469, 2 Rev. Rep. 140; Cary *v.* Abbot, 7 Ves. Jr. 490, 6 Rev. Rep. 161; 2 Seton Judgm. (5th ed.) 1090.

See 9 Cent. Dig. tit. "Charities," § 91 *et seq.*

47. Mr. Justice Gray in Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397. In Moore *v.* Moore, 4 Dana (Ky.) 354, 366, 29 Am. Dec. 417, Robertson, C. J., said: "We are satisfied, that the *cy-pres* doctrine of England is not, or should not be, a judicial doctrine, except in one kind of case; and that is, where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed. In such a case, a Court of Equity may substitute or sanction any other mode that may be lawful and suitable, and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his motives or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intention of the donor. But it does not act judicially when it applies his bounty to a specific object of charity, selected by itself merely because he had dedicated it to charity generally, or to a specified purpose which cannot be effectuated; for the Court cannot know or decide, that he would have been willing that it should be applied to the object to which the Judge, in the plenitude of his unregulated discretion and peculiar benevolence, has seen fit to decree its appropriation — whereby he, and not the donor, in effect and at last, creates the charity."

48. Taylor *v.* Keep, 2 Ill. App. 368; Stratton *v.* Physio-Medical College, 149 Mass. 505, 21 N. E. 874, 14 Am. St. Rep. 442, 5 L. R. A. 33; Cunnack *v.* Edwards, [1896] 2 Ch. 679, 65 L. J. Ch. 801, 75 L. T. Rep. N. S. 122, 45 Wkly. Rep. 99.

The cy-pres doctrine is recognized by statute in California and Pennsylvania. See Matter of Royer, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364; *In re* Tenth Presb. Church, 8

B. Variations From Original Plan. Under the general jurisdiction of a court of chancery to administer the estate of a charity, it has the power to vary the precise terms of a charitable trust, when necessary, and to alien charity property.[49] When the trustees are invested with express power to alienate there is no

Pa. Dist. 323. Also very recently in New York. See N. Y. Laws (1901), c. 291.

The following authorities recognize and uphold the doctrine of *cy-pres:*

California.— People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270; Hinckley's Estate, 58 Cal. 457.

Connecticut.— Woodruff *v.* Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346. *Contra,* White *v.* Fisk, 22 Conn. 31.

Illinois.— Mills *v.* Newberry, 112 Ill. 123, 54 Am. Rep. 213; Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 454; Heuser *v.* Harris, 42 Ill. 425; Gilman *v.* Hamilton, 16 Ill. 225.

Kentucky.— Curling *v.* Curling, 8 Dana (Ky.) 38, 33 Am. Dec. 475; Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Gass *v.* Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446; Roach *v.* Hopkinsville, 13 Ky. L. Rep. 543.

Maine.— Doyle *v.* Whalen, 87 Me. 414, 32 Atl. 1022, 31 L. R. A. 118; Drew *v.* Wakefield, 54 Me. 291.

Massachusetts.— Amory *v.* Atty.-Gen., 179 Mass. 89, 60 N. E. 391; Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713; Atty.-Gen. *v.* Briggs, 164 Mass. 561, 42 N. E. 118; Jackson *v.* Phillips, 14 Allen (Mass.) 539; American Academy of Arts, etc. *v.* Harvard College, 12 Gray (Mass.) 582.

Missouri.— Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414; Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; Missouri Historical Soc. *v.* Academy of Science, 94 Mo. 459, 8 S. W. 346; Schmidt *v.* Hess, 60 Mo. 591.

New Hampshire.— Edgerly *v.* Barker, 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 328; Adams Female Academy *v.* Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785; Hopkinton Second Cong. Soc. *v.* Hopkinton First Cong. Soc., 14 N. H. 315.

Pennsylvania.— Philadelphia *v.* Girard, 45 Pa. St. 9, 84 Am. Dec. 470; Flaherty's Estate, 2 Pars. Eq. Cas. (Pa.) 186; Pepper's Will, 1 Pars. Eq. Cas. (Pa.) 436; *In re* Lower Dublin Academy, 8 Wkly. Notes Cas. (Pa.) 564; Heddleson's Estate, 8 Phila. (Pa.) 602.

Rhode Island.—St. Peter's Church *v.* Brown, 21 R. I. 367, 43 Atl. 642; Kelly *v.* Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413; Rhode Island Hospital Trust Co. *v.* Olney, 14 R. I. 449; Pell *v.* Mercer, 14 R. I. 412.

Utah.— U. S. *v.* Church of Jesus Christ, 8 Utah 310, 31 Pac. 436.

Vermont.— Burr *v.* Smith, 7 Vt. 241, 29 Am. Dec. 154.

United States.— Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478 [*affirming* 5 Utah 361, 15 Pac. 473]; Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397.

See 9 Cent. Dig. tit. "Charities," § 91.

The following authorities reject the doctrine of cy-pres as not in force:

Alabama.— Carter *v.* Balfour, 19 Ala. 814.

Delaware.— State *v.* Bates, 2 Harr. (Del.) 18; Doughten *v.* Vandever, 5 Del. Ch. 51.

Indiana.— Erskine *v.* Whitehead, 84 Ind. 357; Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

Iowa.— Lepage *v.* McNamara, 5 Iowa 124; Miller *v.* Chittenden, 2 Iowa 315.

Maryland.— Dumfries *v.* Abercrombie, 46 Md. 172; Dashiell *v.* Atty.-Gen., 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572.

Michigan.— First Soc. M. E. Church *v.* Clark, 41 Mich. 730, 3 N. W. 207; St. Amour *v.* Rivard, 2 Mich. 294.

Minnesota.— Lane *v.* Eaton, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669.

New York.— Holland *v.* Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; Beekman *v.* Bonsor, 23 N. Y. 298, 80 Am. Dec. 269 [*affirming* 27 Barb. (N. Y.) 260]; Wilson *v.* Lynt, 30 Barb. (N. Y.) 124; Andrew *v.* New York Bible, etc., Soc., 4 Sandf. (N. Y.) 156. See now N. Y. Laws (1893), c. 701; Allen *v.* Stevens, 161 N. Y. 122, 659, 55 N. E. 568.

North Carolina.—Holland *v.* Peck, 37 N. C. 255; McAuley *v.* Wilson, 16 N. C. 276, 18 Am. Dec. 587.

South Carolina.— Pringle *v.* Dorsey, 3 S. C. 502; Atty.-Gen. *v.* Jolly, 2 Strobh. Eq. (S. C.) 379.

Texas.— Paschal *v.* Acklin, 27 Tex. 173.

Wisconsin.— Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724; Fuller's Will, 75 Wis. 431, 44 N. W. 304; Heiss *v.* Murphey, 40 Wis. 276.

See 9 Cent. Dig. tit. "Charities," § 91.

49. *Connecticut.*— See Potter *v.* Munson, 40 Conn. 473.

Kentucky.— Ellerherst *v.* Pythian, 23 Ky. L. Rep. 354, 63 S. W. 37; Hill *v.* McGarvey, 14 Ky. L. Rep. 101, 19 S. W. 586.

Massachusetts.— Smith Charities *v.* Northampton, 10 Allen (Mass.) 498.

Missouri.— Academy of Visitation *v.* Clemens, 50 Mo. 167.

New Hampshire.— Rolfe, etc., Asylum *v.* Lefebre, 69 N. H. 238, 45 Atl. 1087.

Washington.— Tacoma *v.* Tacoma Cemetery, (Wash. 1902) 68 Pac. 723.

England.— Atty.-Gen. *v.* St. John's Hospital, L. R. 1 Ch. 92, 12 Jur. N. S. 127, 35 L. J. Ch. 207, 13 L. T. Rep. N. S. 616, 14 Wkly. Rep. 237; *Re* Colston's Hospital, 27 Beav. 16; Atty.-Gen. *v.* Dedham Free Grammar School, 23 Beav. 350, 3 Jur. N. S. 325, 26 L. J. Ch. 497, 5 Wkly. Rep. 395; *Re* Ashton Charity, 22 Beav. 288; Atty.-Gen. *v.* York, 17 Beav. 495; *Re* Ecclesall Overseers,

room for question.[50] Leases directed by the testator for so long a period as sixty years, with covenants for their perpetual renewal, operate as a substantial alienation of the premises;[51] and long leases will not be set aside when made by trustees who are given an unlimited discretion.[52] The fact that the powers of the donor's trustees are restrained by him does not limit the judicial power to direct an alienation, and thus make specific land inalienable forever.[53] As charities are established for objects of public, general, and lasting benefit, the courts will readily attribute an intention to the donor that they should be as permanent and perpetual as any human institution can be, whether so declared in terms or not.[54] But whenever an alienation of the estate becomes essential to the beneficial administration of the charity, from the lapse of time, or changes as to the condition of the property and the circumstances attending it, as happens especially in this country, because of our rapid growth, the court of chancery may authorize an alienation or sale of the property, and an investment of the proceeds in other funds or in a different manner, care being taken that no diversion of the gift is permitted.[55] This jurisdiction has been exercised notwithstanding a provision

16 Beav. 297, 21 L. J. Ch. 729; Atty.-Gen. *v.* Pilgrim, 12 Beav. 57 [*affirmed* in 2 Hall & T. 186]; Atty.-Gen. *v.* South Sea Co., 4 Beav. 453; Atty.-Gen. *v.* Kerr, 2 Beav. 420, 4 Jur. 406, 9 L. J. Ch. 190, 17 Eng. Ch. 420; *In re* Mason's Orphanage, [1896] 1 Ch. 54, 596, 65 L. J. Ch. 439, 74 L. T. Rep. N. S. 161, 44 Wkly. Rep. 339; Glen *v.* Gregg, 21 Ch. D. 513; *In re* Henry Smith's Charity, 20 Ch. D. 516, 30 Wkly. Rep. 929; Atty.-Gen. *v.* Worcester, 9 Hare 328, 16 Jur. 3, 21 L. J. Ch. 25, 41 Eng. Ch. 328; Atty.-Gen. *v.* Newark-Upon-Trent, 1 Hare 395, 6 Jur. 387, 11 L. J. Ch. 270, 23 Eng. Ch. 395; *In re* Suir Island Female Charity School, 3 J. & La T. 171; *In re* Newton's Charity, 12 Jur. 1011; Atty.-Gen. *v.* Crook, 1 Keen 121, 5 L. J. Ch. 239, 15 Eng. Ch. 121; *Re* Stockport Ragged Industrial, etc., School, 77 L. T. Rep. N. S. 425; Browne's Hospital *v.* Stamford, 60 L. T. Rep. N. S. 288; *Re* Sekforde's Charity, 4 L. T. Rep. N. S. 321; Atty.-Gen. *v.* Cross, 3 Meriv. 524, 17 Rev. Rep. 121; *In re* Parke, 12 Sim. 329, 35 Eng. Ch. 329; Atty.-Gen. *v.* Stamford, 2 Swanst. 591; Atty.-Gen. *v.* Warren, 2 Swanst. 291, Wils. Ch. 387, 19 Rev. Rep. 74; Watson *v.* Hinsworth Hospital, 2 Vern. 596; Atty.-Gen. *v.* Backhouse, 17 Ves. Jr. 283; *Ex p.* Berkhamstead Free School, 2 Ves. & B. 134, 13 Rev. Rep. 43; Atty.-Gen. *v.* Owen, 10 Ves. Jr. 558; *In re* North Shields Old Meeting House, 7 Wkly. Rep. 541; Tudor Charitable Trusts (3d ed.), 250. Sir Samuel Romilly's Act (52 Geo. III, c. 101), and the Charitable Trust Act, [1852] with the amendment and additions thereto, are declaratory as to this jurisdiction. *Re* Ashton Charity, 22 Beav. 288.

50. Drury *v.* Natick, 10 Allen (Mass.) 169; Grandom's Estate, 6 Watts & S. (Pa.) 537; *In re* Mason's Orphanage, [1896] 1 Ch. 54, 596, 65 L. J. Ch. 439, 74 L. T. Rep. N. S. 161, 44 Wkly. Rep. 339; Atty.-Gen. *v.* Hardy, 15 Jur. 441, 20 L. J. Ch. 450, 1 Sim. N. S. 338, 40 Eng. Ch. 338. See 4 Kent Comm. (14th ed.) 311, note *a*.

51. Atty.-Gen. *v.* Newberry Library, 150 Ill. 229, 37 N. E. 236; Richmond *v.* Davis, 103 Ind. 449, 3 N. E. 130; Madison Academy *v.* Board of Education, 16 Ky. L. Rep. 51, 26 S. W. 187; Blackburne *v.* Hungerford, 8 Bligh N. S. 437, 5 Eng. Reprint 1005, 2 Cl. & F. 357, 6 Eng. Reprint 1189; Atty.-Gen. *v.* Pilgrim, 2 Hall & T. 186, 188 [*affirming* 12 Beav. 57]; Atty.-Gen. *v.* Ward, 7 L. J. Ch. 114; Lydiatt *v.* Foach, 2 Vern. 410; Atty.-Gen. *v.* Brook, 18 Ves. Jr. 319.

52. Providence Proprietors' School Fund's Appeal, 2 Walk. (Pa.) 37.

53. *Massachusetts.*— Amory *v.* Atty.-Gen., 179 Mass. 89, 60 N. E. 391.

Missouri.— Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414; Women's Christian Assoc. *v.* Kansas City, 147 Mo. 103, 48 S. W. 960.

Pennsylvania.— John C. Mercer Home *v.* Fisher, 162 Pa. St. 239, 29 Atl. 733; *In re* John C. Mercer Home, 162 Pa. St. 232, 29 Atl. 731.

United States.— Stanley *v.* Colt, 5 Wall. (U. S.) 119, 18 L. ed. 502.

England.— *In re* Clergy Orphan Corp., [1894] 3 Ch. 145, 64 L. J. Ch. 66, 71 L. T. Rep. N. S. 450, 7 Reports 549, 43 Wkly. Rep. 150; Atty.-Gen. *v.* Newark-Upon-Trent, 1 Hare 395, 6 Jur. 387, 11 L. J. Ch. 270, 23 Eng. Ch. 395; St. Mary Magdalen College *v.* Atty.-Gen., 6 H. L. Cas. 189, 3 Jur. N. S. 675, 26 L. J. Ch. 620, 5 Wkly. Rep. 716.

See 9 Cent. Dig. tit. "Charities," §§ 81, 89.

54. *Kentucky.*— Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611.

Massachusetts.— Odell *v.* Odell, 10 Allen (Mass.) 1; Dexter *v.* Gardner, 7 Allen (Mass.) 243; King *v.* Parker, 9 Cush. (Mass.) 71.

Missouri.— Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414.

United States.— Perin *v.* Carey, 24 How. (U. S.) 465, 16 L. ed. 701.

England.—Atty.-Gen. *v.* Brooke, 18 Ves. Jr. 319; Blackburne *v.* Hungerford, 8 Bligh N. S. 437, 5 Eng. Reprint 1005, 2 Cl. & F. 357, 6 Eng. Reprint 1189; Bristol *v.* Whitton, Dwight Charity Cas. 171; St. Mary Magdalen College *v.* Atty.-Gen., 6 H. L. Cas. 189, 3 Jur. N. S. 675, 26 L. J. Ch. 620, 5 Wkly. Rep. 716.

See Gray Perpetuities, § 10; and 9 Cent. Dig. tit. "Charities," § 83 *et seq.*

55. *Illinois.*— Crerar *v.* Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

that "the trustees shall not alienate the land on which the school-room stands," it being held that such a provision will not prevent a court of chancery from permitting, in case of necessity arising from unforeseen circumstances, the sale of the land and the application of the proceeds to the purposes of the trust.[56] It has also been exercised where there was a specific direction that funds given to charity should be invested in certain named stocks, and in the course of time such investments became impracticable;[57] where a devise was made of a given tract, in trust to support a Congregational minister, and the trustees were directed "from time to time to lease the said farm for a term of not more than seven years nor less than three years, extraordinaries excepted," and a decree authorizing an absolute sale was declared to have been within the proper jurisdiction of the court;[58] and where it was directed that the principal of the fund to arise should be loaned only on real-estate security, it was declared that "if that particular form of security should fail or become unavailable, the trustees might be authorized to loan upon other sufficient securities without impairment of the trust."[59] So a decree for the sale of property conveyed to two charities, to be used by them jointly, and an apportionment of one half of the proceeds to each for a separate building, was made where it was shown that, by a change of circumstances, the location of the property had become unsuitable for the purposes intended, and that a structure to be used in common was impracticable.[60]

C. The Cy-Pres Doctrine — 1. Rules Applicable. The equity doctrine of approximation and that of *cy-pres* are both judicial principles of construction and not of administration.[61] The *cy-pres* doctrine, unlike that of approximation, as applied judicially, relates only to charitable gifts, and also to such gifts as are valid.[62] There must be a real necessity for finding another like object, and this is not determined by the advantage to the beneficiaries, but solely by the fact that a strict adherence to the original plan will destroy or impair the donor's general purpose.[63] A charitable gift which is illegal because contrary to the express words of a statute cannot be carried out *cy-pres*; but this rule is held in England not to apply when the gift is void only because it is contrary to the policy of the law.[64] When there is a particular definition of the objects intended, the court may not always be able to find another object so nearly answering a general purpose as to justify it in applying the doctrine of *cy-pres*;[65] and when it is clear that the donor intended only one mode of doing a charitable act, as an essential

Massachusetts.— Weeks *v.* Hobson, 150 Mass. 377, 23 N. E. 215, 42 L. R. A. 642; Odell *v.* Odell, 10 Allen (Mass.) 1; Wells *v.* Heath, 10 Gray (Mass.) 17.

Missouri.— Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414; Women's Christian Assoc. *v.* Kansas City, 147 Mo. 103, 48 S. W. 960; Barkley *v.* Donnelly, 112 Mo. 561, 19 S. W. 305; Schmidt *v.* Hess, 60 Mo. 591; Goode *v.* McPherson, 51 Mo. 126.

New York.—Shotwell *v.* Mott, 2 Sandf. Ch. (N. Y.) 46.

Ohio.— McIntire *v.* Zanesville Canal, etc., Co., 17 Ohio St. 352.

Oregon.— *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

Pennsylvania.— Matter of Philadelphia, 2 Brewst. (Pa.) 462.

Rhode Island.— Brown *v.* Meeting St. Baptist Soc., 9 R. I. 177.

United States.— Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Stanley *v.* Colt, 5 Wall. (U. S.) 119, 18 L. ed. 502.

See 9 Cent. Dig. tit. "Charities," § 83 *et seq.*

Contra, in Delaware. See Thorp *v.* Fleming, 1 Houst. (Del.) 580.

56. Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401.

57. McIntire *v.* Zanesville Canal, etc., Co., 17 Ohio St. 352.

58. Wells *v.* Heath, 10 Gray (Mass.) 17.

59. *In re* John, 30 Oreg. 494, 530, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

60. Missouri Historical Soc. *v.* Academy of Science, 94 Mo. 459, 8 S. W. 346.

61. Hayden *v.* Connecticut Hospital, 64 Conn. 320, 30 Atl. 50; Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478; Hampton *v.* Holman, 5 Ch. D. 183, 46 L. J. Ch. 248, 36 L. T. Rep. N. S. 287, 25 Wkly. Rep. 459.

62. Mason *v.* Perry, 22 R. I. 475, 48 Atl. 671.

63. Atty.-Gen. *v.* Whiteley, 11 Ves. Jr. 241.

64. Atty.-Gen. *v.* Todd, 1 Keen 803, 6 L. J. Ch. 205, 15 Eng. Ch. 803; Sims *v.* Quinlan, 16 Ir. Ch. 191, 17 Ir. Jur. 41.

65. Russell *v.* Kellett, 2 Jur. N. S. 132, 3 Smale & G. 264.

part of the gift, the court cannot apply the money *cy-pres*, if the particular mode of doing the act fails.[66] If the object is to build a church in a certain parish, and the parish will not permit it, it cannot be executed elsewhere;[67] but where a school was founded for the education of children within a certain district, which district was by statute converted into a dock, a scheme was framed for applying the funds of the charity *cy-pres*.[68] So where a college which was a beneficiary suspended, the fund was applied to another college, it being held that if the first college resumed its work, it would again receive its benefits.[69] The objects to be benefited need not be a permanent and enduring class.[70] But a bequest to a charitable institution which has ceased to exist in the testator's lifetime cannot be disposed of *cy-pres*,[71] a rule which does not apply if the institution comes to an end after the testator's death, but before the legacy is paid.[72] In England a gift does not lapse when made to a charitable institution which has once existed, but has ceased to exist;[73] but, in applying the *cy-pres* doctrine equity is always more ready, in the case of a gift to a charitable institution which has never existed, to infer a general charitable intention than to infer the contrary.[74] Property devised to one purpose, such as education, cannot, it seems, be judicially diverted to another purpose, such as religion, to relieving the poor or the sick, or to general charity,[75] although in one case Lord Eldon extended a large bequest for the poor inhabitants of several parishes beyond the purposes expressly pointed out by the will, to the instruction and apprenticing of the children.[76]

2. Trustee's Discretion and Court's Power of Selection. A gift by will of residuary estate to the testator's executor, "to be disposed of by him for such charitable purposes as he shall think proper," is an unconditional gift to charitable purposes, to carry out which a scheme will be framed by the court, if the executor accepts the trust, and then fails to make a selection, or if he applies only a small portion of the fund to charity.[77] And whenever there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails because that selection is not made, the court will carry into effect the general intention in favor of the class, and will itself exercise the power to select the particular object of the charity.[78] But in England it has very recently been held by the House of Lords that a bequest to be applied for "such charitable or public purposes as my trustee thinks proper" is void for uncertainty.[79] There is a broad distinction

66. Atty.-Gen. *v.* Boultbee, 2 Ves. Jr. 380, 2 Rev. Rep. 265; Biscoe *v.* Jackson, 35 Ch. D. 460, 56 L. J. Ch. 540, 56 L. T. Rep. N. S. 753, 35 Wkly. Rep. 554.

67. Sinnett *v.* Herbert, L. R. 12 Eq. 201, 19 Wkly. Rep. 946; Atty.-Gen. *v.* Boultbee, 2 Ves. Jr. 380, 2 Rev. Rep. 265.

68. Atty.-Gen. *v.* Glyn, 12 Sim. 84, 35 Eng. Ch. 84. See Atty.-Gen. *v.* Vint, 14 Jur. 824, 19 L. J. Ch. 150; Daly *v.* Atty.-Gen., 11 Ir. Ch. 41; Incorporated Soc. *v.* Price, 7 Ir. Ch. 260, 1 J. & La T. 498.

69. Barnard *v.* Adams, 58 Fed. 313.

70. Atty.-Gen. *v.* Lawes, 8 Hare 32, 14 Jur. 77, 19 L. J. Ch. 300, 32 Eng. Ch. 32.

71. New *v.* Bonaker, L. R. 4 Eq. 655, 36 L. J. Ch. 846, 17 L. T. Rep. N. S. 28, 15 Wkly. Rep. 1131; Fisk *v.* Atty.-Gen., L. R. 4 Eq. 521, 14 L. T. Rep. N. S. 27, 15 Wkly. Rep. 1200; *In re* Rymer, [1895] 1 Ch. 19, 64 L. J. Ch. 86, 71 L. T. Rep. N. S. 590, 12 Reports 112, 43 Wkly. Rep. 87; Clark *v.* Taylor, 1 Drew. 642; Langford *v.* Gowland, 3 Giff. 617, 9 Jur. N. S. 12, 10 Wkly. Rep. 482; Hayter *v.* Trego, 5 Russ. 113, 29 Rev. Rep. 13, 5 Eng. Ch. 113.

72. *In re* Slevin, [1891] 2 Ch. 236, 60 L. J. Ch. 439, 64 L. T. Rep. N. S. 311, 39 Wkly. Rep. 578. See *Re* Villers-Wilkes, 72 L. T. Rep. N. S. 323.

73. Fisk *v.* Atty.-Gen., L. R. 4 Eq. 521, 17 L. T. Rep. N. S. 27, 15 Wkly. Rep. 1200; *In re* Rymer, [1895] 1 Ch. 19, 64 L. J. Ch. 86, 71 L. T. Rep. N. S. 590, 12 Reports 112, 43 Wkly. Rep. 87; *In re* Ovey, 29 Ch. D. 560, 54 L. J. Ch. 752, 52 L. T. Rep. N. S. 849, 33 Wkly. Rep. 821; Clark *v.* Taylor, 1 Drew. 642; Russell *v.* Kellett, 2 Jur. N. S. 132, 3 Smale & G. 264.

74. *In re* Davis, [1902] W. N. 56.

75. Curling *v.* Curling, 8 Dana (Ky.) 38, 33 Am. Dec. 475.

76. Hereford *v.* Adams, 7 Ves. Jr. 324.

77. Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713; Pocock *v.* Atty.-Gen., 3 Ch. D. 342, 40 L. J. Ch. 495, 25 Wkly. Rep. 277. See St. James Orphan Asylum *v.* Shelby, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553; Atty.-Gen. *v.* Axford, 13 Can. Supreme Ct. 294.

78. Mills *v.* Newberry, 112 Ill. 123, 54 Am. Rep. 213; *In re* Huxtable, [1901] W. N. 230; Burrough *v.* Philcox, 5 Jur. 453, 5 Myl. & C. 73, 46 Eng. Ch. 73.

79. Blair *v.* Duncan, [1902] A. C. 37.

between a gift direct to a charity or charitable institution and a gift to a trustee, to be by him applied to a charity; in the former case, the court gives the fund to the charity as a mere ministerial act; while in the latter case the court's jurisdiction over the trustee enables it to guard against a breach of trust, manifest incapacity, or the application of the funds to purposes foreign to the charity.[80] It is without jurisdiction to sanction, without the consent of the governing board of the trust, a scheme which ousts the board from its right of administering the trust, when it is capable of being effectuated, and no breach of trust is shown.[81] If the donor clearly intended his trustee to apply the fund according to his judgment and discretion for objects not of a permanent nature, the court will order it paid to him without a scheme.[82] After a scheme is once settled by a decree in chancery, the court has power to alter it from time to time, as circumstances may require, since the control of administrative functions is entirely distinct from conditions, either precedent or subsequent, imposed by the founder of the charity.[83] Even in those states which reject the English doctrine of *parens patriæ* and *cy-pres*, as well as in those which apply the fund *cy-pres*, the courts will sustain a charity when the plan and scheme for its management are left to trustees, and will uphold them in the fair exercise of their discretion;[84] but they will not do this, and will hold the trust void when the donor, merely expressing a preference for one kind of charity, as for education, has given the trustees such extensive power and discretion to use the fund for other charitable purposes that there is no designated class of persons who can claim the benefit of the trust;[85] and this is especially the case when the trustees are such irresponsible bodies as a "joint board of finance" to be appointed by the conference of a church, which a court of equity cannot control.[86] Discretionary power in a trustee may be implied as well as express.[87] When the trustee exercises such a

80. *Indiana.*— Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

Kentucky.—Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611.

New York.— Reformed Protestant Dutch Church *v.* Bradford, 8 Cow. (N. Y.) 457.

Tennessee.— Johnson *v.* Johnson, 92 Tenn. 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

Virginia.— Overseers of Poor *v.* Tayloe, Gilmer (Va.) 336.

England.— *In re* Delmar Charitable Trust, [1897] 2 Ch. 163.

See 9 Cent. Dig. tit. "Charities," § 91.

Control of trustee.— In case of a breach of trust, the trustee should be directed to specifically perform the trust, or pay the fund into court, but not to return the fund to the donor. Associate Alumni *v.* General Theological Seminary, 163 N. Y. 417, 57 N. E. 626.

81. Atty.-Gen. *v.* Butler, 123 Mass. 304; Harvard College *v.* Theological Education Soc., 3 Gray (Mass.) 280; Adams Female Academy *v.* Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785; Atty.-Gen. *v.* Moore, 19 N. J. Eq. 503; Atty.-Gen. *v.* Christ's Hospital, [1896] 1 Ch. 879, 60 J. P. 246, 74 L. J. 96; 65 L. J. Ch. 646, 44 Wkly. Rep. 379.

82. *In re* Lea, 34 Ch. D. 528, 56 L. J. Ch. 671, 56 L. T. Rep. N. S. 482, 35 Wkly. Rep. 572; Powerscourt *v.* Powerscourt, Beatty 572, 1 Molloy 616; Horde *v.* Suffolk, 2 Myl. & K. 59, 7 Eng. Ch. 59; Warren *v.* Clancy, [1898] 1 Ir. R. 127.

83. Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414; *In re* Cincinnati Soc's Appeal, 154 Pa. St. 621, 32 Wkly. Notes Cas. (Pa.) 249, 26 Atl. 647, 20 L. R. A. 323; Atty.-Gen. *v.* St. John's Hospital, L. R. 1 Ch. 92, 12 Jur. N. S. 127, 35 L. J. Ch. 207, 13 L. T. Rep. N. S. 616, 14 Wkly. Rep. 237.

84. *Illinois.*— Trafton *v.* Black, 187 Ill. 36, 58 N. E. 292; Hunt *v.* Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491.

Iowa.— Quinn *v.* Shields, 62 Iowa 129, 17 N. W. 437, 49 Am. Rep. 141.

Massachusetts.— Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110; Bullard *v.* Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104.

Missouri.— Howe *v.* Wilson, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226.

New Hampshire.—Haynes *v.* Carr, 70 N. H. 463, 49 Atl. 638.

New Jersey.— Hesketh *v.* Murphy, 35 N. J. Eq. 23.

Ohio.— Sowers *v.* Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418; Miller *v.* Teachout, 24 Ohio St. 525.

Tennessee.— Johnson *v.* Johnson, 92 Tenn. 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179; Smith *v.* Thomas, 4 Heisk. (Tenn.) 116.

Vermont.— Clement *v.* Hyde, 50 Vt. 716, 28 Am. Rep. 522.

See 9 Cent. Dig. tit. "Charities," § 83 *et seq.*

85. Johnson *v.* Johnson, 92 Tenn. 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179.

86. Trinity M. E. Church *v.* Baker, 91 Md. 539, 46 Atl. 1020.

87. New Haven Young Men's Institute *v.* New Haven, 60 Conn. 32, 22 Atl. 447.

discretion and applies the fund to a particular definite charity, under a scheme devised by him under the superintendence of a court of equity, his duties and powers terminate, and the trust is discharged.[88] The right of a donee to receive payment of the fund given for charity is not postponed until after a scheme is prepared for its application.[89]

3. LIMITS TO CY-PRES DOCTRINE. In order that this doctrine may apply, the donor's general charitable purpose for an object mentioned by him must be of such a kind that the court can satisfy itself that some other object can be found, answering in a reasonable degree and most nearly consonant, to such purpose.[90] If, for instance, a grant has long since been made, to tenants by the lord of the manor, of certain woods, in consideration of the repair of a particular portion of long sea-dykes, and the sea afterward recedes from that part of the manor so protected, a scheme may be settled for the management of such a charity *cy-pres*, as by providing for the repair of the whole or of other parts of the sea-dykes surrounding the manor.[91] So property once devoted forever to a charitable purpose for which there is scope at first, such as the release of those taken captive by Barbary pirates,[92] or the education of poor children in a certain district by an incorporated academy, and its successors, which academy is abandoned on the establishment of the public schools;[93] if, in the course of time, the object of such charity ceases, the property will ever after be applied, if possible, to some other like charitable purpose. So if money is directed to be set apart to buy land for establishing a soup kitchen and cottage hospital for a certain parish, in such manner as not to violate the mortmain acts, the benefit of the poor of that parish being evidently intended, if no land in mortmain can be found in or sufficiently near the parish to carry out that intent, a reference may be made to see if other modes may not be found of providing soup and medical attendance for such poor without a building for either of the purposes named.[94] In a case which came before Lord Bacon in 1619, where lands had been given before the Reformation to be sold, and the proceeds applied, one half to the making of a highway from the town in which the lands were, one quarter to the repair of a church in that town, and one quarter to the priest of the church to say prayers for the souls of the donor and others, the lord keeper declared the establishment of the uses for making the highway and repairing the church, and directed that the remaining one quarter, which could not because of the change of religion be applied as directed by the donor, be divided between the poor of the same town and the poor of the town in which the donor resided.[95] If a man and woman, each made a legatee by the same will, afterward marry in the testator's lifetime, both will

88. St. James Orphan Asylum *v.* Shelby, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553; Dye *v.* Beaver Creek Church, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724; Johnson *v.* Johnson, 92 Tenn. 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179; Russell *v.* Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. ed. 397.

89. Atty.-Gen. *v.* Old South Soc., 13 Allen (Mass.) 474.

90. Ford *v.* Thomas, 111 Ga. 493, 36 S. E. 841; Atty.-Gen. *v.* Briggs, 164 Mass. 561, 42 N. E. 118; Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; Winthrop *v.* Atty.-Gen., 128 Mass. 258; Morville *v.* Fowle, 144 Mass. 109, 10 N. E. 766; Jackson *v.* Phillips, 14 Allen (Mass.) 539; Smith Charities *v.* Northampton, 10 Allen (Mass.) 498; Harvard College *v.* Theological Education Soc., 3 Gray (Mass.) 280; Baker *v.* Smith, 13 Metc. (Mass.) 34; Sheldon *v.* Chappell, 47 Hun (N. Y.) 59; Atty.-Gen. *v.* Dedham Free Grammar School, 23 Beav. 350, 3 Jur. N. S. 325, 26 L. J. Ch. 497, 5 Wkly. Rep. 395; Atty.-Gen. *v.* Hartley, 2 Jac. & W. 353, 22 Rev. Rep. 167; Atty.-Gen. *v.* Mansfield, 2 Russ. 501, 26 Rev. Rep. 155, 3 Eng. Ch. 501; Atty.-Gen. *v.* Whiteley, 11 Ves. Jr. 241; Corbyn *v.* French, 4 Ves. Jr. 418, 4 Rev. Rep. 254; Atty.-Gen. *v.* Whitchurch, 3 Ves. Jr. 141; Atty.-Gen. *v.* Boultbee, 2 Ves. Jr. 380, 2 Rev. Rep. 265. See *In re* Geary, 25 L. R. Ir. 171.

91. Wilson *v.* Barnes, 38 Ch. D. 507.

92. 2 Encycl. Laws England 470.

93. Green *v.* Blackwell, (N. J. 1896) 35 Atl. 375.

94. Biscoe *v.* Jackson, 35 Ch. D. 460, 56 L. J. Ch. 540, 56 L. T. Rep. N. S. 753, 35 Wkly. Rep. 554.

95. Bloomfield *v.* Stowe Market, Duke 644. See also the discussion in Church of Jesus Christ *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478.

take; and if two societies, to which legacies are given, amalgamate before the testator's death, the combined society is entitled to both legacies.[96] A bequest to a charitable corporation does not lapse because the corporation has discontinued part of its charity work,[97] or has closed one of its branches.[98]

4. EARLY ENGLISH DECISIONS NOT NOW RELIABLE. The early English decisions upon this doctrine, especially as applied under the sign manual, are not now reliable, as later the court of chancery repeatedly declared that the doctrine had been pushed to an extravagant length, and must be restrained.[99] According to such earlier decisions a charity devoted generally "to the poor" was not too vague;[1] but the court might limit such gifts, *ut res magis valeat*, as, under a gift to "poor inhabitants" of a parish, to the poor not receiving alms or parochial relief,[2] and this may still be the law, though the court doubtless has power to select proper objects of the charity without regard to whether they would operate to the relief of the poor rates or not.[3] So a general gift of money to a certain parish was decreed to the poor of that parish;[4] and when no use was mentioned in the instrument of gift it was held that it may be decreed to the use of the poor.[5] Where also a legacy was given "to the poor," and it appeared that the testator was a French refugee, it was directed to be given to poor refugees.[6] As late as 1767, Lord Chief Justice Wilmot said that the court thought that "one kind of charity would embalm the testator's memory as well as another."[7] A bequest by a Jew for establishing a jesuba or assembly for reading the Jewish law, being contrary to the established religion, was applied, under the sign manual, for the support of a Christian preacher and chapel at a foundling hospital — a result which could not be more than a pretense of carrying out the testator's intention.[8] In Massachusetts, and probably in most of the states, a gift for the poor of a particular church is now a valid charity;[9] while in New York it is held that a perpetual trust in a town for the benefit of its poor, when not limited to those for whose support the town is made liable by statute,[10] or to the poor of a certain church, is void for indefiniteness;[11] and in Connecticut a bequest for "the most deserving poor of" a certain town is held too uncertain.[12]

D. Supervision and Visitation. A scheme of charity is to be distinguished from a scheme or plan for administering it; in the former, while the courts may be expressly or impliedly empowered by the donor to direct the particular manner of carrying out the scheme, they cannot impinge upon, change, or modify the nature of the charity as established by the donor, or modify the manner of administration which he has particularized.[13] Their supervisory power often enables them to control the trustees or visitors in the direction and management of the trust, and this may be done under the power of visitation, but they have no authority to interfere with the just exercise of the trustees' powers and

96. *Re* Joy, 60 L. T. Rep. N. S. 175, 5 Times L. R. 117.

97. Soldiers' Orphans' Home *v.* Wolff, 10 Mo. App. 596.

98. *In re* Bradfield, 36 S. J. 646.

99. Brudenell *v.* Elwes, 1 East 442, 9 Ves. Jr. 390; Atty.-Gen. *v.* Minshull, 4 Ves. Jr. 11.

1. Atty.-Gen. *v.* Peacock, Finch 245.

2. Atty.-Gen. *v.* Clarke, Ambl. 422; Atty.-Gen. *v.* Price, 3 Atk. 108; Atty.-Gen. *v.* Brandreth, 6 Jur. 31, 1 Y. & C. Ch. 200.

3. Atty.-Gen. *v.* Bosvil, 4 Jur. 548; Atty.-Gen. *v.* Bovill, 1 Phil. 762, 19 Eng. Ch. 762.

4. Smith *v.* Palmer, 1 Cas. Ch. 133.

5. Fisher *v.* Hill, Tothill 33, 21 Eng. Reprint 115.

6. Atty.-Gen. *v.* Rance [*cited* in Atty.-Gen. *v.* Clarke, Ambl. 422].

7. Atty.-Gen. *v.* Downing, Wilmot 1; 1 Jarman Wills, 243 note.

8. Da Costa *v.* De Pas, Ambl. 228, 2 Swanst. 489 note, 1 Dick, 258. See Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713, 8 Harv. L. Rev. 69; Jackson *v.* Phillips, 14 Allen (Mass.) 539.

9. Atty.-Gen. *v.* Old South Soc., 13 Allen (Mass.) 474.

10. Fosdick *v.* Hempstead, 125 N. Y. 581, 26 N. E. 801, 35 N. Y. St. 863, 11 L. R. A. 715.

11. Pratt *v.* Albany Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Suppl. 1035 [*affirmed* in 166 N. Y. 593, 59 N. E. 1120]. Now, by N. Y. Laws (1893), c. 701, charitable gifts are not void because of indefiniteness in the beneficiaries.

12. Hughes *v.* Daly, 49 Conn. 34.

13. Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414; *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; Webster

duties.[14] Only corporations, ecclesiastical or eleemosynary, and not civil or public corporations, are said to be visitable.[15] At common law the founder of the charity and his successors or heirs were the visitors, and if they became extinct or could not act, or became attainted, the visitorial power devolved upon the crown.[16] When there is a local visitor, the court of chancery has no jurisdiction over any subject within his cognizance.[17] The founder may delegate his power of visitation either generally or specially; he may appoint a particular mode in which a portion of the visitorial power shall be exercised, as by appointing a special visitor for a particular purpose and no further, in which case the power of a general visitor will be circumscribed to that extent.[18] The question whether a testator, in founding a charity, and appointing trustees has made them visitors depends on the nature of the powers delegated to them, rather than on the name by which they are called in the instrument of foundation; and no technical or precise form of words is necessary for the appointment of either general or special visitors.[19] A college or hospital, chartered by the state, but founded and endowed by private benefaction, is a charity, but also a private corporation;[20] and in all such cases, as the duties of visitor are strictly domestic, his power is confined to offenses against the private laws and regulations of the corporation, and he has no cognizance of acts of disobedience to the general laws of the land.[21] In New York it was early held that the court of chancery had no power of visitation.[22] Now, under the state constitution of 1894,[23] and the acts of 1895[24] and of 1896,[25] imposing upon the state board of charities the duty of visiting and inspecting all institutions of a "charitable, eleemosynary, correctional or reformatory character," such institutions are those in which indigent persons are supported by taxation, and do not include such eleemosynary institutions as the Society for the Prevention of Cruelty to Children, though its work is aided by an allow-

v. Morris, 66 Wis. 396, 28 N. W. 353, 57 Am. Rep. 278; *In re* Taylor Orphan Asylum, 36 Wis. 534.

14. Murdock, Appellant, 7 Pick. (Mass.) 303; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229; Atty.-Gen. *v.* Lock, 3 Atk. 164; Daugers *v.* Rivas, 28 Beav. 233, 6 Jur. N. S. 854, 29 L. J. Ch. 685, 8 Wkly. Rep. 225; Atty.-Gen. *v.* St. Cross Hospital, 17 Beav. 435; Atty.-Gen. *v.* Foundling Hospital, 5 Pro. Ch. 165, 2 Ves. Jr. 42.

15. Tudor Charitable Trusts (3d ed.), 67, 72. See Seton Judgm. (5th ed.) 1092; Ford *v.* Thomas, 111 Ga. 493, 36 S. E. 841.

"Charitable" and "eleemosynary" defined. — The words "charitable" and "eleemosynary" are practically synonymous, the latter designating technically a class of corporations organized for charitable purposes. People *v.* Fitch, 12 N. Y. App. Div. 581, 39 N. Y. Suppl. 926, 42 N. Y. Suppl. 1131 [*reversed* in 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591].

16. Moore *v.* Moore, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Atty.-Gen. *v.* Dedham Free Grammar School, 23 Beav. 350, 3 Jur. N. S. 325, 26 Jur. N. S. 325, 26 L. J. Ch. 497, 5 Wkly. Rep. 395; Atty.-Gen. *v.* Ewelme Hospital, 17 Beav. 366, 381, 22 L. J. Ch. 846, 1 Wkly. Rep. 523; Eden *v.* Foster, Gilb. Eq. 78, 2 P. Wms. 326; Rex *v.* St. Catherine's Hall, 4 T. R. 233, 2 Rev. Rep. 369; Atty.-Gen. *v.* Clarendon, 17 Ves. Jr. 491; Atty.-Gen. *v.* Dixie, 13 Ves. Jr. 519; Atty.-Gen. *v.* Black, 11 Ves. Jr. 191; *Ex p.* Wrangham, 2 Ves. Jr. 609.

17. Atty.-Gen. *v.* Price, 3 Atk. 108; Atty.-Gen. *v.* Harrow School, 2 Ves. 551; 2 Kid Corp. 182–187.

18. Tudor Charitable Trusts (3d ed.), 74.

19. Drury *v.* Natick, 10 Allen (Mass.) 169; Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229; St. John's College, 1 Burr. 158, 1 Keny. K. B. 441.

20. *Alabama.*— State University *v.* Winston, 5 Stew. & P. (Ala.) 17.

California.—Spence *v.* Widney, (Cal. 1896) 46 Pac. 463.

Kentucky.— Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642.

Pennsylvania.— St. Mary's Church Case, 7 Serg. & R. (Pa.) 517.

United States.— Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229; 2 Kent Comm. (14th ed.) 222.

21. Koblitz *v.* Western Reserve University, 21 Ohio Cir. Ct. 144.

The University of California is a public corporation, but it does not partake of the sovereign power so as to exclude it from Cal. Civ. Code, § 1275, permitting corporations formed for educational purposes to take by devise. Matter of Royer, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364.

22. Auburn Academy *v.* Strong, Hopk. (N. Y.) 278.

23. N. Y. Const. (1894), art. 6, § 11.

24. N. Y. Laws (1895), c. 771.

25. N. Y. Laws (1896), c. 546.

ance from city funds which relieves the police department.[26] Nor do they include purely educational institutions; but if they are both charitable and educational, such as the New York Institution for the Blind, they are included.[27]

E. Supervision by Legislature. The legislature cannot, without the consent of the donor, materially change the execution of a charitable trust, unless there exists an exigency for such change;[28] but if the purposes of the charity may be best carried out and promoted by a change in the administration of the trust, without a diversion thereof, the legislature, as *parens patriæ*, may direct such a change.[29] The legality of a charity as a perpetual trust may be established by special act of the legislature, as well as by the courts acting under the general rules of law.[30]

26. People *v.* New York Soc., etc., 161 N. Y. 233, 55 N. E. 1063, 162 N. Y. 429, 56 N. E. 1004 [*affirming* 42 N. Y. App. Div. 83, 58 N. Y. Suppl. 953]; New York Juvenile Guardian Soc. *v.* Roosevelt, 7 Daly (N. Y.) 188.

27. People *v.* Fitch, 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591 [*reversing* 12 N. Y. App. Div. 581, 39 N. Y. Suppl. 926, 42 N. Y. Suppl. 1131]. See People *v.* Brooklyn, 152 N. Y. 399, 46 N. E. 852.

28. Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765 [see *infra*, VII, A]; Greenville *v.* Mason, 53 N. H. 515; Plymouth *v.* Jackson, 15 Pa. St. 44; Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431. In Cary Library *v.* Bliss, 151 Mass. 364, 378, 25 N. E. 92, 7 L. R. A. 765, the court [*citing* Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642; New Gloucester School Fund *v.* Bradbury, 11 Me. 118, 26 Am. Dec. 515; State University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Norris *v.* Abingdon Academy, 7 Gill & J. (Md.) 7; Brown *v.* Hummel, 6 Pa. St. 86, 47 Am. Dec. 431; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Allen *v.* McKean, 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229] said: "The law laid down in these cases, that a charter establishing an eleemosynary corporation is a contract which cannot be changed by the Legislature without the consent of the parties to it, is a mere extension of the doctrine which gives a similar effect to the written statement of a scheme that is made the foundation of donations to unincorporated trustees of a public charity."

In New York the constitution of 1894 makes the state board of charities a constitutional body, so that it is not to be regarded as an inferior board to which the legislature has delegated part of its own powers. Matter of New York Juvenile Asylum, 36 Misc. (N. Y.) 633, 74 N. Y. Suppl. 364.

29. Sohier *v.* Trinity Church, 109 Mass. 1; Van Horne's Petition, 18 R. I. 389, 28 Atl. 341; Wambersie *v.* Orange Humane Soc., 84 Va. 446, 5 S. E. 25; Stanley *v.* Colt, 5 Wall. (U. S.) 119, 18 L. ed. 502. *Contra*, Tharp *v.* Fleming, 1 Houst. (Del.) 580; Dumfries *v.* Abercrombie, 46 Md. 172. In Stanley *v.* Colt, 5 Wall. (U. S.) 119, 18 L. ed. 502, there was an action of ejectment by the heirs of William Stanley to recover for breach of condition a tract of land, situated in the city of Hartford, Connecticut, devised by the ancestor to an ecclesiastical society and their successors, and sold to the defendant by the trustees of such society, in pursuance of an act of the legislature of Connecticut. That act authorized the trustees, together with a third person, to sell the lands in the manner therein prescribed, and to invest the proceeds at interest, in bonds and mortgages of real estate of double the value of the amount invested, appropriating the interest to the use of the society, in the same manner, and subject to the same use, as the rents or income of said property were by will required to be appropriated. In his will the testator devised all his real estate to the ecclesiastical society, "provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let," etc. The plaintiffs contended that this imported a condition, a breach of which forfeited the devise, and that the act in question was unconstitutional and void. In the circuit court for the district of Connecticut there was a judgment for the defendant, and the case was brought up on error. Judgment affirmed. After denying the plaintiffs' contention that there was a condition, the court said: "There is another ground of defense to this action that we are of opinion is equally conclusive against the plaintiffs. . . . In England, and in this country where a court of chancery exists, a charity of the description in question is a peculiar subject of the jurisdiction of that court, and in cases of abuse or misuse of the charity by the trustees or agents in charge of it, this court will interpose to correct such abuses, and enforce the execution of the charitable purposes of the founder. So, as lapse of time, or changes as to the condition of the property and of the circumstances attending it, have made it prudent and beneficial to the charity to aliene the lands, and vest the proceeds in other funds or in a different manner, it is competent for this court to direct such sale and investment, taking care that no diversion of the gift be permitted. . . . This power, in the State of Connecticut, it appears, is exercised by its Legislature, as in the present instance. . . . We cannot doubt that the power exists in the Legislature, and it is not for this court to revise the facts upon which it has seen fit to exercise it."

30. Webster *v.* Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; *In re* Christ Church

F. Place of Administration. The courts will not administer a foreign charity.[31] The charity is administered according to the law of the donor's domicile;[32] and the fact that it is to be administered abroad does not make the gift void, especially when it does not appear that it is not a valid charity in the foreign country.[33] A bequest to a charity, or upon a trust to be administered in another state or country, when lawful in the place of the testator's domicile, may be sustained in the state in which the fund is to be administered, though it contravenes the statute of the latter state against perpetuities, since it is not the policy of one state to interdict perpetuities in other states.[34] If the gift is clearly against the public policy of the state called upon to administer it, its courts may decline to administer it and remit the fund to the testator's domicile, but they cannot properly divest the title and transfer it to others.[35] A devise of land must be executed and be valid where the land lies;[36] and a devise of land in one state may be valid, when it would be invalid in the place of the devisee's domicile.[37] The validity of a charitable bequest of the proceeds of the sale of land owned by the testator in another country or state is determined by the law of his domicile;[38] and where a domiciled Australian gave money by his will to an English corporation for the purchase of land in England for charitable purposes, which gift would, if made by an English will, be invalid under the mortmain acts, it was held that those acts do not apply to colonial wills, and that the bequest was valid.[39] The legality of a gift to a foreign corporation usually depends upon the ability to take under the laws of the place where it exists or is domiciled;[40] but a foreign religious society cannot by comity have a better right than domestic corporations to take property by devise.[41]

G. Actions and Procedure — 1. Control by Commissions. In the reign of

Inclosure Act, 38 Ch. D. 520, 57 L. J. Ch. 564, 58 L. T. Rep. N. S. 827.

31. Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Duggan *v.* Slocum, 83 Fed. 244 [*affirmed* in 92 Fed. 806, 63 U. S. App. 149, 34 C. C. A. 676]; Sickles *v.* New Orleans, 80 Fed. 868, 52 U. S. App. 147, 26 C. C. A. 204.

32. Chamberlain *v.* Chamberlain, 43 N. Y. 424; Kennedy *v.* Palmer, 1 Thomps. & C. (N. Y.) 581.

33. *Georgia.*— Silcox *v.* Harper, 32 Ga. 639.

Massachusetts.— Teele *v.* Derry, 168 Mass. 341, 47 N. E. 422, 60 Am. St. Rep. 401, 38 L. R. A. 629; Burbank *v.* Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312.

Michigan.— Matter of Ticknor, 13 Mich. 44.

New Jersey.— Taylor *v.* Bryn Mawr College, 34 N. J. Eq. 101.

New York.— Hope *v.* Brewer, 136 N. Y. 126, 32 N. E. 558, 48 N. Y. St. 34, 18 L. R. A. 458.

Pennsylvania.— Thompson *v.* Swoope, 24 Pa. St. 474.

England.— New *v.* Bonaker, L. R. 4 Eq. 655, 36 L. J. Ch. 846, 17 L. T. Rep. N. S. 28, 15 Wkly. Rep. 1131; Atty.-Gen. *v.* Sturge, 19 Beav. 597, 23 L. J. Ch. 495; Atty.-Gen. *v.* London, 3 Bro. Ch. 171, 1 Ves. Jr. 243; *Re* Geck, 69 L. T. Rep. N. S. 819; *Re* Davis, 61 L. T. Rep. N. S. 430.

See 9 Cent. Dig. tit. "Charities," §§ 2, 25, 31.

34. Vansant *v.* Roberts, 3 Md. 119; Dammert *v.* Osborn, 140 N. Y. 30, 141 N. Y. 564, 35 N. E. 407, 1088, 55 N. Y. St. 586, 60 N. Y. St. 337; Cross *v.* U. S. Trust Co., 131 N. Y. 330, 30 N. E. 125, 43 N. Y. St. 254, 27 Am. St. Rep. 597, 15 L. R. A. 606; Bascom *v.* Albertson, 34 N. Y. 584; Matter of Sturges, 28 Misc. (N. Y.) 110, 59 N. Y. Suppl. 783.

35. Silcox *v.* Harper, 32 Ga. 639; Dammert *v.* Osborn, 140 N. Y. 30, 35 N. E. 407, 55 N. Y. St. 586.

36. Levy *v.* Levy, 33 N. Y. 97; Draper *v.* Harvard College, 57 How. Pr. (N. Y.) 269; Com. *v.* Levy, 23 Gratt. (Va.) 21; *In re* Stewart, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723; University *v.* Tucker, 31 W. Va. 621, 8 S. E. 410.

37. American Bible Soc. *v.* Marshall, 15 Ohio St. 537; Thompson *v.* Swoope, 24 Pa. St. 474.

38. Methodist Episcopal Church *v.* Smith, 56 Md. 362; Bible Soc. *v.* Pendleton, 7 W. Va. 79; Duggan *v.* Slocum, 83 Fed. 244 [*affirmed* in 92 Fed. 806, 63 U. S. App. 149, 34 C. C. A. 676].

39. Canterbury *v.* Wyburn, [1895] A. C. 89, 64 L. J. P. C. 36, 71 L. T. Rep. N. S. 554, 11 Reports 331, 43 Wkly. Rep. 430.

40. Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Boyce *v.* St. Louis, 29 Barb. (N. Y.) 650, 18 How. Pr. (N. Y.) 125; Matter of Wolf, 25 Misc. (N. Y.) 469, 55 N. Y. Suppl. 650; Matter of Bullock, 6 Dem. Surr. (N. Y.) 335, 11 N. Y. St. 700; Methodist Episcopal Church Missionary Soc. *v.* Calvert, 32 Gratt. (Va.) 357; Roy *v.* Rowzie, 25 Gratt. (Va.) 599. But in White *v.* Howard, 38 Conn. 342, the American Tract Society was permitted to take lands in Connecticut, although it could not take in New York where it was incorporated.

41. Levy *v.* Levy, 33 N. Y. 97.

Elizabeth the danger of misappropriation by trustees of property affected by charitable trusts led to the passage of several statutes to redress such abuses through charity commissions;[42] in the time of Charles II informations by the king's attorney-general began to supersede such commissions, and by this method charitable trustees could be called speedily to account.[43] Yet, although our ancestors, in such states as Massachusetts, brought with them the elements of the law of charitable uses, the form of proceeding by commission under the Statute of Elizabeth never prevailed there.[44] In England this practice is now in its turn superseded by the institution of permanent charity commissioners, to whom accounts must be rendered,[45] and having not only jurisdiction of inquiry and control over the corpus of charitable estates, but also judicial and administrative powers in connection with the chancery jurisdiction over this topic, subject to appeal,[46] when authorized by the attorney-general, or by the board, to the chancery division. Such powers include the right to authorize a sale, exchange, mortgage, charge, or lease of a charity estate; to sanction repairs and improvements, usually from the income of the estate; the purchase of land, redemption of rent charges, compromise of claims, the institution of legal proceedings,[47] with or without the assent of the attorney-general; certain powers of framing schemes under the *cy-pres* doctrine; and power to instruct and advise, with indemnity to those who act under their advice and direction.[48]

2. BY THE ATTORNEY-GENERAL.[49] In England the attorney-general must represent all general charities, but his presence is not universally necessary as to specified individual charities.[50] Generally in America a decree affecting a distinctly public charity is without effect unless the attorney-general is a party to the proceedings.[51] Usually, that officer may be brought in by amendment, when necessary.[52] When the public is the beneficiary of a charitable trust, the attorney-

42. See 3 Bl. Comm. 427, 428; 1 Chitty Stat. (5th ed.) tit. Charities, p. 10 *et seq.*; 2 Encycl. Laws England 458, 459.

43. Atty.-Gen. *v.* Newman, 1 Ch. Cas. 157, Rex *v.* Newman, 1 Lev. 284; and authorities cited *supra*, note 42.

44. Jackson *v.* Phillips, 14 Allen (Mass.) 539.

45. *In re* Gilchrist Educational Trust, [1895] 1 Ch. 367, 64 L. J. Ch. 298, 71 L. T. Rep. N. S. 875, 13 Reports 228, 43 Wkly. Rep. 234.

46. The board is not controllable by mandamus. Reg. *v.* Charity Com'rs, [1897] 1 Q. B. 407, 66 L. J. Q. B. 321, 76 L. T. Rep. N. S. 199, 45 Wkly. Rep. 336.

47. See Rendall *v.* Blair, 45 Ch. D. 139, 59 L. J. Ch. 641, 63 L. T. Rep. N. S. 265, 38 Wkly. Rep. 689; Llanbadarnfawr School Bd. *v.* Official Trustees, [1901] 1 K. B. 430, 70 L. J. K. B. 307, 84 L. T. Rep. N. S. 311, 49 Wkly. Rep. 363.

48. 2 Encycl. Laws England, 472–475.

49. See also, generally, ATTORNEY-GENERAL, V, D, 1, b [4 Cyc. 1031].

50. Ware *v.* Cumberlege, 20 Beav. 503, 1 Jur. N. S. 745, 24 L. J. Ch. 630, 3 Wkly. Rep. 437; Strickland *v.* Weldon, 28 Ch. D. 426, 54 L. J. Ch. 452, 52 L. T. Rep. N. S. 247, 33 Wkly. Rep. 545; 2 Seton Judgm. (5th ed.) 1095, 1104. When there is an excess of power claimed by a public body, and it is a matter that concerns the public, it is wholly within the discretion of the attorney-general whether he will intervene, and the courts are limited to the question whether there is the excess of power which he alleges. London County Council *v.* Atty.-Gen., 50 Wkly. Rep. 497.

51. See Story Eq. Pl. (10th ed.), §§ 8, 69, 222; and the following cases:

California.— People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270.

Illinois.— Atty.-Gen. *v.* Newberry Library, 150 Ill. 229, 37 N. E. 236 [*affirming* 51 Ill. App. 166]; Newberry *v.* Blatchford, 106 Ill. 584; Atty.-Gen. *v.* Illinois Agricultural College, 85 Ill. 516.

Kentucky.—Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611.

Massachusetts.— Burbank *v.* Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; Atty.-Gen. *v.* Parker, 126 Mass. 216; Jackson *v.* Phillips, 14 Allen (Mass.) 539.

Michigan.— Atty.-Gen. *v.* Soule, 28 Mich. 153.

New Hampshire.— Haynes *v.* Carr, 70 N. H. 463, 49 Atl. 638; Rolfe, etc., Asylum *v.* Lefebre, 69 N. H. 238, 45 Atl. 1087; Orford Union Cong. Soc. *v.* West Cong. Soc., 55 N. H. 463.

Tennessee.— State *v.* Elliston, 4 Baxt. (Tenn.) 99.

United States.— Philadelphia Baptist Assoc. *v.* Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499.

Canada.— Atty.-Gen. *v.* Axford, 13 Can. Supreme Ct. 294; Long *v.* Wilmotte, 2 Ch. Chamb. (U. C.) 87; Davidson *v.* Boomer, 15 Grant Ch. (U. C.) 1, 218.

52. Rolfe, etc., Asylum *v.* Lefebre, 69 N. H. 238, 45 Atl. 1087.

general is the only necessary party to a suit instituted by the trustees in relation to their powers and duties.[53] But suits to enforce charitable trusts are properly brought in the name of the attorney-general with a relator, when the action is substantially for the latter's benefit.[54] In such case, if no public interest appears, the relator cannot have the information retained as a simple bill in equity;[55] and if the decision is against the information the relator is liable for the costs of the litigation.[56] When the relator has the chief interest in the suit, the attorney-general, after consenting to the use of the name of the state on his behalf, cannot withdraw and terminate the suit to his prejudice.[57]

3. SUITS BY TRUSTEES.[58] Acting trustees may file a bill in equity in their own names for the transfer of a public charity to new trustees, making the attorney-general a defendant;[59] and when so made a party, any beneficiary having an interest in the trust may proceed in equity to compel its performance.[60] That officer is not a necessary party to a bill for the instructions of the court as to the administration of a public charity, when the gift is in the hands of trustees charged specifically by the donor with its management for the *cestui que trust*, and no charges of waste or mismanagement are made against them.[61] When such charges are made the donor's heirs do not, by proving them, gain a right to have a resulting trust or beneficial interest declared in their favor.[62] In England it has even been held that the attorney-general is not a necessary party to a suit by freemen, on behalf of others, to establish that corporate property was held in trust for them individually.[63] In New York where, contrary to the earlier statutes and decisions, charitable gifts and trusts are now valid by statute though the beneficiaries are indefinite, the attorney-general is, under such statutes, to represent the beneficiaries and to protect and enforce the trusts, he is a proper party to a proceeding for the construction of the donor's will, had before the beneficiaries have been selected by the trustees.[64] No private person, such as a taxpayer

53. *California.*— People *v.* Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305.

Missouri.— Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414.

New York.— Indigent Female Assoc. *v.* Beekman, 21 Barb. (N. Y.) 565.

England.— Wallasey Local Board *v.* Gracey, 36 Ch. D. 593, 51 J. P. 740, 56 L. J. Ch. 739, 57 L. T. Rep. N. S. 51, 35 Wkly. Rep. 694; London Assoc. *v.* London, etc., Joint Committee, [1892] 3 Ch. 242, 7 Aspin. 195, 62 L. J. Ch. 294, 2 Reports 23, 67 L. T. Rep. N. S. 238.

Australia.— Atty.-Gen. *v.* McCarthy, 11 Vict. L. Rep. 617.

54. People *v.* Metropolitan Bank, 7 How. Pr. (N. Y.) 144.

55. Atty.-Gen. *v.* Salem, 103 Mass. 138; Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462; Wilson *v.* Shively, 10 Oreg. 267. See Thompson *v.* Thompson, 6 Houst. (Del.) 225.

56. Atty.-Gen. *v.* Clark, 167 Mass. 201, 45 N. E. 183; Burbank *v.* Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; Atty.-Gen. *v.* Butler, 123 Mass. 304; Strickland *v.* Weldon, 28 Ch. D. 426, 54 L. J. Ch. 452, 52 L. T. Rep. N. S. 247, 33 Wkly. Rep. 545.

57. People *v.* Clark, 72 Cal. 289, 13 Pac. 858; People *v.* North San Francisco Homestead, etc., Assoc., 38 Cal. 564. See Hesing *v.* Atty.-Gen., 104 Ill. 292; Atty.-Gen. *v.* Haberdashers' Co., 15 Beav. 397, 2 Myl. & K. 817, 7 Eng. Ch. 817; Atty.-Gen. *v.* Ironmongers' Co., 2 Beav. 313, 10 Cl. & F. 908, 8 Eng. Reprint 983, 2 Myl. & K. 576, 7 Eng. Ch. 576; Atty.-Gen. *v.* Newark-Upon-Trent, 1 Hare 395, 6 Jur. 387, 11 L. J. Ch. 270, 23 Eng. Ch. 395.

58. Resignation of trustee of a charity pending suit may be pleaded in abatement. See ABATEMENT AND REVIVAL, 1 Cyc. 120, note 76.

59. Harvard College *v.* Theological Education Soc., 3 Gray (Mass.) 280; Women's Christian Assoc. *v.* Kansas City, 147 Mo. 103, 48 S. W. 960.

60. Lancaster Baptist Church *v.* Presbyterian Church, 18 B. Mon. (Ky.) 635; Chambers *v.* Baptist Educational Soc., 1 B. Mon. (Ky.) 215; Raynham First Cong. Soc. *v.* Raynham, 23 Pick. (Mass.) 148.

61. Newberry *v.* Blatchford, 106 Ill. 584; Strong *v.* Doty, 32 Wis. 381.

In New York see Rothschild *v.* Goldenberg, 58 N. Y. App. Div. 499, 69 N. Y. Suppl. 523.

62. Sanderson *v.* White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591; King's Chapel *v.* Pelham, 9 Mass. 501; Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414; First Baptist Church *v.* Robberson, 71 Mo. 326; Emory, etc., College *v.* Shoemaker College, 92 Va. 320, 23 S. E. 765.

63. Prestney *v.* Colchester, 21 Ch. D. 111, 51 L. J. Ch. 805. But see Seton Judgm. (5th ed.) 1090, 1140.

64. Owens *v.* Methodist Episcopal Church Missionary Soc., 14 N. Y. 380, 67 Am. Dec. 160; Rothschild *v.* Goldenberg, 58 N. Y. App. Div. 499, 69 N. Y. Suppl. 523; Indigent Female Assoc. *v.* Beekman, 21 Barb. (N. Y.)

in a town which is the beneficiary, or an individual contributor to a charitable fund raised by subscription, can maintain an action to enforce the exercise of a public charity in his favor, when not himself a beneficiary.[65] The lack of chancery jurisdiction does not affect the validity of charitable bequests when sufficient in form.[66] Laches is a defense to a suit to enforce a charitable trust in which the public have no interest.[67] And although a real information will not be defeated by informalities that are not substantially prejudicial to a defendant,[68] yet an information filed on behalf of one charity, which is found to have no title, cannot be carried on for another charity.[69]

VII. MODIFICATION AND TERMINATION.

A. In General. Property once devoted unqualifiedly to a charitable purpose cannot be withdrawn by the donor, nor can the trustee release the trust after acceptance.[70] So a charity cannot be altered, as to its purposes or management, by any agreement between the donor's heirs and the donees or their trustees.[71] Thus, if a gift for a public library is made to a town, on condition that trustees consisting of the selectmen, school committee, and settled ministers of the town shall hold the fund as trustees, expend the income and manage the library, subject to the approval of the town, a statute subsequently incorporating a library corporation to take, with the assent of the town, the property held by the trustees, and hold and apply it in the same manner as if held by them, is unconstitu-

565; People *v.* Powers, 8 Misc. (N. Y.) 628, 29 N. Y. Suppl. 950, 61 N. Y. St. 261; Wright *v.* O'Brien, 1 N. Y. Suppl. 303, 15 N. Y. St. 1011; De Witt *v.* Chandler, 11 Abb. Pr. (N. Y.) 459; Gumble *v.* Pfluger, 62 How. Pr. (N. Y.) 118.

65. *Massachusetts.*— Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966.

Michigan.— Hathaway *v.* New Baltimore, 48 Mich. 251, 12 N. W. 186.

Missouri.— Tryee *v.* Bingham, 100 Mo. 451, 13 S. W. 952; First Baptist Church *v.* Robberson, 71 Mo. 326.

New Hampshire.— Orford Union Cong. Soc. *v.* West Cong. Soc., 55 N. H. 463.

New Jersey.— Holmes *v.* Wesley M. E. Church, 58 N. J. Eq. 327, 42 Atl. 582; Green *v.* Blackwell, (N. J. 1896) 35 Atl. 375; Van Houten *v.* McKelway, 17 N. J. Eq. 126; Ludlam *v.* Higbee, 11 N. J. Eq. 342.

New York.— Magee *v.* Geneseo Academy, 1 N. Y. Suppl. 709, 17 N. Y. St. 221.

Ohio.— Hullman *v.* Honcomp, 5 Ohio St. 237.

Vermont.— Smith *v.* Nelson, 18 Vt. 511.

Virginia.— Clark *v.* Oliver, 91 Va. 421, 22 S. E. 175.

See 9 Cent. Dig. tit. "Charities," § 82.

66. Drury *v.* Natick, 10 Allen (Mass.) 169; Bartlet *v.* King, 12 Mass. 536, 7 Am. Dec. 99; Vidal *v.* Philadelphia, 2 How. (U. S.) 127, 11 L. ed. 205.

67. Church of Christ *v.* Reorganized Church of Jesus Christ, 71 Fed. 250, 36 U. S. App. 379, 17 C. C. A. 397.

68. Atty.-Gen. *v.* Warren, 2 Swanst. 291, Wils. Ch. 387, 19 Rev. Rep. 74; Atty.-Gen. *v.* Breton, 2 Ves. 425.

69. Atty.-Gen. *v.* Oglender, 1 Ves. Jr. 246.

70. *Connecticut.*— Christ Church *v.* Trustees, 67 Conn. 554, 35 Atl. 552; Storr's Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141; Langdon *v.* Plymouth Cong. Soc., 12 Conn. 113.

Illinois.— Gilman *v.* Hamilton, 16 Ill. 225.

Kentucky.— Penick *v.* Thom, 90 Ky. 665, 12 Ky. L. Rep. 613, 14 S. W. 830.

Massachusetts.— St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Sewall *v.* Roberts, 115 Mass. 262; Drury *v.* Natick, 10 Allen (Mass.) 169.

Pennsylvania.— McKissick *v.* Pickle, 16 Pa. St. 140.

United States.— See District of Columbia *v.* Washington Market Co., 108 U. S. 243, 2 S. Ct. 543, 27 L. ed. 714.

England.— Atty.-Gen. *v.* Caius College, 2 Keen 150, 6 L. J. Ch. N. S. 282, 15 Eng. Ch. 150; Atty.-Gen. *v.* Christ's Hospital, 3 Bro. Ch. 165, 9 L. J. Ch. O. S. 186, 1 Russ. & M. 626, 5 Eng. Ch. 626, Tamlyn 292, 12 Eng. Ch. 393.

See 9 Cent. Dig. tit. "Charities," § 57 *et seq.*

71. *Connecticut.*— Crum *v.* Bliss, 47 Conn. 592; Jacobs *v.* Bradley, 36 Conn. 365.

Illinois.— Gilman *v.* Hamilton, 16 Ill. 225.

Massachusetts.— Winthrop *v.* Atty.-Gen., 128 Mass. 258; Boxford Second Religious Soc. *v.* Harriman, 125 Mass. 321. See Atty.-Gen. *v.* Union Soc., 116 Mass. 167.

Minnesota.— Cone *v.* Wold, 85 Minn. 302, 88 N. W. 977.

Missouri.— McRoberts *v.* Moudy, 19 Mo. App. 26.

New Hampshire.—Orford Union Cong. Soc. *v.* West Cong. Soc., 55 N. H. 463.

New Jersey.— Hendrickson *v.* Shotwell, 1 N. J. Eq. 577.

New York.— Miller *v.* Gable, 2 Den. (N. Y.) 492; Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613.

Pennsylvania.— Williams' Appeal, 73 Pa. St. 249.

See 9 Cent. Dig. tit. "Charities," § 57 *et seq.*

tional as impairing the obligation of a contract, and as unnecessarily authorizing both the taking of property already devoted to a public use for another such use, and a change of management without the parties' consent.[72] So when the income of a fund is left to a religious society for the purpose of maintaining a free school, the society cannot divert it to the support of the ministry or any other object;[73] nor can its doctrines be materially changed as to what is preached when the instrument of gift prescribes certain doctrines.[74] A gift for the education of poor children in a certain district is not defeated by the subsequent adoption by the legislature of the common-school system, and the abandonment of the district schools.[75] Where one of the early "school societies" existing in Connecticut for the education of the children of poor families, for which a bequest had been made in trust, was later abolished by the legislature, the trust was held not thereby terminated, but those having the fund in charge were held justified in applying it to the purchase of books and other necessaries for the poor children of the town.[76] If the trust is not a public charity, but is created by deed for the benefit of a congregation for the maintenance of a particular form of faith and worship, it may be terminated by the unanimous vote of the congregation and the trustees to change their faith and form of worship.[77] The court of chancery, even when its aid is invoked by the trustees, interposes, it seems, only for the benefit of the beneficiary.[78] The founder of a charity always has a standing in court to restrain the diversion of the donated property from the purposes for which it was given.[79] Even as to charities, equity will not, in the absence of bad faith, necessarily interfere in trivial matters, such as the application of fifteen dollars to a person not within the class intended to be benefited.[80] And a bequest to a town to establish a public library is not defeated merely by the failure of the town to pay the expenses required by the will.[81] A grant for charitable purposes may be set aside for undue influence, like other conveyances; but this will be done only when the donor has clearly been deceived or deprived of free agency.[82] Such a grant may be set aside for mistake as well as for fraud; but this does not enable such a charitable institution as an orphan asylum, which has received an orphan gratuitously, to revoke the charity on ascertaining that the orphan has a small pension from the government.[83] When the trustee named in a gift by will to a charity declines to accept the trust, and a new trustee is appointed, all the powers of selection originally given pass to him as appurtenant to the trust.[84] In those states, where at the death of the founder of a charity there must be an existing

72. Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765.

73. *Connecticut.*— Bailey *v.* Lewis, 3 Day (Conn.) 450.

New York.— Field *v.* Field, 9 Wend. (N. Y.) 394.

Ohio.— See Cincinnati M. E. Church *v.* Wood, 5 Ohio 283.

Rhode Island.— See Brown *v.* Meeting St. Baptist Soc., 9 R. I. 177.

South Carolina.— See Busby *v.* Mitchell, 23 S. C. 472.

Texas.— See Pierce *v.* Weaver, 65 Tex. 44.

Vermont.— See Howe *v.* Jericho School Dist. No. 3, 43 Vt. 282.

Virginia.— See Clark *v.* Oliver, 91 Va. 421, 22 S. E. 175.

See 9 Cent. Dig. tit. "Charities," § 57 *et seq.*

74. Combe *v.* Brazier, 2 Desaus. (S. C.) 431.

75. Green *v.* Blackwell, (N. J. 1896) 35 Atl. 375. See New Orleans *v.* Baltimore, 13 La. Ann. 162.

76. Birchard *v.* Scott, 39 Conn. 63. See Atty.-Gen. *v.* Briggs, 164 Mass. 561, 42 N. E. 118; Green *v.* Blackwell, (N. J. 1896) 35 Atl. 375; McIntire *v.* Zanesville Canal, etc., Co., 17 Ohio St. 352.

77. Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray (Mass.) 1. See Potter *v.* Thornton, 7 R. I. 252; Smith *v.* Nelson, 18 Vt. 511.

78. Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

79. Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113.

80. Woodbury *v.* Portland Mar. Soc., 90 Me. 17, 37 Atl. 323.

81. Drury *v.* Natick, 10 Allen (Mass.) 169.

82. Johnson *v.* Rogers, 112 Ala. 576, 20 So. 929; Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; Bowdoin College *v.* Merritt, 75 Fed. 480.

83. St. Joseph's Orphan Soc. *v.* Wolpert, 80 Ky. 86.

84. Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69. See Children's Hospital Appeal, 10 Wkly. Notes Cas. (Pa.) 313.

trustee capable of executing the trust,[85] if trustees capable of taking the legal estate are originally appointed so that a valid use is raised, the court of chancery, having acquired jurisdiction, may supply any subsequent defect arising from the death or disability of the trustees or their refusal to act.[86] In such a case, under the New York practice, where an alumni association raised a fund and transferred it to the institution of which they were alumni, for the establishment of a professorship on certain terms and conditions, it was held that, there being no provision for a reverter to the donors, as a judgment directing the transfer of the fund to the association was erroneous as abrogating the trust, it should be modified by directing its specific performance, failing which the fund would be required to be paid into court or to trustees of the court's appointment.[87]

B. Reverter. When the donor of a charity expressly provides for a reverter in his gift, the trustees' legal title endures only so long as does the use it was created to protect.[88] In general, when no power of revocation is reserved, the trustees' abandonment or abuse of the trust does not cause the trust to fail or the property to revert.[89] In common-law states, and under the laws of New York, a valid bequest to charity is not revocable on account of failure by the trustees to comply with any conditions attached thereto, unless a power of revocation is expressly reserved in the will.[90] In Pennsylvania, Illinois, West Virginia, South Carolina, and Kentucky, in grants to a charity for a special purpose, the property reverts to the donor or his next of kin, when that purpose ceases.[91] So upon the dissolution of a charitable corporation, the title to its lands at once reverts to the donor,[92] subject to debts incurred by the corporation.[93] In New York invalid bequests fall into the residuary estate under the general residuary clause of a will, and void bequests to residuary legatees go to the testator's next of kin.[94] In Massachusetts, Missouri, and Louisiana there is held to be no reversionary interest in the donor of an unconditional gift to charity;[95] and in Virginia that there are no resulting trusts with respect to charities.[96] In Pennsylvania it is also held that when an incorporated charitable institution has ceased its operations, and, having sold its property, holds the proceeds subject to the order of the court, the wishes and recommendations of the contributors are not absolutely controlling as to its decree; and if such institution be a temporary home for poor children, it is within the court's discretion to award the fund to a children's aid society rather than to a hospital and dispensary.[97] If the fund provided by the donor is insufficient to

85. *Connecticut.*— See Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58.

Indiana.— McCord *v.* Ochiltree, 8 Blackf. (Ind.) 15.

Massachusetts.— See Bartlet *v.* King, 12 Mass. 536, 7 Am. Dec. 99.

New York.— See Leslie *v.* Marshall, 31 Barb. (N. Y.) 560; King *v.* Woodhull, 3 Edw. (N. Y.) 79.

Vermont.— See Stone *v.* Griffin, 3 Vt. 400.

86. Haines *v.* Allen, 78 Ind. 100, 41 Am. Rep. 555.

87. People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270; Associate Alumni *v.* General Theological Seminary, 163 N. Y. 417, 57 N. E. 626.

88. Henderson *v.* Hunter, 59 Pa. St. 335; Strong *v.* Doty, 32 Wis. 381.

89. People *v.* Cogswell, 113 Cal. 129, 45 Pac. 270; Hadley *v.* Hopkins Academy, 14 Pick. (Mass.) 240.

90. Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; Brown *v.* Meeting St. Baptist Soc., 9 R. I. 177; Sickles *v.* New Orleans, 80 Fed. 868, 52 U. S. App. 147, 26 C. C. A. 204.

91. St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Gumbert's Appeal, 110 Pa. St. 496, 1 Atl. 437; Henderson *v.* Hunter, 59 Pa. St. 335; Kirk *v.* King, 3 Pa. St. 436; Venable *v.* Coffman, 2 W. Va. 310.

92. Mott *v.* Danville Seminary, 129 Ill. 403, 21 N. E. 927, 136 Ill. 289, 28 N. E. 54; Bates *v.* Taylor, 28 S. C. 476, 6 S. E. 327; Pringle *v.* Dorsey, 3 S. C. 502.

93. Com. *v.* Louisville Trust Co., 16 Ky. L. Rep. 131, 26 S. W. 582; Acklin *v.* Paschal, 48 Tex. 147. See Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481.

94. Booth *v.* Baptist Church of Christ, 126 N. Y. 215, 28 N. E. 238, 37 N. Y. St. 79; Riker *v.* Cornwell, 113 N. Y. 115, 20 N. E. 602, 22 N. Y. St. 151; Spencer *v.* De Witt C. Hay Library Assoc., 36 Misc. (N. Y.) 393, 73 N. Y. Suppl. 712.

95. Vance's Succession, 39 La. Ann. 371, 2 So. 54; Hadley *v.* Hopkins Academy, 14 Pick. (Mass.) 240; Goode *v.* McPherson, 51 Mo. 126.

96. Clark *v.* Oliver, 91 Va. 421, 22 S. E. 175.

97. Com. *v.* Pauline Home, 141 Pa. St. 537, 21 Atl. 661.

An express condition appears to be necessary for a reverter in this state. Stuart *v.*

carry out his purpose, and enough is not secured from other sources, his gift has been held to revert to him.[98] But in general in those states which accept the doctrine of *cy-pres*, there is no reverter when the gift can be applied to a similar charity; as, where income was left "to establish a female academy" in a certain town, it was held that the trustees might apply it to a school in a school district where the academy was situated when the fund became insufficient for an independent school.[99]

VIII. CHARITABLE CORPORATIONS.[1]

A. In General. Charitable corporations are such as are constituted for the perpetual distribution of the free alms of the founders of them, to such purposes and in such manner as they have directed, such as hospitals and colleges.[2] The principal features of such corporations are that they have no capital stock, and that their members can derive no profit from them.[3] The fact that charitable corporations receive pay for services rendered does not alter their character.[4]

B. Public Aid. In the absence of express legislative authority a municipality has no power to make appropriations, by the exercise of the taxing power, to sustain or aid charitable institutions which are not public or municipal agencies.[5] But the legislature may authorize local authorities to raise money by local taxation and pay the same over to local charitable corporations, for the purpose

Easton, 74 Fed. 854, 39 U. S. App. 238, 21 C. C. A. 146 [*affirmed* in 170 U. S. 383, 18 S. Ct. 650, 42 L. ed. 1078].

98. Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278. See Barnard *v.* Adams, 58 Fed. 313.

99. Adams Female Academy *v.* Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785.

1. For general matters relating to corporations see CORPORATIONS.

Adoption of children by charitable societies see ADOPTION OF CHILDREN, 1 Cyc. 921.

Right of a charitable organization to subscribe for bank stock see BANKS AND BANKING, 5 Cyc. 436, note 48.

2. Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; Bishop's Fund *v.* Eagle Bank, 7 Conn. 476; American Asylum *v.* Phœnix Bank, 4 Conn. 172; McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Gooch *v.* Aged Indigent Females Relief Assoc., 109 Mass. 558; Nelson *v.* Cushing, 2 Cush. (Mass.) 519; Society for Propagation *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. A cemetery corporation is not a charitable corporation (Donnelly *v.* Boston Catholic Cemetery Assoc., 146 Mass. 163, 15 N. E. 505); nor is a Young Men's Christian Association (Chapin *v.* Holyoke Young Men's Christian Assoc., 165 Mass. 280, 42 N. E. 1130); nor is a beneficial society (*In re* Benezet Joint Stock Assoc., 17 Phila. (Pa.) 215, 42 Leg. Int. (Pa.) 140). And see Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966 (where a voluntary association was held not to be a public charity); New York Bible Soc. *v.* Budlong, 30 Abb. N. Cas. (N. Y.) 139, 25 N. Y. Suppl. 68.

3. Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; American Asylum *v.* Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112; McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, 435, 21 Am. Rep. 529, where the court said: "The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefits to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity; its affairs are conducted for a great public purpose, that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will enure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity."

4. *Maryland.*— General German Aged People's Home *v.* Hammerbacker, 64 Md. 595, 2 Atl. 678, 54 Am. Rep. 782.

Massachusetts.—McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529.

Missouri.— Girls' Industrial Home *v.* Fritchey, 10 Mo. App. 344.

United States.— Powers *v.* Massachusetts Homœopathic Hospital, 109 Fed. 294, 47 C. C. A. 122.

Australia.— Atty.-Gen. *v.* McCarthy, 11 Vict. L. Rep. 617.

See 9 Cent. Dig. tit. "Charities," § 100 *et seq.*

5. St. Mary's Industrial School *v.* Brown, 45 Md. 310, where there was a bill of complaint by taxpayers of Baltimore, praying for an injunction restraining the mayor and city council of Baltimore from paying certain sums of money appropriated for the benefit of certain charitable corporations by a city ordinance. The decree ordering this injunction was affirmed, on the ground that the city had no authority to make the appropriation in question.

of carrying out designated charities through the instrumentality of private corporations.[6]

C. Liability For Torts. A charitable corporation is not liable for injuries resulting from the negligent or tortious acts of a servant in the course of his employment, where such corporation has exercised due care in his selection.[7] While this rule of law is well established, the reasons assigned for it are not uniform. Some courts hold that the funds of a charitable corporation cannot be appropriated to payment for an injury arising from the neglect or wrong-doing

6. People *v.* Brooklyn, 152 N. Y. 399, 46 N. E. 852 [*affirming* 11 N. Y. App. Div. 114, 42 N. Y. Suppl. 657]; White *v.* Inebriates' Home, 141 N. Y. 123, 35 N. E. 1092, 56 N. Y. St. 665; Shepherd's Fold *v.* New York, 96 N. Y. 137. See in general Drury *v.* Natick, 10 Allen (Mass.) 169; Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82; Candia *v.* French, 8 N. H. 133; People *v.* Fitch, 16 Misc. (N. Y.) 464, 39 N. Y. Suppl. 926.

Liability of directors in New York.— The liability of the directors of a charitable corporation for its debts under the statutes of New York, when execution against it is returned unsatisfied, is practically the same as that of stock-holders under the general corporation laws. Marsh *v.* Kaye, 168 N. Y. 196, 61 N. E. 177.

7. *Connecticut.*—Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224.

Kentucky.— Williamson *v.* Louisville Industrial Reform School, 95 Ky. 251, 15 Ky. L. Rep. 629, 24 S. W. 1065, 44 Am. St. Rep. 243, 23 L. R. A. 200.

Maryland.— Perry *v.* House of Refuge, 63 Md. 20, 52 Am. Rep. 495.

Massachusetts.— McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529.

Michigan.—Pepke *v.* Grace Hospital, (Mich. 1902) 90 N. W. 278; Downes *v.* Harper Hospital, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602.

New York.— Collins *v.* New York Post Graduate Medical School, 59 N. Y. App. Div. 63, 69 N. Y. Suppl. 106; Joel *v.* Woman's Hospital, 89 Hun (N. Y.) 73, 35 N. Y. Suppl. 37, 69 N. Y. St. 430; Haas *v.* Most Holy Redeemer Missionary Soc., 6 Misc. (N. Y.) 281, 26 N. Y. Suppl. 868; Van Tassell *v.* Manhattan Eye, etc., Hospital, 15 N. Y. Suppl. 620, 39 N. Y. St. 781.

Pennsylvania.—Philadelphia F. Ins. Patrol *v.* Boyd, 120 Pa. St. 624, 15 Atl. 553, 6 Am. St. Rep. 745, 1 L. R. A. 417.

United States.— Powers *v.* Massachusetts Homœopathic Hospital, 101 Fed. 896 [*affirmed* in 109 Fed. 294, 47 C. C. A. 122].

England.—Heriot's Hospital *v.* Ross, 12 Cl. & F. 507, 8 Eng. Reprint 1508.

See 9 Cent. Dig. tit. "Charities," § 103.

Contra.— Glavin *v.* Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675. See, however, R. I. Gen. Laws (1896), c. 171, § 38, which exempts institutions like the defendant hospital from liability for the negligence of its servants.

Illustrations.— In McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529, a leading case, it was held that a patient could not recover for injuries caused by the negligence or incompetence of a hospital interne or of an attending surgeon. In Powers *v.* Massachusetts Homœopathic Hospital, 101 Fed. 896 [*affirmed* in 109 Fed. 294, 47 C. C. A. 122], where there is a thorough and able discussion of the subject, it was held that a patient in a public hospital, chartered as a charitable corporation, although under private management, cannot recover from such corporation for injuries resulting from the negligence of a nurse employed in the hospital, in whose selection due care was used. In Perry *v.* House of Refuge, 63 Md. 20, 52 Am. Rep. 495, a charitable corporation was held not liable for an assault committed by one of its officers on an inmate of the institution. In somewhat analogous cases it has been held that railroad and other corporations, having in their regular employ physicians and surgeons whose duty to those corporations requires them to care for the sick and injured among the corporations' employees, are not liable to those employees for the malpractice or negligence of such physicians and surgeons, when there has been no negligence in selecting them. South Florida R. Co. *v.* Price, 32 Fla. 46, 13 So. 638; Eighmy *v.* Union Pac. R. Co., 93 Iowa 538, 61 N. W. 1056, 27 L. R. A. 296; Clark *v.* Missouri Pac. R. Co., 48 Kan. 654, 29 Pac. 1138; Chicago, etc., R. Co. *v.* Howard, 45 Nebr. 570, 63 N. W. 872; Laubheim *v.* De Koninglyke Neder, etc., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815; Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338, 10 Wash. 648, 39 Pac. 95; Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 19 U. S. App. 612, 9 C. C. A. 14, 23 L. R. A. 581. In some cases charitable corporations have been held not liable for the negligence of their agents on the ground that they were municipal agencies. Benton *v.* Boston City Hospital, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; Murtaugh *v.* St. Louis, 44 Mo. 479; Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461. See also Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577 (where the defendant corporation was held not liable on the ground that it was an agency of the state, governed and controlled by the state); Sherbourne *v.* Yuba County, 21 Cal. 113, 81 Am. Dec. 151 (where the defendant was held not liable because it was a quasi corporation, exercising a portion of the sovereign power of the state. In the following Massachusetts cases the defendant corporations were held liable for the expressed reason that they were not public charities. Chapin *v.* Holyoke

of its servants;[8] others exempt charitable corporations from liability on the ground of public policy;[9] still others hold that one who accepts the benefits of a charity assumes the risk of negligence.[10]

D. Disposal of Charitable Fund. A fund given for a purely charitable object cannot be perverted to any other use.[11]

Young Men's Christiau Assoc., 165 Mass. 280, 42 N. E. 1130; Newcomb *v.* Boston Protective Dept., 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778; Donnelly *v.* Boston Catholic Cemetery Assoc., 146 Mass. 163, 15 N. E. 505. See also Boyd *v.* Philadelphia Ins. Patrol, 113 Pa. St. 269, 6 Atl. 536.

In New Brunswick in Donaldson *v.* General Public Hospital, 30 N. Brunsw. 279, it was held that a patient who had been injured by the negligence of the servants employed by the commissioners of the general hospital in Saint John, incorporated by the act of assembly, 23 Vict. c. 61, might maintain an action against the corporation therefor; and that the funds raised by the rates as prescribed by the act, or moneys given to the hospital for the purposes of charity, might be applied in satisfaction of a judgment for damages. It was also held in this case that the relation of master and servant existed between the commissioners of the hospital and the physicians and nurses employed by them in the hospital.

8. *Kentucky.*— Williamson *v.* Louisville Industrial Reform School, 95 Ky. 251, 15 Ky. L. Rep. 629, 24 S. W. 1065, 44 Am. St. Rep. 243, 23 L. R. A. 200.

Maryland.— Perry *v.* House of Refuge, 63 Md. 20, 52 Am. Rep. 495.

Massachusetts.— McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, 436, 21 Am. Rep. 529, where the court, in considering the liability of the defendant corporation for injuries caused by the negligence of its servants, said: "It [the defendant corporation] has no funds which can be charged with any judgment which he [the plaintiff] might recover, except those which are held subject to the trust of maintaining the hospital. . . . The funds intrusted to it are not to he diminished by such casualties, if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them. There was no attempt to show that the trustees had in any respect failed in the performance of their duty. If they had made suitable regulations, had selected proper persons to fill the position of surgeons, then, whether those persons neglected to perform their duty, or whether another person, as the house pupil, not selected for the office of surgeon, assumed without authority to act as such, and injury has thus resulted, the plaintiff has no remedy against the corporation."

Michigan.— Downes *v.* Harper Hospital, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602.

England.— Heriot's Hospital *v.* Ross, 12 Cl. & F. 507, 8 Eng. Reprint 1508.

See 9 Cent. Dig. tit. "Charities," § 103.

9. Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 19 U. S. App. 612, 9 C. C. A. 14, 23 L. R. A. 581. In Hearns *v.* Waterbury Hospital, 66 Conn. 98, 126, 33 Atl. 595, 31 L. R. A. 224, where the defendant was held not liable for the negligent conduct of physicians and nurses employed by it, the court said: "It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule; or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant — whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty — is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care."

10. Powers *v.* Massachusetts Homœopathic Hospital, 109 Fed. 294, 303, 47 C. C. A. 122 [*affirming* 101 Fed. 896], where defendant corporation was held not liable for the negligence of a nurse in its employ, the court saying: "That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence, is familiar law. Such is the case of common employment, and such are the cases of athletic sports and the like. . . . Such is the case at bar. One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants."

11. Harrisburg *v.* Hope Fire Co., 2 Pearson (Pa.) 269; State *v.* Adams, 44 Mo. 570; Potts *v.* Philadelphia Assoc., 1 Leg. Gaz. (Pa.) 369; Penfield *v.* Skinner, 11 Vt. 296. In State *v.* Adams, 44 Mo. 570, it was held that the trustees of an incorporated charitable institution have no authority to accept amendments to the charter which change the character and purpose of the institution and divert the property from the uses which the giver designed. In Riker *v.* Leo, 1 N. Y. Suppl. 128, 15 N. Y. St. 932, it was held that a society incorporated for benevolent and charitable purposes, under N. Y. Laws (1848), c. 319, can invest the principal sum of the gifts it may receive and devote the income to the purposes of its organization. And see Atty.-Gen. *v.* Ministers Relief Soc., 10 Rich. Eq. (S. C.) 604, where it was held that a charitable corporation may obtain an amendment of its charter authorizing it to apply its

E. Officers and Agents. The officers of a charitable organization are accountable to the court and subject to removal by the court.[12] They are bound by the ordinary strict rules concerning the authority of a fiduciary.[13]

F. Dissolution — 1. **How Effected.** A charitable organization may be dissolved by the voluntary act of its members,[14] or involuntarily, on breach of trust, by order of court.[15] A statutory mode of dissolution must be followed strictly, if the charitable organization would avoid itself of the statutory provisions.[16]

2. **Disposition of Property on Dissolution.** On dissolution the property of a charitable organization does not revert to the donors, nor may it be divided among the members of the association, but it should be devoted to the purpose most nearly akin to the intent of the donors, under the direction of the court.[17]

CHARIVARI. A mock serenade of discordant noises, made with kettles, tin horns, etc., designed to annoy and insult;[1] a vile or noisy music made with tin horns, bells, kettles, pans, etc., in derision of some person or event; a mock

surplus funds to other purposes than those for which the charity was originally established.

12. State *v.* Fleming, 3 Del. Ch. 153 (information by the attorney-general for the removal of the trustee); Prattsville Reformed Dutch Church *v.* Brandon, 52 Barb. (N. Y.) 228; State *v.* Ausmus, (Tenn. Ch. 1895) 35 S. W. 1021 (action in equity by the state for an accounting); Penfield *v.* Skinner, 11 Vt. 296 (bill in equity for accounting, brought by members of a charitable association against its treasurer). In Prattsville Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228, it was held that where a testator left a legacy to the consistory of a certain church, the question whether or not the officers forming such consistory were rightfully in office could only be presented by a direct proceeding for that purpose in the name of the people. The trustees of an unincorporated religious society, to which a lot has been given for church purposes, cannot be removed by the beneficiaries of the gift without cause. Bouldin *v.* Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69.

13. The trustees of a charitable corporation have no authority to agree to pay to A all the money in excess of a certain amount, which A may induce the legislature to appropriate for the corporation. People *v.* Dispensary, etc., Soc., 7 Lans. (N. Y.) 304. One of three trustees of a private school-house erected by subscription has no general authority to terminate by forcible entry a lease made by all the trustees. Kingsley *v.* School Directors, 2 Pa. St. 28. The trustees of an academy incorporated to promote morality, piety, and religion, and to instruct youth in the learned languages and in the arts and sciences, may procure subscriptions and take promissory notes to constitute a fund for the purpose of founding an institution "for the classical or academical and collegiate education of indigent young men, with the sole view to the Christian ministry" to be incorporated with the academy. Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387.

14. Penfield *v.* Skinner, 11 Vt. 296, where the charitable association voted to transfer its funds to another society, appointed a committee to make the transfer and failed to elect officers or hold a meeting for five years, and the court held that these facts were sufficient evidence of dissolution.

15. People *v.* Dispensary, etc., Soc., 7 Lans. (N. Y.) 304, where the breach of trust which was thought by the court to be sufficient cause for dissolution consisted in an agreement by the directors of the charitable organization to pay A all the money over a certain amount, which he could induce the legislature to grant to the organization.

A court of equity will not dissolve a charitable association while those remain who will execute the public trust, especially where only a minority desires dissolution. Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98, 1 Pa. L. J. Rep. 502, 3 Pa. L. J. 190.

16. Humane F. Co.'s Appeal, 88 Pa. St. 389.

17. *Massachusetts.*— Coe *v.* Washington Mills, 149 Mass. 543, 21 N. E. 966.

Minnesota.— See Cone *v.* Wold, 85 Minn. 302, 88 N. W. 977.

New Hampshire.— Duke *v.* Fuller, 9 N. H. 536, 32 Am. Dec. 392.

New York.— Matter of Orthodox Cong. Church, 6 Abb. N. Cas. (N. Y.) 398.

Pennsylvania.— Jones *v.* Renshaw, 130 Pa. St. 327, 18 Atl. 651; Humane F. Co.'s Appeal, 88 Pa. St. 389; Mayer *v.* Society for Visitation, etc., 2 Brewst. (Pa.) 385; Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98, 1 Pa. L. J. Rep. 502, 3 Pa. L. J. 190, where it was also held that a restoration of the plaintiff to membership cannot be granted under a prayer for dissolution of the association.

See 9 Cent. Dig. tit. "Charities," § 106.

Equity may enjoin the sale by a charitable organization of its assets and an attempted division of property among it members. Mayer *v.* Society, etc., 2 Brewst. (Pa.) 385. See also *supra*, VI, C, where the *cy-pres* doctrine is fully treated.

1. Webster Dict. [*quoted* in Gilmore *v.* Fuller, 198 Ill. 130, 132, 65 N. E. 84; Bankus *v.* State, 4 Ind. 114, 116].

serenade.[2] It was at first directed against widows who married a second time, at an advanced age, but is now extended to other occasions of nocturnal annoyance and insult.[3]

CHART. A marine map.[4] (Chart: As Subject of Copyright, see COPYRIGHT.)

CHARTA. In old English law, a charter or deed.[5]

CHARTA DE FORESTA. A charter or ordinance containing the laws of forest, granted in the ninth year of the reign of Henry III.[6]

CHARTEL. See CARTEL.

CHARTER. A grant made by the sovereign, either to the whole people, or to a portion of them, securing to them the enjoyment of certain rights;[7] an act of a legislative body creating a municipal or other corporation and defining its powers and privileges.[8] (Charter: Of Corporation, see CORPORATIONS. Of Municipal Corpration, see MUNICIPAL CORPORATIONS. See, generally, FRANCHISES.)

CHARTERER. One who by contract acquires the right to use a vessel belonging to another.[9]

CHARTER LAND. Land held by charter, or written evidence; book-land.[10]

CHARTER PARTY. A contract by which a ship, or some principal part thereof, is let to a merchant, for the conveyance of goods on a determined voyage to one or more places;[11] a contract for the entire or some principal part of a ship for the conveyance of goods on a determined voyage, or for employment in other trade;[12] an agreement by indenture whereby the owners, etc., of a ship, and the freighters covenant with each other that such a ship shall take in such a lading, and carry the same to such a place, etc., in consideration of which the freighter is to pay so much.[13] (Charter Party: Admiralty Jurisdiction Over, see ADMIRALTY. Generally, see SHIPPING.)

CHASE. A large extent of woody ground lying open and privileged for wild beasts and wild fowl; a franchise granted by the crown to a subject, empowering the latter to keep for his diversion, within a certain precinct so called, the wild animals of chase.[14] (Chase: Beasts of the, see BEASTS OF THE CHASE. Law of the, see ANIMALS.)

CHASTE. Pure from all unlawful commerce of sexes, applied to persons before marriage, it signifies pure from all sexual commerce, undefiled; applied to married persons true to the marriage bed; free from obscenity.[15] In language, pure, genuine, uncorrupt.[16]

CHASTISEMENT. Correction; punishment.[17] (Chastisement: As Defense to Action or Prosecution For Assault and Battery, see ASSAULT AND BATTERY. Of Apprentice by Master, see APPRENTICES. Of Pupil by Teacher, see ASSAULT AND BATTERY; SCHOOLS AND SCHOOL DISTRICTS. Of Seaman by Master, see ASSAULT AND BATTERY; SEAMEN; SHIPPING.)

CHASTITY. That virtue which prevents the unlawful commerce of the sexes.[18] (Chastity: Libel or Slander by Imputing Want of, see LIBEL AND SLANDER. Of Female — In Action and Prosecution For Indecent Assault, see ASSAULT AND BATTERY; In Action and Prosecution For Rape, see RAPE; In

2. Worcester Dict. [*quoted* in Gilmore *v.* Fuller, 198 Ill. 130, 132, 65 N. E. 84].
3. Webster Dict. [*quoted* in Bankus *v.* State, 4 Ind. 114, 116].
4. Taylor *v.* Gilman, 23 Blatchf. (U. S.) 325, 326, 24 Fed. 632. See also Ehret *v.* Peirce, 18 Blatchf. (U. S.) 302, 304, 10 Fed. 553.
5. Burrill L. Dict.
6. Burrill L. Dict.
7. Bouvier L. Dict. [*quoted* in State *v.* Railroad Taxation Com'rs, 37 N. J. L. 228, 237].
8. Webster Dict. [*quoted* in State *v.* Ehrmantraut, 63 Minn. 104, 107, 65 N. W. 251].
9. Turner *v.* Cross, 83 Tex. 218, 223, 18 S. W. 578, 15 L. R. A. 262, 60 Fed. 179 note.
10. Burrill L. Dict.
11. Ward *v.* Thompson, 22 How. (U. S.) 330, 333, 16 L. ed. 249.
12. Wilson *v.* Morgan, 4 Rob. (N. Y.) 58, 67.
13. Ashley *v.* Cornwell, 2 Munf. (Va.) 268, 270 [*citing* 4 Bacon Abr. 626].
14. Burrill L. Dict.
15. Webster Dict. [*quoted* in State *v.* Carron, 18 Iowa 372, 375, 87 Am. Dec. 401; People *v.* Kenyon, 5 Park. Crim. (N. Y.) 254, 270].
16. Webster Dict. [*quoted* in State *v.* Carron, 18 Iowa 372, 375, 87 Am. Dec. 401].
17. Century Dict.
18. Bouvier L. Dict.

Action and Prosecution For Seduction, see SEDUCTION; In Action For Breach of Marriage Promise, see BREACH OF PROMISE TO MARRY; In Bastardy Proceedings, see BASTARDS; In Prosecution For Abduction, see ABDUCTION. Of Witness as Affecting Credibility, see WITNESSES.)

CHATTEL. See CHATTELS.

CHATTEL INTEREST. An interest in corporeal hereditaments, not amounting to a freehold, as distinguished from a freehold interest; such as an estate for years in land.[19]

19. Burrill L. Dict.

CHATTEL MORTGAGES

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I. DEFINITION.

A chattel mortgage may be defined as a transfer of the title[1] to personal property,[2] as security for the payment of money or performance of some other act and

1. *Florida.*— McGriff *v.* Porter, 5 Fla. 373.
Georgia.— Peterson *v.* Kaigler, 78 Ga. 464, 3 S. E. 655, interpreting Alabama law.
Indiana.— Lee *v.* Fox, 113 Ind. 98, 14 N. E. 889.
Iowa.— Talbot *v.* De Forest, 3 Greene (Iowa) 586.
Kansas.— See Highland Bank *v.* Evans-Snider-Buell Co., 9 Kan. App. 80, 57 Pac. 1046, where the court held that a valid instrument was not created because the contract did not provide that title to the property, or to a specific interest, should pass to the mortgagee.
Maine.— Stewart *v.* Hanson, 35 Me. 506; Flanders *v.* Barstow, 18 Me. 357.
Massachusetts.—Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905; Homes *v.* Crane, 2 Pick. (Mass.) 607.
Minnesota.— Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364; Fletcher *v.* Neudeck, 30 Minn. 125, 14 N. W. 513. But see Moore *v.* Norman, 43 Minn. 428, 45 N. W. 857, 19 Am. St. Rep. 247, 9 L. R. A. 55.
New Hampshire.— Provenchee *v.* Piper, 68 N. H. 31, 36 Atl. 552. See also Ferguson *v.* Clifford, 37 N. H. 86, holding that the same doctrine exists in Maine.
New York.— Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290 [*reversing* 4 Den. (N. Y.) 489]; Woodward *v.* Republic F. Ins. Co., 32 Hun (N. Y.) 365; Parshall *v.* Eggart, 52 Barb. (N. Y.) 367; Olcott *v.* Tioga R. Co., 40 Barb. (N. Y.) 179; Stewart *v.* Slater, 6 Duer (N. Y.) 83; Stoddard *v.* Denison, 7 Abb. Pr. N. S. (N. Y.) 309, 38 How. Pr. (N. Y.) 296.
Ohio.— Shoenberger *v.* Mount, 1 Handy (Ohio) 566, 12 Ohio Dec. (Reprint) 292.
Oregon.— Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676, holding that the absence of words of conveyance from an instrument purporting to be a chattel mortgage prevented it from being more than a mere equitable lien. See also J. I. Case Threshing Mach. Co. *v.* Campbell, 14 Oreg. 460, 13 Pac. 324 [*distinguishing* Knowles *v.* Herbert, 11 Oreg. 240, 4 Pac. 126; Chapman *v.* State, 5 Oreg. 432].
South Carolina.— Levi *v.* Legg, 23 S. C. 282; Reese *v.* Lyon, 20 S. C. 17; Youngblood *v.* Keadle, 1 Strobh. (S. C.) 121; Montgomery *v.* Kerr, 1 Hill (S. C.) 291. *Compare* Moody *v.* Ellerbe, 4 S. C. 21, where a mortgagee of chattels was held to have an assignable interest in them before the time for redemption had expired. But see Bryan *v.* Robert, 1 Strobh. Eq. (S. C.) 334, where it was held that the mortgagee of slaves was not regarded in equity as holding legal title to them, but merely as holding them as security.
Vermont.—Conner *v.* Carpenter, 28 Vt. 237.
Wisconsin.— Cline *v.* Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700.
United States.— Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189; Simonds *v.* Pearce, 31 Fed. 137.
A trust deed of chattels for security, operating as a mortgage, transfers the legal title to the trustee. Elson *v.* Barrier, 56 Miss. 394.
Mortgagee is owner.— The interest of a mortgagee in property covered by a chattel mortgage is that of an owner (Lewis *v.* Palmer, 28 N. Y. 271; Chadwick *v.* Lamb, 29 Barb. (N. Y.) 518; Robinson *v.* Fitch, 26 Ohio St. 659); and where the mortgage runs to several persons they take as tenants in common of the whole property (Tyler *v.* Taylor, 8 Barb. (N. Y.) 585; Farwell *v.* Warren, 76 Wis. 527, 45 N. W. 217). *Compare* Crane *v.* Pearson, 49 Me. 97, where a written agreement acknowledging the receipt of a horse and undertaking to return it at a certain time or pay a debt was held not to be a mortgage because no title was transferred to the alleged mortgagee. See also Whilden *v.* Pearce, 27 S. C. 44, 2 S. E. 709, where property was held not to be legally mortgaged because no words denoting conveyance or transfer appeared in the instrument.
Mortgagee a tenant in common with cotenants of mortgagor.— Where the owner of land contracts with laborers for its cultivation on shares and then mortgages his share of the profits the mortgagee becomes a tenant in common with the laborers. Smith *v.* Rice, 56 Ala. 417.
2. Instruments covering both real and personal property have been held to be valid

subject to the condition that, if the transferrer performs the specified act, title shall revest in him.[3] There is some dissent from this definition in regard to whether title passes to the mortgagee, and many courts, influenced by the prevailing doctrine regarding real-estate mortgages, have held that legal title does not pass to the mortgagee but that he merely gets a lien.[4]

II. MORTGAGE DISTINGUISHED FROM PLEDGE.

A. In General. The distinction between a pledge and a chattel mortgage is that in the case of a pledge title remains in the pledgor, while in the case of a mortgage it passes to the mortgagee subject to be divested.[5]

B. Rules of Construction. Where a transaction giving security is accompanied by a bill of sale, it will ordinarily constitute a mortgage rather than a

chattel mortgages as to the personal property included (Hall *v.* Johnson, 21 Colo. 414, 42 Pac. 660; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311; Bayne *v.* Brewer Pottery Co., 90 Fed. 754); but in England by reason of the Bills of Sale Act including chattels real in inventory of articles given as security invalidates the entire instrument as a bill of sale (Cochrane *v.* Entwistle, 25 Q. B. D. 116, 59 L. J. Q. B. 418, 62 L. T. Rep. N. S. 852, 38 Wkly. Rep. 587), although it may be valid as to the property other than the chattels personal (*In re* Bansha Woollen Mills Co., 21 L. R. Ir. 181).

3. *California.*— Wright *v.* Ross, 36 Cal. 414.

Florida.— McGriff *v.* Porter, 5 Fla. 373.

Maine.— Stewart *v.* Hanson, 35 Me. 506.

Massachusetts.—Weeks *v.* Baker, 152 Mass. 20, 24 N. E. 905.

New York.— Hill *v.* Beebe, 13 N. Y. 556; Parshall *v.* Eggart, 52 Barb. (N. Y.) 367; Brownell *v.* Hawkins, 4 Barb. (N. Y.) 491; Stoddard *v.* Denison, 2 Sweeny (N. Y.) 54; Streeter *v.* Ward, 12 N. Y. St. 333; Porter *v.* Parmly, 43 How. Pr. (N. Y.) 445.

Oregon.— Hembree *v.* Blackburn, 16 Oreg. 153, 19 Pac. 73.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 1.

A definite agreement for defeasance is essential, and unless there is one the transfer will be an absolute sale and not a mortgage. Fairfield Bridge Co. *v.* Nye, 60 Me. 372.

4. *Dakota.*— Keith *v.* Haggart, 4 Dak. 438, 33 N. W. 465.

Georgia.— Nichols *v.* Hampton, 46 Ga. 253; Stokes *v.* Hollis, 43 Ga. 262.

Michigan.— Wineman *v.* Fisher Electrical Mfg. Co., 118 Mich. 636, 77 N. W. 245; Woods *v.* Gaar, 93 Mich. 143, 53 N. W. 14; Kohl *v.* Lynn, 34 Mich. 360; Flanders *v.* Chamberlain, 24 Mich. 305. *Compare* Warner *v.* Beebe, 47 Mich. 435, 2 N. W. 258, where an agreement that as logs were cut they should become the property of the buyer was held to be in the nature of a chattel mortgage as security for advances and therefore not to pass title to uncut logs.

Nebraska.— Drummond Carriage Co. *v.* Mills, 54 Nebr. 417, 74 N. W. 966, 69 Am. St. Rep. 719, 40 L. R. A. 761; Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30; Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231; Randall *v.* Persons, 42 Nebr. 607, 60 N. W. 898; Musser *v.* King, 40 Nebr. 892, 59 N. W. 744, 42 Am. St. Rep. 700 [*overruling* Adams *v.* Nebraska City Nat. Bank, 4 Nebr. 370].

North Dakota.— Sandford *v.* Duluth, etc., Elevator Co., 2 N. D. 6, 48 N. W. 434.

Texas.— Preston *v.* Carter, 80 Tex. 388, 16 S. W. 17.

Utah.— Blythe, etc., Co. *v.* Houtz, 24 Utah 62, 66 Pac. 611, construing Wyoming statute.

Washington.— Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022; Binnian *v.* Baker, 6 Wash. 50, 32 Pac. 1008; Silsby *v.* Aldridge, 1 Wash. 117, 23 Pac. 836; Byrd *v.* Forbes, 3 Wash. Terr. 318, 13 Pac. 715.

5. *Alabama.*— Sims *v.* Canfield, 2 Ala. 555.

California.— Wright *v.* Ross, 36 Cal. 414; Heyland *v.* Badger, 35 Cal. 404.

Kentucky.— Lobban *v.* Garnett, 9 Dana (Ky.) 389.

Maryland.— Dungan *v.* Mutual Ben. L. Ins. Co., 38 Md. 242.

New Hampshire.— Ash *v.* Savage, 5 N. H. 545.

North Carolina.— McCoy *v.* Lassiter, 95 N. C. 88.

Ohio.— Fielding *v.* Middlebaugh, 2 Ohio Dec. (Reprint) 55, 1 West. L. Month. 218.

United States.— Mitchell *v.* Roberts, 5 McCrary (U. S.) 425, 17 Fed. 776.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 20.

A mortgage is a pledge, and something more; for it is an absolute pledge, to become an absolute interest if not redeemed in a certain time. Doak *v.* State Bank, 28 N. C. 309.

Mere delivery or deposit of goods as security is not a mortgage of them but a pledge (Hamilton *v.* Wagner, 2 A. K. Marsh. (Ky.) 331; Day *v.* Swift, 48 Me. 368; Eastman *v.* Avery, 23 Me. 248); and the same is true of a mere delivery of a promissory note (Evans *v.* Darlington, 5 Blackf. (Ind.) 320), of a bill of sale (Copeland *v.* Barnes, 147 Mass. 388, 18 N. E. 65), of stock certificates (Mechanics' Bldg., etc., Assoc. *v.* Conover, 14 N. J. Eq. 219; Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106), even when accompanied with authority to sell on non-payment of the debt (Huntington *v.* Mather, 2 Barb. (N. Y.) 538) and effected by an instrument under seal (Vanstone *v.* Goodwin, 42 Mo. App. 39) or of a bill of sale, copies of gaugers' returns, and warehouse receipts (Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147) as security; even though the transfer was absolute where

pledge,[6] for the true test is the intention of the parties in regard to the effect of the agreement.[7] Although it has been held that the law favors a pledge rather than a mortgage,[8] where the debtor who is giving the security retains possession of the property the presumption seems to be that the parties intended a mortgage,[9] because a pledge is not valid without a change of possession.[10]

III. FORM AND REQUISITES.

A. In General. Although the prevailing doctrine regarding chattel mortgages is that title is transferred,[11] it has been held that the absence of words of conveyance from an instrument does not prevent it from being a valid mortgage.[12]

the note secured recited that the securities were deposited as collateral (Wilson *v.* Little, 2 N. Y. 443, 51 Am. Dec. 307). But see May *v.* Eastin, 2 Port. (Ala.) 414, where chattels were delivered as security under an agreement to return them if the creditors should be reimbursed for advances and the transaction was held to constitute a mortgage. *Compare* Surber *v.* McClintic, 10 W. Va. 236, where an assignment of property to indemnify the assignees as sureties on assignor's bond, to be returned or reassigned on a termination of the liability, was held to be a pledge merely.

6. Williams *v.* Rorer, 7 Mo. 556; People *v.* Remington, 59 Hun (N. Y.) 282, 12 N. Y. Suppl. 824, 14 N. Y. Suppl. 98, 36 N. Y. St. 282 [*affirmed* in 126 N. Y. 654, 27 N. E. 853, 37 N. Y. St. 962]. *Contra, Ex p.* Fitz, 2 Lowell (U. S.) 519, 9 Fed. Cas. No. 4,837.

Mortgage rather than pledge is the nature of the transaction where an absolute bill of sale is executed for the purpose of giving security (Tedesco *v.* Oppenheimer, 15 Misc. (N. Y.) 522, 37 N. Y. Suppl. 1073, 74 N. Y. St. 420, 2 N. Y. Annot. Cas. 411) and the instrument is to be void provided the sellers do certain acts (Schoenrock *v.* Farley, 49 N. Y. Super. Ct. 302; Barrow *v.* Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354; Wood *v.* Dudley, 8 Vt. 430); and where the instrument reads "I hereby agree to give up all claim to the watch, &c., if all claims due to you from me are not paid by" a day specified (Bunacleugh *v.* Poolman, 3 Daly (N. Y.) 236), gives security on a chattel, authorizes possession to remain in debtor, and provides for sale in case of default, even though the words used are "I hereby pledge and give a lien on" (Langdon *v.* Buel, 9 Wend. (N. Y.) 80), or transfers the legal title to a note, with power to collect and a provision for accounting for any surplus over the amount secured (Wright *v.* Ross, 36 Cal. 414).

7. Janvrin *v.* Fogg, 49 N. H. 340 (holding that, where an instrument was intended to take effect as a chattel mortgage but was invalid, it could not take effect as a pledge, even though possession was transferred to the creditor); McCoy *v.* Lassiter, 95 N. C. 88. *Compare* Parshall *v.* Eggert, 54 N. Y. 18 [*affirming* 52 Barb. (N. Y.) 367], where a contract of pledge ineffectual for want of delivery of the goods was held not to be valid as a chattel mortgage.

Although the lender supposed that the deposit of a bill with him as security created a mortgage, it was held that such was not the case. Copeland *v.* Barnes, 147 Mass. 388, 18 N. E. 65.

Parol evidence of intention is not admissible to show that an instrument in the form of a chattel mortgage was intended merely as a pledge. Whitney *v.* Lowell, 33 Me. 318.

The transaction was held to be a pledge where the creditor was put in possession of the property and given authority to sell on debtor's failure to pay the debt at maturity (Brownell *v.* Hawkins, 4 Barb. (N. Y.) 491); where it was agreed that the lender should have a lien on lumber for advances and that all consignments to market should be on his account (Bogard *v.* Tyler, 21 Ky. L. Rep. 1452, 55 S. W. 709); where shares of stock were indorsed in blank and delivered to a creditor as security for a note (Spreckels *v.* Macfarlane, 9 Hawaii 166); and where the instrument read that a part owner "pledged, hypothecated, and mortgaged" his interest in a boat to a coöwner (Thoms *v.* Southard, 2 Dana (Ky.) 475, 26 Am. Dec. 467). *Compare* Williams *v.* Nichols, 121 Mass. 435, where it was held that merely recording a bill of parcels in the city registry as security for a debt did not render the transaction a mortgage.

8. Bank British Columbia *v.* Marshall, 8 Sawy. (U. S.) 29, 11 Fed. 19.

The pledging of income and tolls by a turnpike company is not a mortgage of the road. Farmers' Turnpike Road Co. *v.* Coventry, 10 Johns. (N. Y.) 389.

9. Ward *v.* Sumner, 5 Pick. (Mass.) 59; Conner *v.* Carpenter, 28 Vt. 237.

10. Bonsey *v.* Amee, 8 Pick. (Mass.) 236; Dirigo Tool Co. *v.* Woodruff, 41 N. J. Eq. 336, 7 Atl. 125; Fielding *v.* Middlebaugh, 2 Ohio Dec. (Reprint) 55, 1 West. L. Month. 218; *Ex p.* Fitz, 2 Lowell (U. S.) 519, 9 Fed. Cas. No. 4,837. But see Finn *v.* Donahoe, 83 Mich. 165, 47 N. W. 125, holding that a pledgee in possession of chattels will prevail over a subsequent mortgagee of the same property.

11. Jones Chatt. Mortg. (4th ed.) 1. See also *supra*, I.

12. Ellington *v.* Charleston, 51 Ala. 166; Marsh *v.* Wade, 1 Wash. 538, 20 Pac. 578. *Contra*, Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676; Whilden *v.* Pearce, 27 S. C. 44, 2 S. E. 709. *Compare* Baldwin *v.* Owens, 21 Ky. L. Rep. 352, 51 S. W. 438, where a writing purporting to be a bill of sale reserved a right to the vendor to take possession in case of default, and it was held that the agreement constituted the vendor a mortgagee.

Written instruments in the form of mortgages which were intended to give a statutory lien on crops but were ineffectual for failure to comply with the statute have been held to operate as mortgages,[13] for, unless the contrary is provided by statute, no particular form of words is necessary,[14] and the defeasance may be on a

Sufficiency of words of transfer.— A valid mortgage of personal property may be created by a writing which uses the word "mortgage" only without any other words of conveyance (Mervine *v.* White, 50 Ala. 388), which merely stipulates that rent shall be paid before certain crops are removed (Weed *v.* Standley, 12 Fla. 166), or which states that the property shall "belong" to the creditor till a debt is paid (Thompson *v.* Blanchard, 4 N. Y. 303). See also Adoue *v.* Jemison, 65 Tex. 680, where an agreement giving one who advanced money to cultivate a plantation the privilege of disposing of the crop and applying the proceeds on the indebtedness was held to constitute a mortgage.

Reserving a lien in an instrument has been held to create a mortgage (Harris *v.* Jones, 83 N. C. 317; Byrd *v.* Wilcox, 8 Baxt. (Tenn.) 65), a charge against the property in the nature of a mortgage (Sawyer *v.* Gerrish, 70 Me. 254, 35 Am. Rep. 323), or to operate as a mortgage (Whiting *v.* Eichelberger, 16 Iowa 422), even though no right to take possession was conferred by the instrument (Woodlief *v.* Harris, 95 N. C. 211).

Mortgage or power.— An instrument giving a creditor a right to take possession of goods, sell them, and apply the proceeds to the satisfaction of a debt is not a mortgage but a mere power, for it transfers no title. McGriff *v.* Porter, 5 Fla. 373; Holmes *v.* Hall, 8 Mich. 66, 77 Am. Dec. 444.

No mortgage was created by an agreement whereby the maker of a note promised to pay it out of the proceeds of some personal property, but the payee was given no authority to sell the property (Britt *v.* Harrell, 105 N. C. 10, 10 S. E. 902); by a credit agreement whereby the owner of a stock of goods agreed to do a cash business, make weekly reports, use only specified sums for expenses, and make no change in business without the lender's consent (Clement *v.* Swanson, 110 Iowa 106, 81 N. W. 233); or by a mere letter which authorized the bearer to mortgage certain property to any one who would advance a certain sum (Newson *v.* Beard, 45 Tex. 151). *Compare* Gushee *v.* Robinson, 40 Me. 412, where it was held that no mortgage was created by an indorsement on a note that personal property purchased thereby should be holden to one of the signers as security.

A conveyance in trust for the use of an infant is not a mortgage. Thomas *v.* Davis, 6 Ala. 113.

13. Tison *v.* Peoples Sav., etc., Assoc., 57 Ala. 323; Dawson *v.* Higgins, 50 Ala. 49; Spivey *v.* Grant, 96 N. C. 214, 2 S. E. 45. But see Green *v.* Jacobs, 5 S. C. 280, where an instrument creating a lien under the "act to secure advances made for agricultural purposes," etc., contained at the bottom the words, "I consider the above instrument of writing a mortgage of all my personal property," and it was held not to be a mortgage.

14. *Alabama.*— Glover *v.* McGilvray, 63 Ala. 508.

Georgia.— Stewart *v.* Jaques, 77 Ga. 365, 3 S. E. 283, 4 Am. St. Rep. 86.

Iowa.— Whiting *v.* Eichelberger, 16 Iowa 422.

Kansas.— See Frankhouser *v.* Fisher, 54 Kan. 738, 39 Pac. 705, where a mortgage was held to be created by an instrument which read: "I hereby sell to Fisher & Enderton 2,000 bushels of corn . . . said corn shall be marketed by Fisher . . . and if the market price be more than 15 cents per bushel, the overplus, . . . shall be paid to me."

Mississippi.— Mason *v.* Moody, 26 Miss. 184.

Missouri.— Bascom *v.* Rainwater, 30 Mo. App. 483. *Compare* Riddle *v.* Norris, 46 Mo. App. 512, where the maker of a note indorsed on it that he mortgaged or pledged certain goods to the payee and agreed at any time to make a chattel mortgage of the same, and this was held to constitute a mortgage, the agreement to make a mortgage meaning a formal mortgage for record.

New Jersey.— Wilmerding *v.* Mitchell, 42 N. J. L. 476.

New York.— Coe *v.* Cassidy, 72 N. Y. 133 [*affirming* 6 Daly (N. Y.) 242].

North Carolina.— Brown *v.* Dail, 117 N. C. 41, 23 S. E. 45; McCoy *v.* Lassiter, 95 N. C. 88.

Tennessee.— Barfield *v.* Cole, 4 Sneed (Tenn.) 464, holding that an instrument under seal, setting forth on its face the sale, transfer, and delivery of personal property and authorizing a sale on default, is a mortgage.

Texas.— Johnson *v.* Brown, (Tex. Civ. App. 1901) 65 S. W. 485, holding that where a mortgage was so drawn that a person reading it could not have understood it otherwise than as a lien upon the property described, and it had been duly registered, it was properly received in evidence in an action to foreclose. *Compare* Harris *v.* Croley, (Tex. Civ. App. 1897) 40 S. W. 510, where an agreement to pay notes in lumber, which was secured by a trust deed, was held to constitute a mortgage.

Vermont.— Atwater *v.* Mower, 10 Vt. 75.

Wyoming.— Graham *v.* Blinn, 3 Wyo. 746, 30 Pac. 446.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 83.

Giving grantee authority to take possession and sell makes the transaction a mortgage, provided the surplus after satisfying the indebtedness is to be returned to the grantor (Frost *v.* Allen, 57 Ga. 326; Roe *v.* Town Mut. F. Ins. Co., 78 Mo. App. 452; Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490. *Contra,* Camp *v.* Thompson, 25 Minn. 175)

separate instrument from the agreement.[15] A statute providing that a bill of sale given as security should be "in accordance with" certain forms has been held not to mean that the instrument should be "in" such form.[16]

B. Necessity For Writing. A verbal mortgage is good between the parties thereto[17] and against those having actual notice of its existence,[18] provided the oral agreement contained all the elements which were necessary to constitute a valid written mortgage;[19] and where possession is immediately taken and retained

or the property left undisposed of is to be given back to him (National Bank *v.* Lovenberg, 63 Tex. 506).

Provisions that the transfer shall become absolute upon non-payment at a day certain have been held not to prevent the transaction from being a mortgage. Smith *v.* Quartz Min. Co., 14 Cal. 242; Anonymous, 3 N. C. 182.

15. Lobban *v.* Garnett, 9 Dana (Ky.) 389; Ring *v.* Franklin, 2 Hall (N. Y.) 1.

The absence of a condition of defeasance was held not to prevent an instrument from operating as a mortgage when it recited that it was intended as one to secure certain debts and gave the mortgagee a power of sale (Reagan *v.* Aiken, 138 U. S. 109, 11 S. Ct. 283, 34 L. ed. 892) and where there was no provision for applying the surplus after payment of the secured debts to the satisfaction of other claims (Schneider *v.* McCoulsky, 6 Tex. Civ. App. 501, 26 S. W. 170).

Construing instruments together.— It has been held that an agreement in a bill of particulars should be construed as part of the mortgage it accompanied and as modifying its effect (Edgell *v.* Hart, 13 Barb. (N. Y.) 380); that an agreement written on a mortgage while on file and signed should be construed with the mortgage so as to constitute an extension (Grimes *v.* Rose, 24 Mich. 416); and that agreements executed contemporaneously with a mortgage must be treated as part of a single contract even though they are not recorded (Alexandria First Nat. Bank *v.* Turnbull, 32 Gratt. (Va.) 695, 34 Am. Rep. 791; Blakeslee *v.* Rossman, 43 Wis. 116). But see Singer *v.* Wambold, 82 Wis. 233, 52 N. W. 178, where an agreement collateral to a mortgage was held to be no part of it, although executed at the same time.

16. Thomas *v.* Kelly, 13 App. Cas. 506, 58 L. J. Q. B. 66, 60 L. T. Rep. N. S. 114, 37 Wkly. Rep. 353 [*affirming* 20 Q. B. D. 569], holding, however, that assigning future acquired property was such a breach of the statutory regulations as to invalidate a bill of sale because it was impossible to comply with the requirement for a description of the property.

Compliance with English statutory form.— The bill of sale was held to be void because of defects in form, where it was executed by two persons as grantors who were not jointly interested in the property (Saunders *v.* White, [1901] 1 K. B. 70, 70 L. J. K. B. 34, 83 L. T. Rep. N. S. 712, 8 Manson 31, 49 Wkly. Rep. 127); where the acknowledgment of receipt of consideration by the grantor was omitted (Davies *v.* Jenkins, [1900] 1 Q. B. 133, 69 L. J. Q. B. 187, 81 L. T. Rep. N. S. 788, 7 Manson 149, 48 Wkly. Rep. 286); where it provided that the grantee might seize the goods if the grantor failed to produce his receipts for rent, rates, and taxes after a verbal demand, when the statute required that the demand be in writing (Davis *v.* Burton, 11 Q. B. D. 537, 52 L. J. Q. B. 636, 32 Wkly. Rep. 423 [*affirming* 10 Q. B. D. 414]); and where it purported to be a license to the grantee to enter and sell the chattels and pay himself out of the proceeds (*Ex p.* Parsons, 16 Q. B. D. 532, 55 L. J. Q. B. 137, 53 L. T. Rep. N. S. 897, 3 Mor. Bankr. Cas. 36, 34 Wkly. Rep. 329 [*disapproving In re* Hall, 14 Q. B. D. 386, 54 L. J. Q. B. 43, 51 L. T. Rep. N. S. 795, 33 Wkly. Rep. 228; *In re* Cunningham, 28 Ch. D. 682, 54 L. J. Ch. 448, 52 L. T. Rep. N. S. 214, 33 Wkly. Rep. 387]); but an agreement to pay "on or before" a certain day did not invalidate the instrument (De Braam *v.* Ford, [1900] 1 Ch. 142, 69 L. J. Ch. 82, 81 L. T. Rep. N. S. 568, 5 Manson 28). See also Hughes *v.* Little, 18 Q. B. D. 32, 56 L. J. Q. B. 96, 55 L. T. Rep. N. S. 476, 35 Wkly. Rep. 36, where a bill of sale set forth that the grantee had indorsed a note for the grantor and that thirty-two pounds or thereabouts was still owing, and as security the goods were assigned to the grantee, and it was held that the consideration was sufficiently set forth, but the bill was invalid because the time set for payment was uncertain. *Compare* Sibley *v.* Higgs, 15 Q. B. D. 619, 54 L. J. Q. B. 525, 33 Wkly. Rep. 748; Hetherington *v.* Groome, 13 Q. B. D. 789, 53 L. J. Q. B. 576, 51 L. T. Rep. N. S. 412, 33 Wkly. Rep. 103.

17. *Alabama.*— Rees *v.* Coats, 65 Ala. 256; Glover *v.* McGilvray, 63 Ala. 508; Thrash *v.* Bennett, 57 Ala. 156; Stearns *v.* Gafford, 56 Ala. 544; Brown *v.* Coats, 56 Ala. 439; McKeithen *v.* Pratt, 53 Ala. 116; Brooks *v.* Ruff, 37 Ala. 371; Morrow *v.* Turney, 35 Ala. 131.

Kansas.— Weil *v.* Ryus, 39 Kan. 564, 18 Pac. 524; Bates *v.* Wiggin, 37 Kan. 44, 14 Pac. 442, 1 Am. St. Rep. 234.

Missouri.— Carroll Exch. Bank *v.* Carrollton First Nat. Bank, 50 Mo. App. 92.

Montana.— Reynolds *v.* Fitzpatrick, 23 Mont. 52, 57 Pac. 452.

Nebraska.—Conchman *v.* Wright, 8 Nebr. 1.

New York.— Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290 [*reversing* 4 Den. (N. Y.) 489].

North Carolina.— McCoy *v.* Lassiter, 95 N. C. 88.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 84.

18. Sparks *v.* Wilson, 22 Nebr. 112, 34 N. W. 111.

19. Highland Bank *v.* Evans-Snider-Buell Co., 9 Kan. App. 80, 57 Pac. 1046; Moore *v.*

by the mortgagee, it has been held that a parol mortgage is valid against all third parties.[20]

C. Construing Instruments to Be Mortgages[21] — **1. Assignments.** The assignment of personal property as security for a debt is usually regarded as constituting a mortgage of the property,[22] and it has been held that a mortgage of book-accounts operates as an assignment of them.[23] The element of giving security for a debt to be paid in the future is essential, and therefore general or partial assignments for the benefit of creditors[24] do not constitute chattel mortgages.[25]

Brady, 125 N. C. 35, 34 S. E. 72. See also Knox *v.* Wilson, 77 Ala. 309, where the oral agreement was not so free from ambiguity as to constitute a mortgage.

20. McTaggart *v.* Rose, 14 Ind. 230; Buckstaff Bros. Mfg. Co. *v.* Snyder, 54 Nebr. 538, 74 N. W. 863; Bardwell *v.* Roberts, 66 Barb. (N. Y.) 433; McCoy *v.* Lassiter, 95 N. C. 88.

An oral agreement not accompanied by change of possession creates a mere equitable lien. Jackson *v.* Rutherford, 73 Ala. 155.

Supplying omissions by parol.— Where a mortgage to secure supplies to be furnished in the future failed to state the quantity to be furnished and to specify the time, these could be proved by parol evidence. Smith *v.* Rice, 56 Ala. 417. *Compare* Bloch *v.* Edwards, 116 Ala. 90, 22 So. 600, where the court refused to give effect to a parol agreement to transfer the lien of a mortgage to property not included in the original instrument.

21. Agreements were held to constitute mortgages where it was agreed that property paid for by checks on a bank should belong to the bank till the money thus checked out was repaid (Kollock *v.* Emmert, 43 Mo. App. 566), and where a retiring partner who had sold out to his copartner was employed to sell the firm goods at retail and the copartner agreed to pay a specified sum in instalments as the purchase-price of the stock (Bragelman *v.* Dane, 69 N. Y. 69). *Compare* Lessing *v.* Grimland, 74 Tex. 239, 11 S. W. 1095, where two contracts were held to constitute a mortgage and not a sale.

22. Lumbert *v.* Woodard, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175; Dunham *v.* Whitehead, 21 N. Y. 131; Blake *v.* Crowley, 12 N. Y. St. 650; Lavigne *v.* Naramore, 52 Vt. 267. *Contra*, Hudgins *v.* Wood, 72 N. C. 256, assignment of half interest in a growing crop. *Compare* Haynes *v.* Ledyard, 44 Mich. 621, 7 N. W. 236 [*affirming* 33 Mich. 319], where a mortgagor assigned to the mortgagee the net proceeds of mortgaged lands and it was held not to be a mortgage on the proceeds of the land.

Subject-matter of assignment.— The doctrine that the assignment of property as security operates as a mortgage has been applied to assignments of insurance policies (Dungan *v.* Mutual Ben. L. Ins. Co., 46 Md. 469; Matthews *v.* Sheehan, 69 N. Y. 585), of leases (Polhemus *v.* Trainer, 30 Cal. 685; Breese *v.* Bange, 2 E. D. Smith (N. Y.) 474; Woodward *v.* Crump, 95 Tenn. 369, 32 S. W. 195), of an expectant legacy (Bacon *v.* Bonham, 27 N. J. Eq. 209. But see Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741, where an assignment of an unpaid legacy was held not to be a mortgage because it was not a proper subject-matter for a mortgage), of shares in a corporation (Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369; McLean *v.* Lafayette Bank, 4 McLean (U. S.) 430, 16 Fed. Cas. No. 8,889), and of the interest in a building contract which amounted to a mortgage of the materials (Hurd *v.* Brown, 37 Mich. 484). *Compare* Yenni *v.* McNamee, 45 N. Y. 614, where a shipping receipt was assigned as collateral security, without setting apart the property, and it was held that this constituted a mortgage as between the parties.

Effect of reserving benefit to grantor.—The statutes declaring that a deed of trust which reserves a benefit to the grantor shall be void have generally been held not to apply to chattel mortgages in the form of trust deeds. Godchaux *v.* Mulford, 26 Cal. 316, 85 Am. Dec. 178; Chapman *v.* Hunt, 14 N. J. Eq. 149; Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65 [*reversing* 11 N. Y. App. Div. 631, 42 N. Y. Suppl. 1123]; Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309. *Compare* Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458, holding that it was not a badge of fraud to provide in a trust deed for the payment of the balance to the grantor.

23. Works *v.* Merritt, 105 Cal. 467, 38 Pac. 1109; *In re* Ehler, 10 Ohio Dec. (Reprint) 439, 21 Cinc. L. Bul. 140, Ohio Prob. 186. *Compare* Neubauer *v.* Gabriel, 86 Wis. 200, 56 N. W. 733, where a mortgage of leased chattels, executed by the lessee, was held to be in legal effect an assignment of the lease.

24. Assignments for benefit of creditors distinguished from chattel mortgages see Assignments For Benefit of Creditors, 4 Cyc. 128, note 27.

25. Mortgage or assignment for benefit of creditors.— The transaction was held to be a mortgage where the transfer was only to become absolute on the non-performance by assignor of some specified condition (Belding-Hall Mfg. Co. *v.* Smith, 125 Mich. 54, 83 N. W. 1001; Dearing *v.* McKinnon Dash, etc., Co., 165 N. Y. 78, 58 N. E. 773, 80 Am. St. Rep. 708 [*affirming* 33 N. Y. App. Div. 31, 53 N. Y. Suppl. 513]. *Compare* Davidson *v.* King, 47 Ind. 372, where the rule was applied although the parties to the agreement treated it as an assignment), although there was a collateral agreement authorizing the collection of the assigned notes without providing for a distribution of the proceeds (Bradley *v.* Hargadine-McKittrick Dry-Goods Co., 96 Fed.

2. Bills of Sale — a. In General. Where an absolute bill of sale is intended as a mortgage it will be construed to be one,[26] for the clause of defeasance may be on a separate instrument[27] or by parol.[28] An absolute bill of sale cannot, however, be shown to have been intended as a mortgage to the prejudice of third persons,[29] or where it was executed for a fraudulent purpose.[30]

914, 37 C. C. A. 623), or although the transfer was to a trustee (Beckman *v.* Noble, 115 Mich. 523, 73 N. W. 803); where it was for the purpose of securing payment of a continuing indebtedness (Parsell *v.* Thayer, 39 Mich. 467; Taylor *v.* Missouri Glass Co., 6 Tex. Civ. App. 337, 25 S. W. 466); and where the net surplus of the proceeds after paying the debt and expenses of converting the stock into cash was to be returned to the assignor (Doggett, etc., Co. *v.* Bates, 26 Ill. App. 369; Schwab *v.* Owens, 10 Mont. 381, 25 Pac. 1049); but a deed conveying property absolutely to a trustee to sell it and distribute the proceeds among creditors operates as an assignment (Tuttle *v.* Merchant's Nat. Bank, 19 Mont. 11, 47 Pac. 203).

Rule in Canada.— An assignment of property in trust to sell and pay the proceeds to creditors operates as an assignment for benefit of creditors when all creditors are included (Kirk *v.* Chisholm, 26 Can. Supreme Ct. 111), and as a mortgage when less than all are included (Archibald *v.* Hubley, 18 Can. Supreme Ct. 116).

Parol evidence of intention is admissible under the law of Arkansas to show whether an instrument was intended as an assignment for the benefit of creditors or a mortgage. Apollos *v.* Staniforth, 3 Tex. Civ. App. 502, 22 S. W. 1060.

An early Massachusetts statute regarding assignments was held not to apply to a mortgage given to secure a part of the mortgagor's creditors. Henshaw *v.* Sumner, 23 Pick. (Mass.) 446.

26. *Alabama.*— May *v.* Eastin, 2 Port. (Ala.) 414.

Arkansas.— Scott *v.* Henry, 13 Ark. 112.

Kentucky.— Boli *v.* Irwin, 21 Ky. L. Rep. 366, 51 S. W. 444.

Maine.— Reed *v.* Jewett, 5 Me. 96.

Maryland.— Seighman *v.* Marshall, 17 Md. 550.

Michigan.— Wetmore *v.* Moloney, 127 Mich. 372, 86 N. W. 808.

Texas.— Anglin *v.* Barlow, (Tex. Civ. App. 1898) 45 S. W. 827.

Virginia.— Bird *v.* Wilkinson, 4 Leigh (Va.) 266.

West Virginia.— Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685. *Compare* Ricketts *v.* Wilson, 6 N. Y. St. 508, where a bill of sale was held to be a mortgage when the parties by mistake believed it to be such when it was executed.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 27.

Tests for determining doubtful cases are: "Did the relation of debtor, and creditor, subsist before the alledged sale? . . . Was there a great disparity between the value of the property, and the price agreed to be given for it? Did the vendor continue bound for the debt?" If any of these facts exist they go to show that a mortgage was intended. Eiland *v.* Radford, 7 Ala. 724, 726, 42 Am. Dec. 610.

Mortgages rather than absolute sales were the conclusion which the court reached regarding the transfers in Folsom *v.* Fowler, 15 Ark. 280; Wheeler *v.* Giddens, (Tenn. Ch. 1900) 59 S. W. 181.

Rule in England.— A bill of sale given to secure the payment of money is void against the rights of a subsequent trustee in bankruptcy if absolute in form (Bills of Sale Act 1892). *Ex p.* Finlay, 10 Mor. Bankr. Cas. 258.

27. Hopkins *v.* Thompson, 2 Port. (Ala.) 433; Barnes *v.* Holcomb, 12 Sm. & M. (Miss.) 306; Brown *v.* Bement, 8 Johns. (N. Y.) 96; Stephens *v.* Sherrod, 6 Tex. 294, 55 Am. Dec. 776. See also Bartels *v.* Harris, 4 Me. 146, where a separate indenture accompanied a bill of sale stating that the conveyance was intended as security and the transaction was held to constitute a mortgage.

28. *Massachusetts.*— Fletcher *v.* Willard, 14 Pick. (Mass.) 464. *Contra,* Pennock *v.* McCormick, 120 Mass. 275 (where the bill was given as security and there was a verbal agreement for defeasance but the court held the transfer was not a mortgage because there was no condition of defeasance in writing); Munro *v.* Merchants' Bank, 11 Allen (Mass.) 216. *Compare* Miller *v.* Baker, 20 Pick. (Mass.) 285, where the absence of a condition of defeasance prevented a bill of sale from operating as a mortgage, although the bill recited an indebtedness by note from the grantor to the grantee.

Nebraska.— Omaha Book Co. *v.* Sutherland, 10 Nebr. 334, 6 N. W. 367.

New Jersey.— Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518.

New York.— Preston *v.* Southwick, 42 Hun (N. Y.) 291; Birbeck *v.* Tucker, 2 Hall (N. Y.) 121; Ring *v.* Franklin, 2 Hall (N. Y.) 1.

Tennessee.— Overton *v.* Bigelow, 3 Yerg. (Tenn.) 513.

Vermont.— Gifford *v.* Ford, 5 Vt. 532.

Modification by subsequent parol agreement has been held sufficient to change an absolute bill of sale to a mortgage where consideration was given for the change. King *v.* Greaves, 51 Mo. App. 534.

Limitation upon the authority of an agent has been held sufficient to convert an instrument purporting to be an absolute sale into a mortgage where the purchaser knew that the agent had authority only to mortgage. Coppage *v.* Barnett, 34 Miss. 621.

29. State *v.* Bell, 2 Mo. App. 102; Gaither *v.* Mumford, 4 N. C. 600.

30. Brantley *v.* West, 27 Ala. 542; Wright *v.* Wright, 2 Litt. (Ky.) 8; Wheeler *v.* Eastwood, 88 Hun (N. Y.) 160, 34 N. Y. Suppl.

b. When Given as Security. When a bill of sale is executed merely as security it is generally held to be a mortgage.[31] So, where a borrowing and lending is designed at the time of executing the instrument,[32] or there is a continuation of indebtedness on the part of the seller,[33] the bill of sale, although absolute in form, will operate as a mortgage.

513, 68 N. Y. St. 297. *Compare* Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418, where a bill was filed alleging that a settlement between a company and a corporation was fraudulent and the court held the transaction to be free from fraud but decreed that stock transferred was by way of security and that complainant was entitled to a reconveyance on payment of the amount actually due from him.

31. *Arkansas.*— Rogers *v.* Vaughan, 31 Ark. 62.

Georgia.— Stokes *v.* Hollis, 43 Ga. 262.

Illinois.— Laing *v.* People, 50 Ill. App. 324.

Indiana.— Plummer *v.* Shirley, 16 Ind. 380.

Kansas.— Gray *v.* Delay, 53 Kan. 177, 35 Pac. 1108; Butts *v.* Privett, 36 Kan. 711, 14 Pac. 247.

Kentucky.— Hart *v.* Burton, 7 J. J. Marsh. (Ky.) 322; Ward *v.* Deering, 2 T. B. Mon. (Ky.) 9.

Maine.— White *v.* Mann, 26 Me. 361.

Maryland.— Laeber *v.* Langhor, 45 Md. 477; Ing *v.* Brown, 3 Md. Ch. 521; Clark *v.* Levering, 1 Md. Ch. 178.

Michigan.— Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Weed *v.* Mirick, 62 Mich. 414, 29 N. W. 78; Cooper *v.* Brock, 41 Mich. 488, 2 N. W. 660.

Mississippi.— Vasser *v.* Vasser, 23 Miss. 378.

Missouri.— Du Pont *v.* McLaran, 61 Mo. 502; Albert *v.* Van Frank, 87 Mo. App. 511; King *v.* Greaves, 51 Mo. App. 534.

Montana.— Story *v.* Cordell, 13 Mont. 204, 33 Pac. 6.

Nebraska.— Kemp *v.* Small, 32 Nebr. 318, 49 N. W. 169.

New Jersey.— Cake *v.* Shull, (N. J. 1888) 13 Atl. 666.

New York.— Keller *v.* Paine, 107 N. Y. 83, 13 N. E. 635 [*affirming* 34 Hun (N. Y.) 167]; Smith *v.* Beattie, 31 N. Y. 542; Ford *v.* Ransom, 8 Abb. Pr. N. S. (N. Y.) 416; Marsh *v.* Lawrence, 4 Cow. (N. Y.) 461; Gardner *v.* Henry, 2 Cow. (N. Y.) 324; Barrow *v.* Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354. See also Wellington *v.* Morey, 12 N. Y. Wkly. Dig. 476, where a bill of sale of personal property, possession of which is not surrendered, directing that the vendee may sell the property for the debt secured by it if not paid within a certain time, was held to be in legal effect a chattel mortgage.

North Carolina.— Johnson *v.* Murchison, 60 N. C. 286.

Oklahoma.— Smith-McCord Dry Goods Co. *v.* Jno. B. Farwell Co., 6 Okla. 318, 50 Pac. 149.

Rhode Island.— Harris *v.* Chaffee, 17 R. I. 193, 21 Atl. 104.

South Carolina.— Lowery *v.* Gregory, 60 S. C. 149, 38 S. E. 257; Hattier *v.* Etinaud, 2 Desauss. Eq. (S. C.) 570.

Texas.— Young *v.* Epperson, 14 Tex. 618.

Virginia.— Gold *v.* Marshal, 76 Va. 668; Dabney *v.* Green, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503.

Washington.— Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022; Seibenbaum *v.* Delanty, 4 Wash. 596, 30 Pac. 662.

West Virginia.— Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

Wisconsin.— Salter *v.* Eau Claire Bank, 97 Wis. 84, 72 N. W. 352.

United States.— Pollard *v.* Saltonstall, 56 Fed. 861.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 24.

The absence of a debt which the transfer of the property alleged to be mortgaged could have been given to secure has been held to prevent the transaction from constituting a mortgage. Atwood *v.* Impson, 20 N. J. Eq. 150.

32. Weathersly *v.* Weathersly, 40 Miss. 462, 90 Am. Dec. 344.

33. Wilson *v.* Carver, 4 Hayw. (Tenn.) 90, where the seller gave a bond for the amount of the ostensible purchase-price. But see State *v.* Rice, 43 S. C. 200, 20 S. E. 986, where property was bargained and sold in consideration of certain money "advanced" and the transfer was held not to be a mortgage.

Bill of sale in payment.— A creditor agreed to take certain property of his debtor in full payment, and a bill of sale was executed and recorded. A further agreement was also recorded by which it was agreed that the vendor was to remain in possession as clerk and sell the goods, remitting net proceeds semi-weekly. The insurance was transferred but the sign over the store remained the same, and the purchaser remitted a small portion of the proceeds over and above the amount of the debt which was supposed to be paid. It was held that the bill of sale and the written contract did not amount to a mortgage of the goods. P. J. Peters Saddlery, etc., Co. *v.* Schoelkopf, 71 Tex. 418, 9 S. W. 336. *Compare* Hammer *v.* O'Loughlin, 8 Wash. 393, 36 Pac. 257, holding that, where the debt was paid and no right to the property or proceeds was reserved, the transfer was not by way of mortgage.

Declarations of a purchaser at an execution sale that he will hold the property as security for his debt do not constitute the transfer a mortgage in the absence of an agreement on the part of the debtor. Loyd *v.* Currin, 3 Humphr. (Tenn.) 462.

The transaction amounted to a mortgage where it was stipulated that, after paying the debt with the proceeds of the property, the balance should be returned to the vendor (Moore *v.* Foster, 97 Ill. App. 233; Canfield

3. Conditional Sales[34] — a. In General. A contract of sale by which a vendor agrees that title to property shall pass to a purchaser on payment of the purchase-price or on payment in instalments is a conditional sale,[35] but the transaction is a

v. Gould, 115 Mich. 461, 73 N. W. 550; Sloan *v.* Coburn, 26 Nebr. 607, 42 N. W. 726, 4 L. R. A. 470; Nichols *v.* Lyon, 14 N. Y. St. 549), or that the articles remaining after payment of the debt be returned (Bissell *v.* Hopkins, 3 Cow. (N. Y.) 166, 15 Am. Dec. 259), even though the agreement is by parol (Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518), or that the property should be held in trust to secure payment of a note (Ward *v.* Lord, 100 Ga. 407, 28 S. E. 446); where there was a pretended absolute sale and a lease back (Potter *v.* Boston Locomotive Works, 12 Gray (Mass.) 154; Homes *v.* Crane, 2 Pick. (Mass.) 607; *In re* Raymond Bag Co., 8 Ohio S. & C. Pl. Dec. 688), and in spite of a stipulation in the instrument that the sale should be absolute in case vendor died, which event had since taken place (Hughes *v.* Harlam, 37 N. Y. App. Div. 528, 55 N. Y. Suppl. 1106). See also Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307, 41 N. Y. St. 628 [*affirming* 13 N. Y. Suppl. 4, 36 N. Y. St. 598], where the facts were held to be sufficient to show that an apparently absolute transfer was made as security. *Compare* Upham *v.* Richey, 61 Ill. App. 650.

Negotiating a loan at the time the bill of sale is executed or in connection therewith shows the transaction to be a mortgage. Williams *v.* Chadwick, (Conn. 1901) 50 Atl. 720; Shad *v.* Livingston, 31 Fla. 89, 12 So. 646; Murphy *v.* Charlton, 118 Mich. 141, 76 N. W. 305. *Compare* Ross *v.* Ross, 21 Ala. 322, where an instrument reciting "This day received of Frederic Ross two hundred and twenty dollars, for the payment of which, by the 25th Dec'r. next, I assign over to said Ross," etc., was held to be a mortgage.

34. Distinction between effect of mortgage and conditional sale is that in a mortgage, although the time of payment is past, there is an equity of redemption which continues until foreclosed or barred by the statute of limitations; in a conditional sale if the condition of payment is not complied with at or before the time limited the sale becomes absolute. Weathersly *v.* Weathersly, 40 Miss. 462, 90 Am. Dec. 344.

35. *Alabama.*—Murphy *v.* Barefield, 27 Ala. 634. But see Dowdell *v.* Empire Furniture, etc., Co., 84 Ala. 316, 4 So. 31, where the purchaser was given authority to sell the property, take notes, and turn them over to the seller, and the transaction was held to be a mortgage within a provision of the statutes requiring mortgages to be in writing.

Colorado.— Gerow *v.* Castello, 11 Colo. 560, 19 Pac. 505, 7 Am. St. Rep. 260.

Georgia.— Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 225.

Illinois.— Gilbert *v.* National Cash-Register Co., 176 Ill. 288, 52 N. E. 22; Lucas *v.* Campbell, 88 Ill. 447; Murch *v.* Wright, 46 Ill. 487, 95 Am. Dec. 455; People *v.* Kirkpatrick, 69 Ill. App. 207.

Indiana.— Plummer *v.* Shirley, 16 Ind. 380.

Iowa.— Davis Gasoline Engine Works Co. *v.* McHugh, (Iowa 1902) 88 N. W. 948.

Maine.— Goddard *v.* Coe, 55 Me. 385.

Massachusetts.— Blanchard *v.* Cooke, 144 Mass. 207, 11 N. E. 83.

Minnesota.— Berlin Mach. Works *v.* Security Trust Co., 60 Minn. 161, 61 N. W. 1131, where it is further held that, conceding the sale to have been absolute, the agreement for a lien constituted an equitable chattel mortgage in favor of the seller.

New York.— Grant *v.* Skinner, 21 Barb. (N. Y.) 581. *Compare* Dunning *v.* Stearns, 9 Barb. (N. Y.) 630, where an instrument by which it was agreed by one to sell and by the other to purchase certain personal property at a specified price and that the vendor should have a lien upon the property till the purchase-price was paid was held to be in the nature of a chattel mortgage.

North Carolina.— State *v.* Oliver, 104 N. C. 458, 10 S. E. 709; Clayton *v.* Hester, 80 N. C. 203; Ellison *v.* Jones, 26 N. C. 48.

Virginia.— Strider *v.* Reid, 2 Gratt. (Va.) 38; Moss *v.* Green, 10 Leigh (Va.) 260, 34 Am. Dec. 731 (where vendor was given a right to buy back on repayment of an instalment already paid).

Contra.— Perkins *v.* Loan, etc., Bank, 43 S. C. 39, 20 S. E. 759; Talmadge *v.* Oliver, 14 S. C. 522, which hold that such a reservation of title is in the nature of an equitable mortgage and must be in writing.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 23.

The transaction was a conditional sale where it stipulated that if the amount received by the vendor was not returned by a certain date the purchaser was to have the property for that amount (Chapman *v.* Turner, 1 Call (Va.) 280, 1 Am. Dec. 514), and where the risk of loss was to be on the vendee after a stated time (Critcher *v.* Walker, 5 N. C. 488, 4 Am. Dec. 576).

That the grantee's title was to become absolute did not make the transfer a conditional sale when the value of the property was nearly double the amount of the sum borrowed. Williamson *v.* Culpepper, 16 Ala. 211, 50 Am. Dec. 175.

Where the purchaser was to continue liable for the purchase-price in case the property sold for less than enough to pay the balance of the purchase-money, the reservation of title to the seller was held to be in the nature of a mortgage and to create a valid lien between the parties. Barney, etc., Mfg. Co. *v.* Hart, 8 Ky. L. Rep. 223, 1 S. W. 414.

The Texas statute declaring that reservations of title to property as security for the purchase-price shall be held to be chattel mortgages has the effect of making a sale on a condition a mortgage (Garretson *v.* De

mortgage if title and possession vest in the vendee at the time of the sale.[36] It has been held that where the circumstances are doubtful courts of equity incline against conditional sales.[37]

b. Effect of Agreement For Redemption. Although a bill of sale purports to convey an absolute title, it will take effect as a mortgage if it gives the vendor a right to "redeem" the property[38] or is to be void upon the performance of some act by the vendor.[39] When the alleged clause of defeasance takes the form of an agreement to resell the property at a fixed price, attendant circumstances must be examined to determine the nature of the transfer. It may be shown to be a mortgage by evidence that the vendor's obligation continued,[40] that he bound him-

Poyster, (Tex. App. 1890) 16 S. W. 106; Clark *v.* West Pub. Co., (Tex. Civ. App. 1894) 26 S. W. 527), and a provision authorizing the vendor to take possession without refunding money already paid on default by the vendee is subject to the latter's rights as mortgagee (Harling *v.* Creech, 88 Tex. 300, 31 S. W. 357).

36. Turner *v.* Brown, 82 Mo. App. 30; Gaither *v.* Teague, 29 N. C. 460; Tufts *v.* Haynie, 4 Ohio Cir. Ct. 494. *Compare* Burdick *v.* Coates, 22 R. I. 410, 48 Atl. 389, where a mortgage of personalty, recorded ninety-eight days after execution and followed twelve days later by a transfer of possession, was held not to be a conditional sale which became absolute on vendee's taking possession.

An absolute sale with a mortgage back was held to have been effected by the dealings of the parties in Damm *v.* Mason, 98 Mich. 237, 57 N. W. 123; Strong *v.* Hoskin, 85 Wis. 497, 55 N. W. 852; Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160.

Where notes are given for the purchase-money the transaction seems to be an absolute sale with a mortgage back to secure payment of the notes. Tufts *v.* Beach, 8 Colo. App. 33, 44 Pac. 771; Baldwin *v.* Crow, 86 Ky. 679, 9 Ky. L. Rep. 836, 7 S. W. 146; Woodman *v.* Chesley, 39 Me. 45; Straub *v.* Screven, 19 S. C. 445; Foster *v.* Calhoun, Dudley (S. C.) 75. *Compare* Herring *v.* Cannon, 21 S. C. 212, 53 Am. Rep. 661, where a note given for the purchase-money recited that the vendors did not part with any title till the purchase-money had been fully paid and it was held to be an instrument in writing in the nature of a mortgage.

Right of vendee to demand repayment without regard to loss of property shows the transaction to be a mortgage. Robinson *v.* Farrelly, 16 Ala. 472; Berry *v.* Glover, Harp. Eq. (S. C.) 153.

37. Parish *v.* Gates, 29 Ala. 254; Turnipseed *v.* Cunningham, 16 Ala. 501, 50 Am. Dec. 190.

38. *Alabama.*— Morrow *v.* Turney, 35 Ala. 131.

Mississippi.— Barnes *v.* Holcomb, 12 Sm. & M. (Miss.) 306; Kent *v.* Allbritain, 4 How. (Miss.) 317.

North Carolina.— Wilson *v.* Weston, 57 N. C. 349.

Tennessee.— Wheeler *v.* Giddens, (Tenn. Ch. 1900) 59 S. W. 181, where, on an assignment sale, the assignor advanced part of the purchase-money but title was transferred to a person advancing the balance and the assignor was to have the entire property on repaying this balance.

Vermont.— Blodgett *v.* Blodgett, 48 Vt. 32.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 37.

A fortiori holding property at the vendor's risk constitutes the transaction a mortgage when a right to redeem is also given. Perkins *v.* Drye, 3 Dana (Ky.) 170.

39. *Kentucky.*— Townsend *v.* Frazee, 21 Ky. L. Rep. 1183, 54 S. W. 722. *Compare* Secrest *v.* Turner, 2 J. J. Marsh. (Ky.) 471, where an agreement to "restore" property upon payment of a sum of money on a certain day was held to constitute the transfer a mortgage.

Massachusetts.— Ward *v.* Sumner, 5 Pick. (Mass.) 59; Homes *v.* Crane, 2 Pick. (Mass.) 607.

Minnesota.— Minnesota Linseed Oil Co. *v.* Maginnis, 32 Minn. 193, 20 N. W. 85.

North Carolina.— McFadden *v.* Turner, 48 N. C. 481; Joyner *v.* Vincent, 20 N. C. 535.

Texas.— Soell *v.* Hadden, 85 Tex. 182, 19 S. W. 1087.

In the absence of a covenant for repayment a clause reserving to the seller a right to annul the sale did not render the transaction a mortgage. Poindexter *v.* McCannon, 16 N. C. 377, 18 Am. Dec. 591.

A clause of defeasance in a bill of sale makes it a mortgage. Horn *v.* Reitler, 12 Colo. 310, 21 Pac. 186; Taber *v.* Hamlin, 97 Mass. 489, 93 Am. Dec. 113. See also Tufts *v.* Haynie, 4 Ohio Cir. Ct. 494, where a conveyance of property to be held until a debt was paid was held to constitute a mortgage.

40. *Arkansas.*— Merrick *v.* Avery, 14 Ark. 370.

Georgia.— Frost *v.* Allen, 57 Ga. 326.

Kentucky.— Lohban *v.* Garnett, 9 Dana (Ky.) 389; Bishop *v.* Rutledge, 7 J. J. Marsh. (Ky.) 217.

Maine.— Titcomb *v.* McAllister, 77 Me. 353.

South Carolina.—Mosely *v.* Crocket, 9 Rich. Eq. (S. C.) 339.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 36.

The absence of personal obligation on the part of the vendor shows the transaction was not a mortgage.

Alabama.— Swift *v.* Swift, 36 Ala. 147.

Arkansas.— Johnson *v.* Clark, 5 Ark. 321. *Compare* Porter *v.* Clements, 3 Ark. 364, where a vendee covenanted to reconvey on receiving

self to pay interest,[41] that the bill of sale was given to secure a loan,[42] or that the amount of consideration was inadequate as a purchase-price.[43] In the absence of any circumstances of this kind, however, a mere stipulation for repurchase does not make a transfer a mortgage.[44]

4. Equitable Mortgages. In those jurisdictions where transfer of legal title to chattels is essential to the creation of a chattel mortgage, it has been held that an equitable mortgage may be made in spite of some obstacle which prevents a passage of title.[45] So there are cases holding that an equitable mortgage is created by an agreement founded on a valuable consideration to give a mortgage,[46] by giving an irrevocable power of attorney to collect rents,[47] by depositing

five hundred dollars provided the slaves purchased neither ran away nor died and it was held to be a personal covenant merely and not a mortgage.

Kentucky.— Stone *v.* Willis, 4 B. Mon. (Ky.) 496.

Mississippi.— Magee *v.* Catching, 33 Miss. 672.

Tennessee.— Hickman *v.* Cantrell, 9 Yerg. (Tenn.) 171, 30 Am. Dec. 396; Scott *v.* Britton, 2 Yerg. (Tenn.) 214. *Compare* Bracken *v.* Chaffin, 5 Humphr. (Tenn.) 575, where a claimant of property levied on consented to a sale on condition that he should have a right to take the slave upon paying the purchaser the amount of the bid, and the agreement was held not to be a mortgage.

41. Fountain *v.* Bryce, 12 Rich. Eq. (S. C.) 234. See also Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636, where property transferred by absolute bill of sale was to be transferred back upon repayment of certain advancements with interest.

42. *Idaho.*— Pritchard *v.* Butler, (Ida. 1895) 43 Pac. 73.

Illinois.— Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43.

Kentucky.— Knox *v.* Black, 1 A. K. Marsh. (Ky.) 298; McGinnis *v.* Hart, 4 Bibb (Ky.) 327.

Maine.— Winslow *v.* Tarbox, 18 Me. 132.

New York.— Susman *v.* Whyard, 71 Hun (N. Y.) 215, 25 N. Y. Suppl. 222, 54 N. Y. St. 758.

North Carolina.— See Munnerlin *v.* Birmingham, 22 N. C. 358, 34 Am. Dec. 402, where a transfer was held not to be a mortgage in the absence of proof that there was a loan between the parties.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 36.

43. Rapier *v.* Gulf City Paper Co., 77 Ala. 126; Davis *v.* Hubbard, 38 Ala. 185; Hudson *v.* Isbell, 5 Stew. & P. (Ala.) 67; Mulford *v.* ———, 3 N. C. 431; Anglin *v.* Barlow, (Tex. Civ. App. 1898) 45 S. W. 827.

44. *Alabama.*— Murphy *v.* Barefield, 27 Ala. 634; Sewall *v.* Henry, 9 Ala. 24.

California.— Morris *v.* Angle, 42 Cal. 236.

Connecticut.— Roberts *v.* Norton, 66 Conn. 1, 33 Atl. 532.

Hawaii.— Onomea Sugar Co. *v.* Austin, 5 Hawaii 555, holding that the transferees of stock under a conditional sale were entitled to vote on it after default in performance of the condition.

Illinois.— Kerting *v.* Hilton, 152 Ill. 658, 38 N. E. 941 [*affirming* 51 Ill. App. 437].

Kentucky.— Harrison *v.* Lee, 1 Litt. (Ky.) 190.

Massachusetts.— Lee *v.* Kilburn, 3 Gray (Mass.) 594.

Mississippi.— Mason *v.* Moody, 26 Miss. 184; Vasser *v.* Vasser, 23 Miss. 378.

New York.— Quirk *v.* Rodman, 5 Duer (N. Y.) 285; Brennan *v.* Crouch, 10 N. Y. Suppl. 419, 32 N. Y. St. 273 [*affirmed* in 125 N. Y. 763, 26 N. E. 620, 36 N. Y. St. 194].

Oregon.— Spalding *v.* Brown, 36 Oreg. 160, 59 Pac. 185.

But see *In re* Gurney, 7 Biss. (U. S.) 414, 11 Fed. Cas. No. 5,873, 9 Chic. Leg. N. 255, 4 L. & Eq. Rep. 28, 15 Nat. Bankr. Reg. 373, where the contest as to whether the sale with agreement to repurchase was a mortgage was not between the original parties, and the transfer was shown to be a mortgage by proof that the parties fraudulently concealed the real nature of the agreement.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 36.

In equity an instrument intended as a mortgage will be sustained as such, although it is on its face a defeasible sale. Chapman *v.* Turner, 1 Call (Va.) 280, 1 Am. Dec. 514.

45. See *infra*, VII, B, 2.

46. Davis *v.* Childers, 45 S. C. 133, 22 S. E. 784, 55 Am. St. Rep. 757. See also Tilden *v.* Tilden, 26 Misc. (N. Y.) 672, 57 N. Y. Suppl. 864, where an agreement to give a mortgage on a vested remainder was held to create an equitable mortgage on a *pro tanto* share of the remainder.

Parol agreements to give mortgages have been held to create valid equitable mortgages when founded on valuable consideration. Shelburne *v.* Letsinger, 52 Ala. 96; Morrow *v.* Turney, 35 Ala. 131; Davis *v.* Childers, 45 S. C. 133, 22 S. E. 784, 55 Am. St. Rep. 757.

What not an agreement to mortgage.— An agreement that one who had advanced part of the purchase-price of a stock of goods was to be repaid out of the proceeds of the business before the balance of the price should be paid was held not to be an agreement to give a mortgage on the goods. Finn *v.* Donahoe, 83 Mich. 165, 47 N. W. 125.

47. Joseph Smith Co. *v.* McGuinness, 14 R. I. 59.

property as security,[48] or by authorizing one advancing money to hold a lien on property.[49]

5. Leases. An agreement for the hire of chattels at a specified rent is not a mortgage of them,[50] and the addition of a clause in the lease reserving a lien for rent does not necessarily change the nature of the instrument and cause it to become a chattel mortgage;[51] but where such a clause is inserted it has been variously held that the instrument operates as a mortgage, or is in legal effect a mortgage of the property.[52]

6. Trusts. One of the common forms which a chattel mortgage takes is a deed of trust, and the fact that the transfer assumes this form does not affect the nature of the transaction or make it any the less a mortgage.[53]

7. Construction or Determination — a. Province of Court and Jury. The

48. Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349 (deposit of warehouse receipts for cotton); Mowry *v.* Wood, 12 Wis. 413 (deposit of school-land certificates).

49. Mason *v.* Bumpass, 1 Tex. App. Civ. Cas. § 1338; Hauselt *v.* Harrison, 105 U. S. 401, 26 L. ed. 1075. See also Wilbur *v.* Almy, 12 How. (U. S.) 180, 13 L. ed. 944 [*reversing* 2 Woodb. & M. (U. S.) 371, 1 Fed. Cas. No. 256], where a person agreed to buy machinery for a factory owner and to let him use it at an agreed price per yard of cloth produced. The same person was also to furnish raw material and sell the finished cloth, crediting all above an agreed price toward payment of the machinery. It was held that a stipulation in the agreement that the machinery was to stand as collateral for the money advanced to buy it created an equitable mortgage. *Compare* Hume *v.* Riggs, 12 App. Cas. (D. C.) 355, where a written instrument charging chattels covered by a deed of trust for the payment of arrears of rent and authorizing the surviving trustee to sell them was held to create an equitable lien.

50. Neidig *v.* Eifler, 18 Abb. Pr. (N. Y.) 353. See also Booher *v.* Stewart, 75 Hun (N. Y.) 214, 27 N. Y. Suppl. 114, 58 N. Y. St. 666, 31 Abb. N. Cas. (N. Y.) 224, where an agreement to work on shares the farm of another, who was to make certain advances and in whom the title to the crop was to remain until they were paid, was held not to constitute a chattel mortgage. *Compare* Wright *v.* McAlexander, 11 Ala. 236, where it was held that a contract by which the use of slaves was allowed as a compensation for the interest of money could not be converted into a mortgage by the borrower.

51. *Michigan.*— Dalton *v.* Laudahn, 27 Mich. 529. See also Haynes *v.* Ledyard, 33 Mich. 319, construing an agreement whereby one party was to work land for the benefit of another, who was to own and have the crops raised and apply the proceeds upon an indebtedness, and holding that the agreement was not a mortgage.

Missouri.— Burgess *v.* Kattleman, 41 Mo. 480.

Ohio.— Metcalfe *v.* Fosdick, 23 Ohio St. 114; Shoenberger *v.* Mount, 1 Handy (Ohio) 566, 12 Ohio Dec. (Reprint) 292.

Oregon.— Marquam *v.* Sengfelder, 24 Oreg. 2, 32 Pac. 676.

Rhode Island.— Groton Mfg. Co. *v.* Gardiner, 11 R. I. 626.

South Dakota.— Kennedy *v.* Hull, 14 S. D. 234, 85 N. W. 223.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 19.

52. *Arkansas.*— Mitchell *v.* Badgett, 33 Ark. 387.

Florida.— Weed *v.* Standley, 12 Fla. 166.

Indiana.— Blakemore *v.* Taber, 22 Ind. 466.

Kentucky.— Three Forks Lumber Co. *v.* Smith, 17 Ky. L. Rep. 566, 32 S. W. 167.

Minnesota.— McNeal *v.* Rider, 79 Minn. 153, 81 N. W. 830, 79 Am. St. Rep. 437; Merrill *v.* Ressler, 37 Minn. 82, 33 N. W. 117, 5 Am. St. Rep. 822.

Missouri.— Faxon *v.* Ridge, 87 Mo. App. 299.

New York.—McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Betsinger *v.* Schuyler, 46 Hun (N. Y.) 349; Smith *v.* Taber, 46 Hun (N. Y.) 313; Reynolds *v.* Ellis, 34 Hun (N. Y.) 47; Johnson *v.* Crofoot, 53 Barb. (N. Y.) 574, 37 How. Pr. (N. Y.) 59; Nestell *v.* Hewitt, 19 Abb. N. Cas. (N. Y.) 282.

South Dakota.— Greeley *v.* Winsor, 1 S. D. 117, 45 N. W. 325, 36 Am. St. Rep. 720.

Texas.— Abacock *v.* St. Louis Type Foundry, 59 Tex. 514.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 19.

The instrument was a mortgage where the pretended lessor was to remain in possession, cultivate the crop, and receive one third in return for his labor (Davis *v.* Akers, 73 Mo. App. 531, holding that it was therefore void as a chattel mortgage on future crops); where it stipulated that the property should not be removed from the premises as long as any of the rent remained unpaid (Smith *v.* Worman, 19 Ohio St. 145); and where it contained a proviso that on default the rights of the lessees should be determined and the property might be reclaimed by the lessors (Frank *v.* Denver, etc., R. Co., 23 Fed. 123). *Compare* Lamson *v.* Moffat, 61 Wis. 153, 21 N. W. 62, where the instrument purported to be a lease, but the circumstances under which it was executed were such that it was held proper to submit to a jury the question whether it was intended as a mortgage.

53. Roberts *v.* Johnson, 5 Colo. App. 406, 39 Pac. 596 (statutory); Wallace *v.* Bagley, 6 Tex. Civ. App. 484, 26 S. W. 519. *Compare*

question whether a transaction is a sale or a mortgage is for the jury,[54] because it ordinarily depends upon the intention of the parties;[55] but the construction of a written instrument which is alleged to constitute a mortgage raises questions of law which must be determined by the court.[56]

b. Admissibility of Evidence. Parol evidence of intention, to show that a bill of sale absolute on its face was in fact a mortgage, was formerly restricted to cases in equity where there was fraud or mistake.[57] Now such evidence is almost universally admitted in equitable proceedings without proof of the existence of fraud,[58] and it is allowed in a great many jurisdictions in actions at law,[59]

Fouke *v.* Fleming, 13 Md. 392, where a conveyance of specified chattels to a trustee, with power to sell to pay certain debts, was held to be a quasi mortgage, and hence was not rendered void by a reservation of the surplus.

Mortgage or trust.— A conveyance by a partner of his share in firm property to secure his individual debt and providing that his net interest only should be subjected has been held to be a mortgage and not a deed of trust (Millhiser *v.* Pleasants, 118 N. C. 237, 23 S. E. 969); but the court refused to construe the instrument to be a mortgage where property was conveyed with an express agreement that it should be sold to pay certain debts, but that any residue should be resold to grantors if within a year they paid the secured debts (Iron Cliffs Co. *v.* Beecher, 50 Mich. 486, 15 N. W. 558), and where a negotiable note and mortgage securing it were transferred to indemnify the transferee against liability on certain acceptances, to be retransferred on a termination of the liability (Warren *v.* Emerson, 1 Curt. (U. S.) 239, 29 Fed. Cas. No. 17,195).

54. King *v.* Greaves, 51 Mo. App. 534; Gaither *v.* Teague, 29 N. C. 460; Horne *v.* Puckett, 22 Tex. 201.

55. Cook *v.* Lion F. Ins. Co., 67 Cal. 368, 7 Pac. 784.

The intention of the parties will control the form of the contract in determining whether a transfer is a mortgage or a sale. Eiland *v.* Radford, 7 Ala. 724, 42 Am. Dec. 610.

56. Fairbanks *v.* Bloomfield, 2 Duer (N. Y.) 349; Britt *v.* Harrell, 105 N. C. 10, 10 S. E. 902; Comron *v.* Standland, 103 N. C. 207, 9 S. E. 317, 14 Am. St. Rep. 797.

57. McKinstry *v.* Conly, 12 Ala. 678; Marshall *v.* Cox, 7 J. J. Marsh. (Ky.) 133; Thompson *v.* Patton, 5 Litt. (Ky.) 74, 15 Am. Dec. 44; Farrell *v.* Bean, 10 Md. 217.

The ground upon which courts of equity hold an absolute bill of sale to be a mortgage is that it would be fraud on the grantor to hold the property discharged of trusts attached with the grantee's consent. Sewell *v.* Price, 32 Ala. 97.

The absence of fraud or mistake has been held not to prevent the admission of extrinsic evidence to show that an absolute transfer was in fact given as a mortgage. Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307, 41 N. Y. St. 628 [*affirming* 13 N. Y. Suppl. 4, 36 N. Y. St. 598]; Mollenkopf *v.* Baumgardner, 21 Ohio Cir. Ct. 591, 11 Ohio Cir. Dec. 655. *Contra*, Whitfield *v.* Cates, 59 N. C. 136, holding that the allegation of a parol trust in favor of a third person formed no exception to the rule.

Sufficient proof of fraud was made out by showing that vendor was old, infirm, and in embarrassed circumstances and that vendee took advantage of these circumstances. Smith *v.* Pearson, 24 Ala. 355. *Compare* Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553, where evidence that a high rate of interest was charged and that grantee admitted he had only a lien was held sufficient to go to the jury on the question of fraud.

58. *Alabama.*— Bishop *v.* Bishop, 13 Ala. 475; English *v.* Lane, 1 Port. (Ala.) 328.

Indiana.— Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

Kentucky.— Blanchard *v.* Kenton, 4 Bibb (Ky.) 451.

Maryland.—Booth *v.* Robinson, 55 Md. 419; Farrell *v.* Bean, 10 Md. 217.

Massachusetts.— Raphael *v.* Mullen, 171 Mass. 111, 50 N. E. 515; Newton *v.* Fay, 10 Allen (Mass.) 505.

Mississippi.— Carter *v.* Burris, 10 Sm. & M. (Miss.) 527.

New Jersey.— Cake *v.* Shull, 45 N. J. Eq. 208, 16 Atl. 434.

Virginia.— Ross *v.* Norvell, 1 Wash. (Va.) 14, 1 Am. Dec. 422.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 44.

59. *Arkansas.*— Scott *v.* Henry, 13 Ark. 112, where it was held to be a well-established rule, in determining whether a bill of sale is a mortgage, that the courts will not be limited to the terms of the written contract, but will consider all the circumstances connected with it, such as the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances verbal or written, as well as the acts and declarations of the parties, and will decide on the whole circumstances taken together.

California.— Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911.

Illinois.— Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; National Ins. Co. *v.* Webster, 83 Ill. 470; Moore *v.* Foster, 97 Ill. App. 233.

Iowa.— Votaw *v.* Diehl, 62 Iowa 676, 13 N. W. 757, 18 N. W. 305.

Kansas.— Butts *v.* Privett, 36 Kan. 711, 14 Pac. 247.

Michigan.—Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134; Fuller *v.* Parrish, 3 Mich. 211.

Minnesota.— Jones *v.* Rahilly, 16 Minn. 320.

Missouri.— King *v.* Greaves, 51 Mo. App.

especially in cases where the action is between the original parties to the bill of sale.[60]

c. Sufficiency of Evidence. To warrant the conclusion that an absolute bill of sale was intended as a mortgage, the evidence must be clear, unequivocal, and convincing;[61] and where a debt was admitted to be satisfied by the transfer even stronger proof is necessary.[62] Inadequacy of consideration for the sale is entitled to great weight as showing that it was intended as a mortgage,[63] and the inquiry whether a note was given at the time of the sale is also an important one.[64]

534; Quick *v.* Turner, 26 Mo. App. 29; Newell *v.* Keeler, 13 Mo. App. 189. *Contra*, Montany *v.* Rock, 10 Mo. 506.

New York.— Coe *v.* Cassidy, 72 N. Y. 133 [*affirming* 6 Daly (N. Y.) 242]; Despard *v.* Walbridge, 15 N. Y. 374; Tyler *v.* Strang, 21 Barb. (N. Y.) 198.

Oregon.— Bartel *v.* Lope, 6 Oreg. 321.

Texas.—Watson *v.* Boswell, (Tex. Civ. App. 1901) 61 S. W. 407.

Washington.— Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

Wisconsin.— Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257; Manufacturers' Bank *v.* Rugee, 59 Wis. 221, 18 N. W. 251.

Contra, Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82; Hartshorn *v.* Williams, 31 Ala. 149; Reisterer *v.* Carpenter, 124 Ind. 30, 24 N. E. 371; Proctor *v.* Cole, 66 Ind. 576; Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 44.

Other writings and acts of the parties are admissible to show that a bill of sale absolute on its face was intended as a mortgage. Reed *v.* Jewett, 5 Me. 96; Brogden *v.* Walker, 2 Harr. & J. (Md.) 285; New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275; Dabney *v.* Green, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503; Chapman *v.* Turner, 1 Call (Va.) 280, 1 Am. Dec. 514; Ross *v.* Norvell, 1 Wash. (Va.) 14, 1 Am. Dec. 422.

60. Henderson *v.* Mayhew, 2 Gill (Md.) 393, 41 Am. Dec. 434; Link *v.* Harrington, 41 Mo. App. 635; State *v.* Koch, 40 Mo. App. 635; Moore *v.* Keep, 5 Mo. App. 593.

The assignee of a grantor who has executed an absolute bill of sale has been allowed to show that the consideration was insufficient in order to prove that the transfer was a mortgage. Grove *v.* Rentch, 26 Md. 367. *Compare* Hawes *v.* Weeden, 180 Mass. 106, 61 N. E. 802, where it was held that a third person not a party to a bill of sale absolute on its face might show that it was intended merely as security.

Parol evidence to show that an instrument was not a mortgage is not admissible when it was called on its face a "chattel mortgage" and registered as such. Wilber *v.* Kray, 73 Tex. 533, 11 S. W. 540.

61. *Alabama.*— Harris *v.* Miller, 30 Ala. 221; Brantley *v.* West, 27 Ala. 542; Turnipseed *v.* Cunningham, 16 Ala. 501, 50 Am. Dec. 190; Chapman *v.* Hughes, 14 Ala. 218; Freeman *v.* Baldwin, 13 Ala. 246.

Arkansas.— Williams *v.* Cheatham, 19 Ark. 278.

Illinois.—Purington *v.* Akhurst, 74 Ill. 490.

Maryland.— Watkins *v.* Stockett, 6 Har. & J. (Md.) 435, holding that the strongest kind of proof was required.

Michigan.— Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134.

New Jersey.— Cake *v.* Shull, 45 N. J. Eq. 208, 16 Atl. 434.

Wisconsin.— Mackey *v.* Stafford, 43 Wis. 653.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 45.

Requiring proof that both parties should understand the transaction to be a mortgage has been held error. Perkins *v.* Eckert, 55 Cal. 400.

62. McKinstry *v.* Conly, 12 Ala. 678.

Declarations of the parties are not of themselves sufficient to prove an absolute bill of sale to be a mortgage. Colvard *v.* Waugh, 56 N. C. 335.

63. Todd *v.* Hardie, 5 Ala. 698; English *v.* Lane, 1 Port. (Ala.) 328; Hudson *v.* Isbell, 5 Stew. & P. (Ala.) 67; Cooper *v.* Brock, 41 Mich. 488, 2 N. W. 660. *Compare* Wilson *v.* Weston, 57 N. C. 349, where the fact that the bargainor was illiterate, poor, and needy, added to the insufficiency of the consideration, was held to show that a security was intended.

64. **Giving of note.**— Where a note was given the transfer was held to be a mortgage (Smith *v.* Tilton, 10 Me. 350) and where no note was given it was a strong circumstance to show a sale (Robinson *v.* Farrelly, 16 Ala. 472).

Sufficiency of evidence.— Where it was shown that grantee exercised absolute control over goods and claimed to be absolute owner, the transaction was held to be a sale (Bodman *v.* Fisher, 12 Ky. L. Rep. 698, 15 S. W. 8), and where there was a bill of sale of a newspaper and the manager testified that he had recognized the grantee as owner and had bought an interest from him, but that he had received money from the grantor to run the paper, the court held the evidence insufficient to justify a holding that the bill of sale was a mortgage (Cochrane *v.* Price, (Md. 1887) 8 Atl. 361). So, in determining whether a conveyance of a slave was a conditional sale or a mortgage, the retention of the slave by the owner, the existence of a previous debt on his part, and the fact that the grantees were not negro traders justified the court in construing the instrument as a mortgage. Desloge *v.* Ranger, 7 Mo. 327. *Compare* Hatfield *v.* Montgomery, 2 Port. (Ala.) 58, where there was no testimony rebutting a denial of an alleged parol agreement for redemption con-

IV. FORMALITIES ESSENTIAL TO CREATION OF VALID INSTRUMENT.

A. In General. Since at common law a valid mortgage could be created by parol,[65] informalities in the signature of a written mortgage will not invalidate it,[66] unless certain requirements are made necessary by statute,[67] such as that chattel mortgages shall be executed in like manner as mortgages of real estate,[68] or that mortgages of household property shall be signed by both husband and wife.[69] The mortgagor need not sign the instrument with his own proper name if the signature used by him sufficiently discloses his identity,[70] and, although it was

tained in the answer to a bill to redeem and the sale was held absolute.

65. See *supra*, III, B.

Stamping.— A chattel mortgage may be read in evidence, although not stamped, in the absence of proof that the stamp was fraudulently omitted. Fenelon *v.* Hogoboom, 31 Wis. 172. So, where mortgage notes were stamped but the mortgage deed itself was not, because it was not thought necessary, it was valid and binding. Plunkett *v.* Hanschka, 14 S. D. 454, 85 N. W. 1004. *Compare* Griffith *v.* Hershfield, 1 Mont. 66, where it was held that a county recorder was not authorized to determine the value of gold dust described in a mortgage which was presented to him for record and could not know what stamp should be affixed thereto before he recorded it.

66. Alabama Warehouse *v.* Lewis, 56 Ala. 514; Breene *v.* McCrary, 52 Ala. 154, which hold a signature by mark to be sufficient. But under statute a signature by making a mark is not good where the mark is attested only by a witness who attests by means of his mark. Houston *v.* State, 114 Ala. 15, 21 So. 813.

Signature by a trustee under a deed of trust by way of mortgage is not essential to the validity of the instrument, although it is material on the question of acceptance by the trustee. Dewoody *v.* Hubbard, 1 Stew. & P. (Ala.) 9.

67. **Strict compliance necessary.**—Statutes which prescribe the manner in which mortgages of goods and chattels shall be executed and recorded must be strictly complied with. Hill *v.* Gilman, 39 N. H. 88.

68. Willows *v.* Rosenstien, (Ida. 1897) 48 Pac. 1067; Hooker *v.* Hammill, 7 Nebr. 231; American Surety Co. *v.* Worcester Cycle Mfg. Co., 100 Fed. 40.

Instruments conveying both real and personal property, it has been held, must be executed as chattel mortgages in order to be valid as to the personal property conveyed. Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201 [*affirming* 29 Ill. App. 304]. But see Strouse *v.* Cohen, 113 N. C. 549, 18 S. E. 323, holding that although an instrument purporting to be a mortgage of a married woman's realty and personalty is invalid as to the realty, because the husband does not join in the body thereof, this does not invalidate it as to the personalty.

69. McKelvy *v.* Kolbe, 89 Ill. App. 661, holding that a mortgage executed by a married woman without the signature of her husband was void, although her husband had abandoned her.

What constitutes "household goods."— It has been held that the term "household goods" means goods suitable to the condition and station of the mortgagor which are used by him for personal, home, or household convenience (Peter Schoenhofen Brewing Co. *v.* Merrion, 67 Ill. App. 123), and also that the goods must be in use by the family as well as in their possession (Green *v.* McCrane, 55 N. J. Eq. 436, 37 Atl. 318).

Mortgages securing purchase-money for household furniture have been held not to be within the purview of the statutes requiring joint execution by husband and wife (Pease *v.* L. Fish Furniture Co., 70 Ill. App. 138; Mantonya *v.* Martin Emrich Outfitting Co., 69 Ill. App. 62), or of a general statute requiring chattel mortgages executed by a married man to be signed by his wife (Twombly *v.* Randall, MacArthur & M. (D. C.) 48).

A chattel mortgage is only void as to exempt property because it was executed by the husband alone. Watson *v.* Mead, 98 Mich. 330, 57 N. W. 181.

Signature of wife not required.— Under Wis. Rev. Stat. (1898), § 2313, requiring that a chattel mortgage must be executed by the mortgagor's wife, it is not necessary that the wife execute a mortgage covering exempt property to make it valid against creditors of the mortgagor, since they could not be benefited by having the mortgage declared void. Cunningham *v.* Brictson, 101 Wis. 378, 77 N. W. 740. *Compare* Strickland *v.* Minnesota Type-Foundry Co., 77 Minn. 210, 79 N. W. 674, holding that a mortgage of exempt property to secure the purchase-price need not be signed by the mortgagor's wife, notwithstanding it was not executed directly to the seller.

70. Taylor *v.* Bowen, 84 Mo. App. 613. See also Walrath *v.* Campbell, 28 Mich. 111, holding that a mortgage executed by a religious society was valid, in spite of a misnomer, where the identity of the society was clearly shown.

The signature to a partnership mortgage may be in the name of one of the partners if the instrument covers partnership property and is given to secure a partnership debt (Citizens' Nat. Bank *v.* Johnson, 79 Iowa 290, 44 N. W. 551), or in the firm-name without the use of the names of any of the partners (Hendren *v.* Wing, 60 Ark. 561, 31 S. W. 149, 46 Am. St. Rep. 218).

required that a mortgage be subscribed, signing at the bottom of a schedule annexed thereto was held not to be necessary.[71]

B. Acknowledgment[72]— **1. Necessity.** Acknowledgment is necessary to render the instrument valid against creditors and third persons,[73] but between the parties[74] or against persons with actual notice[75] a mortgage is effectual, although it is defectively acknowledged or not acknowledged at all. The necessity of acknowledgment may be superseded by the mortgagee taking possession of the mortgaged property before the rights of third parties intervene,[76] and in cer-

The president of a corporation may sign with his own name a chattel mortgage which purports to be made by the corporation and such signature is not rendered invalid because the president affixes his personal seal. Sherman *v.* Fitch, 98 Mass. 59.

71. American Surety Co. *v.* Worcester Cycle Mfg. Co., 100 Fed. 40, construing Connecticut statute.

The presumption that the schedule was annexed before the instrument was executed is sufficient to render the instrument valid in the absence of proof to the contrary. Belknap *v.* Wendell, 21 N. H. 175.

Blank spaces in a chattel mortgage, which are filled in after the execution of the instrument, must be filled in accordance with the agreement of the parties. Ward *v.* Watson, 24 Nebr. 592, 39 N. W. 615. See, generally, ALTERATIONS OF INSTRUMENTS.

Proof of execution.— The execution of a chattel mortgage is not proved by production of a copy thereof and a certificate of acknowledgment attached thereto certified by the town-clerk. Maxwell *v.* Inman, 42 Hun (N. Y.) 265. *Compare* Edwards *v.* Hushing, 31 Ill. App. 223, where the proper execution of a chattel mortgage was held to be a question for the jury.

72. For matters relating to acknowledgments, generally, see ACKNOWLEDGMENTS, 1 Cyc. 506.

73. Crane *v.* Chandler, 5 Colo. 21; Edinger *v.* Grace, 8 Colo. App. 21, 44 Pac. 855; Forest *v.* Tinkham, 29 Ill. 141; Weill *v.* Zacher, 92 Ill. App. 296; Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154; Hodgson *v.* Butts, 3 Cranch (U. S.) 140, 2 L. ed. 391. See also Machette *v.* Wanless, 1 Colo. 225 (holding that an unacknowledged mortgage cannot be received in evidence); Einstein *v.* Shouse, 24 Fla. 490, 5 So. 380 (holding that the requirement that a mortgage be proved before it was admitted in evidence required that its due acknowledgment be shown).

No person other than a purchaser or a creditor can complain of an absence of acknowledgment. Chase *v.* Tacoma Box Co., 11 Wash. 377, 39 Pac. 639; Scruggs *v.* Burruss, 25 W. Va. 670.

Recording a defectively acknowledged instrument is ineffectual to impart constructive notice of the contents of the instrument to subsequent parties. Kothe *v.* Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594; St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497, 55 N. W. 60; Selking *v.* Hebel, 1 Mo. App. 340.

The copy of a lost mortgage must be acknowledged to entitle it to record. Porter *v.* Dement, 35 Ill. 478.

Necessity for reacknowledgment after alteration.— Where a mortgage is invalidated by an alteration by consent of the parties after it has been acknowledged, it must be reacknowledged before it is again placed upon the record. Harvey *v.* Crane, 2 Biss. (U. S.) 496, 11 Fed. Cas. No. 6,178, 3 Chic. Leg. N. 341, 5 Nat. Bankr. Reg. 218. But see Milton *v.* Boyd, 49 N. J. Eq. 142, 22 Atl. 1078, holding that when a mortgage was altered to include other property and then reacknowledged it took effect as to the property originally included from the time of the original acknowledgment.

74. *Arkansas.*—Lemay *v.* Williams, 32 Ark. 166; Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732.

Colorado.— Crane *v.* Chandler, 5 Colo. 21; Machette *v.* Wanless, 2 Colo. 169; Morse *v.* Morrison, (Colo. App. 1901) 66 Pac. 169.

Illinois.— Porter *v.* Dement, 35 Ill. 478; Forest *v.* Tinkham, 29 Ill. 141; Weill *v.* Zacher, 92 Ill. App. 296.

Iowa.— Waterhouse *v.* Black, 87 Iowa 317, 54 N. W. 342; Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340.

Minnesota.—Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 116.

75. Waterhouse *v.* Black, 87 Iowa 317, 54 N. W. 342; Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340; Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872. *Contra,* Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732; Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201 [*affirming* 29 Ill. App. 304]; Kothe *v.* Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594. See also ACKNOWLEDGMENTS, 1 Cyc. 516, note 22; 1 Cyc. 527, note 82.

76. *Arkansas.*— Garner *v.* Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715.

Colorado.— Wilcox *v.* Jackson, 7 Colo. 521, 4 Pac. 966.

Illinois.— Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Chipron *v.* Feikert, 68 Ill. 284; Webber *v.* Mackey, 31 Ill. App. 369. See also ACKNOWLEDGMENTS, 1 Cyc. 541, note 53.

Iowa.— Liggett, etc., Tobacco Co. *v.* Collier, 89 Iowa 144, 56 N. W. 417.

Maryland.— Bryan *v.* Hawthorne, 1 Md. 519.

United States.— Rainwater-Boogher Hat Co. *v.* Malcolm, 51 Fed. 734, 10 U. S. App. 249, 2 C. C. A. 476.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 443.

tain jurisdictions by filing the instrument for record[77] or by having it duly witnessed.[78]

2. CERTIFICATE. The certificate must set forth that it was the mortgagor who acknowledged the mortgage[79] and state which partner acknowledged a mortgage executed by a firm,[80] but need not state the venue.[81] It should be signed by the officer taking the acknowledgment[82] and sealed with the official seal.[83] A certificate regular in form, if shown to be false, makes the mortgage void as to creditors of the mortgagor[84] and third parties acting in good faith.[85]

3. SUFFICIENCY — a. In General. Statutes relative to the acknowledgment of chattel mortgages are in derogation of common law and should be strictly construed.[86] While a statutory requirement that the justice taking an acknowledgment enter a memorandum thereof is not rendered unnecessary by record of the mortgage,[87] entry on the justice's docket is not necessary to make the mortgage valid between the parties,[88] and superfluous matter will not render a docket entry void.[89] Acknowledgment of a firm mortgage by one partner is sufficient, although

77. Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250; Hicks *v.* Ross, 71 Tex. 358, 9 S. W. 315. *Contra,* Sanders *v.* Pepoon, 4 Fla. 465. *Compare* Baxter *v.* Howell, 7 Tex. Civ. App. 198, 26 S. W. 453, holding that the statute providing that a certified copy could be admitted in evidence did not dispense with the necessity for the acknowledgment of an original mortgage filed on agreement that it shall be given in evidence as a certified copy.

Probative effect of recorded, but unacknowledged, chattel mortgage see ACKNOWLEDGMENTS, 1 Cyc. 538, note 36.

Preëxisting mortgages are not affected by a subsequent statute providing that filing an unacknowledged mortgage shall make it valid as to all persons. Singer Mfg. Co. *v.* Shull, 74 Mo. App. 486. *Compare* Westheimer *v.* Goodkind, 24 Mont. 90, 60 Pac. 813, where a defectively acknowledged mortgage was held invalid against a purchaser with notice, because a statute did not have a retroactive effect.

78. Fisher *v.* Porter, 11 S. D. 311, 77 N. W. 112. *Compare* Hodgson *v.* Butts, 3 Cranch (U. S.) 140, 2 L. ed. 391, holding that proving by the oaths of three witnesses supplies the need of acknowledgment.

79. Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154. *Compare* Brown *v.* Corbin, 121 Ind. 455, 23 N. E. 276, holding that a certificate that "personally appeared Augustus Palin, and Nancy J. Palin, his wife, acknowledged," etc., showed an acknowledgment by both husband and wife.

The words "and entered by me" may be omitted from the justice's certificate of acknowledgment if the justice has in fact made the entry. Harvey *v.* Dunn, 89 Ill. 585; Schroder *v.* Keller, 84 Ill. 46; Harlow *v.* Birger, 30 Ill. 425.

80. Hughes *v.* Morris, 110 Mo. 306, 19 S. W. 481; Sloan *v.* Owens, etc., Mach. Co., 70 Mo. 206. *Contra,* Barrow *v.* Conlee, 89 Ill. App. 625.

81. Martin *v.* Heilman Mach. Works, 89 Ill. App. 159. But see Willard *v.* Cramer, 36 Iowa 22, holding the acknowledgment void where the certificate failed to state the county of the notary taking it.

82. Hill *v.* Gilman, 39 N. H. 83.

83. Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340; Thompson *v.* Scheid, 39 Minn. 102, 38 N. W. 801, 12 Am. St. Rep. 619.

84. Fahndrich *v.* Hudson, 76 Ill. App. 641.

85. McDowell *v.* Stewart, 83 Ill. 538.

86. Porter *v.* Dement, 35 Ill. 478; Westheimer *v.* Goodkind, 24 Mont. 90, 60 Pac. 813.

General statutory provisions regarding acknowledgments have been held applicable to chattel mortgages. Hooker *v.* Hammill, 7 Nebr. 231.

An acknowledgment by a wife that she has relinquished dower in a mortgage of both personalty and realty will not create a valid encumbrance on her interest in the personalty, as to third persons. Carle *v.* Wall, (Ark. 1891) 16 S. W. 293.

Omitting name of mortgagor from acknowledgment clause is a fatal defect in the acknowledgment. Lenehan *v.* Akana, 6 Hawaii 538.

Acknowledgment in the form appropriate to mortgages of real estate has been held insufficient. Long *v.* Cockern, 128 Ill. 29, 21 N. E. 201 [*affirming* 29 Ill. App. 304].

87. Koplin *v.* Anderson, 88 Ill. 120.

88. Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302; Frank *v.* Miner, 50 Ill. 444; Porter *v.* Dement, 35 Ill. 478.

89. Hamilton *v.* Seeger, 75 Ill. App. 599.

Omission of the word "acknowledged" from the justice's entry is not fatal if words having the same legal effect are used. Jesse French Piano, etc., Co. *v.* Meehan, 84 Ill. App. 262.

Proof of docket entry is unnecessary in an action of replevin by the mortgagee (Calumet Paper Co. *v.* Knight, etc., Co., 43 Ill. App. 566), for it will be presumed that the justice taking the acknowledgment made the proper entry (Harlow *v.* Birger, 30 Ill. 425).

A docket entry is not rendered void by failure to make the heading in the statutory form (Crescent Coal, etc., Co. *v.* Raymond, 57 Ill. App. 197), or by a misnomer in describing the mortgagee as "L. Fish" instead of the "L. Fish Furniture Co." (Pease *v.* L. Fish Furniture Co., 176 Ill. 220, 52 N. E. 932 [*affirming* 70 Ill. App. 138]).

his name does not appear in the firm-name,[90] and a mistake in date as to the year when the acknowledgment was taken does not invalidate it.[91]

b. Place. The place for acknowledgment may be fixed by statute,[92] but a statute designating the place where a chattel mortgage shall be acknowledged is satisfied by an acknowledgment before a justice in a village located in the district where the mortgagor resides[93] or before a justice in the district where one mortgagor resides;[94] and recitals in the mortgage as to the residence of the mortgagor are not conclusive.[95]

c. Who May Take. An acknowledgment may be taken by a justice of the peace,[96] although he be only a *de facto* officer,[97] or by a county recorder,[98] but a justice is disqualified who is a party to the mortgage.[99]

C. Affidavits of Good Faith[1] — **1. Necessity.** The statutory provisions[2] regarding affidavits of good faith render it necessary that such an affidavit shall be attached to a chattel mortgage[3] to make it valid against creditors of the mortgagor and purchasers of the property covered by the mortgage,[4] but between the

90. Keck *v.* Fisher, 58 Mo. 532.

A mortgage made by a corporation, but acknowledged by its president and secretary as the mortgagor's therein named, is not acknowledged in compliance with the statute. Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154.

91. Durfee *v.* Grinnell, 69 Ill. 371.

92. See ACKNOWLEDGMENTS, 1 Cyc. 547, note 93; 1 Cyc. 558, note 67.

Requiring acknowledgment in the place where the mortgagor resides has been held to prevent a non-resident of the state, whether a natural or artificial person, from executing a valid mortgage. Cook *v.* Hager, 3 Colo. 386. But see Hewitt *v.* General Electric Co., 164 Ill. 420, 45 N. E. 725, holding that the acknowledgment by a foreign corporation of a mortgage on personalty within the state may be made at its home office, before any officer authorized to take acknowledgments.

93. Ticknor *v.* McClelland, 84 Ill. 471. *Compare* Durfee *v.* Grinnell, 69 Ill. 371, holding that an acknowledgment was not invalidated by the facts that the acknowledgment was not taken within the town of the justice's residence and that he kept his office and docket a few rods outside the town.

94. Funk *v.* Staats, 24 Ill. 632.

Acknowledgment of a mortgage of personalty situated in two counties made before a justice of the peace of one of the counties is sufficient to render the mortgage good as to the property in such county. McDaniel *v.* Harris, 27 Mo. App. 545.

95. Hewitt *v.* General Electric Co., 164 Ill. 420, 45 N. E. 725 [*affirming* 61 Ill. App. 168], holding that it could be shown by evidence that the mortgagor was a non-resident and that the mortgage was properly acknowledged in the state of his residence.

96. Ticknor *v.* McClelland, 84 Ill. 471, Herkelrath *v.* Stookey, 58 Ill. 21, in which cases it was held that the statute conferring on police magistrates the powers of a justice of the peace entitled them to take acknowledgments.

A statute requiring a foreign acknowledgment to be made before the mayor of the town near which the mortgagor resided is not satisfied by a certificate of acknowledgment by two justices authenticated by the clerk of the county court. Miller *v.* Henshaw, 4 Dana (Ky.) 325.

97. Nelson *v.* Kessinger, 16 Ill. App. 185.

98. Hamilton *v.* Mitchell, 6 Blackf. (Ind.) 131.

99. Hammers *v.* Dole, 61 Ill. 307.

Where the officer taking the acknowledgment was disqualified on account of interest, the record is none the less notice to a subsequent mortgagee where such disqualification does not appear on the face of it. Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449.

1. Attestation and acknowledgment are not rendered unnecessary by an affidavit of good faith. Fulton *v.* Doty, 7 Ohio S. & C. Pl. Dec. 503.

2. In Maryland the Maryland Act of 1856, c. 154, §§ 128–142, dispensing with the requirement for an affidavit, was not repealed or affected by chapter 113, providing how an affidavit could be made, which was passed on the same day. Fouke *v.* Fleming, 13 Md. 392.

3. Where a chattel mortgage is acknowledged and recorded as a deed of conveyance, an affidavit of good faith is unnecessary and therefore a defect in the jurat of the affidavit is not fatal. Whitehead *v.* Hamilton Rubber Co., 53 N. J. Eq. 454, 32 Atl. 377.

4. Phillips *v.* Johnson, 64 N. H. 393, 10 Atl. 819; Field *v.* Silo, 44 N. J. L. 355; Nash *v.* Hall, (N. J. 1898) 39 Atl. 374; Benedict *v.* Peters, 58 Ohio St. 527, 51 N. E. 37; Droege *v.* Ipsharding, 5 Ohio Dec. (Reprint) 543, 6 Am. L. Rec. 478 (against an assignee for the benefit of creditors); Carstens *v.* Moyer, 22 Wash. 61, 60 Pac. 51; Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 16 Wash. 499, 48 Pac. 333, 737.

A lien on crops under a contract for the sale of land is not effective as a chattel mortgage unless accompanied by an affidavit that the debt secured is justly due. Whiting *v.* Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598.

The affidavit should be put on file along with the copy of the mortgage to render it valid against a purchaser. Marsden *v.* Cornell, 2 Hun (N. Y.) 449. *Compare* Mowry *v.* White, 21 Wis. 417, holding it sufficient to have the affidavit placed on file in the clerk's

parties[5] and against persons with notice[6] an affidavit is unnecessary. An affidavit is also unnecessary where the mortgagee takes possession of the property before the rights of third persons intervene.[7]

2. SUFFICIENCY — a. Form — (I) *IN GENERAL.* Slight departure from the form prescribed by statute will not render an affidavit invalid,[8] while in the absence of statutory requirements the form of the affidavit is immaterial,[9] so that affiant's failure to sign is not fatal;[10] but omission of a material clause from the statutory form will render the affidavit invalid.[11]

(II) *STATEMENT OF SUBSTANTIVE FACTS.* If the consideration for the mortgage is a debt, the affidavit should contain a statement as to how such debt arose[12] and the amount thereof,[13] and it must show that the consideration set forth

office of the town where the mortgagor resided.

On refiling the affidavit of execution need not be repeated or any copy of it filed. Armstrong *v.* Ausman, 11 U. C. Q. B. 498; Beaty *v.* Fowler, 10 U. C. Q. B. 382.

5. Adams *v.* Rice, 65 N. H. 186, 18 Atl. 652; Wilson *v.* Lippincott, (N. J. 1899) 44 Atl. 989.

Third persons who have no rights against the mortgagor cannot object to the absence of any affidavit accompanying a mortgage. Marcum *v.* Coleman, 8 Mont. 196, 19 Pac. 394. *Compare* Reynolds *v.* Fitzpatrick, 23 Mont. 52, 57 Pac. 452, where the mortgagor sold the mortgaged chattels to a purchaser, who assumed the mortgage debt, and subsequently to this sale creditors of the mortgagor levied on them. It was held that the mortgagee was entitled to recover possession, even though the mortgage was not accompanied by an affidavit of good faith.

6. Roberts *v.* Crawford, 58 N. H. 499; Whitaker *v.* Westfall, 2 Ohio Cir. Ct. 321, 1 Ohio Cir. Dec. 509; Roy *v.* Scott, 11 Wash. 399, 39 Pac. 679. *Contra,* Milburn Mfg. Co. *v.* Johnson, 9 Mont. 537, 24 Pac. 17; American L. & T. Co. *v.* Olympia Light, etc., Co., 72 Fed. 620.

7. Chicago Title, etc., Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4; Clark *v.* Tarbell, 57 N. H. 328 [*overruling* Janvrin *v.* Fogg, 49 N. H. 340]; Levin *v.* Russell, 42 N. Y. 251. *Contra,* Reid *v.* Creighton, 24 Can. Supreme Ct. 69. *Compare* Bonnet *v.* Hope Mfg. Co., 51 N. J. Eq. 162, 26 Atl. 685, where possession was not taken till after a sheriff had levied on the chattels and it was held that the possession did not supply the place of an insufficient affidavit.

A mortgage of book-accounts need not be accompanied by an affidavit. Nash *v.* Hall, (N. J. 1898) 39 Atl. 374.

8. Petrovitzky *v.* Brigham, 14 Utah 472, 47 Pac. 666; Emerson *v.* Bannerman, 19 Can. Supreme Ct. 1; De Forrest *v.* Bunnell, 15 U. C. Q. B. 370.

Use of past tense instead of present is not fatal to validity of the affidavit. Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

Using the name of assignor where the name of assignee should be put will make the affidavit bad. Olmstead *v.* Smith, 15 U. C. Q. B. 421.

The name of the lender to whom the mortgage is executed need not be specifically stated. Douglass *v.* Williams, (N. J. 1901) 48 Atl. 222.

9. Gardiner *v.* Parmalee, 31 Ohio St. 551, holding that all material facts must be stated.

10. Ede *v.* Johnson, 15 Cal. 53; Lutz *v.* Kinney, 23 Nev. 279, 46 Pac. 257; Gambrinus Stock Co. *v.* Weber, 41 Ohio St. 689 [*reversing* 6 Ohio Dec. (Reprint) 1102, 10 Am. L. Rec. 482, 8 Ohio Dec. (Reprint) 259, 6 Cinc. L. Bul. 741].

Misnomer of mortgagor in body of affidavit is immaterial where the mortgage purports to be made, and is signed, by the same person as is the affidavit. Sanborn *v.* Cunningham, (Cal. 1893) 33 Pac. 894.

An omission of a description showing the official character of affiant in his signature may be supplied from the correct description contained in the body of the affidavit. Yost *v.* Santa Ana Commercial Bank, 94 Cal. 494, 29 Pac. 858.

A statutory requirement that the parties shall make and subscribe an affidavit is not complied with by having the mortgagor and mortgagee write their names in the body of the affidavit. Stone *v.* Marvel, 45 N. H. 481.

11. Sherman *v.* Estey Organ Co., 69 Vt. 355, 38 Atl. 70, where the affidavit omitted the clause in the statutory form stating that the debt was not created to support the mortgage.

Failure to state where the affidavit is sworn to renders it void, even though the affidavit is headed with the county where the oath was taken. Morse *v.* Phinney, 22 Can. Supreme Ct. 563.

The affidavit must be indorsed on the mortgage and authenticated by the signature of the officer administering the oath to satisfy the requirements of one statute in regard thereto. Benedict *v.* Peters, 58 Ohio St. 527, 51 N. E. 37.

12. Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571; Ehler *v.* Turner, 35 N. J. Eq. 68. *Compare* Wilson *v.* Lippincott, (N. J. 1899) 44 Atl. 989, holding that a statement that the consideration for the mortgage is milk and part of a vendue bill is sufficient.

13. A misstatement of the actual amount of indebtedness, although made under an honest mistake of fact, renders the affidavit void. Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl.

in the instrument is the real consideration for the conveyance.[14] According as the mortgage is given to secure a debt, liability, or agreement, the affidavit must be so varied as to verify the real transaction between the parties.[15] Such facts as are stated in the mortgage need not be repeated in the affidavit when a specific reference is made to them,[16] for under such circumstances matters in the mortgage must be regarded as part of the affidavit.[17]

(III) *JURAT.* The jurat[18] should indicate the person who took the oath to the affidavit;[19] and, while it has been held that an oath before a justice of the peace of another state was sufficient,[20] the mayor of a foreign town was not a proper officer to administer the oath.[21]

b. Time of Execution. An affidavit need not be made on the day the mortgage was executed.[22]

402. See also Nichols *v.* Bingham, 70 Vt. 320, 40 Atl. 827, holding a mortgage void where the amount of indebtedness stated in the affidavit was reduced to the actual sum, by indorsing the excess as payment on the mortgage note.

14. Denton *v.* Griffith, 17 Md. 301.

15. Parker *v.* Morrison, 46 N. H. 280; Tarbell *v.* Jones, 56 Vt. 312. See also Sumner *v.* Dalton, 58 N. H. 295, holding that, where a debt and a liability were secured by a chattel mortgage and the affidavit spoke of the debt only, the mortgage would be good as to the debt, although invalid as security for the liability.

Indemnity mortgages.— An affidavit in an indemnity mortgage, which merely states that the mortgagor is indebted to the mortgagee in a sum certain, is bad, because it does not conform to the actual facts (Baldwin *v.* Benjamin, 16 U. C. Q. B. 52), and a defect in this respect cannot be cured by the conditions contained in the mortgage (Blandy *v.* Benedict, 42 Ohio St. 295). In describing the contingent indebtedness the number of notes on which the mortgagee is surety, their amount, and the date of their maturity should be given. It is not sufficient to give a gross amount (Winslow *v.* Hart, 4 Ohio Dec. (Reprint) 567, 2 Clev. L. Rep. 387) and an affidavit is insufficient which fails to give the name of the payee of the notes and to state that they were put in circulation (Thropp *v.* Knight, (N. J. 1894) 28 Atl. 1037); but the affidavit was sufficient where the actual transaction between the parties was disclosed and it was stated in the affidavit that "there is nothing now due and the utmost that may become due is" a sum mentioned (Horowitz *v.* Weidner, (N. J. 1895) 31 Atl. 771). *Compare* Southern *v.* Wilcox, 4 Ohio Dec. (Reprint) 251, 1 Clev. L. Rep. 170, where, on the facts, it was held that the relation between mortgagor and mortgagee was that of principal and surety.

A statement that the claim on which the mortgagee is surety is still unpaid does not render the affidavit sufficient, but it must be shown that the mortgage was taken in good faith to make it valid against creditors. Nesbit *v.* Worts, 37 Ohio St. 378.

16. Douglass *v.* Williams, (N. J. 1901) 48 Atl. 222; Camden Safe-Deposit, etc., Co. *v.* Burlington Carpet Co., (N. J. 1895) 33 Atl. 479; Tompkins *v.* Crosby, (N. J. 1890) 19 Atl. 720; Gardiner *v.* Parmalee, 31 Ohio St. 551; Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37; Gilbert *v.* Vail, 60 Vt. 261, 14 Atl. 542; Smith *v.* McLean, 21 Can. Supreme Ct. 355; Valentine *v.* Smith, 9 U. C. C. P. 59.

17. Fletcher *v.* Bonnet, 51 N. J. Eq. 615, 28 Atl. 601.

Extrinsic evidence cannot be admitted to support an insufficient affidavit, nor can it be aided by the mortgage unless a reference is made thereto. Marcum *v.* Coleman, 10 Mont. 73, 24 Pac. 701; Baker *v.* Gans, 7 Mont. 329, 16 Pac. 590; Baker *v.* Power, 7 Mont. 326, 16 Pac. 589; Butte Hardware Co. *v.* Sullivan, 7 Mont. 307, 16 Pac. 588; Leopold *v.* Silverman, 7 Mont. 266, 16 Pac. 580.

Unless the facts requisite to make the mortgage sufficient are contained therein a reference in the affidavit to the mortgage is useless. Winslow *v.* Hart, 4 Ohio Dec. (Reprint) 567, 2 Clev. L. Rep. 387.

18. Form of jurat.— An omission of the words "Before me" and of the date from the jurat of an affidavit is a fatal defect (Archibald *v.* Hubley, 18 Can. Supreme Ct. 116); but a jurat is not rendered invalid by the notary's failure to affix his notarial seal (Ashley *v.* Wright, 19 Ohio St. 291), to specify his residence (Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396) or his official capacity (Magowan *v.* Baird, 53 N. J. Eq. 656, 33 Atl. 1054); and it has been held that the omission of the words "So help us God" from a statutory affidavit did not render it invalid (Comey *v.* Pickering, 63 N. H. 126).

19. An affidavit is sufficient where it recites that "Samuel Ward and Marcum and Lennon, the parties to the foregoing chattel mortgage, being . . . duly sworn, each for himself," made oath to the required facts (Marcum *v.* Coleman, 10 Mont. 73, 24 Pac. 701), and in spite of the omission of the word "severally" in an affidavit made by two which failed to specify which had "sworn and affirmed" the affidavit (Moyer *v.* Davidson, 7 U. C. C. P. 521).

20. Gibbs *v.* Parsons, 64 N. H. 66, 6 Atl. 93.

21. De Forrest *v.* Bunnell, 15 U. C. Q. B. 370.

22. Perry *v.* Ruttan, 10 U. C. Q. B. 637.

Prior execution of the affidavit does not

c. **Who May Execute Affidavit.** A trustee in a mortgaged deed of trust may make the affidavit of good faith necessary to the validity of a chattel mortgage.[23] So an affidavit by an agent is sufficient[24] where the absence of the mortgagee is accounted for;[25] and one of several co-mortgagees has authority to make the affidavit as agent for the others.[26] The spouse of the mortgagor need not join in the affidavit unless a necessary party to the mortgage,[27] but a third person who is secured by a mortgage must have someone make an affidavit in his behalf as to the validity of his claim.[28]

D. Attestation — 1. In General. Where a chattel mortgage can be created without a writing, informalities in the attestation of the written instrument will

render it ineffectual to support the mortgage when it is subsequently executed. *In re* Wise, 9 Ohio S. & C. Pl. Dec. 760, 7 Ohio N. P. 103; Engleright *v.* Annesser, 19 Ohio Cir. Ct. 73, 10 Ohio Cir. Dec. 406.

An affidavit may be subsequently executed and attached and will render a mortgage of personal property valid except against intervening rights and claims (Allen *v.* American L. & T. Co., 79 Fed. 695, 48 U. S. App. 219, 25 C. C. A. 147); but the instrument must be recorded after the affidavit has been executed and attached (Alferitz *v.* Scott, 130 Cal. 474, 62 Pac. 735).

23. Fletcher *v.* Bonnet, 51 N. J. Eq. 615, 28 Atl. 601 [*reversing* 51 N. J. Eq. 162, 26 Atl. 685].

A fortiori this is true where the mortgage does not disclose the trusteeship. Cope *v.* Minnesota Type Foundry Co., 20 Mont. 67, 49 Pac. 387.

The oath of the mortgagor alone to the affidavit has been held insufficient to render the mortgage valid against creditors. Lovell *v.* Osgood, 60 N. H. 71.

24. Fuller *v.* Smith, 71 Ill. App. 576. *Contra,* Holmes *v.* Vancamp, 10 U. C. Q. B. 510.

An affidavit by an agent must state in whose behalf affiant acts and that he has personal knowledge of the validity of the consideration. Bonnet *v.* Hope Mfg. Co., 51 N. J. Eq. 162, 26 Atl. 685. *Contra,* Streeter *v.* Johnson, 23 Nev. 194, 44 Pac. 819.

The agent's knowledge of the circumstances connected with the making of the mortgage need not appear in the affidavit. Carlisle *v.* Tait, 7 Ont. App. 10 [*overruling* 32 U. C. C. P. 43].

25. Cope *v.* Minnesota Type Foundry Co., 20 Mont. 67, 49 Pac. 387 (where it was not sufficiently shown that the mortgagee was absent); Leopold *v.* Silverman, 7 Mont. 266, 16 Pac. 580. See also Lathrop *v.* Blake, 23 N. H. 46, where it is held that an agent of a bank having full power to dispose of the interest of the bank in certain real and personal property was competent to sell the property and take a mortgage for the purchase-price and to make the affidavit required to be made by a mortgagee.

Authority of agent.—An attorney employed to collect a claim has been held to have authority to execute the affidavit of good faith necessary to the validity of a mortgage securing the claim. *In re* Merling, 5 Ohio S. & C. Pl. Dec. 390, 1 Ohio N. P. 35.

Ratification of an agent's act in executing an affidavit of good faith by subsequently employing him to collect the claim secured by the mortgage will not render valid the affidavit. *In re* Merling, 5 Ohio S. & C. Pl. Dec. 390, 1 Ohio N. P. 35.

An affidavit by one selectman in behalf of a town is sufficient when a claim due the town has been secured by mortgage. Sumner *v.* Dalton, 58 N. H. 295.

A forged authority to an agent in pursuance of which he executes an affidavit of good faith in behalf of the mortgagee does not render the mortgage valid. Matter of Ebert, Ohio Prob. 231.

The principal officer of a corporation acts as a principal not as an agent, and therefore needs no authority in writing to make an affidavit. Toronto Bank *v.* McDougall, 15 U. C. C. P. 475.

26. Voss *v.* Murray, 50 Ohio St. 19, 32 N. E. 1112; Tidey *v.* Craib, 4 Ont. 696; Balkwell *v.* Beddome, 16 U. C. Q. B. 203 (prior to 20 Vict. c. 3). *Contra,* Butte Hardware Co. *v.* Sullivan, 7 Mont. 307, 16 Pac. 588.

One partner may make an affidavit in a firm mortgage using the words "of and for the firm . . . the mortgagee in said mortgage named" (Modesto Bank *v.* Owens, 121 Cal. 223, 53 Pac. 552) or by signing the name by which the firm was known and designated (Randall *v.* Baker, 20 N. H. 335); but a signature by one partner in his own name without identifying himself as a member of the firm is insufficient (Baker *v.* Gans, 7 Mont. 329, 16 Pac. 590; Baker *v.* Power, 7 Mont. 326, 16 Pac. 589).

A mortgage made by three describing themselves as composing a certain firm is the mortgage of such persons individually, and the affidavit must be made by and in the name of each individually. Cope *v.* Minnesota Type Foundry Co., 20 Mont. 67, 49 Pac. 387. *Compare* Butte Hardware Co. *v.* Sullivan, 7 Mont. 307, 16 Pac. 588.

27. Harker *v.* Woolery, 10 Wash. 484, 39 Pac. 100, holding that the unnecessary joining of the wife of the mortgagor in the execution of the instrument did not alter the rule. But see Hunt *v.* Allen, 73 Vt. 322, 50 Atl. 1103, holding that where a married woman mortgaged her property and her husband joined in the execution of the mortgage he must be a party to the affidavit of good faith.

28. Leopold *v.* Silverman, 7 Mont. 266, 16 Pac. 580.

not invalidate it,[29] and statutory requirements as to attestation merely form a condition precedent to the admission of the instrument to record;[30] but it has been held that statutory requirements regarding attestation must be strictly complied with.[31] Disputed questions as to proper attestation should be left to the jury.[32]

2. Who May Be Attesting Witnesses. The mortgagee is not a competent attesting witness for his own mortgage,[33] but attestation may be made by a notary public in his individual, as well as in his official, capacity,[34] and if he acts officially it is no objection that he is also attorney for the mortgagee.[35]

E. Dating. The date of execution need not be stated in a chattel mortgage,[36]

29. Alabama Warehouse *v.* Lewis, 56 Ala. 514.

Where acknowledgment dispenses with necessity of attesting witnesses in mortgages of real estate attestation of a mortgagor's mark in a mortgage of both realty and personalty is unnecessary to pass the personal property, if the instrument is acknowledged before a proper officer by whom it is duly certified. Breene *v.* McCrary, 52 Ala. 154.

Attesting witnesses need not expressly describe themselves as such and the words "In the presence of" preceding their names are a sufficient certificate. De Smet First Nat. Bank *v.* Northwestern Elevator Co., 4 S. D. 409, 57 N. W. 77.

30. Strahorn-Hutton-Evans Commission Co. *v.* Florer, 7 Okla. 499, 54 Pac. 710.

Between mortgagor and mortgagee the formalities of attestation are not necessary to render the instrument valid. Smith *v.* Camp, 84 Ga. 117, 10 S. E. 539; J. I. Case Threshing Mach. Co. *v.* Olson, 10 N. D. 170, 86 N. W. 718; McGowan *v.* Reid, 27 S. C. 262, 3 S. E. 337. *Contra*, Baghott *v.* Norman, 41 L. T. Rep. N. S. 787.

Actual notice of the mortgage prevents a subsequent purchaser from the mortgagor from setting up defective attestation against the mortgagee. Strahorn-Hutton-Evans Commission Co. *v.* Florer, 7 Okla. 499, 54 Pac. 710; Walter A. Wood Mowing, etc., Mach. Co. *v.* Lee, 4 S. D. 495, 57 N. W. 238.

Equity will not set aside a defectively attested mortgage after a recovery at law has been had thereunder. Dust *v.* Conrod, 5 Munf. (Va.) 411.

A correction of a defective attestation, it has been held, only renders the instrument valid as to third persons from the date of such correction. Jennings *v.* Atty.-Gen., 4 Hen. & M. (Va.) 424.

31. Sims *v.* Trollope, [1897] 1 Q. B. 24, 66 L. J. Q. B. 11, 75 L. T. Rep. N. S. 351, 45 Wkly. Rep. 97 (holding that the omission of the description of the attesting witness renders the bill of sale void, although such witness may in fact have had no occupation); Casson *v.* Churchley, 53 L. J. Q. B. 335, 50 L. T. Rep. N. S. 568 (where the attestation clause omitted to state that the effect of the instrument had been explained to the grantor by the attesting solicitor, although an actual explanation is unnecessary); *Ex p.* National Mercantile Bank, 15 Ch. D. 42, 44 J. P. 780, 49 L. J. Bankr. 62, 43 L. T. Rep. N. S. 36. *Compare* Hill *v.* Kirkwood, 42 L. T. Rep. N. S. 105, 28 Wkly. Rep. 358.

Supplying omissions in the attestation clause from the affidavit filed on registering will not be allowed. Parsons *v.* Brand, 25 Q. B. D. 110, 59 L. J. Q. B. 189, 62 L. T. Rep. N. S. 479, 38 Wkly. Rep. 388; Blankenstein *v.* Robertson, 24 Q. B. D. 543, 59 L. J. Q. B. 315, 62 L. T. Rep. N. S. 732.

An incomplete superfluous attestation clause will not avoid a bill of sale. Bird *v.* Davey, [1891] 1 Q. B. 29, 60 L. J. Q. B. 8, 63 L. T. Rep. N. S. 741, 39 Wkly. Rep. 40.

32. Keith *v.* Haggart, 2 N. D. 18, 48 N. W. 432, holding that the evidence was such that it was error not to submit the question of proper execution to the jury.

A mortgage purporting on its face to be duly executed is properly received for record, and disqualification of the witnesses must be shown by proof in the case. Watts *v.* El Reno First Nat. Bank, 8 Okla. 645, 58 Pac. 782.

33. Seibold *v.* Rogers, 110 Ala. 438, 18 So. 312; Donovan *v.* St. Anthony, etc., Elevator Co., 8 N. D. 585, 80 N. W. 772, 73 Am. St. Rep. 779, 46 L. R. A. 721; Seal *v.* Claridge, 7 Q. B. D. 516, 50 L. J. Q. B. 316, 44 L. T. Rep. N. S. 501, 29 Wkly. Rep. 598. *Contra*, Fisher *v.* Porter, 11 S. D. 311, 77 N. W. 112. *Compare* Jones *v.* Hough, 77 Ala. 437, holding that the mortgagee may prove the execution of the mortgage where the attesting witnesses are unable to identify the paper.

A relative of the mortgagee, as his brother-in-law, is a competent attesting witness. Welsh *v.* Lewis, 71 Ga. 387.

34. Janes *v.* Penny, 76 Ga. 796. See also Lamar *v.* Coleman, 88 Ga. 417, 14 S. E. 608, holding that a notary's attestation need not be under seal. *Compare* Hill *v.* Kirkwood, 42 L. T. Rep. N. S. 105, 28 Wkly. Rep. 358, holding that the Bills of Sale Act of 1878 does not require that the attesting solicitor shall be a practising solicitor or one in any way connected with the grantee.

35. Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231; Wardlaw *v.* Mayer, 77 Ga. 620; Penwarden *v.* Roberts, 9 Q. B. D. 137, 51 L. J. Q. B. 312, 46 L. T. Rep. N. S. 161, 30 Wkly. Rep. 427.

36. Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289, holding that absence of date may be supplied by parol evidence.

Mere mistake in dating the instrument will not invalidate it. Partridge *v.* Swazey, 46 Me. 414; Jacobs *v.* Denison, 141 Mass. 117, 5

for at most it only raises a *prima facie* presumption as to the time when it was executed.[37]

F. Effect of Notice of Irregularities. A defect in any detail of execution will ordinarily be cured by the actual knowledge of the adverse claimant regarding the existence of the mortgage,[38] but there is some dissent from this doctrine.[39]

G. Delivery and Acceptance of Instrument — 1. Necessity For Delivery. The delivery of a mortgage[40] to the mortgagee or to his duly authorized agent[41] is essential to its validity.[42]

N. E. 526; Johnson *v.* Stellwagen, 67 Mich. 10, 34 N. W. 252.

Parol evidence is admissible to show that the date stated in the *in testimonium* clause of a chattel mortgage is not its true date. Shaughnessey *v.* Lewis, 130 Mass. 355.

Chattel mortgages executed on same day.— Where two chattel mortgages were executed on the same day, and there is no evidence that one was executed at an earlier hour than the other, they will be presumed to have been executed contemporaneously. Sheldon *v.* Brown, 72 Minn. 496, 75 N. W. 709.

37. Stonebreaker *v.* Kerr, 40 Ind. 186; Merrill *v.* Dawson, Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469. *Compare* Alberson *v.* Elk Creek Gold Min. Co., 39 Oreg. 552, 65 Pac. 978, where the date of a mortgage, coupled with evidence that it was executed at the time it purported to be, was held sufficient to justify the court in submitting to the jury the question as to when the instrument was in fact executed.

38. *California.*— Harms *v.* Silva, 91 Cal. 636, 27 Pac. 1088. *Contra,* Gassner *v.* Patterson, 23 Cal. 299.

Iowa.— Luce *v.* Moorehead, 77 Iowa 367, 42 N. W. 328; Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411.

New Hampshire.— Gooding *v.* Riley, 50 N. H. 400.

Ohio.— Whitaker *v.* Westfall, 2 Ohio Cir. Ct. 321, 1 Ohio Cir. Dec. 509.

South Dakota.— Fisher *v.* Porter, 11 S. D. 311, 77 N. W. 112.

Washington.— Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872.

Defects cured by actual notice.—Actual notice by a creditor has been held to postpone him to a mortgage which is without acknowledgment, so that its record does not give constructive notice. St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497, 55 N. W. 60.

39. Crane *v.* Chandler, 5 Colo. 21; Long *v.* Cockern, 128 Ill. 29, 21 N. W. 201 [*affirming* 29 Ill. App. 304]; Sage *v.* Browning, 51 Ill. 217; People *v.* Hamilton, 17 Ill. App. 599.

40. The delivery of an incomplete instrument, under an agreement that it is to be retained by the grantee until such time as the grantor notifies the grantee of the happening of a contingency upon which the instrument is to be completed and filled out as a mortgage, does not make the mortgage immediately effective against attaching creditors. Midland State Bank *v.* Kilpatrick-Koch Dry Goods Co., 54 Nebr. 410, 74 N. W. 837.

41. Who may accept delivery.— A delivery to the attorney for the mortgagor to the use of the mortgagee is of no avail against an attaching creditor (Welch *v.* Sackett, 12 Wis. 243), but a delivery to the attorney for the mortgagee who is authorized to draw the mortgage and accept delivery is as effective as delivery to the mortgagee himself would be (Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231). *Compare* Kane *v.* Lodor, 56 N. J. Eq. 268, 38 Atl. 966, where a chattel mortgage was held not to be invalidated by the fact that it was delivered to the landlord of the mortgagor in pledge to secure the carrying out an agreement by which a new first mortgage was to be given to the landlord.

Who can make delivery.— Where a mortgage was executed prior to the dissolution of a firm, one partner may deliver it or file it for record after the firm is dissolved. Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306.

42. *Indiana.*— McFadden *v.* Ross, 14 Ind. App. 312, 41 N. E. 607.

Iowa.—Cobb *v.* Chase, 54 Iowa 253, 6 N. W. 300.

Maine.— Foster *v.* Perkins, 42 Me. 168; Jewett *v.* Preston, 27 Me. 400.

Massachusetts.— Dole *v.* Bodman, 3 Metc. (Mass.) 139.

Nebraska.— A mortgage which remains in the possession of the mortgagor may, without actual delivery, create a valid lien on the property therein described, if the parties to the instrument intend that it shall have that effect; but such intention will not be presumed. Western Assur. Co. *v.* Kilpatrick-Koch Dry Goods Co., 54 Nebr. 241, 74 N. W. 592.

Texas.— Whitaker *v.* Sanders, (Tex. Civ. App. 1899) 52 S. W. 638.

Wisconsin.— McCourt *v.* Myers, 8 Wis. 236, where a purchaser of the goods with full notice of the undelivered mortgage prevailed over the claims of the mortgagee. But see Gilmore *v.* Roberts, 79 Wis. 450, 48 N. W. 522, where a chattel mortgage purporting to secure notes payable to mortgagee "or bearer" was held to be valid and to follow the notes in whosesoever hands they might be, although it was never delivered to the mortgagee and he never had any interest in it.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 136.

Delivery to one of several mortgagees named in an instrument renders it effective as to all and cannot be restrained by the use of words on the part of the mortgagor so as to take effect as to one only. Hubby *v.* Hubby, 5 Cush. (Mass.) 516, 52 Am. Dec. 742.

2. STATUTORY REQUIREMENTS FOR DELIVERY OF COPY TO MORTGAGOR. Under a statute making a mortgage void unless it shall appear on the instrument, over the signature of the mortgagor, that a full and complete copy was delivered to him by the mortgagee, it was sufficient to have the statement inserted in the body of the mortgage and signed before the mortgage was executed.[43]

3. PROOF OF DELIVERY — a. In General. A delivery will be presumed[44] when the note and mortgage are found in the possession of the mortgagee,[45] and may be inferred from the acts of the mortgagee assenting to and adopting a recorded mortgage.[46]

b. Recording as Delivery. Recording a mortgage at the instance of the mortgagor does not amount to a delivery,[47] but where a chattel mortgage is executed in pursuance of a previous agreement to give security the registration of the instrument constitutes a sufficient delivery.[48]

A return of the instrument to the mortgagor after delivery, for the purpose of having the mortgagor's signature witnessed, was held not to avoid the instrument. Berlin Mach. Works *v.* Security Trust Co., 60 Minn. 161, 61 N. W. 1131.

A constructive delivery only has been held to be sufficient, as where the mortgage was pasted on the front page of an account-book, the accounts in which it assumed to convey. Lydia Pinkham Medicine Co. *v.* Gibbs, 108 Ga. 138, 33 S. E. 945.

43. Commercial State Bank *v.* Interstate Elevator Co., 14 S. Dak. 276, 85 N. W. 219, 86 Am. St. Rep. 760. *Compare* Kennedy *v.* Hull, 14 S. Dak. 234, 85 N. W. 223, where a lease of a building which reserved a lien for rent was held not to be within the purview of such a statute.

44. Presumption as to time of delivery.— In the absence of testimony the law presumes that a chattel mortgage is delivered on the day of its date. Schweinber *v.* Great Western Elevator Co., 9 N. D. 113, 81 N. W. 35.

45. Wickler *v.* People, 68 Ill. App. 282; Foster *v.* Perkins, 42 Me. 168 (where there was also evidence of a delivery to the register). *Compare* Molineux *v.* Coburn, 6 Gray (Mass.) 124, holding that proof of the execution and registration of a chattel mortgage and of its subsequent possession by the mortgagee was sufficient to authorize a jury to find it had been delivered.

46. Thayer *v.* Stark, 6 Cush. (Mass.) 11. *Compare* Sargeant *v.* Solberg, 22 Wis. 132, where one who had received money to invest used it and executed a mortgage to the lender which was recorded and delivered to a friend (but not agent) of the lender and there was held to be a sufficient delivery, although a letter informing the lender of these transactions miscarried.

47. McFaddin *v.* Ross, 14 Ind. App. 312, 41 N. E. 607; Wadsworth *v.* Barlow, 68 Iowa 599, 27 N. W. 775; Oxnard *v.* Blake, 45 Me. 602; Miller *v.* Blinebury, 21 Wis. 676.

A fortiori record was not equivalent to delivery where the mortgage was taken off the records in a short time and the mortgagor told the recording clerk it was merely to protect the property from creditors and the mortgagee had no knowledge of the execution of the instrument. McCourt *v.* Myers, 8 Wis. 236.

Forwarding the mortgage directly to the mortgagee from the recording office has been held to constitute a valid delivery. Com. *v.* Cutler, 153 Mass. 252, 26 N. E. 855.

48. *Illinois.*— Wickler *v.* People, 68 Ill. App. 282.

Iowa.— *In re* Guyer, 69 Iowa 585, 29 N. W. 826; Everett *v.* Whitney, 55 Iowa 146, 7 N. W. 487, in which cases the mortgagor was authorized to record the mortgage.

Massachusetts.— Jordan *v.* Farnsworth, 15 Gray (Mass.) 517, holding that it was for the jury to determine whether there was in fact a delivery when the mortgagor had delayed for a year to record the mortgage.

Michigan.— Field *v.* Fisher, 65 Mich. 606, 32 N. W. 838, where the form of the requested security had not been agreed upon, but there was a delivery to the attorney of the mortgagee.

Missouri.— State *v.* O'Neill, 74 Mo. App. 134.

Nebraska.— Rein *v.* Kendall, 55 Nebr. 583, 75 N. W. 1104, holding that the mortgagee would be *prima facie* entitled to possession against an attaching creditor.

North Dakota.— Keith *v.* Haggart, 2 N. D. 18, 48 N. W. 432, where a certified copy of the recorded instrument was sent to the mortgagee.

Washington.— Matter of Day, 15 Wash. 525, 46 Pac. 1048.

Wisconsin.— Sargeant *v.* Solberg, 22 Wis. 132.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 138.

Ratification.— Where a mortgagee ratifies the act of the mortgagor in sending for record, this constitutes the registration a sufficient delivery as effectively as a previous agreement for the giving of the mortgage would have done. Storrs *v.* Sharp, 2 MacArthur (D. C.) 549.

Record of the instrument is essential in order that it shall be deemed to be delivered by reason of its having been executed in accordance with a previous agreement, and an agreement on the part of the mortgagor to file the mortgage will not avail the mortgagee unless it is carried out. Mull *v.* Dooley, 89 Iowa 312, 56 N. W. 513.

4. Acceptance — a. In General. Acceptance on the part of the mortgagee is essential to make a mortgage a valid instrument,[49] and a subsequent acceptance will not relate back.[50] While it will be presumed when the mortgage was executed in pursuance of a previous agreement,[51] such an inference cannot be drawn from the beneficial character of the instrument to the detriment of intervening creditors.[52] It has been held that a mortgage in the form of a deed of trust must be accepted by the beneficiaries named therein.[53]

b. Sufficiency — (i) *Generally.* It is a sufficient acceptance of a mortgage if a creditor to whom it is executed is notified of its execution and does nothing which shows an intention to reject it,[54] does some act which shows his acquiescence thereto,[55] or ratifies some act of an unauthorized agent in assuming to recognize or procure the mortgage.[56]

(ii) *Trust Mortgages.* The trustee in a mortgage to secure certain named creditors must be authorized by the beneficiaries in order to accept for them,[57] but

Sufficiency of previous agreement.— It has been held that the previous agreement for giving a mortgage was not sufficient where the specific part or quantity of goods to be covered was not agreed upon. Cobb *v.* Chase, 54 Iowa 253, 6 N. W. 300.

The return of the mortgage to the mortgagor after registration has been held not to affect the sufficiency of the delivery. Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847.

49. *Indiana.*— Hemstreet *v.* Kutzner, 58 Ind. 319.

Maine.— Oxnard *v.* Blake, 45 Me. 602.

Michigan.— Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823.

Missouri.—Moon Bros. Carriage Co. *v.* Porter, 76 Mo. App. 128.

Oklahoma.— Meyer Bros. Drug Co. *v.* Kelley, 5 Okla. 118, 47 Pac. 1065.

Washington.— Griswold *v.* Case, 13 Wash. 623, 43 Pac. 876.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 139.

50. Hemstreet *v.* Kutzner, 58 Ind. 319; Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181; Rogers *v.* Heads Iron Foundry, 51 Nebr. 39, 70 N. W. 527, 37 L. R. A. 429; Wallis *v.* Taylor, 67 Tex. 431, 3 S. W. 321.

51. *In re* Guyer, 69 Iowa 585, 29 N. W. 826.

52. Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847; Ensworth *v.* King, 50 Mo. 477; Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181.

53. Elmes *v.* Sutherland, 7 Ala. 262; Wallis *v.* Taylor, 67 Tex. 431, 3 S. W. 321; Scurry *v.* Fromer, (Tex. Civ. App. 1894) 26 S. W. 461; Bauman *v.* Jaffray, 6 Tex. Civ. App. 489, 26 S. W. 260.

54. Wadsworth *v.* Barlow, 68 Iowa 599, 27 N. W. 775 (where it is said that the authorities are not quite uniform on this point); Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181.

Acceptance must be with full knowledge, and where mortgages in favor of creditors which had been executed and filed were accepted by them without knowing that they were given to secure new notes, it was held that there had been no delivery which would render the mortgage valid against an attachment. Burlington Nat. State Bank *v.* Morse, 73 Iowa 174, 34 N. W. 803, 5 Am. St. Rep. 670.

55. Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222, holding that where the mortgagee, in answer to the question whether she was satisfied with what her agent had done in regard to the mortgage, said: "Well, I am satisfied if I get my pay, and not before," she did not thereby contradict her testimony that she gave her attorney authority to take possession of the property.

56. Field *v.* Fisher, 65 Mich. 606, 32 N. W. 838; Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847; Brown *v.* Platt, 8 Bosw. (N. Y.) 324.

Where ratification relates back.— Although a ratification of a mortgage will not ordinarily relate back to the detriment of third persons (Oxnard *v.* Blake, 45 Me. 602), it was held that where there was a previous arrangement to give security, the subsequent ratification of a mortgage which had been executed and delivered to the mortgagee's attorney for filing would relate back to the date of filing (Field *v.* Fisher, 65 Mich. 606, 32 N. W. 838).

Where several mortgages were executed and filed by a mortgagor without the knowledge of the mortgagees, it was held that the one first ratified would be entitled to priority (Oxnard *v.* Blake, 45 Me. 602), and the refusal of some creditors to accept the mortgages executed to them did not impair the validity of those which were duly accepted (Brown *v.* Platt, 8 Bosw. (N. Y.) 324).

Admissibility of evidence as to time.— On an issue as to when a chattel mortgage was accepted by the mortgagee, evidence of statements made by him as to such acceptance, when he received a telegram announcing its execution, is admissible. Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181.

57. Wallace *v.* Bagley, 6 Tex. Civ. App. 484, 26 S. W. 519.

Action by trustee as showing acceptance.— The court properly found that the beneficiaries under a trust mortgage had accepted such security where it appeared that the trustee had taken possession of the mortgaged property and sold the same for their benefit. National State Bank *v.* Sweeney, (Iowa 1897) 73 N. W. 476.

the acceptance by the creditor is sufficient when communicated to the trustee without notifying the mortgagor.[58]

H. Sealing. It is not necessary to the validity of a chattel mortgage that a seal be affixed to it.[59]

V. CONSIDERATION FOR MORTGAGE AND THE DEBT SECURED.

A. Necessity. Every chattel mortgage to be valid and enforceable must be supported by a valuable consideration.[60]

B. Sufficiency — 1. IN GENERAL. Any consideration which will support a simple contract will support a mortgage,[61] and the same considerations of policy

58. McLaughlin *v.* Carter, 13 Tex. Civ. App. 694, 37 S. W. 666.

Where the creditor stated to the trustee that he would look to him for payment and received the reply that the trustee would see him paid, acceptance by such creditor was sufficiently shown, even though he subsequently sued out a distress warrant against the property. Traders' Nat. Bank *v.* Fry, 14 Tex. Civ. App. 403, 37 S. W. 672.

59. *Illinois.*— Cook *v.* Harrison, 19 Ill. App. 402.

Maine.— Gerrey *v.* White, 47 Me. 504.

Massachusetts.— Sherman *v.* Fitch, 98 Mass. 59; Milton *v.* Mosher, 7 Metc. (Mass.) 244.

Michigan.— Sweetzer *v.* Mead, 5 Mich. 107.

New Hampshire.—Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York.— Ring *v.* Franklin, 2 Hall (N. Y.) 1.

Ohio.— Johnson *v.* Nelson, 6 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306.

Texas.— Fowler *v.* Bell, (Tex. Civ. App. 1896) 35 S. W. 822.

Wisconsin.—Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

United States.—Gibson *v.* Warden, 14 Wall. (U. S.) 244, 20 L. ed. 797 (construing law of Ohio); Hawkins *v.* Hastings Bank, 1 Dill. (U. S.) 462, 11 Fed. Cas. No. 6,244, 2 Nat. Bankr. Reg. 337 (construing law of Minnesota).

See 9 Cent. Dig. tit. "Chattel Mortgages," § 114.

Where a superfluous seal is added the instrument is not thereby vitiated. Milton *v.* Mosher, 7 Metc. (Mass.) 244; Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306.

60. *Indiana.*— Krag-Reynolds Co. *v.* Oder, 21 Ind. App. 333, 52 N. E. 458.

Kansas.— McCartney *v.* Wilson, 17 Kan. 294.

Michigan.— Walrath *v.* Campbell, 28 Mich. 111.

Minnesota.— Bickford *v.* Johnson, 36 Minn. 123, 30 N. W. 439.

Missouri.— Hume *v.* Eagon, 83 Mo. App. 576.

Nebraska.— McGhee *v.* Tobias First Nat. Bank, 40 Nebr. 92, 58 N. W. 537.

New York.— Leslie *v.* Hoffman, 1 Edm. Sel. Cas. (N. Y.) 475.

North Carolina.— Moore *v.* Woodward, 83 N. C. 531.

United States.— Norman *v.* Peper, 24 Fed. 403, where a certain covenant in a mortgage was held to be unsupported by any consideration and therefore unenforceable.

An equitable mortgage must be supported by a valuable consideration as well as created by an express agreement. Cotten *v.* Blocker, 6 Fla. 1.

Effect of absence of consideration.— It has been held that when a mortgage is without consideration the mortgagee has no right to possession of the property (McGhee *v.* Tobias First Nat. Bank, 40 Nebr. 92, 58 N. W. 537) and cannot foreclose the mortgage (Krag-Reynolds Co. *v.* Oder, 21 Ind. App. 333, 52 N. E. 458).

No proof of consideration is necessary against a purchaser from the mortgagor beyond the recital of consideration in the mortgage, where the only issue is in regard to the title to the property. Webb *v.* Mann, 3 Mich. 139.

Under a statute making any mortgage for a consideration under £30 void, it was held that a bill of sale for £30, £15 of which was payable on demand and was immediately demanded, was not necessarily void. Davis *v.* Usher, 12 Q. B. D. 490, 53 L. J. Q. B. 422, 51 L. T. Rep. N. S. 297, 32 Wkly. Rep. 832.

61. Cobb *v.* Malone, 87 Ala. 514, 6 So. 299, where the consideration for the mortgage was a novation. *Compare* Clark *v.* Barnes, 72 Iowa 563, 34 N. W. 419, where an agreement on the part of a mortgagee to take possession of mortgaged goods and sell them at retail was held to be a sufficient consideration to support a mortgage. See also Hincks *v.* Field, 14 N. Y. Suppl. 247, 37 N. Y. St. 724, where a first mortgage contained a provision that if it proved ineffectual a second should be executed and it was held that the consideration of the first was sufficient to support a second made in pursuance of such provision.

Evidence of an adjustment of mutual pre-existing claims between the mortgagor and mortgagee is competent to be weighed by the jury, as tending to show a full and sufficient consideration for a mortgage given simultaneously with such adjustment. Ferguson *v.* Clifford, 37 N. H. 86.

Where several debtors are jointly liable and each executes a separate mortgage to the common creditor to secure the portion for which he is primarily liable, the benefit accruing to each debtor is sufficient considera-

which apply in the case of simple contracts will prevent certain acts from affording a sufficient consideration to support a mortgage.[62]

2. Assuming and Releasing Obligation. It furnishes a valid consideration to support a chattel mortgage for the mortgagee to go as surety on an obligation of the mortgagor [63] or to release one who was formerly surety for the payment of an

tion to support the mortgages. Spivey *v.* Grant, 96 N. C. 214, 2 S. E. 45.

There was not a sufficient consideration to support a mortgage where it was given by a religious society to secure the salary of its pastor which had not been fixed in the manner required by statute (Walrath *v.* Campbell, 28 Mich. 111), or where a second mortgage was given to secure the same debt secured by the first and there was no cancellation of the first mortgage or note and no extension of the time of maturity of the indebtedness (Hume *v.* Eagon, 83 Mo. App. 576).

62. McCartney *v.* Wilson, 17 Kan. 294 (where a mortgage given an officer in consideration of his releasing the mortgagor from jail was held to be void because not supported by a consideration which the law would recognize as such); Kusworm *v.* Hess, 7 Ohio Dec. (Reprint) 224, 1 Cinc. L. Bul. 315 (holding that a mortgage given to secure the purchase of furniture used to equip a house of prostitution was invalid).

When a usurious loan is secured by a chattel mortgage it renders the mortgage invalid (Moore *v.* Woodward, 83 N. C. 531), and the mortgagor can bring trover against the mortgagee for selling the mortgaged chattels (Leslie *v.* Hoffman, 1 Edm. Sel. Cas. (N. Y.) 475). But see Spaulding *v.* Austin, 2 Vt. 555, where a surety on a note was secured by a mortgage, and the fact that the note bore usurious interest was held not to affect the surety's right to the property. *Compare* Drennon *v.* Dalincourt, 56 Mo. App. 128, where a statute rendered a mortgage invalid if the mortgagee exacted or received usurious interest, and it was void if the mortgagee exacted and received such interest.

Where the consideration is bad in part the mortgage can be set aside as to that part and sustained as to the remainder. Rathbone *v.* Boyd, 30 Kan. 485, 2 Pac. 664; Campbell *v.* Patterson, 21 Can. Supreme Ct. 645. *Contra,* Denny *v.* Dana, 2 Cush. (Mass.) 160, 48 Am. Dec. 655; Ball *v.* O'Neill, 64 Mo. App. 388, 2 Mo. App. Rep. 1000.

63. *Alabama.*— Hawkins *v.* May, 12 Ala. 673; Tarver *v.* Roffe, 7 Ala. 873; Perkins *v.* Mayfield, 5 Port. (Ala.) 182.

Illinois.— Goodheart *v.* Johnson, 88 Ill. 58.

Kansas.— Consolidated Barb-Wire Co. *v.* Purcell, 48 Kan. 267, 29 Pac. 160.

Maine.— Wheeler *v.* Nichols, 32 Me. 233.

Massachusetts.— Rogers *v.* Abbott, 128 Mass. 102; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

Michigan.— Adams *v.* Niemann, 46 Mich. 135, 8 N. W. 719.

Missouri.— Steele *v.* Farber, 37 Mo. 71; Sparks *v.* Brown, 33 Mo. App. 505.

New Jersey.— Tompkins *v.* Crosby, (N. J. 1890) 19 Atl. 720.

North Carolina.— Irwin *v.* Wilson, 56 N. C. 210.

Vermont.— Sherman *v.* Estey Organ Co., 67 Vt. 550, 32 Atl. 483; Spaulding *v.* Austin, 2 Vt. 555.

Washington.— Warren *v.* His Creditors, 3 Wash. 48, 28 Pac. 257.

Wisconsin.— Paine *v.* Benton, 32 Wis. 491, even though the note on which the surety put his name was executed prior to the giving of the mortgage.

Canada.— Robinson *v.* Mann, 2 Ont. L. Rep. 63; Mathers *v.* Lynch, 28 U. C. Q. B. 354.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 71.

The validity of an indemnity mortgage is not affected by the circumstance that it provides that the mortgagee shall have no remedy by sale of the property till he has paid the debt (Tarver *v.* Roffe, 7 Ala. 873); that the contingent liability does not become fixed till after a levy of attachment on the property (Rogers *v.* Abbott, 128 Mass. 102); that the mortgage does not appear on its face to have been given for a contingent liability (Goodheart *v.* Johnson, 88 Ill. 58; Warren *v.* His Creditors, 3 Wash. 48, 28 Pac. 257. *Contra,* Johnson *v.* Murchison, 60 N. C. 286), provided the purchaser of the mortgaged property bought with notice and only gave in payment a preëxisting debt (Sherman *v.* Estey Organ Co., 67 Vt. 550, 32 Atl. 483); that there are several mortgagees and no two are liable on the same paper (Wheeler *v.* Nichols, 32 Me. 233); that the indorser's own paper is exchanged for the original indorsed instrument (Fraser *v.* Toronto Bank, 19 U. C. Q. B. 381); or that the surety did not by his indorsement incur a legal liability, provided he paid under an honest belief that he was legally liable (Robinson *v.* Mann, 2 Ont. L. Rep. 63).

When there is no allegation or proof of fraud a mortgage to secure sureties for existing and future contingent liabilities is valid and will be enforced in a court of equity. Irwin *v.* Wilson, 56 N. C. 210. *Compare* Sparks *v.* Brown, 33 Mo. App. 505, holding that in the absence of fraud a mortgage to secure the mortgagee's contingent liability as surety for the mortgagor to an amount not greater than the debt is valid against a subsequent mortgage.

A mortgage by a cosurety to secure claims which may arise against him for contribution is valid. Steele *v.* Farber, 37 Mo. 71.

After a discharge of a surety he cannot allege as a breach of the condition of a mortgage the non-payment of the note secured at

obligation;[64] and with even greater reason the assumption of primary liability for the debt or obligation of another will afford a valid consideration.[65]

3. EXTENDING TIME. An extension of time for the payment of a debt,[66] or for the performance of a conditional contract of sale,[67] or an agreement not to sue on an overdue note[68] furnishes a sufficient consideration to support a chattel mortgage.

4. MORTGAGES SECURING FUTURE ADVANCES. When executed in good faith and not for the purpose of protecting property from creditors, a mortgage given to secure future advances alone,[69] or an existing debt and future advances,[70] is valid

the time originally provided for. Newsam *v.* Finch, 25 Barb. (N. Y.) 175.

No excuse for an absence of a written instrument witnessing an indemnity mortgage is afforded by the circumstance that the suretyship of the mortgagee affords a valid consideration therefor. Oyler *v.* Renfro, 86 Mo. App. 321. *Compare* Wood *v.* Evans, 98 Ga. 454, 25 S. E. 559, where a parol agreement to give a surety a mortgage was carried out before he had notice of an intervening mortgage to a third person, but it was held that the surety was postponed to the claim of the intervening mortgagee.

64. Henry *v.* Vliet, 33 Nebr. 130, 49 N. W. 1107, 29 Am. St. Rep. 478, 19 L. R. A. 590, where the mortgage was taken by the principal creditor from the principal debtor in place of the personal security of the surety. *Compare* Sparks *v.* Wilson, 22 Nebr. 112, 34 S. W. 111, where a release of the right against property acquired by a parol agreement to execute a mortgage was held to be a sufficient consideration to support a mortgage executed by a third person.

65. Smith *v.* Post, 1 Hun (N. Y.) 516, even though the assumed obligation has not been discharged. *Compare* Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133, where a former surety became primarily liable on the debt and the former principal became his surety, and this was held to furnish a valid consideration for a mortgage from the new surety to his principal.

66. Fuller *v.* Brownell, 48 Nebr. 145, 67 N. W. 6; Barnes *v.* Gray, 14 Tex. Civ. App. 439, 37 S. W. 162.

67. Sinker *v.* Green, 113 Ind. 264, 15 N. E. 266 [*followed* in 113 Ind. 600, 15 N. E. 268].

68. Berner *v.* Kaye, 14 Misc. (N. Y.) 1, 35 N. Y. Suppl. 181, 69 N. Y. St. 297, even though the time for such forbearance was not fixed.

69. *Alabama.*— Steiner *v.* McCall, 61 Ala. 406, at least between parties to the mortgage and their privies.

Arkansas.— Moore *v.* Terrey, 66 Ark. 393, 50 S. W. 998; Curtis *v.* Flinn, 46 Ark. 70.

California.— Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102, holding that the mortgage must show the utmost amount intended to be secured.

Minnesota.— Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 840.

Mississippi.— Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653.

Missouri.— Smith-Wallace Shoe Co. *v.* Wilson, 63 Mo. App. 326, 1 Mo. App. Rep. 749.

New York.— Nelson *v.* Drake, 14 Hun (N. Y.) 465, against one to whom the property was subsequently delivered to pay an existing debt.

Oregon.— Coffin *v.* Taylor, 16 Oreg. 375, 18 Pac. 638; Nicklin *v.* Betts Spring Co., 11 Oreg. 406, 5 Pac. 51, 50 Am. Rep. 477.

Texas.— Freiberg *v.* Magall, 70 Tex. 116, 7 S. W. 684, against purchasers from the mortgagor with notice of the mortgage.

United States.— Schuelenburg *v.* Martin, 1 McCrary (U. S.) 348, 2 Fed. 747.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 68.

The contrary doctrine is due to the requirement that a mortgagee must make affidavit that the debt secured is a just debt, honestly due and owing from the mortgagor. Page *v.* Ordway, 40 N. H. 253, holding that a mortgage would be construed to cover existing claims if such construction were possible and would not be declared void because the language was broad enough to cover future claims.

The amount of the advances need not be limited where the time within which they are to be made is limited to a certain period. Moore *v.* Terry, 66 Ark. 393, 50 S. W. 998.

What not an optional advance.— A chattel mortgage securing future instalments of rent falling due under a lease is not invalid as securing future optional advances. Friend *v.* Johnson, 68 Ill. App. 661.

70. *Hawaii.*— Lose *v.* Davies, 10 Hawaii 591, even though the mortgagee is not bound to make the future advances.

Illinois.— Speer *v.* Skinner, 35 Ill. 282.

Kansas.— McCord, etc., Mercantile Co. *v.* Burson, 38 Kan. 278, 16 Pac. 664.

Maine.— Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472; Holbrook *v.* Baker, 5 Me. 309, 17 Am. Dec. 236.

Massachusetts.— Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

Michigan.— Chafey *v.* Mathews, 104 Mich. 103, 62 N. W. 141, 27 L. R. A. 558.

Montana.— Westheimer *v.* Goodkind, 24 Mont. 90, 60 Pac. 813.

New York.— Brown *v.* Kiefer, 71 N. Y. 610; Carpenter *v.* Blote, 1 E. D. Smith (N. Y.) 491.

Wisconsin.— Carter *v.* Rewey, 62 Wis. 552, 22 N. W. 129, where a mortgage was given to secure claims in the hands of an attorney for collection and future claims which might be put into his hands.

United States.— Lawrence *v.* Tucker, 23 How. (U. S.) 14, 16 L. ed. 474; Conard *v.*

and enforceable to the extent of the amount due at the time when adverse rights attach to the property [71] or the mortgagee exercises his right to take possession.[72]

5. Past Indebtedness. It has been said that mortgages to secure antecedent debts are regarded by the law with no disfavor and under proper limitations are constantly upheld;[73] and while it is true that an existing debt is a valid consideration for the execution of a mortgage as between the parties and their assigns,[74] and that such a mortgage is not fraudulent against creditors,[75] such a consideration does not put the mortgagee in the position of a purchaser for value so as to entitle him to prevail over the rights of a defrauded vendor.[76]

Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 68.

Where no advances were made under an agreement for a statutory lien on a crop so that the terms of the statute were not complied with, the instrument was allowed to take effect as a mortgage on the crop, where it appeared that it had also been given to secure the payment of antecedent debts. Hamilton *v.* Maas, 77 Ala. 283; McLester *v.* Somerville, 54 Ala. 670.

What must appear in the instrument.— While a mortgage cannot be made to cover future advances by a secret agreement between the parties which is not expressed in the instrument (Divver *v.* McLaughlin, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655), it was held not to be invalidated because it did not disclose what part of the sum it purported to secure was to be advanced in the future (Brace *v.* Berdan, 104 Mich. 356, 62 N. W. 568) or show the amount of the intended advances (Westheimer *v.* Goodkind, 24 Mont. 90, 60 Pac. 813).

Unless the advances are actually made the mortgage cannot be enforced as to them. Coffin *v.* Taylor, 16 Oreg. 375, 18 Pac. 638.

71. Barnard *v.* Moore, 8 Allen (Mass.) 273 (where a creditor of the mortgagor attached the property and summoned the mortgagee as trustee, and it was held that the mortgagee could not enforce the mortgage for sums subsequently advanced to the mortgagor); Carpenter *v.* Blote, 1 E. D. Smith (N. Y.) 491.

After the mortgagee has notice of a sale of the property all advances subsequently made by him will be postponed to the right of the purchaser, unless he was under an obligation to make such advances. Preble *v.* Conger, 66 Ill. 370.

The lien does not attach until the future advances have been made. Nicklin *v.* Betts Spring Co., 11 Oreg. 406, 5 Pac. 51, 50 Am. Rep. 477.

72. Fairbanks *v.* Bloomfield, 5 Duer (N. Y.) 434.

Change in person of mortgagor.— A mortgage by a firm, although valid to secure future advances, cannot inure to secure advances made to their successors after a dissolution of the original firm. Monnot *v.* Ibert, 33 Barb. (N. Y.) 24. But see Lawrence *v.* Tucker, 23 How. (U. S.) 14, 16 L. ed. 474, where the admission of a new partner to a firm was held not to prevent a previously executed mortgage from securing future advances to the new firm.

73. McClelland *v.* Remsen, 36 Barb. (N. Y.) 622.

A mortgage executed in pursuance of a previous agreement is not invalid for want of sufficient consideration because the debt it secures is owing at the time the mortgage is executed. Heitman *v.* Griffith, 43 Kan. 553, 23 Pac. 589; Hees *v.* Carr, 115 Mich. 654, 74 N. W. 181. *Compare* Streeter *v.* Johnson, 23 Nev. 194, 44 Pac. 819, where a note which had been agreed to be secured by a mortgage fell due before the mortgage was given, but it was held that a mortgage subsequently executed according to the agreement was valid.

74. *Alabama.*— Turner *v.* McFee, 61 Ala. 468.

Indiana.— Louthain *v.* Miller, 85 Ind. 161.

Iowa.— Johnston *v.* Robuck, 104 Iowa 523, 73 N. W. 1062.

Minnesota.— Berlin Mach. Works *v.* Security Trust Co., 60 Minn. 161, 61 N. W. 1131; Close *v.* Hodges, 44 Minn. 204, 46 N. W. 335.

Missouri.— Splint *v.* Sullivan, 58 Mo. App. 582.

Montana.— Laubenheimer *v.* McDermott, 5 Mont. 512, 6 Pac. 344, in spite of a Montana statute.

Nebraska.— Henry *v.* Vliet, 33 Nebr. 130, 49 N. W. 1107, 29 Am. St. Rep. 478, 19 L. R. A. 590.

North Carolina.— State *v.* Surles, 117 N. C. 720, 23 S. E. 324, where the question arose on an indictment of the mortgagor for selling the mortgaged property without consent.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 80.

An alleged failure of consideration may be rebutted by showing that a mortgage given to secure rent was also to secure the payment of overdue rent under a prior lease. Morris *v.* Tillson, 81 Ill. 607.

75. Wright *v.* Towle, 67 Mich. 255, 34 N. W. 578; Chaffee *v.* Atlas Lumber Co., 43 Nebr. 224, 61 N. W. 637, 47 Am. St. Rep. 753. *Compare Ex p.* Ames, 1 Lowell (U. S.) 561, 1 Fed. Cas. No. 323, 7 Nat. Bankr. Reg. 230, where a mortgage by an insolvent trader to secure present and future advances was held not to be rendered fraudulent by including a small item for past advances.

A chattel mortgage to various creditors to secure preëxisting debts is valid. Hosea *v.* McClure, 42 Kan. 403, 22 Pac. 317.

76. *Georgia.*— Dinkler *v.* Potts, 90 Ga. 103, 15 S. E. 690. *Compare* Matthews *v.* Kennedy, 113 Ga. 378, 38 S. E. 854, where a mortgage was executed to secure an existing indebtedness and it was held that the mort-

6. Bona Fides of Debt. A chattel mortgage is *prima facie* executed for a good consideration when it recites that it is given to secure a promissory note[77] or for future advances in a specified sum;[78] but the presence of the mortgage note among the mortgagor's papers after his death is strong evidence of bad faith.[79]

C. The Debt Secured — 1. In General. A mortgage may be given to secure the performance of a contract or of any other act by the mortgagor,[80] but where, as is usually the case, a mortgage is given to secure the payment of money the language of a mortgage will generally be liberally construed to enable it to cover all obligations from the mortgagor to the mortgagee which were intended to be secured,[81] and a round sum secured by a chattel mortgage may be shown

gagee was not entitled to the same equities as a *bona fide* purchaser against the real owner of the mortgaged property who allowed the mortgagor to use and control it.

Indiana.— Curme *v.* Rauh, 100 Ind. 247; Louthain *v.* Miller, 85 Ind. 161.

Iowa.—Flannigan *v.* Althouse, 56 Iowa 513, 9 N. W. 381.

Michigan.—Vincent *v.* Hansen, 113 Mich. 173, 71 N. W. 488.

Missouri.— Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171.

New York.— Van Slyck *v.* Newton, 10 Hun (N. Y.) 554; Woodburn *v.* Chamberlin, 17 Barb. (N. Y.) 466. *Compare* Allen *v.* Heine, 20 N. Y. Suppl. 38, 47 N. Y. St. 763, where the adverse claimant failed to establish his claim of title and it was held that he could not proceed to attack the mortgage as fraudulent because it was executed to secure an existing indebtedness.

Ohio.— Goldsmith *v.* Hain, 1 Ohio Cir. Ct. 333.

United States.— Commercial Nat. Bank *v.* Pirie, 82 Fed. 799, 49 U. S. App. 596, 27 C. C. A. 171.

Contra, Lushton State Bank *v.* O. S. Kelly Co., 49 Nebr. 242, 68 N. W. 481; Henry *v.* Vliet, 33 Nebr. 130, 49 N. W. 1107, 29 Am. St. Rep. 478, 19 L. R. A. 590.

Only a partial payment at the time of making the mortgage is necessary to make the mortgagee an innocent purchaser to the full extent of his loan. Commercial Nat. Bank *v.* Pirie, 82 Fed. 799, 49 U. S. App. 596, 27 C. C. A. 171.

Where the time for payment is extended by the creditor who receives a mortgage to secure a preëxisting debt, it was suggested that the mortgagee would prevail over the claims of one from whom the mortgagor had secured the property by fraud. Flannigan *v.* Althouse, 56 Iowa 513, 9 N. W. 381.

77. Ede *v.* Johnson, 15 Cal. 53, because the note itself imports a valuable and sufficient consideration. But see Hixon *v.* Mullikin, 18 Ill. App. 232, where a chattel mortgage was given to secure a note for a large sum on short time, and a note for one dollar on much longer time, and it was held not to be given in good faith.

78. Dyer *v.* State, 88 Ala. 225, 7 So. 267, limited in its application to the immediate parties to the mortgage.

79. Bullock *v.* Narrott, 49 Ill. 62.

An alleged indebtedness for worthless mining stock did not furnish a *bona fide* consideration for a mortgage where the mortgagor was insolvent and pressed by creditors and did not know in what companies the stocks were. Johnson *v.* Phillips, 2 N. Y. Suppl. 432.

Where part of debts secured were fraudulent and part valid the mortgage was held to be valid as to the *bona fide* debts secured. Pittman *v.* Rotan Grocery Co., 15 Tex. Civ. App. 676, 39 S. W. 1108.

80. Byram *v.* Gordon, 11 Mich. 531. But see Fowler *v.* Hoffman, 31 Mich. 215, holding that an obligation not to use a newspaper plant so as to injure the reputation or business of the mortgagee was too vague. *Compare* Long Dock Co. *v.* Mallery, 12 N. J. Eq. 93, holding that the mortgage under adjudication was not to secure the general performance of a contract, but could only be resorted to in case of certain forfeitures.

A mortgage conditioned on mortgagor's appearance at the next term of court, and given to protect sureties on recognizance bond, is not discharged by his appearance, if the case is continued and the mortgage is properly kept alive by renewals. Crawford *v.* Vinton, 102 Mich. 83, 62 N. W. 988.

81. Machette *v.* Wanless, 1 Colo. 225, where a mortgage was in terms defeasible on payment of a certain note, but by another clause was shown to have been intended to cover a past indebtedness, and it was held that it would be construed to bring the clause concerning the past indebtedness within the terms of the defeasance. *Compare* State Bank *v.* Vance, 4 Litt. (Ky.) 168, where an indorsement on a mortgage by the mortgagor that it would secure an additional note if such note were discounted was held sufficient to bring such note within the mortgage lien.

Failure to state the amount secured does not prevent an equitable proceeding to foreclose a bill of sale which is executed to secure a certain indebtedness owing from the vendor to the vendee. Blake *v.* Corbett, 120 N. Y. 327, 24 N. E. 477, 31 N. Y. St. 31.

What debts are covered.— A mortgage executed to secure a specific loan and all other debts owing from the mortgagor to the mortgagee (Collier *v.* White, 97 Ala. 615, 12 So. 385) or to secure an accommodation indorser on three described notes and to save him harmless from all other damages he might suffer by reason of the use of his name as indorser (Ripley *v.* Larmouth, 56 Barb. (N. Y.) 21) has been held to cover all claims which the mortgagee might have against the mort-

to be made up of certain specific items of liability due the mortgagee from the mortgagor.[82]

2. Between What Parties. A chattel mortgage may be made to cover separate debts owing to different persons,[83] and it seems to be unobjectionable to have a mortgage run in favor of a third person;[84] but it has been held that the debt, liability, or agreement which a chattel mortgage is given to secure must be strictly between the mortgagor and mortgagee.[85]

3. Counsel Fees. Although equity will not allow a mortgagee to clog the equity of redemption with an oppressive agreement,[86] a provision allowing attorney's fees charged against the mortgagee to be added to the mortgage debt has

gagor. *Compare* State Bank *v.* Vance, 4 Litt. (Ky.) 168, where a recital in a subsequent mortgage that the property was bound by a prior one to secure a certain debt was held equivalent to an agreement that the latter mortgage should secure that debt. See also Spencer *v.* Pierce, 5 R. I. 63, holding that a mortgage included an amount due for service under a sealed contract of employment.

A contingent indebtedness was held to be created where the payee of a note indorsed it to a third person for the maker and such liability was held to be secured by a mortgage given to secure "all his indebtedness . . . by note, account, or otherwise" from the maker to the payee. Treat *v.* Gilmore, 49 Me. 34.

Where a chattel mortgage fails to specify what portion of a debt it secures it is presumed to have been given to secure the part that is due. Calkins *v.* Clement, 54 Vt. 635.

82. Hills *v.* Farrington, 6 Allen (Mass.) 80.

The expression "all other indebtedness" in the defeasance clause of a mortgage has been held not to include a judgment rendered against the mortgagor before the execution of the mortgage and purchased by the mortgagee at a discount after the mortgage was executed, it not being shown that the judgment was taken up at the instance of the mortgagor. Martin *v.* Halbrooks, 55 Ark. 569, 18 S. W. 1046.

83. *Maine.*— Wheeler *v.* Nichols, 32 Me. 233.

Massachusetts.— Hubby *v.* Hubby, 5 Cush. (Mass.) 516, 52 Am. Dec. 742; Burnett *v.* Pratt, 22 Pick. (Mass.) 556.

Michigan.— Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; Adams *v.* Niemann, 46 Mich. 135, 8 N. W. 719.

Nebraska.— Skinner *v.* Pawnee City First Nat. Bank, 59 Nebr. 17, 80 N. W. 42; Sloan *v.* Thomas Mfg. Co., 58 Nebr. 713, 79 N. W. 728.

New York.— Tyler *v.* Taylor, 8 Barb. (N. Y.) 585.

Wisconsin.— Farwell *v.* Warren, 76 Wis. 527, 45 N. W. 217.

Mortgage is several not joint.— Where a chattel mortgage is given to two persons to secure their several demands, such mortgage is several and not joint. Hubby *v.* Hubby, 5 Cush. (Mass.) 516, 52 Am. Dec. 742; Burnett *v.* Pratt, 22 Pick. (Mass.) 556; Skinner *v.* Pawnee City First Nat. Bank, 59 Nebr. 17, 80 N. W. 42; Sloan *v.* Thomas Mfg. Co., 58 Nebr. 713, 79 N. W. 728.

A subsequent mortgage was held to inure to the benefit of all previous mortgagees where the joint mortgage contained a covenant for further security on subsequent goods and the second mortgage was executed on these goods to secure the separate claim of one of the mortgagees. Hunter *v.* Bosworth, 43 Wis. 583.

84. Hincks *v.* Field, 14 N. Y. Suppl. 247, 37 N. Y. St. 724. *Compare* Chafey *v.* Mathews, 104 Mich. 103, 62 N. W. 141, 27 L. R. A. 558, where a mortgage securing an indebtedness due to a bank ran to the cashier, but other creditors knew of the purpose of the mortgage and were not prejudiced thereby. See also Russell *v.* Longmoor, 29 Nebr. 209, 45 N. W. 624, where the ownership of the money advanced by the mortgagee as consideration for the giving of the mortgage was held to be immaterial.

Although a mortgage is taken in the name of a third person and the mortgage notes are payable to the mortgagee or bearer, the actual lender of the money may testify that the mortgage was given to secure a loan made by him to the mortgagor. Gilmore *v.* Roberts, 79 Wis. 450, 48 N. W. 522. *Compare* Foster *v.* Berkey, 8 Minn. 351, holding that a chattel mortgage was valid and entitled the mortgagee to possession against creditors of the mortgagor, although the debt secured did not belong to the mortgagee at the time of the execution of the mortgage or at the time of the institution of the suit for possession.

Where a note is indorsed in blank for collection the indorsee may, to secure its payment, take a chattel mortgage in his own name from the maker which is valid as against the maker and his creditors. Sabin *v.* Lebenbaum, 26 Oreg. 420, 38 Pac. 434.

85. Parker *v.* Morrison, 46 N. H. 280. *Compare* Miami County Nat. Bank *v.* Barkalow, 53 Kan. 68, 35 Pac. 796, where a mortgage executed by a firm was held to be void as to creditors because it included a debt due from one partner. But see Walker *v.* White, 60 Mich. 427, 27 N. W. 554, holding that a trust deed by a firm was not rendered invalid because it secured a claim due from an individual partner.

86. Hall *v.* Ditson, 5 Abb. N. Cas. (N. Y.) 198.

been held not to avoid a chattel mortgage,[87] and a stipulation to indemnify the mortgagee against all costs, trouble, and expense is also valid and enforceable.[88]

4. Description — a. Generally. A chattel mortgage[89] must, subject to exceptions, contain such a description of the debt or other obligation secured as is sufficient, in connection with the inquiries suggested by the instrument, to enable a third person using due diligence to ascertain the nature and extent of the obligation secured.[90] Where the amount of the obligation is known to the parties the rule in some states is that the mortgage must definitely state the extent of the encumbrance;[91] but a statement of the gross amount of the obligation secured is

87. *Alabama.*— Boyd *v.* Jones, 96 Ala. 305, 11 So. 405, 38 Am. St. Rep. 100.

Florida.— Logan *v.* Slade, 28 Fla. 699, 10 So. 25.

Kentucky.— Thomasson *v.* Townsend, 10 Bush (Ky.) 114.

Texas.— Meyer Bros. Drug Co. *v.* Rather, (Tex. Civ. App. 1895) 30 S. W. 812; Rainwater-Boogher Hat Co. *v.* Weaver, 4 Tex. Civ. App. 594, 23 S. W. 914; Butler *v.* Sanger, 4 Tex. Civ. App. 411, 23 S. W. 487; Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

United States.— Mills *v.* Pessels, 55 Fed. 588, 13 U. S. App. 49, 5 C. C. A. 215.

But see Jarvis *v.* Southern Grocery Co., 63 Ark. 225, 38 S. W. 148, holding that the stipulation itself was unenforceable.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 74.

The withdrawal of an attorney's claim in so far as it affected the rights of the client for whom he acted has been held not to affect the validity of the conveyance as to other creditors thereby secured. Mills *v.* Pessels, 55 Fed. 588, 13 U. S. App. 49, 5 C. C. A. 215.

Amount of fee.— The stipulation in the mortgage does not control the amount to be added when the foreclosure is by suit. A reasonable amount only can be recovered (Grangers' Business Assoc. *v.* Clark, 84 Cal. 201, 23 Pac. 1081) and the amount is not measured by the attorney-fee statute or by what was paid in fact (Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857). It has been held that a commission of ten per cent (Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517) and one of twenty per cent (Balfour *v.* Davis, 14 Oreg. 47, 12 Pac. 89) for an attorney's fee was excessive. See also Keokuk Falls Imp. Co. *v.* Kingsland, etc., Mfg. Co., 5 Okla. 32, 47 Pac. 484, holding that if there is doubt as to the mode of computing counsel fees the mode most favorable to the debtor must be adopted.

Necessity for actual expenditure.— No fee can be added to the mortgage debt unless the mortgagee has in fact employed an attorney (Benson Bank *v.* Hove, 45 Minn. 40, 47 N. W. 449) to act in respect to foreclosure which would come within the terms of the stipulation (Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627); but the failure of a legitimate effort to get hold of the property does not affect the validity of a charge (Reisan *v.* Mott, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489). *Compare* Fechheimer *v.* Baum, 43 Fed. 719, holding that an attorney was entitled to the stipulated fees, although the foreclosure had been enjoined.

88. Robinson *v.* Hill, 15 N. H. 477, where plaintiff gave a bond to a third person for the benefit of defendant, who executed a chattel mortgage to indemnify plaintiff, and after plaintiff had been compelled by suit to pay the bond, was held to be entitled to recover costs and expenses incurred in the suit as part of the amount secured by the mortgage.

89. **Necessity for indorsement on note that it is secured by mortgage.**— Ill. Laws (1895), p. 260, requiring that a note secured by mortgage shall state such fact, does not render a mortgage void between the parties which fails to make the statement. Sellers *v.* Thomas, 185 Ill. 384, 57 N. E. 10 [*reversing* 85 Ill. 58; and *overruling* Thompson *v.* Akin, 81 Ill. App. 62; Quaintance *v.* Badham, 68 Ill. App. 87]; Butler *v.* Colwell, 89 Ill. App. 133.

90. *Arkansas.*— Hoye *v.* Burford, 68 Ark. 256, 57 S. W. 795 (sustaining a description of "all indebtedness that I owe said H. L. Burford"); Curtis *v.* Flinn, 46 Ark. 70.

Indiana.— New *v.* Sailors, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632.

Iowa.— Magirl *v.* Magirl, 89 Iowa 342, 56 N. W. 510, holding valid a mortgage conditioned to be void provided mortgagor paid "all debts and liabilities that have been secured for him by said second party [plaintiff], and save and protect said second party from the payment of any and all debts which he has obligated himself to pay on first party's account, as surety in fact or otherwise, for first party."

Maine.— Cayford *v.* Brickett, 89 Me. 77, 35 Atl. 1018, holding that a bill of sale made to secure against loss by signing a bond used in pending litigation was sufficiently clear.

Missouri.— Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97.

New Hampshire.—Webb *v.* Stone, 24 N. H. 282; Robertson *v.* Stark, 15 N. H. 109.

New York.— Dinniny *v.* Gavin, 159 N. Y. 556, 54 N. E. 1090 [*affirming* 4 N. Y. App. Div. 298, 39 N. Y. Suppl. 485].

Ohio.— Greiss *v.* Wilkop, 12 Ohio Cir. Ct. 481, 5 Ohio Cir. Dec. 544.

Wisconsin.— Weber *v.* Illing, 66 Wis. 79, 27 N. W. 834; Shores *v.* Doherty, 65 Wis. 153, 26 N. W. 577; Paine *v.* Benton, 32 Wis. 491.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 106.

91. Stearns *v.* Porter, 46 Conn. 313; Hart *v.* Chalker, 14 Conn. 77; Bullock *v.* Battenhousen, 108 Ill. 28 [*affirming* 11 Ill. App. 665]; Pearce *v.* Hall, 12 Bush (Ky.) 209; Reiff *v.* Eshleman, 52 Md. 582; Stanhope *v.* Dodge, 52 Md. 483.

The design to secure future advances need

sufficient,[92] and it is not necessary that the mortgage itself should contain a full description of the debt to prevent its being fraudulent against creditors.[93]

b. Misdescription of Debt. The weight of authority is that a misdescription in the mortgage of the nature of the debt is not necessarily fatal,[94] and a clerical inaccuracy which does not in fact mislead may be disregarded;[95] but a wholly

not expressly appear in the mortgage. Wood *v.* Franks, 67 Cal. 32, 7 Pac. 50. *Contra*, Butts *v.* Peacock, 23 Wis. 359. But see Bell *v.* Radcliff, 32 Ark. 645, holding that a mortgage to secure advances on an unplanted crop would be protected and upheld in a court of equity, although the advances exceeded the amount named in the mortgage, where the evident intent was to secure all that should be required for making the crop.

92. Clark *v.* Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294. *Compare* North *v.* Crowell, 11 N. H. 251, holding sufficient a statement that a mortgage was to secure all legal demands not exceeding fifty dollars.

93. Magirl *v.* Magirl, 89 Iowa 342, 56 N. W. 510.

The particulars of the note secured need not be stated in the mortgage (Varney *v.* Hawes, 68 Me. 442; Webb *v.* Stone, 24 N. H. 282; Robertson *v.* Stark, 15 N. H. 109), for an omission of the name of the payee and maker in the description of the note may be supplied by parol (Ede *v.* Johnson, 15 Cal. 53 (statutory); Holmes *v.* Hinkle, 63 Ind. 518); and although the date of the note is not given the mortgage is valid if the note is described with reasonable certainty (Weber *v.* Illing, 66 Wis. 79, 27 N. W. 834). *Compare* Wood *v.* Weimar, 104 U. S. 786, 26 L. ed. 779, holding that parol evidence is admissible to identify the debt, although the debt is in fact represented by several notes, none of which are described. But see Cincinnati Leaf Tobacco Warehouse Co. *v.* Combs, 22 Ky. L. Rep. 523, 58 S. W. 420, holding that a chattel mortgage reciting that it was executed to secure "a certain sum of money" advanced to mortgagor under a contract entered into on a day named, and that a note was executed therefor, is so uncertain as to amount that it does not, although recorded, operate as constructive notice to purchasers or creditors.

A mortgage of a crop for a stated year and for every year thereafter until the debt is fully paid is not void for uncertainty as to the debt secured, since parol evidence is admissible to show that it is still unpaid. Truss *v.* Harvey, 120 Ala. 636, 24 So. 927.

A statutory requirement for the statement of the actual consideration in certain instances has been held not to apply to a mortgage given by the purchaser of furniture to the seller, at the time of sale, to secure a part or the whole of the purchase-price. Day *v.* Cohen, 165 Mass. 304, 43 N. E. 109. But the details of statement made necessary by statute were not complied with in Rood *v.* Welch, 28 Conn. 157; Page *v.* Ordway, 40 N. H. 253.

Provisions of Ontario Chattel Mortgage Act are met where it is stated in a chattel mortgage that the consideration therefor is the indorsement of a note, for it is only necessary to state the facts and not their legal effect. Robinson *v.* Mann, 31 Can. Supreme Ct. 484. *Compare* Boulton *v.* Smith, 18 U. C. Q. B. 458 [*affirming* 17 U. C. Q. B. 400], holding a mortgage to be defective in not showing the terms, nature, and effect of the mortgagee's liability incurred by indorsing the mortgagor's paper.

In England, unless a bill of sale given for security sets forth truly the consideration for which it is given, it is void *in toto*, even between the grantor and grantee (Davis *v.* Goodman, 5 C. P. D. 128, 49 L. J. C. P. 344, 42 L. T. Rep. N. S. 288, 28 Wkly. Rep. 559, confirmed by "Bills of Sale Act 1882," § 8); but inaccuracies in statement of consideration will not invalidate bill if true consideration appears from the context (Roberts *v.* Roberts, 13 Q. B. D. 794, 53 L. J. Q. B. 313, 50 L. T. Rep. N. S. 351, 32 Wkly. Rep. 605), for strict literal accuracy of statement is not required (*Ex p.* Johnson, 26 Ch. D. 338, 48 J. P. 648, 53 L. J. Ch. 762, 50 L. T. Rep. N. S. 214, 32 Wkly. Rep. 693), but this information cannot be obtained from a reference to another instrument (Sharp *v.* McHenry, 38 Ch. D. 427, 57 L. J. Ch. 961, 57 L. T. Rep. N. S. 606).

94. Foster *v.* Cramer, 19 Colo. 405, 35 Pac. 747; Barrows *v.* Turner, 50 Me. 127; Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687. *Contra*, Phillips *v.* Johnson, 64 N. H. 393, 10 Atl. 819; Belknap *v.* Wendell, 31 N. H. 92.

Erroneous portions of the description may be omitted and the true portions alone may be regarded, when that of itself is sufficient to designate the debt secured. Dodge *v.* Potter, 18 Barb. (N. Y.) 193.

The fact that a renewal note has been given is sufficient to account for a misdescription of the debt secured by a mortgage. Barrows *v.* Turner, 50 Me. 127; Clark *v.* Houghton, 12 Gray (Mass.) 38.

95. Crafts *v.* Crafts, 13 Gray (Mass.) 360; Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538. See also Foster *v.* Cramer, 19 Colo. 405, 35 Pac. 747, holding that where a mortgage was intended to secure payment of a certain note, of even date therewith, payable on or before March 14, 1887, but by mistake the mortgage recited that the sum of money secured was payable on or before March 14, 1886, according to the tenor of a certain note "bearing even date with this deed," the facts were sufficient to put third persons upon inquiry.

A discrepancy of over three hundred dollars between the statement of the consideration in the commencement of the mortgage, and a subsequent accurate statement of the debt secured in the body of the mortgage does not render a chattel mortgage fraudulent and void *per se*. Kaysing *v.* Hughes, 64 Ill. 123.

false description of the debts secured transfers no title to the property by virtue of which the mortgagee can assert a claim in an action at law.[96]

c. Misstatement of Amount. The fact that a chattel mortgage states a sum greater than the actual liability of the mortgagor to the mortgagee does not of itself render the mortgage void at law,[97] but overstatement[98] of amount always requires explanation[99] and is a circumstance from which a jury may infer

Extrinsic evidence is admissible to identify the debt secured, where the date of the note does not conform to the date of it as stated in the mortgage (Clark *v.* Houghton, 12 Gray (Mass.) 38), where the sum described in the mortgage is different from that in the note (Johns *v.* Church, 12 Pick. (Mass.) 557, 23 Am. Dec. 651), and where the note differs from the mortgage in various other respects (Paine *v.* Benton, 32 Wis. 491). *Compare* Rock *v.* Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885, holding that a description of a note in a chattel mortgage given to secure it which incorrectly states the amount at a larger sum than it bears, but otherwise describes it correctly, there being but the one note in the mortgagee's hands payable by the mortgagor, is sufficiently certain to uphold the validity of the mortgage.

96. Jewett *v.* Preston, 27 Me. 400, holding that where the notes described were not executed other notes held by the mortgagee against the mortgagor could not be substituted therefor. *Compare* Follett *v.* Heath, 15 Wis. 601, holding that in some cases the mortgagee may succeed by having the instrument reformed in a court of equity. But see Bramhall *v.* Flood, 41 Conn. 68, holding that the correction of such a mistake would not affect the rights of creditors who obtained a lien by attachment while it continued.

Although the condition of a mortgage recites that the debt secured is absolute, evidence is admissible to show that the obligation secured was in realty contingent. Goodheart *v.* Johnson, 88 Ill. 58; Kackley *v.* State, 91 Ind. 437; Sparks *v.* Brown, 33 Mo. App. 505; McKinster *v.* Babcock, 26 N. Y. 378 [*reversing* 37 Barb. (N. Y.) 265]. *Contra,* Kennard *v.* Gray, 58 N. H. 51 (statutory); Belknap *v.* Wendell, 31 N. H. 92 (statutory). *Compare* Honaker *v.* Vesey, 57 Nebr. 413, 77 N. W. 1100, holding that a mortgage in terms to secure the payment of a debt evidenced by a promissory note may be shown to be one of indemnity only.

97. *Alabama.*— Lawson *v.* Alabama Warehouse Co., 80 Ala. 341.

Arkansas.— Reynolds *v.* Johnson, 54 Ark. 449, 16 S. W. 124.

California.— Wood *v.* Franks, 67 Cal. 32, 7 Pac. 50; Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102.

Georgia.— Kiser *v.* Carrollton Dry Goods Co., 96 Ga. 760, 22 S. E. 303.

Illinois.— Bell *v.* Prewitt, 62 Ill. 361; Upton *v.* Craig, 57 Ill. 257; Strauss *v.* Kranert, 56 Ill. 254; Wooley *v.* Fry, 30 Ill. 158.

Iowa.— Van Patten *v.* Thompson, 73 Iowa 103, 34 N. W. 763; Wood *v.* Scott, 55 Iowa 114, 7 N. W. 465.

Kansas.— Bowling *v.* Armourdale Bank, 57 Kan. 174, 45 Pac. 584; Bush *v.* Bush, 33 Kan. 556, 6 Pac. 794; Hughes *v.* Shull, 33 Kan. 127, 133, 5 Pac. 414, 770. See also Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145, holding that a chattel mortgage taken for a sum greater than was due is not void when the excess was small and no fraudulent intention existed on the part of any of the parties to the mortgage.

Louisiana.— Jackson *v.* Miller, 32 La. Ann. 432.

Michigan.—Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; Willison *v.* Desenberg, 41 Mich. 156, 2 N. W. 201.

Minnesota.— Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 840; Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687.

New York.— Frost *v.* Warren, 42 N. Y. 204; Wescott *v.* Gunn, 4 Duer (N. Y.) 107.

Texas.— Meyer Bros. Drug Co. *v.* Rather, (Tex. Civ. App. 1895) 30 S. W. 812.

Wisconsin.— Rock *v.* Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692; Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16; Blakeslee *v.* Rossman, 43 Wis. 116; Butts *v.* Peacock, 23 Wis. 359. *Compare* Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296, holding that, to render a chattel mortgage void in law because taken for a larger amount than was in fact due the mortgagee, it must appear that it was so taken intentionally and not by mere mistake in computation or otherwise.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 108.

98. **An understatement of the amount** due does not affect the validity of the mortgage (Cushman *v.* Luther, 53 N. H. 562; Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396), but the sum stated limits the amount secured (Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396). *Compare* Cushman *v.* Luther, 53 N. H. 562, holding that a mortgage may be sustained as a security for a note, notwithstanding the amount of the note is understated in the mortgage, if it appears that the note is the one which the parties to the mortgage in good faith intended to secure.

99. Lawson *v.* Alabama Warehouse Co., 80 Ala. 341, holding that where a chattel mortgage recited the indebtedness secured as five thousand dollars, but it appeared that two thousand eight hundred dollars only was loaned at the date of the mortgage and the residue was to be advanced at times and in sums to suit the mortgagee's convenience, the explanation was sufficient to relieve the instrument of any imputation of fraud.

A large difference between the debt and

fraud,[1] in which case the mortgage is rendered invalid as against creditors of the mortgagor.[2]

5. FUTURE ADVANCES INCLUDED. A mortgage containing a provision that it shall cover future advances will only secure the kind of advances contemplated by the parties,[3] but a provision that future transactions should be based on the same security will make the mortgage cover all future indebtedness,[4] and such an instrument has been held to secure advances made after the maturity of the mortgage.[5]

6. PERSONAL LIABILITY OF MORTGAGOR. When a chattel mortgage is executed to secure a note, the mortgagee may recover in an action at law the amount recited in the mortgage to be due and to be secured thereby, although the note was never signed;[6] and where mortgaged personal property is taken away by a title paramount to that of either of the parties, the mortgagor continues liable

the amount given in the mortgage is strong evidence of fraud. Wallach *v.* Wylie, 28 Kan. 138. *Compare* Bailey *v.* Burton, 8 Wend. (N. Y.) 339, holding a mortgage for three hundred dollars on five hundred dollars' worth of property, to cover a liability of one hundred dollars for a suretyship obligation, to be void against creditors, although, prior to the attaching of their liens, it was reduced to one hundred dollars and the property delivered.

A slight excess is not sufficient to stamp the deed with fraud, where there was no actual fraudulent intent on the part of the mortgagee. Van Patten *v.* Thompson, 73 Iowa 103, 34 N. W. 763; Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145. See also Kiser *v.* Carrollton Dry Goods Co., 96 Ga. 760, 22 S. E. 303, holding immaterial a variance between a mortgage for five thousand dollars and a debt of four thousand three hundred and ninety-eight dollars secured thereby.

If the real amount of a mortgagee's claim is not known at the time of making the mortgage, an overstatement of the amount by mistake is no evidence of fraud and does not invalidate the instrument. Reynolds *v.* Johnson, 54 Ark. 449, 16 S. W. 124.

1. **The jury is the proper tribunal** to determine whether the overstatement of indebtedness is fraudulent.

California.— Wood *v.* Franks, 67 Cal. 32, 7 Pac. 50; Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102.

Illinois.— Upton *v.* Craig, 57 Ill. 257; Strauss *v.* Kranert, 56 Ill. 254; Wooley *v.* Fry, 30 Ill. 158.

Iowa.— Van Patten *v.* Thompson, 73 Iowa 103, 34 N. W. 763; Wood *v.* Scott, 55 Iowa 114, 7 N. W. 465.

Michigan.—Willison *v.* Desenberg, 41 Mich. 156, 2 N. W. 201.

Minnesota.— Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 820; Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687.

Wisconsin.— Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692; Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296; Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16; Blakeslee *v.* Rossman, 43 Wis. 116; Butts *v.* Peacock, 23 Wis. 359.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 108.

2. Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102; Wallach *v.* Wylie, 28 Kan. 138; Bailey *v.* Burton, 8 Wend. (N. Y.) 339.

3. Marcus *v.* Robinson, 76 Ala. 550, where the mortgage was on a crop and was limited to securing statutory advances for making a crop, as such was the intention of the parties. *Compare* Gray *v.* Helm, 60 Miss. 131, where advances made after maturity were covered by the mortgage only in so far as they were made for the purpose of raising a crop as provided for in the mortgage.

Only a reasonable price can be charged for supplies furnished according to the terms of a trust deed given as security therefor, and it is immaterial that in similar cases a large profit was charged on account of the risk of non-payment. Paxton *v.* Meyer, 58 Miss. 445.

4. Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97. *Compare* Moore *v.* Terry, 66 Ark. 393, 50 S. W. 998, where a chattel mortgage was given to secure a note "and all other indebtedness which may then be due," etc., and it was held that the words "then due" referred to the time when the note was due.

5. Hill *v.* Nelms, 86 Ala. 442, 5 So. 796. *Compare* Douglas *v.* Smith, 74 Iowa 468, 38 N. W. 163, where it was held that the word "due" in a mortgage securing future advances would not limit the mortgage to securing only indebtedness payable at or before the date indicated, but that the mortgage would secure any outlay made by the mortgagee in good faith in pursuance of the enterprise. But see Fort *v.* Black, 50 Ark. 256, 7 S. W. 131, where a mortgage was executed to secure any sum that might become due for supplies to be furnished by a certain date, and it was held not to secure an account contracted subsequently to that date.

A mortgage was a continuing security for advances where it was conditioned to pay according to the condition of a bond which was conditioned "to pay all the advances which may be made to them under this agreement at the times, in the manner, and with the interest agreed upon." Shores *v.* Doherty, 65 Wis. 153, 26 N. W. 577.

6. Mason *v.* Parker, 101 Ga. 659, 28 S. E. 985; Swancey *v.* Parrish, 62 S. C. 240, 40 S. E. 554.

for the mortgage debt,[7] provided there was an original undertaking to pay it.[8]

7. Priority of Different Debts Secured by Same Mortgage. Where one mortgage secures several notes due at different times and there is no special provision to the contrary, they have priority of lien in the order of their maturity.[9] Where two distinct kinds of liability are secured, the proceeds must be applied primarily to the payment of the liability first mentioned in the mortgage.[10]

8. Right of Secured Creditor to Benefit of Indemnity Mortgage. A chattel mortgage to secure an accommodation indorser of a note inures at the maturity of the note to the benefit of the holder,[11] unless the mortgage has been assigned by the surety, when the right of the principal creditor to the mortgaged property seems to be cut off.[12]

9. Rule Against Including Other Indebtedness. A chattel mortgage given to secure a certain indebtedness therein expressed cannot be extended to become a lien for another and different indebtedness,[13] except perhaps by agreement

7. Whitney *v.* Willard, 13 Gray (Mass.) 203.

Mortgagee's failure to deliver a verified statement of account as required by statute before he takes possession of the property does not cause him to forfeit the mortgage or lose the debt. Atkinson *v.* Burt, (Ark. 1898) 53 S. W. 404.

Admissibility of evidence to defeat liability.— Where a mortgagee is not guilty of laches in prosecuting a suit to recover mortgaged property attached by a creditor of the mortgagor, evidence of a settlement by the debtor with the attaching creditor is not admissible in an action by the mortgagee to recover the mortgage debt. Mason *v.* J. S. Hughes & Co.'s Banking House, (Kan. 1898) 52 Pac. 885.

8. Weed *v.* Covill, 14 Barb. (N. Y.) 242, holding that, where a chattel mortgage contained no agreement to pay the debt secured and no recital or declaration that the mortgagor is personally indebted, there is no personal liability on the mortgage.

What constitutes an agreement to pay.— A recital that a chattel mortgage is given to secure certain notes which the mortgagors "hereby agree to pay" is a promise to pay the mortgage debt (Dinniny *v.* Gavin, 4 N. Y. App. Div. 298, 39 N. Y. Suppl. 485); but the liability of three mortgagors was not changed from that expressed in notes given by them because of a promise in the mortgage to pay the whole sum (Kelley *v.* Maxwell, 7 Ohio St. 239).

9. Marseilles Mfg. Co. *v.* Rockford Plow Co., 26 Ill. App. 198; Campbell Printing Press, etc., Co. *v.* Roeder, 44 Mo. App. 324; McDonnell *v.* Burns, 83 Fed. 866, 55 U. S. App. 233, 28 C. C. A. 174. See also Lyman *v.* Smith, 21 Wis. 674, holding that the failure of the assignee of the note first maturing to bring an action to foreclose till after the maturity of another note would not cause him to lose his right to priority.

10. Low *v.* Allen, 41 Me. 248.

11. Troy *v.* Smith, 33 Ala. 469; Stewart *v.* Preston, 1 Fla. 11, 44 Am. Dec. 621 (where, however, the surety had transferred the mortgage to the creditor); Tompkins *v.* Crosby, (N. J. 1890) 19 Atl. 720. *Compare* Cullum *v.* Mobile Branch Bank, 23 Ala. 797, where a mortgage was assigned by the principal debtor to a trustee for the protection of his surety, with authority to collect the mortgage notes and pay the debt out of the proceeds, on default being made in its payment, and it was held that the principal creditor was entitled to the benefit of the security.

Subrogation.— Where a chattel mortgage was given on logs to secure the payment of accommodation paper, with the understanding that the mortgagor was to saw the logs, sell the lumber, and with the proceeds take up the paper, and the mortgagor did sell the lumber, the claim of his vendee, who had no notice of the mortgage, had priority over any claim of the chattel mortgagee, or any claim by way of subrogation of the holders of the paper to secure which such mortgage was given. Marquette First Nat. Bank *v.* Weed, 89 Mich. 357, 50 N. W. 864.

Surety as trustee.— Where a mortgagee relying on the security of his mortgage went as surety on other notes of the mortgagor, it was held that he held the surplus of the mortgaged property over an amount sufficient to protect himself as trustee for the benefit of the holder of the note. Showman *v.* Lee, 79 Mich. 653, 44 N. W. 1061.

12. Potter *v.* Holden, 31 Conn. 385; Thrall *v.* Spencer, 16 Conn. 139.

Where the mortgage was assigned by the surety to the holder of the secured claim, who executed a release to the surety, it was held that the mortgage was thereby paid and discharged and could not be enforced by the holder of the secured claim. Sumner *v.* Bachelder, 30 Me. 35.

13. Marcus *v.* Robinson, 76 Ala. 550; Morris *v.* Tillson, 81 Ill. 607; Sims *v.* Mead, 29 Kan. 124. See also Hume *v.* Riggs, 12 App. Cas. (D. C.) 355, holding that a mortgage to secure rents accruing under a lease would not secure rents accruing after the maturity of the lease.

Taxes on the mortgaged property which have been paid by the mortgagee cannot be added to the mortgage debt, because the statute allowing it applies only to mortgages of

between the parties,[14] and such an agreement cannot be enforced to the detriment of creditors[15] or junior encumbrancers;[16] but the substitution of new notes as evidence of the mortgage debt does not render a mortgage open to the objection that it has been extended to cover a new indebtedness,[17] especially where such a substitution was contemplated at the time of giving the mortgage.[18]

10. Time of Payment — a. In General. In general it is not necessary to state the time for performance of the mortgage obligation.[19] When no time is specified in a mortgage for the performance of the obligation on which it is conditioned, the law will require it to be performed within a reasonable time;[20] but where the mortgage secures an existing debt and no time for payment is specified it is due as soon as given.[21]

real estate. Dunsmuir *v.* Port Angeles Gas, etc., Co., 24 Wash. 104, 63 Pac. 1095.

Insurance premiums paid by the mortgagee for insurance on the mortgaged property effected without any agreement between the parties cannot be added to the mortgage debt. Booth *v.* Baltimore Steam-Packet Co., 63 Md. 39.

14. Hill *v.* Nelms, 86 Ala. 442, 5 So. 796, previous to a statute prohibiting verbal mortgages.

15. Mueller *v.* Provo, 80 Mich. 475, 45 N. W. 498, 20 Am. St. Rep. 525, holding that as against creditors a mortgage was valid only to the amount set forth.

16. Schiffer *v.* Feagin, 51 Ala. 335. But see Cullum *v.* Mobile Branch Bank, 23 Ala. 797, holding that where a creditor secured by a chattel mortgage purchased a judgment which was a prior lien on the mortgaged premises at the request of his debtor, and with the express understanding that it should be tacked to the mortgage and paid out of the fund, he was entitled in equity to have it tacked to his mortgage and paid out of the fund.

17. Pond *v.* Clarke, 14 Conn. 334. *Contra,* Ayres *v.* Wattson, 57 Pa. St. 360.

The absence of any note to represent the debt secured by a mortgage was held not to prevent the mortgage from securing the note when it was subsequently executed, since the amount and date of payment of the debt were clearly defined in the mortgage. Schweer *v.* Schwabacher, 17 Ill. App. 78.

18. McKinster *v.* Babcock, 26 N. Y. 378 [*reversing* 37 Barb. (N. Y.) 265].

19. Cayford *v.* Brickett, 89 Me. 77, 35 Atl. 1018; McGraw *v.* Bishop, 85 Mich. 72, 48 N. W. 167; Bearss *v.* Preston, 66 Mich. 11, 32 N. W. 912; Byram *v.* Gordon, 11 Mich. 531. *Compare* Peck *v.* Logsdon, 84 Ill. App. 420, holding that failure of mortgage to state when the note secured became due did not render the mortgage fraudulent and void as to third persons.

Under the English acts the time for payment must be set forth certainly in the bill of sale or it will be void (Hughes *v.* Little, 18 Q. B. D. 32, 56 L. J. Q. B. 96, 55 L. T. Rep. N. S. 476, 35 Wkly. Rep. 36); but omitting the year on which the mortgage debt is to be repaid does not invalidate a bill of sale if the year can be supplied from the context (Grannell *v.* Monck, 24 L. R. Ir. 241). An agreement to pay on demand (Mackay *v.* Merritt, 34 Wkly. Rep. 433) or on demand in writing (Hetherington *v.* Groome, 13 Q. B. D. 789, 53 L. J. Q. B. 576, 51 L. T. Rep. N. S. 412, 33 Wkly. Rep. 103) or "forthwith" (*In re* Williams, 25 Ch. D. 656, 53 L. J. Ch. 500, 49 L. T. Rep. N. S. 475, 32 Wkly. Rep. 187) is not a sufficient compliance with the statute.

Debt maturing Saturday.— Where the last day of grace on the note secured by the mortgage is Saturday there is no breach until the next Monday. Arnold *v.* Stock, 81 Ill. 407.

20. Avery *v.* Bushnell, 123 Mass. 349; McGraw *v.* Bishop, 85 Mich. 72, 48 N. W. 167; Bearss *v.* Preston, 66 Mich. 11, 32 N. W. 912; Smith-Wallace Shoe Co. *v.* Wilson, 63 Mo. App. 326, 1 Mo. App. Rep. 749. *Compare* Lose *v.* Davies, 10 Hawaii 591, holding that the indebtedness secured by a mortgage was sufficiently described, although no definite time of payment was fixed, for then the debt was payable on demand.

21. *Iowa.*— Johnston *v.* Robuck, 104 Iowa 523, 73 N. W. 1062.

Massachusetts.— Southwick *v.* Hapgood, 10 Cush. (Mass.) 119, holding that parol evidence was not admissible to show that the mortgage was in fact given as indemnity against certain liabilities not yet matured.

Michigan.—McGraw *v.* Bishop, 85 Mich. 72, 48 N. W. 167; Bearss *v.* Preston, 66 Mich. 11, 32 N. W. 912; Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; Eaton *v.* Truesdail, 40 Mich. 1.

Missouri.—Pollock *v.* Douglas, 56 Mo. App. 487.

New York.— Howland *v.* Willett, 3 Sandf. (N. Y.) 607; Dikeman *v.* Puckhafer, 1 Daly (N. Y.) 489, 1 Abb. Pr. N. S. (N. Y.) 32.

Contra, Tarrell *v.* Bean, 10 Md. 217, holding that where no time was specified the debt was due within a reasonable time.

A condition to pay when payment is demanded implies an extension of credit when the mortgage is given to secure two notes, one due and the other not yet due. Carpenter *v.* Town, Lalor (N. Y.) 72.

Stipulations necessitating a demand.— Where no time of payment was specified in the mortgage, it was held that a demand for payment was necessary when a mortgage provided that the mortgagor should retain possession until default, and that then it should be lawful for the mortgagee to take possession and sell the property. Ashmead *v.* Kellogg, 23 Conn. 70. *Compare* Brown *v.* Grand

b. Statutory Limitation on Term of Credit. Under a statute[22] requiring a renewal affidavit to be filed at the expiration of two years after record of a mortgage, it has been held that a mortgage is not rendered invalid because the mortgage provides for a longer term of credit than two years.[23]

VI. DESCRIPTION OF THE PARTIES AND PROPERTY.

A. Of the Parties. A chattel mortgage, to be effectual against third persons, must point out the parties so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify them.[24]

B. Of the Property — 1. RULE STATED. As against third persons the mortgage must point out the subject-matter so that the third person may identify the property covered by the aid of such inquiries as the instrument itself suggests;[25]

Rapids Parlor Furniture Co., 58 Fed. 286, 16 U. S. App. 221, 7 C. C. A. 225, 22 L. R. A. 817, where a mortgage to secure overdue notes was not void but was construed to require a demand and refusal before it became absolute.

A mortgage securing the payment of an overdue note "according to its tenor" will be understood to be conditioned on the payment of the note in its then existing state. Pettis *v.* Kellogg, 7 Cush. (Mass.) 456.

A mortgage given to indemnify a surety is due as soon as judgment is rendered against the surety on his contract. Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

An alteration of the note postponing maturity so as to make it conform to the mortgage in respect to the time of payment does not render the transaction fraudulent *per se* as to creditors. Meixsell *v.* Williamson, 35 Ill. 529.

22. In the absence of statute a mortgage deed of trust on growing crops was not fraudulent because it was not to be enforced till after two years from its date. Cochran *v.* Paris, 11 Gratt. (Va.) 348.

23. Keller *v.* Robinson, 153 Ill. 458, 38 N. E. 1072 [*affirming* 55 Ill. App. 56]. *Contra*, Silvis *v.* Aultman, 141 Ill. 632, 31 N. E. 11 [*reversing* 39 Ill. App. 164], which was decided under an earlier statute which only provided for the filing of the renewal affidavit upon the maturity of the indebtedness and not upon the expiration of the two-year period. *Compare* Richards *v.* Matson, 51 Ill. App. 530, where the earlier doctrine of the supreme court was followed and it was held that a mortgage providing for payment at the end of two years was bad because days of grace must be added and that would extend the credit beyond the permitted limit. See also Friend *v.* Johnson, 68 Ill. App. 661, where a mortgage was held not to be open to the objection that the debt secured did not mature within two years.

24. *Arkansas.*— Henderson *v.* Gates, 52 Ark. 371, 12 S. W. 780.

California.— Ede *v.* Johnson, 15 Cal. 53.

Colorado.— Herr *v.* Denver Milling, etc., Co., 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641.

Kansas.—Emporia First Nat. Bank *v.* Ridenour, 46 Kan. 718, 27 Pac. 150, 26 Am. St. Rep. 167.

Ohio.— Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 86.

A recital of the partnership name under which partners ordinarily do their business is sufficient and the names of the individual partners need not be set forth. Henderson *v.* Gates, 52 Ark. 371, 12 S. W. 780; Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306.

Misuse of term "party of first part" does not render a mortgage invalid when the meaning of the instrument is not confused thereby. Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222; Taylor *v.* Commercial Bank, 4 U. C. C. P. 447. But see Kern *v.* Wilson, 73 Iowa 490, 35 N. W. 594, holding that a chattel mortgage describing the mortgagee as party of the second part, and expressed to cover "all of said stock, and additions to the same that may be made from time to time by second party," should not be construed as intending "first party" by the words "second party."

A chattel mortgage with blank left for the insertion of the name of the mortgagee is of no validity against a vendee of the mortgagor. Herr *v.* Denver Milling, etc., Co., 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641.

Where statutory provisions require the mortgage to show the profession, trade, or occupation of the parties, these requirements must be regarded as matters of description, intended for the purpose of identification, and not as indispensable requisites of the mortgage without which it can have no effect as against third persons. Ede *v.* Johnson, 15 Cal. 53.

The courts frequently look beyond the description in the paper itself, in determining the parties secured by a mortgage, and construe it to embrace or exclude the persons contemplated, on general legal principles, by the substance of the transaction. Emporia First Nat. Bank *v.* Ridenour, 46 Kan. 718, 27 Pac. 150, 26 Am. St. Rep. 167; World Mfg. Co. *v.* Hamilton-Kenwood Cycle Co., 123 Mich. 620, 82 N. W. 528; Bainbridge *v.* Richmond, 17 Hun (N. Y.) 391.

25. *Alabama.*— Tomkins *v.* Henderson, 83 Ala. 391, 3 So. 774.

Arkansas.— Gurley *v.* Davis, 39 Ark. 394.

Idaho.— McConnell *v.* Langdon, 2 Ida. 892, 28 Pac. 403.

Indiana.— Tindall *v.* Wasson, 74 Ind. 495;

but between the parties it is only necessary to identify the chattels so that the mortgagee may say with a reasonable degree of certainty what property is subject to his lien.[26] Persons with actual knowledge of the property covered by the

Buck *v.* Young, 1 Ind. App. 558, 27 N. E. 1106.

Iowa.— Iowa Lumber Co. *v.* Cassidy, 107 Iowa 564, 78 N. W. 210; Dayton State Bank *v.* Felt, 99 Iowa 532, 68 N. W. 818, 61 Am. St. Rep. 253. *Compare* Muir *v.* Blake, (Iowa 1881) 9 N. W. 345, holding valid a chattel mortgage on "all the crops raised by the mortgagor in any part of Jones county for the term of three years, and all other stock, cows, horses, and hogs that may be either bought or raised and belonging to the mortgagor during the said three years."

Kansas.— McDermed *v.* Hutchinson Wholesale Grocer Co., (Kan. 1901) 65 Pac. 668; Scrafford *v.* Gibbons, 44 Kan. 533, 24 Pac. 968; Griffiths *v.* Wheeler, 31 Kan. 17, 2 Pac. 842; Tootle *v.* Lyster, 26 Kan. 589; Mills *v.* Kansas Lumber Co., 26 Kan. 574; Parsons Sav. Bank *v.* Sargent, 20 Kan. 576; Golden *v.* Cockril, 1 Kan. 259, 81 Am. Dec. 510; Willson *v.* Nichols, 7 Kan. App. 641, 53 Pac. 185.

Minnesota.— Schneider *v.* Anderson, 77 Minn. 124, 79 N. W. 603; Adamson *v.* Horton, 42 Minn. 161, 43 N. W. 849.

Missouri.— Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97; Williamson *v.* Wylie, 69 Mo. App. 368; Atchison County Bank *v.* Shackelford, 67 Mo. App. 475; McNichols *v.* Fry, 62 Mo. App. 13, 1 Mo. App. Rep. 707; Ranney *v.* Meisenheimer, 61 Mo. App. 434, 1 Mo. App. Rep. 647; Rogers *v.* Gage, 59 Mo. App. 107, 1 Mo. App. Rep. 21; Bozeman *v.* Fields, 44 Mo. App. 432; Boeger *v.* Langenberg, 42 Mo. App. 7; Jennings *v.* Sparkman, 39 Mo. App. 663; Chandler *v.* West, 37 Mo. App. 631; State *v.* Cabanne, 14 Mo. App. 294.

Nebraska.— Rawlins *v.* Kennard, 26 Nebr. 181, 41 N. W. 1004; Wiley *v.* Shars, 21 Nebr. 712, 33 N. W. 418.

North Carolina.—Moore *v.* Brady, 125 N. C. 35, 34 S. E. 72.

Ohio.— Lawrence *v.* Evarts, 7 Ohio St. 194.

Oklahoma.— Watts *v.* El Reno First Nat. Bank, 8 Okla. 645, 58 Pac. 782.

Oregon.— Lee *v.* Cole, 17 Oreg. 559, 21 Pac. 819, holding invalid a security upon "The Chronicle Plant," where it appeared that at time of agreement the plant was not in the state or in possession of defendants, that no one had specific information as to what it consisted of, and that after the agreement much of the property pertaining to the plant was furnished.

Tennessee.— Williamson *v.* Steele, 3 Lea (Tenn.) 527, 31 Am. Rep. 652.

Texas.— Solinsky *v.* O'Connor, (Tex. Civ. App. 1899) 54 S. W. 935.

Vermont.— Parker *v.* Chase, 62 Vt. 206, 20 Atl. 198, 22 Am. St. Rep. 99.

Washington.— Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872. *Compare* Lawrence *v.* Times Printing Co., 22 Wash. 482, 61 Pac. 166, holding "franchises" too vague a term to cover a newspaper contract with the Associated Press.

Wisconsin.— Knapp *v.* Deitz, 64 Wis. 31, 24 N. W. 471.

Canada.— McCall *v.* Wolff, 13 Can. Supreme Ct. 130, holding a description of a stock of goods by locating it and by an annexed schedule with technical trade-marks insufficient, since they could not be readily distinguished.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 87.

Every inquiry which the instrument itself could reasonably be deemed to suggest must be made by a subsequent encumbrancer. Yant *v.* Harvey, 55 Iowa 421, 7 N. W. 675.

Statutory provisions must be strictly complied with and courts cannot extend them by construction, in case of hardship, so as to include property not mentioned in the mortgage or to dispense with any of the conditions the legislature has seen fit to impose. Gassner *v.* Patterson, 23 Cal. 299, construing Chattel Mortgage Act of 1857, as amended in 1861. *Compare* Central Trust Co. *v.* Worcester Cycle Mfg. Co., 93 Fed. 712, 35 C. C. A. 547, construing Conn. Gen. Stat. § 3016, which provides that when any manufacturing establishment, with its machinery, shall be mortgaged, and a particular description of the personal property executed and recorded, retention of such personal property shall not impair title of mortgagee.

When successive mortgage deeds are given the same general principles govern descriptions as where only one mortgage exists. Dixon *v.* Coke, 77 N. C. 205; Claflin *v.* Foley, 22 W. Va. 434.

26. *Arkansas.*—Dodds *v.* Neel, 41 Ark. 70; Gurley *v.* Davis, 39 Ark. 394.

Georgia.— Green *v.* Rogers, 62 Ga. 166, holding that an omnibus clause covering future-acquired property was valid.

Iowa.—Boone City Bank *v.* Ratkey, 79 Iowa 215, 44 N. W. 362.

Michigan.—Cass *v.* Gunnison, 58 Mich. 108, 25 N. W. 52.

Nebraska.— Leighton *v.* Stuart, 19 Nebr. 546, 26 N. W. 198.

New Hampshire.— Call *v.* Gray, 37 N. H. 428, 75 Am. Dec. 141.

New York.— Payne *v.* Wilson, 74 N. Y. 348.

Oregon.— Lee *v.* Cole, 17 Oreg. 559, 21 Pac. 819.

Texas.— Ranck *v.* Howard-Sansom Co., 3 Tex. Civ. App. 507, 22 S. W. 773, sustaining a very meager description between the parties.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 87.

Failure to show the species of animals mortgaged does not render the mortgage invalid between the original parties. Frick *v.* Fritz, (Iowa 1902) 88 N. W. 961.

Effect of inserting other property by consent

mortgage stand in no better position than the mortgagor in respect to their right to object to an insufficient description in the mortgage.[27]

2. LOCATION AS ELEMENT OF DESCRIPTION. A statement of the exact *situs* of mortgaged property is of great service in identifying it,[28] and it is enough that the location of the property may be determined by fair inferences drawn from the entire instrument.[29] Although it is generally not a sufficient location to say

see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 157, note 64.

27. *Iowa.*— Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340; Luce *v.* Moorehead, 77 Iowa 367, 42 N. W. 328; Cole *v.* Green, 77 Iowa 307, 42 N. W. 304, 14 Am. St. Rep. 283; American Well Works *v.* Whinery, 76 Iowa 400, 41 N. W. 53 [*following* Plano Mfg. Co. *v.* Griffith, 75 Iowa 102, 39 N. W. 214].

Kansas.— Willson *v.* Nichols, 7 Kan. App. 641, 53 Pac. 185.

Missouri.— Johnson *v.* Hutchinson, 81 Mo. App. 299; Dodson *v.* Dedman, 61 Mo. App. 209, 1 Mo. App. Rep. 349.

Nebraska.— Drexel *v.* Murphy, 59 Nebr. 210, 80 N. W. 813.

United States.— Northwestern Nat. Bank *v.* Freeman, 171 U. S. 620, 19 S. Ct. 36, 43 L. ed. 307; Cox *v.* Beck, 83 Fed. 269.

Compare Blythe *v.* Crump, (Tex. Civ. App. 1902) 66 S. W. 885, sustaining a mortgage of "two gray mares" where second mortgagees had actual notice as to the mares referred to.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 87.

Unless he has a valid lien on the property a third person cannot object to a description of property in a mortgage when it is sufficiently definite between the parties. Manistee First Nat. Bank *v.* Marshall, etc., Bank, 108 Mich. 114, 65 N. W. 604. See also J. H. North Furniture, etc., Co. *v.* Davis, 76 Mo. App. 512, holding that an imperfect description would not render void a mortgage as to third parties having no interest, although relying on possession, especially if such possession is accompanied with notice.

28. *Alabama.*— Hurt *v.* Redd, 64 Ala. 85.

Hawaii.— Lose *v.* Davies, 10 Hawaii 591, holding sufficient a description of chattels "belonging to me and situated in Honolulu, pertaining to the business carried on by me at said Honolulu."

Indiana.—Muncie Nat. Bank *v.* Brown, 112 Ind. 474.

Iowa.— McGarry *v.* McDonnell, 82 Iowa 732, 47 N. W. 866; Eggert *v.* White, 59 Iowa 464, 13 N. W. 426.

Michigan.— De Graff *v.* Byles, 63 Mich. 25, 29 N. W. 487.

Minnesota.— Adamson *v.* Horton, 42 Minn. 161, 43 N. W. 849.

Missouri.—Mexico First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332; McNichols *v.* Fry, 62 Mo. App. 13, 1 Mo. App. Rep. 707.

Nebraska.— Wiley *v.* Shars, 21 Nebr. 712, 33 N. W. 418; Jordan *v.* Hamilton County Bank, 11 Nebr. 499, 9 N. W. 654.

Texas.— Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318.

Canada.— Thomson *v.* Quirk, 18 Can. Supreme Ct. 695.

29. Baldwin *v.* Boyce, 152 Ind. 46, 51 N. E. 334; Johnson *v.* Hutchinson, 81 Mo. App. 299; Estes *v.* Springer, 47 Mo. App. 99; Jennings *v.* Sparkman, 39 Mo. App. 663; Union Nat. Bank *v.* Oium, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533; Commercial State Bank *v.* Interstate Elevator Co., 14 S. D. 276, 85 N. W. 219, 86 Am. St. Rep. 760. *Compare* Mayer *v.* Keith, 55 Mo. App. 157, holding that property was sufficiently located in a certain county by recital of residence of mortgagor and that property should not be removed.

A direct statement of possession by the mortgagor is not necessary, but it is sufficient that such a conclusion should be drawn as an inference from the other facts stated. Alfernitz *v.* Ingalls, 83 Fed. 964, construing Nevada law.

An error in locating the property did not render the description in the mortgage insufficient, where the mortgagor owned no other property of a similar nature (King *v.* Howell, 94 Iowa 208, 62 N. W. 738; Pettis *v.* Kellogg, 7 Cush. (Mass.) 456), and it was held that a misdescription of a lot of land on which the mortgaged property was temporarily located could be rejected as surplusage (Spaulding *v.* Mozier, 57 Ill. 148); but a mortgage of goods in the residence of the mortgagor will not pass goods in a warehouse in another state (Mackey *v.* Jenkins, 62 Mo. App. 618), and a subsequent removal of the property will not make the statement of location good (J. H. North Furniture, etc., Co. *v.* Davis, 76 Mo. App. 512). See also Latta *v.* Bell, 122 N. C. 641, 30 S. E. 15, holding that when property was described as located in a certain room property which was outside the room was not included in the mortgage. *Compare* Goff *v.* Pope, 83 N. C. 123, holding evidence admissible to identify an engine misdescribed as to location.

Failure to locate is not fatal when the description is otherwise sufficient for the purpose of identity (Crescent Coal, etc., Co. *v.* Raymond, 57 Ill. App. 197; Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97; Jones *v.* Workman, 65 Wis. 269, 27 N. W. 158); but when there was also an omission to state the ownership of the chattel the description was bad (Nicholson *v.* Karpe, 58 Miss. 34), as was a description of "300 railroad ties" without locating the ties (Stephenson *v.* Seaboard, etc., R. Co., 86 N. C. 455), and of a stock of goods which failed to state where they were to be found (Jaffrey *v.* Brown, 29 Fed. 476). See also Ormsby *v.* Nolan, 69 Iowa 130, 28 N. W. 569, holding a

merely that chattels are in a certain county,[30] or in a certain city or town,[31] with nothing more, in agricultural communities a statement that the mortgaged property is in the mortgagor's possession in a certain county seems to be sufficient.[32] *A fortiori* where the mortgage contains an additional provision forbidding removal of the chattel from a certain county the description is sufficient.[33]

3. Mortgage of Part of a Mass of Property. A mortgage of a specified number of chattels out of a larger number or of a specified quantity out of a larger mass which does not furnish data for the separation of the mortgaged chattels is, when there is no separation or delivery, void for uncertainty,[34] but mortgages of

description with many details insufficient when the property was not located.

30. Warner *v.* Wilson, 73 Iowa 719, 36 N. W. 719, 5 Am. St. Rep. 710; Allen *v.* Dicken, 63 Miss. 91; J. H. North Furniture, etc., Co. *v.* Davis, 76 Mo. App. 512.

Location of mortgaged lumber.— It is a sufficient location of mortgaged lumber to follow a description in general terms with a statement that it is on a specified dock in a certain city (De Graff *v.* Byles, 63 Mich. 25, 29 N. W. 487), in the lumber-yard of a certain company on a certain creek (Sommer *v.* Island City Mercantile, etc., Co., 24 Oreg. 214, 33 Pac. 559), in a certain mill-yard and mill-pond (Morse *v.* Pike, 15 N. H. 529), or lying near a railroad track in a certain town (Trimble *v.* Keet, etc., Mercantile Co., 65 Mo. App. 174, 2 Mo. App. Rep. 1212). *Compare* Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318, holding that a mortgage on one and a half million feet of pine saw-logs was valid where a part was described as being in a specified lake and the balance was to be cut and placed there from certain designated lands.

31. Gilchrist *v.* McGhee, 98 Iowa 508, 67 N. W. 392, where the description was of an article in common use in the locality.

Naming the street in the country town and telling the place on the street where the property is situated is a sufficient location (Hodgdon *v.* Libby, 69 N. H. 136, 49 Atl. 312; Lawrence *v.* Evarts, 7 Ohio St. 194); and giving the number on a city street is also sufficient (McNichols *v.* Fry, 62 Mo. App. 13, 1 Mo. App. Rep. 707).

32. Lightle *v.* Castleman, 52 Ark. 278, 12 S. W. 564; Kenyon *v.* Tramel, 71 Iowa 693, 28 N. W. 37; Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145; Shaffer *v.* Pickrell, 22 Kan. 619. *Contra,* Commercial State Bank *v.* Interstate Elevator Co., 14 S. D. 276, 85 N. W. 219, 86 Am. St. Rep. 760.

33. Preston *v.* Caul, 109 Iowa 443, 80 N. W. 522; Brock *v.* Barr, 70 Iowa 399, 30 N. W. 652; Wells *v.* Wilcox, 68 Iowa 708, 28 N. W. 29; Scrafford *v.* Gibbons, 44 Kan. 533, 24 Pac. 968; Schmidt *v.* Bender, 39 Kan. 437, 18 Pac. 491; Scott *v.* Harden, 10 Kan. App. 514, 62 Pac. 707.

34. *Arkansas.*— Krone *v.* Phelps, 43 Ark. 350; Dodds *v.* Neel, 41 Ark. 70; Gurley *v.* Davis, 39 Ark. 394; Person *v.* Wright, 35 Ark. 169; Washington *v.* Love, 34 Ark. 93.

Connecticut.— Croswell *v.* Allis, 25 Conn. 301, where the *res* was furniture.

Iowa.—Meredith *v.* Kunze, 78 Iowa 111, 42 N. W. 619, 4 L. R. A. 455, where the mortgage was on bricks.

Massachusetts.— Bullock *v.* Williams, 16 Pick. (Mass.) 33, *semble* that if property is of such a nature that identification requires measurement, weighing, counting, or other separation from larger parcels or quantities these requisites are not to be considered as dispensed with by registration.

Michigan.—Cass *v.* Gunnison, 58 Mich. 108, 25 N. W. 52; Richardson *v.* Alpena Lumber Co., 40 Mich. 203 (where the mortgage covered logs in a drive).

Minnesota.— Walter A. Wood Mowing, etc., Co. *v.* Minneapolis, etc., Elevator Co., 48 Minn. 404, 51 N. W. 378, holding that a chattel mortgage of forty acres out of seventy-five planted was too vague.

Missouri.— Stonebraker *v.* Ford, 81 Mo. 532; Dawson *v.* Cross, 88 Mo. App. 292 (where the mortgage covered part of a drove of hogs); Chandler *v.* West, 37 Mo. App. 631; Lafayette County Bank *v.* Metcalf, 29 Mo. App. 384.

Nebraska.— Union State Bank *v.* Hutton, 61 Nebr. 571, 85 N. W. 535; Grimes *v.* Cannell, 23 Nebr. 187, 36 N. W. 479; Price *v.* McComas, 21 Nebr. 195, 31 N. W. 511.

North Carolina.— Holman *v.* Whitaker, 119 N. C. 113, 25 S. E. 793; Spivey *v.* Grant, 96 N. C. 214, 2 S. E. 45; Blakely *v.* Patrick, 67 N. C. 40, 12 Am. Rep. 600.

Tennessee.— Williamson *v.* Steele, 3 Lea (Tenn.) 527, 31 Am. Rep. 652, holding insufficient a mortgage of so much of the growing crop as will make two bales of lint cotton, each weighing not less than five hundred pounds.

Texas.— Avery *v.* Popper, (Tex. Civ. App. 1895) 34 S. W. 325.

Utah.— Jacobsen *v.* Christiansen, 18 Utah 149, 55 Pac. 562.

Vermont.— Parker *v.* Chase, 62 Vt. 206, 20 Atl. 198, 22 Am. St. Rep. 99.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 100.

In Texas a mortgage of a stated number of animals included in a larger herd is not void for uncertainty, but confers upon the mortgagee the right to select them, which right he may exercise by suit to foreclose and the sequestration of such animals; and such a mortgage when recorded is constructive notice to an execution creditor of mortgagor of mortgagee's right to select. Avery *v.* Popper, (Tex. 1898) 48 S. W. 572 [*modifying* (Tex. Civ. App. 1898) 45 S. W. 951]; Ox-

part of a larger mass of grain of uniform grade and quality,[35] lying in bulk, have been sustained.[36] The mere fact that mortgaged articles are mingled with articles not mortgaged does not affect the mortgage lien on such of the mortgaged articles as can be identified,[37] and a defect in a mortgage, from lack of separation or other identification of the property meant to be covered, may be cured by such subsequent action of the parties as removes doubt as to identity of the property mortgaged.[38] So where there is a sufficient designation of the property included it is permissible for a mortgage of a mass of property to except certain articles which would be included under the general description,[39] even though the exception may be of property which is by law exempt from attachment and execution.[40]

4. Necessity For Enumeration. Stock in trade may be described in a mortgage thereof by general terms, as all the property of that nature in a certain store,[41] and a schedule or particular enumeration of the mortgaged chattels is

sheer *v.* Watt, 91 Tex. 124, 41 S. W. 466, 66 Am. St. Rep. 863.

If nothing appears to show that the chattels mortgaged are only part of a larger number of the same description the courts will sustain a mortgage, the only description in which is of number or bulk. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

If the total number of a certain kind owned by mortgagor is less than the number mentioned in the mortgage the mortgage is valid as to the whole. Croswell *v.* Allis, 25 Conn. 301.

Actual notice of the mortgage by the adverse claimant will postpone him, even though the description does not separate the part mortgaged from a larger mass. Hall *v.* Ballou, 58 Iowa 585, 12 N. W. 475.

35. Uniformity in the grain is essential, and unless it exists the description is insufficient. Clark *v.* Voorhees, 36 Kan. 144, 12 Pac. 529; Souders *v.* Voorhees, 36 Kan. 138, 12 Pac. 526.

36. Burton *v.* Cochran, 5 Kan. App. 508, 47 Pac. 569; McCormick Harvesting Mach. Co. *v.* Reynolds, 62 Nebr. 892, 88 N. W. 130. *Compare* St. Paul Merchants' Nat. Bank *v.* McLaughlin, 1 McCrary (U. S.) 258, 2 Fed. 128, where this doctrine was applied to a mortgage of a part of a homogeneous mass of logs.

37. Stephens *v.* Tucker, 55 Ga. 543; Elder *v.* Miller, 60 Me. 118; Caring *v.* Richmond, 28 Hun (N. Y.) 25. *Compare* Frick *v.* Fritz, (Iowa 1902) 88 N. W. 961, holding that a description of cattle in a mortgage was not rendered insufficient because they were subsequently turned into a pasture with other similar cattle.

38. Inter-State Galloway Cattle Co. *v.* McLain, 42 Kan. 680, 22 Pac. 728.

Although the hogs were designated after execution of the mortgage, a mortgage of "sixty hogs," where the mortgagor owned more, was held void against *bona fide* creditors. Leighton *v.* Stuart, 19 Nebr. 546, 26 N. W. 198.

Between the parties mortgages indefinitely phrased have been sustained on the ground that the mortgagee had a right to select from the total mass the number or quantity described. John S. Brittain Dry Goods Co. *v.* Blanchard, 60 Kan. 263, 56 Pac. 474; Call *v.* Gray, 37 N. H. 428, 75 Am. Dec. 141.

Separation may be shown.— Evidence is admissible to show that the parties have separated the subject-mass from a larger quantity or number. Pruett *v.* Warren, 87 Mo. App. 566.

39. Cayford *v.* Brickett, 89 Me. 77, 35 Atl. 1018; Spears *v.* Robinson, 71 Miss. 774, 15 So. 111.

Excepting stock in trade to a certain value is too vague and renders the mortgage void for uncertainty. Fowler *v.* Hunt, 48 Wis. 345, 4 N. W. 481.

40. Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222; Newell *v.* Warner, 44 Barb. (N. Y.) 258; Chelsea First Nat. Bank *v.* Fitts, 67 Vt. 57, 30 Atl. 697; Wilson *v.* Perrin, 62 Fed. 629, 22 U. S. App. 514, 11 C. C. A. 66 (construing Michigan statute). *Compare* Seiling *v.* Gunderman, 35 Tex. 544, where exempt property was excluded without an express exception, merely because the property was not described in detail.

What constitutes a selection of exempt property.— The execution of a second mortgage is not such a selection of exempt property excepted from a prior one that the exempt property will pass to the second mortgagee. Norman *v.* Craft, 90 N. C. 211.

Articles not particularly enumerated will come within an excepting clause of exempt property rather than articles which are specifically described in the mortgage. Giddey *v.* Uhl, 27 Mich. 94.

41. *Indiana.*— Ebberle *v.* Mayer, 51 Ind. 235; McKinney *v.* Cabell, 24 Ind. App. 676, 57 N. E. 598.

Maine.— Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289; Wolfe *v.* Dorr, 24 Me. 104.

New Jersey.— Shaw *v.* Glen, 37 N. J. Eq. 32.

New York.— Conkling *v.* Shelley, 28 N. Y. 360, 84 Am. Dec. 348.

Texas.— Crow *v.* Red River County Bank, 52 Tex. 362.

Washington.— Dillon *v.* Dillon, 13 Wash. 594, 43 Pac. 894.

United States.—Wagner *v.* Watts, 2 Cranch C. C. (U. S.) 169, 28 Fed. Cas. No. 17,040.

Compare Cochran *v.* Breen, 8 Ohio Dec. (Reprint) 103, 5 Cinc. L. Bul. 646, requiring

unnecessary;[42] so that a failure to annex a contemplated schedule of the property that the parties to the mortgage must possess some idea of the number or kind of goods intended to be conveyed.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 89.

The words "stock on hand" of a baker were held insufficient to describe property which was intended to be covered by a mortgage. Rocheleau *v.* Boyle, 11 Mont. 451, 28 Pac. 872.

What passes as "stock in trade."— Clothing and furnishing goods did not include boots and shoes (Clement *v.* Hartzell, 57 Kan. 482, 46 Pac. 961), unfilled prescriptions were not considered part of a stock of drugs (R. C. Stuart Drug Co. *v.* Hirsch, (Tex. Civ. App. 1899) 50 S. W. 583), and "'groceries' contained in a 'country and village store'" did not include pails, shovels, and the like (Fletcher *v.* Powers, 131 Mass. 333); but a horse and wagon, sleigh and harness, used in carrying on the business passed as a part of the stock of goods (Arnett *v.* Trimmer, 43 N. J. Eq. 488, 11 Atl. 487), although an iron safe, not for sale but for private use, was not included (Curtis *v.* Phillips, 5 Mich. 112). See also Chapin *v.* Garretson, 85 Iowa 377, 52 N. W. 104, holding that ladies' notions, consisting of hats, etc., and all other goods now on hand or to be purchased and used in the business of a general millinery store, included only such property as was described immediately following.

Notes and debts due a firm do not pass under a mortgage of its stock in trade. Kemp *v.* Carnley, 3 Duer (N. Y.) 1.

A question for the jury.— Whether "drug stock" included show-cases, bottles, funnels, etc., used in the drug store was held a question for the jury. Kern *v.* Wilson, 73 Iowa 490, 35 N. W. 594, 82 Iowa 407, 48 N. W. 919.

When property becomes part of a stock of trade.— Goods which are merely bargained for, but not received at the mortgagor's place of business, do not become a part of his stock in trade (Curtis *v.* Wilcox, 49 Mich. 425, 13 N. W. 803), nor do goods which are temporarily received and then removed without becoming a portion of the stock kept on hand for sale (Robinson *v.* Norton, 108 Ga. 562, 34 S. E. 147). But see Stephens *v.* Pence, 56 Iowa 257, 9 N. W. 215, holding that salt stored in an adjoining shed and kerosene temporarily on the pavement in front of the store are covered by a chattel mortgage on "our entire stock of goods, wares and merchandise . . . in the store-room . . . being No. 21."

Subsequent removal of the stock does not render the description insufficient, whether such removal is contemplated and provided for (Brown *v.* Thompson, 59 Me. 372) or not (Wheelden *v.* Wilson, 44 Me. 11).

An omnibus clause in a chattel mortgage to the effect that all the property located on certain premises is included therein has been held to be a sufficient description of property (Rhutasel *v.* Stephens, 68 Iowa 627, 27 N. W. 786; Goulding *v.* Swett, 13 Gray (Mass.) 517; Streeter *v.* Johnson, 23 Nev. 194, 44 Pac. 819; Harris *v.* Allen, 104 N. C. 86, 10 S. E. 127), even though there is a detailed list of part of the property covered by the mortgage (Veazie *v.* Somerby, 5 Allen (Mass.) 280; Goulding *v.* Swett, 13 Gray (Mass.) 517; Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680; Merritt *v.* Kitchen, 121 N. C. 148, 28 S. E. 358); and such a clause regarding all the personal property of a railroad appurtenant to its construction and operation has been sustained (Buck *v.* Seymour, 46 Conn. 156), although the opposite conclusion was reached in regard to a similar clause covering future goods, wares, etc., to be brought upon the premises (Buskirk *v.* Cleveland, 41 Barb. (N. Y.) 610). But see Santa Fé Electric Co. *v.* Hitchcock, 9 N. M. 156, 50 Pac. 332, holding that the mortgage of the entire assets of a business does not necessarily include a mortgage of its good-will. *Compare* Darden *v.* Gerson, 91 Ala. 323, 9 So. 278, holding that a mortgage of all the mortgagor's interest in a plantation included the rents of his wife's statutory separate estate.

Effect of describing part in greater detail. — Where a description in general terms is followed by a specific description of the property, the latter description has been held to limit the former to the goods therein described. Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394; Matthews *v.* Sniffen, 10 Daly (N. Y.) 200.

The terms "furniture," "fixtures," etc., which were used in a chattel mortgage to describe the property covered thereby, have been held to include a piano, billiard tables, and paintings (Sumner *v.* Blakslee, 59 N. H. 242, 47 Am. Rep. 196); the appliances, implements, and instruments used in carrying on a business (Brody *v.* Chittenden, 106 Iowa 524, 76 N. W. 1009); and a wooden statue of an elephant which was used as an advertising sign (Curtis *v.* Martz, 14 Mich. 506); but not wagons and teams used to deliver goods from the mortgaged store (Van Patten *v.* Leonard, 55 Iowa 520, 8 N. W. 334), or a house (Kuschell *v.* Campau, 49 Mich. 34, 12 N. W. 899).

What articles pass as appurtenances.— A mortgage of a leasehold interest in land includes all erections on the land for manufacturing purposes, in the absence of a contrary intention expressed in the mortgage. Breese *v.* Bange, 2 E. D. Smith (N. Y.) 474. A mortgage of a "threshing machine" includes the horse-power apparatus accompanying it. Osborne *v.* McAllister, 15 Nebr. 428, 19 N. W. 510. Scales pass as appurtenances of

[42] Cooper *v.* Berney Nat. Bank, 99 Ala. 119, 11 So. 760; Brinley *v.* Spring, 7 Me. 241. *Compare* Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358, holding that a description of personal property in a chattel mortgage, stating in general terms its character, and specifically stating in what building and rooms it is situated, is sufficient.

does not render the description insufficient or affect the validity of the mortgage.[43]

5. Non-Existence of Other Property. The scarcity or plenitude of chattels similar to those mortgaged is an element to be considered in determining the sufficiency of the description of the chattels covered by the mortgage,[44] and the non-existence of other property to which the terms of the mortgage could

a warehouse (Bacon *v.* Thompson, 60 Iowa 284, 14 N. W. 312), and the apparatus of an electric light company was held to include its street lamps (Ramsdell *v.* Citizens' Electric Light, etc., Co., 103 Mich. 89, 61 N. W. 275); but an agreement that tools should not pass as appurtenances was binding in favor of a subsequent mortgagee (Frederick *v.* Devol, 15 Ind. 357). A mortgage of the implements, machinery, and tools in a foundry included "patterns" (Eason *v.* Miller, 15 S. C. 194), and the sugar on the premises passed by a mortgage of a refinery and all the machinery and effects therein (Thurber *v.* Minturn, 62 How. Pr. (N. Y.) 27); but an engine-house and scales located at a distance did not pass with a mortgage of an elevator building (Frey *v.* Drahos, 6 Nebr. 1, 29 Am. Rep. 353), and saw-logs on hand did not pass under the clause "all the supplies I now have on hand" in a mortgage of a sawmill (Conner *v.* Littlefield, 79 Tex. 76, 15 S. W. 217). *Compare* Nelson *v.* Howison, 122 Ala. 573, 25 So. 211, holding it sufficient to name the principal articles and include the rest as appurtenances.

An iron safe has been held to be included in a mortgage of a stock of goods and all fixtures and utensils in a store. McCall *v.* Walter, 71 Ga. 287; Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822.

A mortgage of all claims that "may be due" to the grantor at a specified subsequent date passes to the grantee all accounts contracted, although not due, at the date of the conveyance. Page *v.* Gardner, 20 Mo. 507.

Description with reference to property held by mortgagor at a specified date.—The phrase "stock on hand at the time of expiration" was held to refer to the expiration of the mortgage and not to the time when an insurance policy on the goods would expire. Citizens' Coal, etc., Co. *v.* Stanley, 6 Colo. App. 181, 40 Pac. 693.

A chattel mortgage need not recite that the property is in the mortgagor's possession in the vicinity or that he has no other like property in the vicinity. Holmes *v.* Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97.

A mistake in enumerating the composite parts of a herd of cattle will prevent the herd from passing under the mortgage. Mt. Pleasant First Nat. Bank *v.* Davis, 38 Nebr. 238, 56 N. W. 975.

43. Van Heusen *v.* Radcliff, 17 N. Y. 580, 72 Am. Dec. 480. *Compare* Winslow *v.* Merchants Ins. Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368, holding that the description was sufficient as to such property as could be identified.

Where a mortgage describes in general terms the property to be covered and refers to a schedule annexed, which latter states that it is "an inventory of personal property mentioned and referred to in the annexed mortgage," only that property passes which is mentioned in the schedule (Broadhead *v.* Smith, 55 Hun (N. Y.) 499, 8 N. Y. Suppl. 760, 29 N. Y. St. 817); but property referred to merely in an annexed schedule, and not covered by the general description preceding, will not pass (Williams *v.* Leonard, 26 Can. Supreme Ct. 406).

Description sufficient with schedule.— A description of the property conveyed by trust deed as "the stock of merchandise and all other personal property now contained in the store-room occupied by" R in F, "listed and invoiced and of the value of $3,113.92 as per schedule made" was held sufficient when accompanied with the schedule (State *v.* Cooper, 79 Mo. 464), since a schedule annexed to the mortgage is a part of the mortgage (Page *v.* Kendig, (N. J. 1887) 7 Atl. 878). But *compare* Meyer Bros. Drug Co. *v.* Self, 77 Mo. App. 284, holding that an inventory describing the mortgaged goods could not be considered because it was not recorded.

Effect of a schedule is to cut down a general description to goods enumerated therein. Partridge *v.* White, 59 Me. 564.

Description by reference.— A description of the property mortgaged by reference to another mortgage, where the property is specifically described, is sufficient, not only as between the parties but as to third persons (Thompson *v.* Anderson, 94 Iowa 554, 63 N. W. 355; Kneller *v.* Kneller, 86 Iowa 417, 53 N. W. 271; Chicago Title, etc., Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4); and a reference to a schedule annexed to another mortgage is also sufficient (Newman *v.* Tymeson, 13 Wis. 172, 80 Am. Dec. 735).

44. Ames Iron Works *v.* Chinn, 15 Tex. Civ. App. 88, 38 S. W. 247. *Compare* Willey *v.* Snyder, 34 Mich. 60, holding good, as against a subsequent purchaser, a mortgage of "one Durm bull, known as the Grinnalls Bull,— said bull is four years old and weighs about 2,400 pounds."

Sufficiency of description where there is other similar property.— A mortgage of "a brindle cow about 3 years old and her increase" was sufficiently accurate, although the mortgagor had another cow of about the same description (Harkey *v.* Jones, 54 Ark. 158, 15 S. W. 192), and a description of cattle by age, sex, ownership, and location was sufficient, although they were in a pasture with cattle belonging to others (Waggoner *v.* Oursler, 54 Kan. 141, 37 Pac. 973).

apply frequently renders valid a description in a mortgage which otherwise would be too indefinite.[45]

6. Particular Kinds of Property — a. Animals — (1) *In General.* Where the *situs* of animals covered by a mortgage is sufficiently indicated, as by a statement that they are in the possession of the mortgagor at a certain place,[46] they

45. *Alabama.*— Cragin *v.* Dickey, 113 Ala. 310, 21 So. 55; Hurt *v.* Redd, 64 Ala. 85.

Georgia.— Kiser *v.* Carrollton Dry Goods Co., 96 Ga. 760, 22 S. E. 303; Lamar *v.* Coleman, 88 Ga. 417, 14 S. E. 608.

Illinois.— Myers *v.* Ladd, 26 Ill. 415.

Iowa.— Dayton State Bank *v.* Felt, 99 Iowa 532, 68 N. W. 818, 61 Am. St. Rep. 253; Iowa State Nat. Bank *v.* Taylor, 98 Iowa 631, 67 N. W. 677; Gilchrist *v.* McGhee, 98 Iowa 508, 67 N. W. 392; Davis *v.* Pitcher, 97 Iowa 13, 65 N. W. 1005, 59 Am. St. Rep. 392; Shellhammer *v.* Jones, 87 Iowa 520, 54 N. W. 363; McGarry *v.* McDonnell, 82 Iowa 732, 47 N. W. 866; Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411.

Kansas.— Schmidt *v.* Bender, 39 Kan. 437, 18 Pac. 491; Crisfield *v.* Neal, 36 Kan. 278, 13 Pac. 272; Burton *v.* Cochran, 5 Kan. App. 508, 47 Pac. 569.

Michigan.— Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222; Manistee First Nat. Bank *v.* Marshall, etc., Bank, 108 Mich. 114, 65 N. W. 604.

Missouri.—Mexico First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332.

Nebraska.— Wiley *v.* Shars, 21 Nebr. 712, 33 N. W. 418; Peters *v.* Parsons, 18 Nebr. 191, 24 N. W. 687.

Nevada.— Streeter *v.* Johnson, 23 Nev. 194, 44 Pac. 819.

New York.— Dunning *v.* Stearns, 9 Barb. (N. Y.) 630.

North Carolina.— Spivey *v.* Grant, 96 N. C. 214, 2 S. E. 45.

South Dakota.— Advance Thresher Co. *v.* Schmidt, 9 S. D. 489, 70 N. W. 646; Coughran *v.* Sundback, 9 S. D. 483, 70 N. W. 644; Redfield First Nat. Bank *v.* Koechel, 8 S. D. 391, 66 N. W. 933.

Texas.— Johnson *v.* Brown, (Tex. Civ. App. 1901) 65 S. W. 485; Lapowski *v.* Taylor, 13 Tex. Civ. App. 624, 35 S. W. 934; Ballinger Nat. Bank *v.* Bryan, 12 Tex. Civ. App. 673, 34 S. W. 451.

Vermont.— Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309; Shum *v.* Claghorn, 69 Vt. 45, 37 Atl. 236.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 98.

Where the mortgagor had no other property of the kind covered by the mortgage there was held to be a sufficient identification by describing the property as "eighteen cows, three yearling heifers, five heifer calves," etc. (Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309); "one three year old Jersey, . . . one brown cow six years old, crumpled horn" (Johnson *v.* Brown, (Tex. Civ. App. 1901) 65 S. W. 485); "one bay horse eight years old, weight about 1,200" (Peters *v.* Parsons, 18 Nebr. 191, 24 N. W. 687); "twenty-three head of horses and mules, . . . all situated on their range on the South Loup river, . . . above described chattels are now in their [the mortgagors'] possession and are owned by them" (Wiley *v.* Shars, 21 Nebr. 712, 33 N. W. 418); "one hundred and twenty head of feeding cattle now on feed in Audrian county, Mo." (Mexico First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332), "one hundred and eighty head of Merino and Cotswold sheep" owned and possessed by B in said county (Crisfield *v.* Neal, 36 Kan. 278, 13 Pac. 272); "fourteen mules, now on my plantation in Russell county" (Hurt *v.* Redd, 64 Ala. 85); and a mortgage of "ashes," being all the ashes in the sole ashery of the mortgagor is sufficient (Dunning *v.* Stearns, 9 Barb. (N. Y.) 630).

A mortgage on "our entire stock of goods" is valid where the mortgagor firm has but one stock. Kiser *v.* Carrollton Dry Goods Co., 96 Ga. 760, 22 S. E. 303.

Misstating the horse-power of a mortgaged engine did not render the description insufficient when the mortgagor had but one engine in his possession. Lamar *v.* Coleman, 88 Ga. 417, 14 S. E. 608.

46. Sufficiency of location.— The *locus* of mortgaged property was sufficiently indicated where it was stated to be in the mortgagor's possession in or about a certain village (Fordyce *v.* Neal, 40 Mich. 705), in a certain county and state (Wilson *v.* Rustad, 7 N. D. 330, 75 N. W. 260, 66 Am. St. Rep. 649), or in a certain county and the counties thereto adjoining (Lapowski *v.* Taylor, 13 Tex. Civ. App. 624, 35 S. W. 934). *Compare* Golden *v.* Cockril, 1 Kan. 259, 81 Am. Dec. 510, holding that locating in the territory of Kansas was insufficient. But see Williams *v.* Crook, 63 Miss. 9, holding that a statement that a mortgaged horse was in the possession of the mortgagor was a sufficient location to render valid a description by age and color.

As affected by nature of property.—A statement of the county of the mortgagor's residence is not a sufficient location of a mortgaged horse to enable a third person to identify it (Barrett *v.* Fisch, 76 Iowa 553, 41 N. W. 310, 14 Am. St. Rep. 238); but the reverse was true where a herd of cattle were mortgaged instead of a single horse (Brown *v.* Holmes, 13 Kan. 482).

Location on land in possession of mortgagor.— Mortgaged animals were sufficiently located when they were said to be on the mortgagor's farm (Kenyon *v.* Tramel, 71 Iowa 693, 28 N. W. 37) or plantation (Hurt *v.* Redd, 64 Ala. 85) in a certain county; and *a fortiori* location in a certain feed lot on a farm is sufficient (Evans-Snyder-Buell Co. *v.* Turner, 143 Mo. 638, 45 S. W. 654).

The land where the mortgaged animals are

are sufficiently identified by stating some of their characteristics in respect to age, color, height, sex, and weight,[47] or by indicating their marks and brands,[48] or

is sufficiently described by a statement that it is a range on "Loup" river (Wiley *v.* Shars, 21 Nebr. 712, 33 N. W. 418) or by giving the government subdivision of township, range, and section (Jordan *v.* Hamilton County Bank, 11 Nebr. 499, 9 N. W. 654).

Discrepancy in location will render a description bad, just as much as the misstatement of color, marks, etc. Baer *v.* Whittaker, 57 Ark. 151, 20 S. W. 1087.

47. *Alabama.*— Connally *v.* Spragins, 66 Ala. 258, color and age.

Iowa.— Wheeler *v.* Becker, 68 Iowa 723, 28 N. W. 40, color, age, and weight.

Mississippi.— Nicholson *v.* Karpe, 58 Miss. 34, color, sex, and name.

Missouri.— Campbell *v.* Allen, 38 Mo. App. 27, age, color, sex, and weight.

Nebraska.— Shreck *v.* Spain, 30 Nebr. 887, 47 N. W. 419 (holding sufficient to constitute notice to a subsequent mortgagee "one dark brown mare, age five years, weight about 1,200 pounds, of the value of $175, and one dark brown mare, right hind foot white, age five years, weight about 1,200 pounds, of the value of $175"); Rawlings *v.* Kennard, 26 Nebr. 181, 41 N. W. 1004 (age, color, and weight).

See 9 Cent. Dig. tit. "Chattel Mortgages," § 90.

Misstatement of age of mortgaged horse does not render the description faulty (Peters *v.* Parsons, 18 Nebr. 191, 24 N. W. 687); and this principle of disregarding errors in statement of the age of mortgaged animals has received general affirmation (George R. Barse Live-Stock Commission Co. *v.* Turner, 56 Kan. 778, 44 Pac. 987; Redfield First Nat. Bank *v.* Koechel, 8 S. D. 391, 66 N. W. 933; Harris *v.* Kennedy, 48 Wis. 500, 4 N. W. 651). *Compare* Tolbert *v.* Horton, 33 Minn. 104, 22 N. W. 126, where horses which were three years old coming four were held to be properly described as four-year-old horses.

Misstating the color of a mortgaged animal has been held not to render a description insufficient or invalid (Adamson *v.* Fagan, 44 Minn. 489, 47 N. W. 56; Harris *v.* Woodard, 96 N. C. 232, 1 S. E. 544); but a description was insufficient where a bay mule was described as gray (Bowman *v.* Roberts, 58 Miss. 126) and where the number of white feet of a mortgaged horse was misstated (Rowley *v.* Bartholomew, 37 Iowa 374). *Compare* Hutton *v.* Arnett, 51 Ill. 198, holding that a mortgage of "one yoke of oxen, seven or eight years old; one of said oxen is a brindle in color, with the point of his horn broken off; the other is a spotted one in color. Also one yoke of oxen four years old, color red" would not warrant mortgagee's claim in trover to three head of cattle about eight or nine years old, and one of them three years old last spring, and all of red color.

Change in color of a mortgaged horse does not affect the validity of the mortgage. Turpin *v.* Cunningham, 127 N. C. 508, 37 S. E. 453, 80 Am. St. Rep. 808, 51 L. R. A. 800.

The possibility of describing with greater detail, as where a stallion of a well-known name is simply described as a sorrel horse, tends to render a description insufficient. Montgomery *v.* Wight, 8 Mich. 143, construing Canadian statute.

In spite of a sufficient location of the property a mortgage of "three yoke of oxen" (McCord *v.* Cooper, 30 Ind. 9) or of a herd of steers by age and number (Caldwell *v.* Trowbridge, 68 Iowa 150, 26 N. W. 49) was held insufficient.

Describing mortgaged "bulls" as "stags" was held fatal to the validity of the mortgage. Becker *v.* Dalby, (Iowa 1901) 86 N. W. 314.

The species of mortgaged animals need not be stated to render the instrument valid between the parties thereto. Frick *v.* Fritz, (Iowa 1902) 88 N. W. 961.

48. *Colorado.*— Horn *v.* Reitler, 12 Colo. 310, 21 Pac. 186, as between the parties.

Iowa.— Haller *v.* Parrott, 82 Iowa 42, 47 N. W. 996. *Compare* Ivins *v.* Hines, 45 Iowa 73, holding that a description of "fourteen cows branded with star on right horn" is insufficient to give notice that it embraces cattle branded "J" on hip and Irvis on horn.

Nebraska.— Spelts *v.* Davenport Sav. Bank, 29 Nebr. 411, 45 N. W. 777; Buck *v.* Davenport Sav. Bank, 29 Nebr. 407, 45 N. W. 776, 26 Am. St. Rep. 392.

Oregon.— Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517.

South Dakota.— Crow *v.* Zollars, 11 S. D. 203, 76 N. W. 924, holding description good as between the parties and others having actual notice.

Texas.— Ballinger Nat. Bank *v.* Bryan, 12 Tex. Civ. App. 673, 34 S. W. 451.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 91.

Effect of mistake.— A mortgage of twenty-five head of cattle branded with "(=) on left side and Z on both hips" was held insufficient to cover eighteen branded with "(=)" on the left side and the remaining seven with Z on both hips. New Hampshire Cattle Co. *v.* Bilby, 37 Mo. App. 43. But see Ft. North Nat. Bank *v.* Red River Nat. Bank, 84 Tex. 369, 19 S. W. 517, holding valid a mortgage describing the property as so many head of steers, branded as follows: "about seventy-five head are branded TEX, and about twenty head are in various brands," although only sixty-two head were branded.

Misstatement of brands and height of a mortgaged mare may be rejected when the rest of the description is sufficient. King *v.* Aultman, 24 Kan. 246. But see Packers Nat. Bank *v.* Chicago, etc., R. Co., 114 Iowa 621, 87 N. W. 653, holding it error to instruct a jury that they might disregard a misdescription of brands in determining the sufficiency of a description.

registration in a herd-book.[49] In the absence of a sufficient location of the property description of animals by color, age, etc., is insufficient;[50] but a description of the mortgaged animal in great detail was held to be sufficient to identify it, even though there was no statement as to where it was to be found.[51]

(II) *Increase.* A chattel mortgage will not be deemed to cover after-acquired property unless the intention that it should is clearly expressed,[52] although it has been held that the young of mortgaged animals pass as an incident to the original property;[53] and between the original parties to the mortgage

49. Boone City Bank *v.* Ratkey, 79 Iowa 215, 44 N. W. 362. *Compare* Taylor *v.* Gilbert, 92 Iowa 587, 61 N. W. 203, holding too indefinite, as against a subsequent mortgagee, a mortgage of nineteen pure-blood Hereford cattle, giving their names, and adding the above "names were the names recorded in the American Hereford Herd Book."

Construction of description.— Successive descriptions differing in material respects should be construed as applying to different property rather than to the same chattels. Norfolk Nat. Bank *v.* Wood, 33 Nebr. 113, 49 N. W. 958. See also Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340, holding that two mortgages, the first describing the property as "one brown horse, nine years old, named Charlie," and the second, as "one bay horse, nine years old, named Charlie," should be treated, in foreclosure of the second, as referring to different horses.

50. *Colorado.*— Tabor *v.* Sampson, 7 Colo. 426, 4 Pac. 45.

Georgia.— Stewart *v.* Jaques, 77 Ga. 365, 3 S. E. 283, 4 Am. St. Rep. 86.

Iowa.— Citizens' Nat. Bank *v.* Johnson, 79 Iowa 290, 44 N. W. 551; Warner *v.* Wilson, 73 Iowa 719, 36 N. W. 719, 5 Am. St. Rep. 710; Rhutasel *v.* Stephens, 68 Iowa 627, 27 N. W. 786.

Mississippi.—Cowden *v.* Lockridge, 60 Miss. 385.

Missouri.— Randol *v.* Buchanan, 61 Mo. App. 445; Bozeman *v.* Fields, 44 Mo. App. 432.

New York.— McDonald *v.* City Trust Safe Deposit, etc., Co., 32 Misc. (N. Y.) 644, 66 N. Y. Suppl. 475.

Vermont.— Huse *v.* Estabrooks, 67 Vt. 223, 31 Atl. 293, 48 Am. St. Rep. 810.

Contra, Koehring *v.* Aultman, 7 Ind. App. 475, 34 N. E. 30, where description by name, age, and color was held sufficient without locating the animals.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 90.

A fortiori a description is insufficient which contains neither age, color, etc., nor location. Everett *v.* Brown, 64 Iowa 420, 20 N. W. 743.

51. Adams *v.* Hill, 10 Kan. 627. See also Shum *v.* Claghorn, 69 Vt. 45, 52, 37 Atl. 236, 238, where it is said that "a statement of the location of the animal, or the designation of special marks, will often be necessary to perfect a description when the mortgagor has others of the same sex, age and color; but we think a mortgage ought not to be held invalid for the want of such further description, unless it appears that the mortgagor owned other animals answering the description given."

A statement of ear brands on a mortgaged steer was held to be insufficient to identify it in the absence of a sufficient location of the property. Andregg *v.* Brunskill, 87 Iowa 351, 54 N. W. 135, 43 Am. St. Rep. 388.

52. Robinson, J., in Iowa State Nat. Bank *v.* Taylor, 98 Iowa 631, 636, 67 N. W. 677.

Excess not included.— A mortgage of three hundred hogs on premises of mortgagor, "being all the hogs that I have," was held not to include an excess of twenty-one above that number. Chipman *v.* Weiny, 112 Iowa 702, 84 N. W. 905. Nor does a mortgage executed in April, 1879, describing the property as certain hogs from "six weeks to two years old" include hogs that in January, 1880, were described as being "about ten months old." Boggs *v.* Stanky, 13 Nebr. 400, 14 N. W. 392.

Fleece of mortgaged sheep thereafter growing was held not to pass with the sheep when it was not specified that the fleece or increase should pass (Santa Ana First Nat. Bank *v.* Erreca, 116 Cal. 81, 47 Pac. 926, 58 Am. St. Rep. 133), and "increase" was held not to include fleece but offspring only (Alferitz *v.* Borgwardt, 126 Cal. 201, 58 Pac. 460. *Contra,* Alferitz *v.* Ingalls, 83 Fed. 964). But see Cox *v.* Beck, 83 Fed. 269, holding that, where sheep and their increase are mortgaged, the young lambs and fleece on the sheep at the time the mortgagee takes possession for foreclosure is necessarily included in the mortgage, but that purchasers of such as previously have been separated and sold by the mortgagor in possession take without reference to the mortgage.

The description was sufficient to pass the increase of the mortgaged animals against adverse claims by third persons, where the mortgage read that it included "all increase of said mares" (Hopkins Fine Stock Co. *v.* Reid, 106 Iowa 78, 75 N. W. 656), all the cows and calves of the mortgagor that may be raised on his farm during the season (Cleveland *v.* Koch, 108 Mich. 514, 66 N. W. 376), or "six hundred head of sheep, consisting of wethers, ewes and lambs, and their increase for the year 1882" (Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145).

53. Cahoon *v.* Miers, 67 Md. 573, 11 Atl. 278, holding that since the legal title to the mortgaged property was in the mortgagee, the legal title to the offspring of all mortgaged female animals was in him also; and that this title could be asserted against a third person, even though the mortgagor retained possession. To same effect see Meyer *v.* Cook,

the product of mortgaged property, such as the increase of female animals, will pass to the mortgagee without any special provision to that effect.[54]

b. Book-Accounts. When existing book-accounts[55] are mortgaged the names of the debtors and the several amounts they owe should be set forth in the description of the accounts.[56] Where the accounts do not exist the transactions should be specified whereby the future accounts are to arise,[57] and the place specified where accounts are to be earned by the use of a mortgaged machine.[58]

c. Crops. When a growing crop[59] is conveyed by a chattel mortgage the

85 Ala. 417, 5 So. 147, where a possible exception in favor of a *bona fide* purchaser was suggested.

Additional requirements.— In order that offspring of mortgaged animals shall pass to the mortgagee in the absence of any clause including them, the mortgagee must show either that they were conceived before the mortgage was executed or he must take possession of the original mortgaged property. Thorpe *v.* Cowles, 55 Iowa 408, 7 N. W. 677.

Notice to mortgagee that a colt has been born of a mare mortgaged to him and in the possession of the mortgagor is held unnecessary to perfect the mortgagee's title to the colt under the mortgage. Ellis *v.* Reaves, 94 Tenn. 210, 28 S. W. 1089.

Proceeds could not be garnished when the offspring of a mortgaged flock of sheep were weaned and sold, even though the mortgage did not specifically include increase. Gannaway *v.* Tate, 98 Va. 789, 37 S. E. 768.

After the offspring is born it will not pass as an incident to its mother, even though the mortgage expressly mentions the existence of the offspring, for a specific clause of conveyance is necessary. Griffin *v.* Gwin, (Tex. Civ. App. 1895) 32 S. W. 861.

54. *Alabama.*— Dyer *v.* State, 88 Ala. 225, 7 So. 267.

Kentucky.— Forman *v.* Proctor, 9 B. Mon. (Ky.) 124.

New Jersey.— Cumberland Bank *v.* Baker, 57 N. J. Eq. 569, 41 Atl. 704.

Texas.—Austin First Nat. Bank *v.* Western Mortg., etc., Co., 6 Tex. Civ. App. 59, 24 S. W. 691 [*reversed,* on other grounds, in 86 Tex. 636, 26 S. W. 488].

United States.— Northwestern Nat. Bank *v.* Freeman, 171 U. S. 620, 19 S. Ct. 36, 43 L. ed. 307; Pyeatt *v.* Powell, 51 Fed. 551, 10 U. S. App. 200, 2 C. C. A. 367.

Contra, Shoobert *v.* De Motta, 112 Cal. 215, 44 Pac. 487, 53 Am. St. Rep. 207, because a mortgage does not transfer legal title to the mortgagee but merely gives him a lien.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 204.

The rule as to trust deeds is the same. Latta *v.* Fowlkes, 94 Tenn. 219, 29 S. W. 124.

Offspring did not pass to mortgagee under a mortgage describing the property as "my herd . . . all of such cattle being marked and branded . . . and consisting of bulls and breeding and grazing cattle of one year old and upwards," although constituting a part of the herd at the time of execution. Austin First Nat. Bank *v.* Western Mortg., etc., Co., 86 Tex. 636, 26 S. W. 488 [*reversing* 6 Tex. Civ. App. 59, 24 S. W. 691].

A fortiori the mortgagee is entitled to the offspring as against the mortgagor, where the mortgaged animals were pregnant at the time the mortgage was executed. Kellogg *v.* Lovely, 46 Mich. 131, 8 N. W. 699, 41 Am. Rep. 151; Funk *v.* Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576.

Burden of proof rests on the mortgagee to show what, if any, increase has taken place (Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340), and as against a person levying an execution on two mares of the mortgagor, a mortgagee of one of them in order to recover a colt must adduce evidence that it was dropped by the mare covered by his mortgage (Boggs *v.* Stanky, 13 Nebr. 400, 14 N. W. 392). See also *infra,* VII, B, 1, c, (II), (B).

55. What obligations are covered by term "book-account."—The fiduciary obligation of a factor to pay over proceeds less commissions to his principal are not book-accounts and will not pass as such under a description in a mortgage. Stieglitz *v.* O. J. Lewis Mercantile Co., 76 Mo. App. 275.

Shares of stock for which no certificate has been issued may be described as so many shares of stock in a certain corporation. Boob *v.* Hall, 107 Cal. 160, 40 Pac. 117.

56. Lawrence *v.* McKenzie, 88 Iowa 432, 55 N. W. 505.

An actual entry of the debit item on an account-book is not necessary in order that it may pass under a mortgage. Dunn *v.* Michigan Club, 115 Mich. 409, 73 N. W. 386.

57. Sperry *v.* Clarke, 76 Iowa 503, 41 N. W. 203.

58. Sandwich Mfg. Co. *v.* Robinson, 83 Iowa 567, 49 N. W. 1031, 14 L. R. A. 126 (where the description also failed to state who was to operate the machine and earn the accounts); Minneapolis Threshing Mach. Co. *v.* Skau, 10 S. D. 636, 75 N. W. 199. *Compare* Davis *v.* Pitcher, 97 Iowa 13, 65 N. W. 1005, 59 Am. St. Rep. 392, holding it sufficient to describe the accounts as to accrue from the sale of certain merchandise, also mortgaged, and situated in a certain building.

A mortgage does not operate to pass future accounts unless the description is sufficient to cover them (Nugent *v.* John McNeil Shoe Co., 62 N. J. Eq. 583, 50 Atl. 628) and the parties expressed their intention to have them pass by the terms of the written instrument (Lormer *v.* Allyn, 64 Iowa 725, 21 N. W. 149).

59. A growing crop is defined as one only that is at the time nourished and supported by the soil and not yet cut or threshed. Ford *v.* Sutherlin, 2 Mont. 440.

Increase of live stock not included in a

description must designate the time or year of growth[60] and the land on which the crop is to be produced;[61] but it is not necessary for the mortgage to specify

mortgage of "all the crops produced and products raised or grown hereafter on said premises." Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309.

60. Dodds *v.* Neel, 41 Ark. 70; McConnell *v.* Langdon, 2 Ida. 892, 28 Pac. 403; Barr *v.* Cannon, 69 Iowa 20, 28 N. W. 413; Eggert *v.* White, 59 Iowa 464, 13 N. W. 426; Pennington *v.* Jones, 57 Iowa 37, 10 N. W. 274. But see Truss *v.* Harvey, 120 Ala. 636, 24 So. 927, sustaining a mortgage of "all crops of corn, cotton, and other produce which I may raise."

During the continuance of a mortgage was held a sufficient designation of time of growth of mortgaged crops (Hall *v.* Glass, 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77), and so the conclusion has been drawn that a mortgage was only intended to cover crops raised before the maturity of mortgage notes, which rendered the statement of time of growth sufficient (Hahn *v.* Heath, 127 N. C. 27, 37 S. E. 63; Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156).

Description of crops as growing, without a specification of the year, is also sufficient. Luce *v.* Moorehead, 73 Iowa 498, 35 N. W. 598.

Crops of a certain year "and each succeeding year" until the debt is paid has been held sufficiently definite as to time. Truss *v.* Harvey, 120 Ala. 636, 24 So. 927; Merchants' Nat. Bank *v.* Mann, 2 N. D. 456, 51 N. W. 946.

"My entire crop grown the present or next year" is likewise sufficiently definite as to time. Holst *v.* Harmon, 122 Ala. 453, 26 So. 157.

"Out of the first cotton that may be gathered" has been held a good specification of time. Stearns *v.* Gafford, 56 Ala. 544.

61. Keith *v.* Ham, 89 Ala. 590, 7 So. 234 (holding that the mortgage is good in equity, although the land is not designated); Redfield *v.* Montgomery, 71 Miss. 113, 14 So. 199; Crinkley *v.* Egerton, 113 N. C. 142, 18 S. E. 341; Weil *v.* Flowers, 109 N. C. 212, 13 S. E. 761; Gwathney *v.* Etheridge, 99 N. C. 571, 6 S. E. 411. *Compare* Atkinson *v.* Graves, 91 N. C. 99, where a mortgage of a bale of cotton to be made during the year was held to operate merely as an executory contract, because of uncertainty.

Sufficiency of designation of place.— It is sufficient to state in a mortgage of a crop that it is to be raised on land in a certain county, township, range, and section (Shepard *v.* Barnes, 3 Dak. 148, 14 N. W. 110; Muse *v.* Lehman, 30 Kan. 514, 1 Pac. 804; Strolberg *v.* Brandenberg, 39 Minn. 348, 40 N. W. 356; Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687; Reinstein *v.* Roberts, 34 Oreg. 87, 55 Pac. 90, 75 Am. St. Rep. 564), as where the portions of the section on which the mortgaged crops were to be raised were indicated by acres and points of the compass (Chicago Lumber Co. *v.* Hunter, 58 Nebr. 328, 78 N. W. 619); and it has also been held sufficient to describe the crops merely as being raised in a certain county (Hamilton *v.* Maas, 77 Ala. 283; Johnson *v.* Grissard, 51 Ark. 410, 11 S. W. 585, 3 L. R. A. 795 [*followed* in Henderson *v.* Gates, 52 Ark. 371, 12 S. W. 780]; Hughes *v.* Abston, 105 Tenn. 70, 58 S. W. 296. *Contra,* Muir *v.* Blake, 57 Iowa 662, 11 N. W. 621; Commercial State Bank *v.* Interstate Elevator Co., 14 S. D. 276, 85 N. W. 219, 86 Am. St. Rep. 760).

Particular designations.—It was a sufficient identification of the land to refer to it as "my place" (Seay *v.* McCormick, 68 Ala. 549), the G place in D county (Durham *v.* Atwell, (Tex. Civ. App. 1894) 27 S. W. 316), the T plantation in L county (Stephens *v.* Tucker, 55 Ga. 543), the land of the mortgagor in N county known as the "timber claim" (McConnell *v.* Langdon, 2 Ida. 892, 28 Pac. 403), lands in a certain county leased of a certain person (Wetlin *v.* Mount, 73 Miss. 526, 19 So. 201), or as a certain "forty-acre field" (Krone *v.* Phelps, 43 Ark. 350). *Compare* Woodlief *v.* Harris, 95 N. C. 211, where the description, which was held sufficient, was "on lands owned or rented" by the mortgagor.

What lands are included.— "All my lands" was held to include a parcel recovered by suit from the mortgagor ten days after the mortgage was given. Brown *v.* Miller, 108 N. C. 395, 13 S. E. 167 [*following* Rawlings *v.* Hunt, 90 N. C. 270]. So rented lands were included in a mortgage of crops grown on "my lands, or any other lands that I may cultivate, or aid in or cause to be cultivated" (Cobb *v.* Daniel, 105 Ala. 335, 338, 16 So. 882), but an adjoining farm rented by the mortgagor was not included in a mortgage of growing corn on his farm in section 35, in B county (Mayer *v.* Keith, 55 Mo. App. 157), and land rented by croppers who paid a portion of their crop to the mortgagor by way of rent was held not covered by a mortgage of cotton to be raised by the mortgagor assisted by his family and hired help (Blount *v.* Lewis, (Tex. Civ. App. 1900) 59 S. W. 293). *Compare* State *v.* Logan, 100 N. C. 454, 6 S. E. 398, where the description embraced all the crops grown on the mortgagor's lands.

Where a specific location of a five-acre tract was wrong it was held that the mortgage did not cover crops grown on another tract on the same farm. Darr *v.* Kempe, 54 Ark. 91, 15 S. W. 14.

Where land is conveyed and mortgaged together with "the crop . . . to be raised by us," no other crop is mortgaged save that to be grown on the land sold. Pettis *v.* Sullivan, (Miss. 1897) 21 So. 607.

Misstating the name of the lessor of lands in a mortgage of the crop by the lessee did not render the description bad. Hunt *v.* Shackleford, 56 Miss. 397.

Misstating the government subdivision on which a crop was to be raised was fatal when

or state in terms the nature and kind of crop intended to be conveyed to the mortgagee.[62]

7. Construction[63] and Determination of Description — a. Admissibility of Extrinsic Evidence. As even a detailed description of the subject-matter of a mortgage is frequently insufficient when taken alone to indicate the property conveyed,[64] the general rule of law is that parol evidence is admissible, whether the description be general or specific, to identify the subject-matter of a chattel mortgage and to separate it from other property of a similar kind.[65] So parol evidence is admissible to show that particular chattels are included by a general description,[66]

both range and township were misstated (Adams *v.* Dubuque Commercial Nat. Bank, 53 Iowa 491, 5 N. W. 619); but a misdescription of range should be disregarded when location by section and town is correct (Love *v.* Putnam, 41 Nebr. 86, 59 N. W. 691. *Contra*, Wadena First Nat. Bank *v.* Hendrickson, 61 Minn. 293, 63 N. W. 725).

62. Woodlief *v.* Harris, 95 N. C. 211; Coughran *v.* Sundback, 9 S. D. 483, 70 N. W. 644. But see Rountree *v.* Britt, 94 N. C. 104, rejecting as too vague a mortgage describing the property as "my entire crop of every description."

An undivided part of fractional interest in a crop may be mortgaged, either by specifying the fractional interest which is to pass to the mortgagee (Shepard *v.* Barnes, 3 Dak. 148, 14 N. W. 110; Johnson *v.* Rider, 84 Iowa 50, 50 N. W. 36; Melin *v.* Reynolds, 32 Minn. 52, 19 N. W. 81; Advance Thresher Co. *v.* Schmidt, 9 S. D. 489, 70 N. W. 646), a fractional number of acres (Zehner *v.* Aultman, 74 Ind. 24), the first twenty acres planted with certain grain on the specified farm (Wade *v.* Strachan, 71 Mich. 459, 39 N. W. 582), or by stating that the mortgagee is entitled to the first pickings up to a certain amount (Watson *v.* Pugh, 51 Ark. 218, 10 S. W. 493; Stephens *v.* Tucker, 58 Ga. 391; Senter *v.* Mitchell, 5 McCrary (U. S.) 147, 16 Fed. 206). But see Wattles *v.* Cobb, 60 Nebr. 403, 83 N. W. 195, 83 Am. St. Rep. 537, where the attempt was made to mortgage three hundred and forty acres of corn, a part of a growing crop of four hundred and twenty-five acres, but was unsuccessful, as it was not uniform in quality or capable of identification.

Parol evidence is admissible to show that a certain crop was grown during the year designated in a mortgage. Wasson *v.* Connor, 54 Miss. 351.

What mortgage is construed to cover.— A written clause in the mortgage of a crop that it was "to the extent of one hundred bales of cotton" was held not to limit the printed description which covered the entire crop raised. Comer *v.* Lehman, 87 Ala. 362, 6 So. 264.

63. "Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. . . . A subsequent purchaser or mortgagor [sic] is supposed to acquire a knowledge of all the facts, so far as may be needful to his protection, and he purchases in view of that knowledge." Cooley, J., in Willey *v.* Snyder, 34 Mich. 60, 61.

64. Necessity for outside evidence.— "Most personal property must, from the nature of the case, be described in such general terms as to leave no other alternative, but to resort to parol evidence to identify it. Apparently it seems a more bald description to say 'all my household furniture,' than to enumerate the articles, and describe them as 'two dozen of chairs, five tables,' &c.; but in reality the latter will require extrinsic evidence to identify the property, as much as the former would." Dewey, J., in Harding *v.* Coburn, 12 Metc. (Mass.) 333, 339, 46 Am. Dec. 680.

Identity must be shown.— Where a mortgagee sues a third person in conversion he must show that the property claimed is the property to which the description of the mortgage was intended to be applied. Kellogg *v.* Anderson, 40 Minn. 207, 41 N. W. 1045; Gregory *v.* North Pac. Lumbering Co., 15 Oreg. 447, 17 Pac. 143.

65. *Alabama.*— Hurt *v.* Redd, 64 Ala. 85; Turner *v.* McFee, 61 Ala. 468.

Illinois.— Myers *v.* Ladd, 26 Ill. 415; Mattingly *v.* Darwin, 23 Ill. 618; Chicago, etc., R. Co. *v.* Beach, 29 Ill. App. 157.

Indiana.— Burns *v.* Harris, 66 Ind. 536; Holmes *v.* Hinkle, 63 Ind. 518; Duke *v.* Strickland, 43 Ind. 494.

Iowa.— Becker *v.* Dalby, (Iowa 1901) 86 N. W. 314; Myers *v.* Snyder, 96 Iowa 107, 64 N. W. 771; Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411.

Massachusetts.— Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680.

Mississippi.—Hunt *v.* Shackleford, 56 Miss. 397.

Missouri.— Atchinson County Bank *v.* Shackelford, 67 Mo. App. 475; Campbell *v.* Allen, 38 Mo. App. 27; State *v.* Cabanne, 14 Mo. App. 294.

New Hampshire.— Brooks *v.* Aldrich, 17 N. H. 443.

North Carolina.— Morris *v.* Connor, 108 N. C. 321, 12 S. E. 917; Harris *v.* Woodard, 96 N. C. 232, 1 S. E. 544; Goff *v.* Pope, 83 N. C. 123.

Ohio.— Lawrence *v.* Evarts, 7 Ohio St. 194.

Pennsylvania.— Passmore *v.* Eldridge, 12 Serg. & R. (Pa.) 198.

Texas.— Ft. Worth Nat. Bank *v.* Red River Nat. Bank, 84 Tex. 369, 19 S. W. 517.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 102.

66. *Alabama.*— Ellis *v.* Martin, 60 Ala. 394.

Georgia.— Stephens *v.* Tucker, 58 Ga. 391.

and that general language was used by the parties with a certain meaning or limitation or in a certain sense;[67] but it is not allowable to introduce evidence to contradict the clearly defined meaning of the instrument[68] or to show omission by mistake of certain property.[69]

b. Effect of Changes in the Mortgaged Res. An agreed substitution of other property for that originally covered by the mortgage is valid between the parties to the instrument[70] but invalid as to third persons,[71] unless the amount of substituted property is so small that it will pass on the doctrine of accession.[72] When

Illinois.— Bell *v.* Prewitt, 62 Ill. 361; Boyle *v.* Miller, 93 Ill. App. 627.

Minnesota.— Eddy *v.* Caldwell, 7 Minn. 225.

New York.— Conkling *v.* Shelley, 28 N. Y. 360, 84 Am. Dec. 348 (holding evidence admissible to identify goods making up stock in trade); Hastings *v.* Parke, 22 Alb. L. J. 115.

North Carolina.—Harris *v.* Allen, 104 N. C. 86, 10 S. E. 127, holding that parol evidence was admissible to identify the chattels referred to by the description, "all the personal property . . . of which he was then possessed."

See 9 Cent. Dig. tit. "Chattel Mortgages," § 102.

67. State *v.* Cabanne, 14 Mo. App. 455; Weber *v.* Illing, 66 Wis. 79, 27 N. W. 834 (holding parol evidence admissible to show that a mortgage of "one portable saw-mill" was meant to include the "skid-engine" used to run the mill). *Compare* Dunning *v.* Stearns, 9 Barb. (N. Y.) 630, holding that where ashes in an ashery were mortgaged but the number of bushels was left blank parol evideuce might be given of the quantity intended.

68. Hutton *v.* Arnett, 51 Ill. 198; Citizens' Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261. *Compare* Van Evera *v.* Davis, 51 Iowa 637, 2 N. W. 509, holding that parol evidence was inadmissible to show that by a recital in a mortgage of "stock" of drugs, medicines, etc., it was intended by the terms used to cover fixtures and apparatus used in carrying on the drug business. But see Adamson *v.* Petersen, 35 Minn. 529, 29 N. W. 321, holding that a misdescription of location of lumber could be explained by parol.

Evidence of general usage and custom is admissible to explain, but not to contradict, the terms of the mortgage. Schaub *v.* Dalls Brewing Co., 80 Tex. 634, 16 S. W. 429; Riggs *v.* Armstrong, 23 W. Va. 760.

69. Mayer *v.* Keith, 55 Mo. App. 157.

70. *Alabama.*— Winslow *v.* Jones, 88 Ala. 496, 7 So. 262.

Mississippi.— Marx *v.* Davis, 56 Miss. 745.

New Jersey.— Hulsizer *v.* Opdyke, (N. J. 1888) 13 Atl. 669; Howell *v.* Francis, (N. J. 1887) 10 Atl. 436.

North Carolina.— Sharpe *v.* Pearce, 74 N. C. 600.

Texas.— Leeds *v.* Reed, (Tex. Civ. App. 1896) 36 S. W. 347.

Washington.—Armstrong *v.* Ford, 10 Wash. 64, 38 Pac. 866.

Contra, Crocker *v.* Hopps, 78 Md. 260, 28 Atl. 99, where the mortgagee's rights were disputed by the mortgagor's assignee in insolvency.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 213.

The effect of an agreement allowing substitution has been held not to require that the mortgagor should supply substituted property for that which had been consumed or which had perished. Hulsizer *v.* Opdyke, (N. J. 1887) 7 Atl. 879.

71. *Illinois.*— Rhines *v.* Phelps, 8 Ill. 455.

Mississippi.—Williams *v.* Crook, 63 Miss. 9.

North Carolina.— Sharpe *v.* Pearce, 74 N. C. 600.

Tennessee.— Rodes *v.* Haynes, 95 Tenn. 673, 33 S. W. 564.

Washington.— McDonald *v.* Tower Lumber, etc., Co., 10 Wash. 474, 38 Pac. 1122.

Contra, Wardlaw *v.* Mayer, 77 Ga. 620; Rosenberry *v.* Thompson, 10 Ky. L. Rep. 332, 8 S. W. 895; Abbott *v.* Goodwin, 20 Me. 408. *Compare* Rhodes *v.* Stephens, 61 Wis. 388, 21 N. W. 239, holding that in an action against an attaching creditor the burden was on the mortgagee to show that some of the goods on hand at the time the mortgage was given were seized on the attachment.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 213.

Ratification of the exchange by the mortgagee has been held to render the substituted property subject to the lien of the mortgage, although there is no change of possession and no refiling of the mortgage. Hubbard *v.* Winborne, 20 N. C. 226.

Laches on the part of the mortgagee in claiming substituted property will deprive him of his rights thereto. New York Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 13 S. Ct. 944, 37 L. ed. 799 [*affirming* 36 Fed. 722].

72. Holly *v.* Brown, 14 Conn. 255; Fowler *v.* Hoffman, 31 Mich. 215 (where the doctrine of accession was applied in the case of supplies purchased for a mortgaged printing establishment). But see New York Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 149 U. S. 436, 13 S. Ct. 944, 37 L. ed. 799 [*affirming* 36 Fed. 722], holding that when a newspaper plant was consolidated with another, a new corporation formed, name of paper changed, and the mortgaged plant used up, the mortgage did not apply to the new plant, although the new company for some time paid interest on the original mortgage debt. *Compare* Southworth *v.* Isham, 3 Sandf. (N. Y.) 448, holding that a set of new sails substituted for old ones passed to the mortgagee of a ship. See also Hudson *v.* McKale, 107

a mortgage is given on raw material or goods in a state of partial completion the finished product will be subject to the mortgage,[73] even though the increase in value has been large,[74] unless the identity of the chattels has been lost.[75] A description in a chattel mortgage has been held to include the produce, outgrowth, or equivalent of the original subject-matter.[76]

c. Misdescription.[77] An error in description does not affect the validity of a mortgage if it does not actually mislead,[78] as where the weight[79] or number[80] of mortgaged chattels is understated, or a general description given which does not apply to all the units included under the mortgage;[81] and a material error in description can be corrected in a court of equity.[82] Misdescription of a portion

Mich. 22, 64 N. W. 727, 61 Am. St. Rep. 310, where the doctrine was applied to property used to replace broken fixtures in a saloon.

In the absence of an expressed intention to have renewals of stock in trade come within the terms of a mortgage, they will not pass as part of the original stock. St. Louis Drug Co. *v.* Dart, 7 Mo. App. 590; Tolerton, etc., Co. *v.* Wayne First Nat. Bank, (Nebr. 1901) 88 N. W. 865; Midland State Bank *v.* Kilpatrick-Koch Dry Goods Co., 54 Nebr. 410, 74 N. W. 837; Rockford Watch Co. *v.* Manifold, 36 Nebr. 801, 55 N. W. 236; Kane *v.* Lodor, 56 N. J. Eq. 268, 38 Atl. 966. *Compare* Snow *v.* Ulmer, 91 Me. 324, 39 Atl. 993, 64 Am. St. Rep. 237, holding that only such property was included as was in the store at the date of the mortgage, although the mortgage was executed at a later day.

A covenant that the stock be kept up to a certain value was held to cover after-acquired goods. Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52. *Contra*, Phillips *v.* Both, 58 Iowa 499, 12 N. W. 481.

The original value covered by the mortgage is the limit beyond which newly acquired goods will not be included. Goodrich *v.* Williams, 50 Ga. 425; Chisolm *v.* Chittenden, 45 Ga. 213.

Renewals must be made by the original mortgagor, and where they were made by the mortgagor and his partner (Anderson *v.* Howard, 49 Ga. 313) or by a purchaser of the property (Stewart *v.* Long, 16 Ind. App. 164, 44 N. E. 63) they were held not to be included under the mortgage.

Including property not owned by the mortgagor at the request of the real owner and without stating the true ownership to the mortgagee will have the effect of transferring the property to the mortgagee when the mortgagor subsequently acquires the property. Berghoff *v.* McDonald, 87 Ind. 549.

The description of the after-acquired property must be such that it can be identified (Fraser *v.* Macpherson, 34 N. Brunsw. 417); and a general clause including all future-acquired property has been held insufficient (Williams *v.* Crook, 63 Miss. 9). *Compare* Barbin *v.* Zetlmaier, 6 Ohio S. & C. Pl. Dec. 188, 4 Ohio N. P. 154, holding that the object of registering and filing chattel mortgages is to give notice to third persons of what is covered by the mortgage; and if the mortgage contains no clause clearly covering substituted property, it would seem that the mortgage would not be good as to such additional property.

73. Dehority *v.* Paxson, 97 Ind. 253; Putnam *v.* Cushing, 10 Gray (Mass.) 334; Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680; Jenckes *v.* Goffe, 1 R. I. 511; *Ex p.* Ames, 1 Lowell (U. S.) 561, 1 Fed. Cas. No. 323, 7 Nat. Bankr. Reg. 230.

Repairs and alterations made upon a rifle were held not to terminate the mortgage lien. Comins *v.* Newton, 10 Allen (Mass.) 518.

74. Perry *v.* Pettingill, 33 N. H. 433.

75. Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680.

76. **A mortgage has been held to include** plants raised from cuttings from mortgaged plants (Bryant *v.* Pennell, 61 Me. 108, 14 Am. Rep. 550), profits earned by a mortgaged undivided share in a whaling vessel (Munro *v.* Merchants' Bank, 11 Allen (Mass.) 216), subsequent patents secured on a mortgaged invention (Hollins *v.* Mallard, 10 How. Pr. (N. Y.) 540), and the lumber manufactured from mortgaged logs (White *v.* Browne, 12 U. C. Q. B. 477). See also McNeeley *v.* Welz, 166 N. Y. 124, 59 N. E. 697 [*affirming* 20 N. Y. App. Div. 566, 47 N. Y. Suppl. 310], holding that a mortgage of mortgagor's right to sell beer or to a renewal thereof included a liquor-tax certificate obtained by mortgagor one month after execution of the mortgage. See *infra*, XI, H.

77. **Defects in description cured by transfer of possession to mortgagee** see *infra*, VIII, C.

78. Adamson *v.* Fagan, 44 Minn. 489, 47 N. W. 56; Goff *v.* Pope, 83 N. C. 123; Harris *v.* Kennedy, 48 Wis. 500, 4 N. W. 651. See also Dodge *v.* Potter, 18 Barb. (N. Y.) 193, holding that a mistake in giving the name of a coach was not a fatal one where there was no other coach of the kind in the neighborhood.

79. Barry *v.* Bennett, 7 Metc. (Mass.) 354, holding a description of two thousand six hundred and sixty-two pounds of iron as a ton sufficient.

80. Pollard *v.* Saltonstall, 56 Fed. 861, where it was held sufficient to describe seven thousand hides as "about six thousand."

81. Fordyce *v.* Neal, 40 Mich. 705, where cattle were described as red, white, and blue, and it was held that the description did not apply to each individual animal.

82. Wardlaw *v.* Mayer, 77 Ga. 620; Wright *v.* Market Bank, (Tenn. Ch. 1900) 60 S. W. 623.

of the property covered by the mortgage does not render the mortgage invalid as to the part which is correctly described.[83]

d. Province of Court and Jury. Where the question in regard to the description contained in a chattel mortgage is one of construction merely, its decision is for the court;[84] but the identity of the property claimed with that described in the mortgage is a question for the jury,[85] and so is the question whether the recitals, aided by inquiries suggested, would enable third persons using diligence to identify the property intended to be conveyed.[86]

VII. SUBJECT-MATTER OF A CHATTEL MORTGAGE.

A. Present Interests — 1. In General. All personal property subject to absolute sale can be mortgaged,[87] and it makes no difference that the property is exempt from attachment and from levy and sale upon execution, for exemption is a privilege of the debtor, not a limitation upon his power to dispose of his property voluntarily.[88]

Necessity for reformation.—A chattel mortgage erroneously describing the property cannot be the basis of an action in claim and delivery, without first having the description reformed. Wadena First Nat. Bank *v.* Hendrickson, 61 Minn. 293, 63 N. W. 725. *Contra,* Bernheimer *v.* Prince, 29 Misc. (N. Y.) 308, 60 N. Y. Suppl. 449 [*affirming* 58 N. Y. Suppl. 392], holding that the claim to a chattel admittedly included by mistake in the description may be asserted without first resorting to equity for reformation of the mortgage.

No reformation after foreclosure.—A mortgagee cannot waive a completed foreclosure and then seek to have an error in description reformed. Williams *v.* Hatch, 38 Ala. 338.

83. Waggoner *v.* Oursler, 54 Kan. 141, 37 Pac. 973; Chrisman-Sawyer Banking Co. *v.* Strahorn-Hutton-Evans Commission Co., 80 Mo. App. 438. See also Fisher *v.* Moore, 7 Kan. App. 14, 51 Pac. 787, holding that a nonsuit in an action by a mortgagee against a third person was error where part of the property covered by the mortgage was correctly described.

84. Curtis *v.* Martz, 14 Mich. 506, holding that in such a case a hypothetical charge was proper. *Compare* Austin *v.* French, 36 Mich. 199, where the sufficiency of the description had first arisen in a court of chancery and it was held that the question could not be submitted to a jury in a collateral proceeding.

Questions as to the admissibility of the mortgage in evidence must be determined by the court where the admissibility depends on the description of the property as well as where it depends on any other circumstance. Andregg *v.* Brunskill, 87 Iowa 351, 54 N. W. 135, 43 Am. St. Rep. 388.

Preliminary questions regarding variance of proof owing to differences between a description must be passed on by the court. Tompkins *v.* Henderson, 83 Ala. 391, 3 So. 774.

85. *Alabama.*— Tompkins *v.* Henderson, 83 Ala. 391, 3 So. 774.

Georgia.— Stephens *v.* Tucker, 55 Ga. 543.

Missouri.— Ranney *v.* Meisenheimer, 61 Mo. App. 434, 1 Mo. App. Rep. 647.

Nebraska.— Iowa Sav. Bank *v.* Dunning, 37 Nebr. 322, 55 N. W. 1079.

South Dakota.— Fisher *v.* Porter, 11 S. D. 311, 77 N. W. 112.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 103.

86. Ranney *v.* Meisenheimer, 61 Mo. App. 434, 1 Mo. App. Rep. 647; Iowa Sav. Bank *v.* Dunning, 37 Nebr. 322, 55 N. W. 1079; Fisher *v.* Porter, 11 S. D. 311, 77 N. W. 112. But see Wilson *v.* Rustad, 7 N. D. 330, 75 N. W. 260, 66 Am. St. Rep. 649, holding that the question of the sufficiency of the description of the property in a chattel mortgage is a question of law.

The effect of inaccuracies and mistakes in description should be passed upon by the jury to determine whether third persons could identify the property. Farkas *v.* Duncan, 94 Ga. 27, 20 S. E. 267; Peterson *v.* Foli, 67 Iowa 402, 25 N. W. 677.

87. White *v.* Quinlan, 30 Mo. App. 54; Dorsey *v.* Hall, 7 Nebr. 460; Kimball *v.* Sattley, 55 Vt. 285, 45 Am. Rep. 614.

Mortgages of intoxicating liquors.—It has been held that a mortgage of liquors in contravention of a prohibitory law is void *in toto* (Korman *v.* Henry, 32 Kan. 49, 3 Pac. 764), even though it covers other property in part (Flersheim *v.* Cary, 39 Kan. 178, 17 Pac. 825). But see Bagg *v.* Jerome, 7 Mich. 145, holding that a mortgage of intoxicating liquor could not be treated as void by reason of a prohibitory law where possession was transferred to the mortgagee.

88. *Indiana.*— Love *v.* Blair, 72 Ind. 281.

Kansas.— Rice *v.* Nolan, 33 Kan. 28, 5 Pac. 437.

New Jersey.— Conway *v.* Wilson, 44 N. J. Eq. 457, 11 Atl. 734.

North Carolina.—Norman *v.* Craft, 90 N. C. 211, holding that where a mortgage reserved personal property exempt by law, to be selected by the mortgagor, title to the whole passed to the mortgagee and remained in him until the exempted articles were legally set apart.

Texas.— Silberberg *v.* Trilling, 82 Tex. 523, 18 S. W. 591.

2. PARTICULAR CASES — a. Buildings.[89] A building erected by one person on land of another, although *prima facie* a part of the freehold, nevertheless, if erected under an agreement with the owner of the land that it may be moved, remains personalty and is the proper subject of a chattel mortgage.[90]

b. Furniture. Furniture in a building, where not a fixture, may be mortgaged as personal property.[91]

c. Intangible Property. As a rule intangible property may be mortgaged, and hence chattel mortgages of choses in action,[92] shares of stock,[93] and other claims and intangible rights[94] have been held valid; but where what is sought to be mortgaged consists merely in a license and does not amount to a property right the mortgage will convey nothing.[95]

3. STATUTORY PROVISIONS. Under a statute providing that chattel mortgages may be made upon certain enumerated articles of personal property and upon "none other,"[96] it has been held that mortgages of personal property not so

89. For chattel mortgages on fixtures see FIXTURES.

90. *Indiana.*— Brown *v.* Corbin, 121 Ind. 455, 23 N. E. 276.

Iowa.— Denham *v.* Sankey, 38 Iowa 269.

Kansas.— Docking *v.* Frazell, 38 Kan. 420, 17 Pac. 160, where a hotel was moved upon leased land which was to be surrendered up in the same condition as at the making of the lease.

Maine.— Goodenow *v.* Allen, 68 Me. 308.

Massachusetts.— Hartwell *v.* Kelly, 117 Mass. 235.

Nebraska.— Holt County Bank *v.* Tootle, 25 Nebr. 408, 41 N. W. 291; Lanphere *v.* Lowe, 3 Nebr. 131.

New York.— Smith *v.* Benson, 1 Hill (N. Y.) 176.

United States.— Deering *v.* Ladd, 22 Fed. 575, where a mortgage was given on an elevator built on land belonging to a railroad company.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 48.

The mortgagor will be estopped as against the mortgagee to claim that the property mortgaged is real estate where the mortgage recites that it is personalty. Lucy *v.* Gray, 61 N. H. 151, where a mortgage was given of a sawmill and the machinery therein.

91. Bacon *v.* Thompson, 60 Iowa 284, 14 N. W. 312; Metropolitan Concert Company *v.* Sperry, 9 N. Y. St. 342.

92. **An interest in an executory contract** before performance has been held to be the proper subject of a chattel mortgage. Forman *v.* Proctor, 9 B. Mon. (Ky.) 124.

Book-accounts can be mortgaged. Lawrence *v.* McKenzie, 88 Iowa 432, 55 N. W. 505; Dunn *v.* Michigan Club, 115 Mich. 409, 73 N. W. 386. See also *supra*, VI, B, 6, b. *Contra, In re* Ehler, 10 Ohio Dec. (Reprint) 439, 21 Cinc. L. Bul. 140, Ohio Prob. 186.

Life insurance policies can be mortgaged. King *v.* Van Vleck, 109 N. Y. 363, 16 N. E. 547, 15 N. Y. St. 521.

Negotiable notes, however, were held not to be mortgageable under a Vermont statute providing that all personal property could be mortgaged, because personal property meant only material, movable property, capable of a *situs* of its own. Woodward *v.* Laporte, 70 Vt. 399, 41 Atl. 443.

Unpaid legacies.— It was held that a chattel mortgage of an unpaid legacy was not valid (Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741), but an assignment of an expectant legacy is good in equity (Bacon *v.* Bonham, 27 N. J. Eq. 209).

93. Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369; Gilmer *v.* Morris, 80 Ala. 78, 60 Am. Rep. 85; Manns *v.* Brookville Nat. Bank, 73 Ind. 243; Durkee *v.* Stringham, 8 Wis. 1. See also Ede *v.* Johnson, 15 Cal. 53, holding that under the Chattel Mortgage Act of 1857 such a mortgage is complete without a transfer on the books of the corporation.

94. **The good-will of a business** may be mortgaged in connection with the business itself, but as it is a mere incident of the business it cannot be sold independently, and hence where a mortgage is given of all the property connected with the business, including the good-will, and all the tangible property is later alienated or destroyed the mortgage cannot be foreclosed as to the good-will. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 36 Fed. 722.

All claims growing out of and adhering to property, rights of action for damages *ex contractu*, and interests in actions pending and undetermined may be the subject of a chattel mortgage. Pindell *v.* Grooms, 18 B. Mon. (Ky.) 501; White *v.* Quinlan, 30 Mo. App. 54.

95. Feigenspan *v.* Mulligan, (N. J. 1902) 51 Atl. 191, where it was held that a liquor license was a mere privilege, not a property right, and hence incapable of being the subject of a chattel mortgage, even under a law providing that with the assent of the license board such a license could be transferred.

96. Cal. Civ. Code, § 2955, as amended in 1895.

Mortgages of furniture.— Under this statute, providing that mortgages may be made upon furniture in hotels, lodging, or boarding-houses to secure the purchase-money of the articles mortgaged, it has been held that the mortgage need not be given to the seller of the articles, but may be given to one who advances the money wherewith they are pur-

enumerated are not absolutely void, but as between the parties and against all other persons except creditors of the mortgagor and *bona fide* purchasers such mortgages are valid;[97] and a mortgage is valid as to property enumerated by the statute, notwithstanding it also covers property not authorized.[98]

4. Sufficiency of Mortgagor's Interest — a. In General. It is not necessary to the validity of a chattel mortgage that the mortgagor have an absolute title to the property mortgaged, but he must have some interest therein.[99] A mortgage of property in which the mortgagor has no interest whatever is void,[1] and ratification by the real owner cannot make it valid as against a subsequent purchaser without notice;[2] but it seems that almost any interest in chattels will warrant the giving of a chattel mortgage thereon to the extent of such interest,[3] as where

chased. Blaisdell *v.* McDowell, 91 Cal. 285, 27 Pac. 656, 25 Am. St. Rep. 178.

As to what is within the statute, it has been held that the furniture must have been actually used in a hotel or boarding-house (Stringer *v.* Davis, 30 Cal. 318), and that the use of the property in a saloon will not suffice (Gassner *v.* Patterson, 23 Cal. 299).

What constitutes verbal mortgage in violation of Cal. Civ. Code, § 2922.— After the giving of a mortgage on growing wheat to P, the latter made other advances of money to the mortgagor, and on receiving from him certain of the wheat when it was grown applied the proceeds to the unsecured debt under a verbal agreement to that effect with the mortgagor. It was held that this verbal agreement was not a verbal mortgage in violation of Cal. Civ. Code, § 2922, since its effect was rather to extinguish the mortgage on the crops to which it applied than the creation of one.

97. Perkins *v.* Maier, etc., Brewery, 133 Cal. 496, 65 Pac. 1030; McLeod *v.* Barnum, 131 Cal. 605, 63 Pac. 924; Tomlinson *v.* Ayres, 117 Cal. 568, 49 Pac. 717; Ukiah Bank *v.* Gibson, 109 Cal. 197, 41 Pac. 1008; Ukiah *v.* Moore, 106 Cal. 673, 39 Pac. 1071.

98. San Francisco Breweries *v.* Schurtz, 104 Cal. 420, 38 Pac. 92.

Under a statute authorizing the mortgage of "implements" without a transfer of possession, it was held that an iron safe of moderate size came within the terms of the statute. Talcott *v.* Meigs, 64 Conn. 55, 29 Atl. 131.

99. **Partnership mortgages.**—When a member of a partnership gives a mortgage of partnership property to secure his individual debt, it covers the entire interest of the firm, subject to the claims of his copartners in the mortgaged property, and the lien of the mortgage becomes absolute upon the whole property covered thereby, if he afterward secures a release of such claims. Fargo *v.* Ames, 45 Iowa 491. But see Taliaferro *v.* Sater, 113 N. C. 76, 18 S. E. 94, where the mortgagee was not allowed to claim after-acquired property coming to the firm.

1. Jewell *v.* Simpson, 38 Kan. 362, 16 Pac. 450; Hawk *v.* Konouzki, 10 N. D. 37, 84 N. W. 563; Learned *v.* Brown, 94 Fed. 876, 36 C. C. A. 524. See also John S. Brittain Dry Goods Co. *v.* Blanchard, 60 Kan. 263, 56 Pac. 474 (where the owner of property employed an intermediary through whom to transmit a mortgage on them and it was held not to be fraudulent against his creditors); Martin *v.* Armstrong, (Tex. Civ. App. 1901) 62 S. W. 83 (where the owner of a moving-picture machine loaned it to another for one night, to be used in giving an exhibition and to be returned the next day; but the latter without the knowledge of the owner took it to other towns and finally mortgaged it to secure a board bill — the owner in the meanwhile using every effort to find and recover it; and it was held that the mortgage created no lien against the owner).

Ownership is a question of law dependent on findings of fact, and so it was error to leave it to the jury to determine the ownership of the property at the time of the execution of the mortgage. Bell *v.* Barnes, 87 Mo. App. 451.

2. Lewis *v.* Buttrick, 102 Mass. 412; Maier *v.* Davis, 57 Wis. 212, 15 N. W. 187.

Authority to mortgage.— A power to an agent to sell property does not authorize him to execute a chattel mortgage on it. Switzer *v.* Wilvers, 24 Kan. 384, 36 Am. Rep. 259. *Compare* Roberts' Appeal, 60 Pa. St. 400, holding that an enabling act for mining and manufacturing corporations did not authorize a mortgage of chattels.

No presumption that the mortgagor has title to certain property arises from the execution of a mortgage thereon. Warner *v.* Wilson, 73 Iowa 719, 36 N. W. 719, 5 Am. St. Rep. 710.

The mortgagee acquires only the interest of the mortgagor. Rainey *v.* Nance, 54 Ill. 29; Warner *v.* Porter, 2 Ohio Dec. (Reprint) 26, 1 West. L. Month. 104.

There is no "order and disposition doctrine" as to mortgages, and the execution of a chattel mortgage of property which has been in the open possession of, and offered for sale in the regular course of business by, the mortgagor does not give the mortgagee any rights as against a person whom he knows all the time to be the real owner. Bray *v.* Flickinger, 69 Iowa 167, 28 N. W. 492. But see Carr *v.* Lester, 90 Ala. 349, 8 So. 35, where, under a statute, a mortgage of a piano which had been left in the possession of the mortgagor for four years by its owner was held valid.

3. **Mortgagor need not be in possession.**— A chattel mortgage by the general owner of

the mortgagor has an equitable interest in certain property [4] or owns an undivided share.[5]

property is valid notwithstanding the goods are at the time in the hands of a third person who has a claim to have a special interest therein. Hughes *v.* Stubblefield, 21 Ill. App. 216; Brown *v.* Allen, 35 Iowa 306; McCalla *v.* Bullock, 2 Bibb (Ky.) 288. But see Fletcher *v.* Drath, 66 Mo. 126, holding that the doctrine of *caveat emptor* applies to one advancing money and taking a deed of trust upon personal property not in the possession of the grantor in the deed of trust, but in the possession of a third party.

Leased property.— Chattels held by the buyer on a lease and not to become his till wholly paid for may be mortgaged by the seller to another person before the price is fully paid, and such person will acquire a title superior to that of the conditional buyer. Everett *v.* Hall, 67 Me. 497.

Interest after forfeiture.— After the seizure of a vessel and cargo for a supposed breach of the navigation laws and after confession thereof by the owner, he has still such an interest therein as would enable him to make a valid mortgage to some of his creditors as against others who attach upon the final restoration of the property by the government. Mitchell *v.* Cunningham, 29 Me. 376. But see Beattie *v.* Boyle, 2 Cinc. Super. Ct. 201, where it was held that a mortgage of personal property made six days after the decree of forfeiture thereof for violation of the revenue law as to illicit distilling, but before the sale, was invalid.

Mortgage by an administratrix.— Where the administratrix and several children of the intestate united in a mortgage of personal property belonging to the estate, the rights of creditors not being in controversy, the mortgagors could not object to the mortgage on the ground that the property was in the hands of the administratrix for distribution and liable to the demands of creditors and next of kin. Clagett *v.* Salmon, 5 Gill & J. (Md.) 314.

Property in custodia legis.— It has been held that the owner of property may mortgage it, although it is in the hands of an officer who has levied an attachment (Parsons *v.* Merrill, 5 Metc. (Mass.) 356. *Contra*, Hudson *v.* Lamar, 74 Mo. App. 238) or execution (Gardner *v.* Bunn, 132 Ill. 403, 23 N. E. 1072, 7 L. R. A. 729) upon it; but such a mortgage made to one who has notice of the levy to secure a prior debt is invalid as against the creditor in execution (Thompson *v.* Van Vechten, 6 Bosw. (N. Y.) 373). In Parsons *v.* Merrill, 5 Metc. (Mass.) 356, the mortgagor died before judgment, which dissolved the attachment, and it was held that the mortgagee was entitled to have the property delivered to him on payment of the officer's fees. See also Pindell *v.* Grooms, 18 B. Mon. (Ky.) 501, where a defendant in replevin was allowed to mortgage the property in controversy, because choses in action were properly subject to mortgage and the mortgagee's equitable title entitled him to the benefit of the judgment in the replevin suit.

Where the mortgagor obtained title by fraud, the mortgagee not being an innocent purchaser, the mortgage was held invalid. Fletcher *v.* Drath, 66 Mo. 126.

What are not defects in mortgagor's title. — Mere failure to pay for goods purchased on credit in the usual course of business will not prevent the purchaser from executing a mortgage thereon. Lippincott *v.* Shaw Carriage Co., 25 Fed. 577. *Compare* Codman *v.* Freeman, 3 Cush. (Mass.) 306, holding that the title of a mortgagee could not be defeated by showing that the mortgaged chattels were purchased by the mortgagor with money which he fraudulently reserved from his creditor upon the settlement of his estate as an insolvent debtor. See also Wetzel *v.* Webb, (Cal. 1893) 33 Pac. 1105, where the evidence was held to justify a finding that the mortgagor had title.

A mortgage of goods which the mortgagor is under contract to sell to another has been held valid. Buckingham *v.* Dake, 112 Fed. 258, 50 C. C. A. 492.

A husband's rights in his wife's chattels is sufficient to authorize him to mortgage them. Wolfe *v.* Bate, 9 B. Mon. (Ky.) 208. *Compare* Eddy *v.* McCall, 71 Mich. 497, 39 N. W. 734, holding that where a mortgage was signed by both husband and wife it was immaterial which one owned the mortgaged property.

As against the general owner or the mortgagor's assignee for the benefit of creditors, a mortgage by one having a special interest is invalid where the mortgage was not delivered or the mortgagee did not obtain possession. Cook *v.* Kelly, 9 Bosw. (N. Y.) 358.

4. Fields *v.* Carter, 121 Ala. 329, 25 So. 800.

Equity of redemption sufficient.— A mortgagor of personal property in possession has, even after condition broken, a mortgageable interest therein until such right is foreclosed either by sale or perhaps by lapse of time (White *v.* Quinlan, 30 Mo. App. 54; Smith *v.* Coolbaugh, 21 Wis. 427); and until foreclosure the junior mortgagee has a right to redeem or whatever other rights the mortgagor had (White *v.* Quinlan, 30 Mo. App. 54). See also Burnham *v.* Citizens' Bank, 55 Kan. 545, 40 Pac. 912, holding that, where goods were mortgaged with power to sell and possession delivered to the mortgagee, the mortgagor reserving one half of the proceeds of sales to be made during a certain month, and afterward the mortgagor executed a second mortgage subject to the former, the second mortgagee acquired the right to one half of the proceeds of the sales for the month specified. *Compare* Kimball *v.* Sattley, 55 Vt. 285, 45 Am. Rep. 614, holding that the owner of an equity of redemption in real estate could mortgage the grass grown thereon.

5. Patterson *v.* Atkinson, 20 R. I. 102, 37 Atl. 532; Crane *v.* McGuire, (Tex. Civ. App. 1901) 64 S. W. 942. See also Potts *v.* New-

b. Inchoate or Incomplete Title. It has been held that a person in possession of chattels not paid for and which, by the terms of the sale to him, were to remain the property of the seller until paid in full has a mortgageable interest therein[6] and may give a mortgage of the goods themselves which will be valid against attaching creditors and subsequent mortgagees whose mortgages were given after the property was paid for.[7]

B. Future Interests — 1. At Law — a. In General. At common law[8] a chattel mortgage upon property subsequently to be acquired, in which the mortgagor has no present or potential interest, is void against subsequent purchasers and attaching creditors,[9] even though given to secure the purchase-price of the

ell, 22 Minn. 561, where, under a contract by A to deliver to B one third of a crop of wheat to be set apart at the threshing machine, the right of B could be mortgaged, so that the title to the third, when set apart, would vest in the mortgagee. *Compare* Citizens' State Bank *v.* Abbott, 80 Iowa 646, 45 N. W. 576, holding that where cattle shipped by the purchaser to a man with whom he had a contract to sell them on commission for half the profits, after deducting the cost price, are mortgaged by the consignee to a bank which has paid the shipper's drafts for their cost price before they were sold, the mortgagee is entitled to their possession as against the shipper.

6. Crompton *v.* Pratt, 105 Mass. 255; Albright *v.* Meredith, 58 Ohio St. 194, 50 N. E. 719.

7. Chase *v.* Ingalls, 122 Mass. 381; Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867. See also Drake *v.* Reese, 6 Kan. App. 538, 51 Pac. 590, where it was held error to instruct that a chattel mortgage was invalid to the extent that it covered goods not paid for as to the sellers of those goods. But see Taylor *v.* Barker, 30 S. C. 238, 9 S. E. 115, where defendant sold to B certain machinery, the contract providing that, until paid for, the title to the machinery should remain in defendant. Plaintiff, through whose agency the machinery was sold and who had actual notice of the stipulation, took a mortgage on the machinery to secure his own debt and recorded it. Defendant subsequently took new notes from B and took a mortgage on the machinery as security. It was held that as when plaintiff took his mortgage the title to the machinery was in defendant, B had no power to give that mortgage and it could not be asserted as a lien prior to defendant's.

Estoppel on mortgagee.— The acceptance of a chattel mortgage estops the mortgagee to assert that a prior transfer of the mortgaged property to the mortgagor was a conditional sale, reserving title until payment was made. Sprague *v.* Branch, 3 Cush. (Mass.) 575.

8. **Statutory provisions.**— In Dakota, under Dak. Civ. Code, § 1704, a lien might be created on property not yet acquired or not yet in existence (McKay *v.* Shotwell, 6 Dak. 124, 50 N. W. 622); and a similar rule prevails in North Dakota by N. D. Code, § 4680 (Bidgood *v.* Monarch Elevator Co., 9 N. D. 627, 84 N. W. 561, 81 Am. St. Rep. 604), but the lien attaches only to the extent of the mortgagor's interest when he acquires the property, and hence, where the mortgagor was a tenant and under the terms of his agreement with his landlord never acquired an interest in any specific grain, the mortgage conveyed nothing (Bidgood *v.* Monarch Elevator Co., 9 N. D. 627, 84 N. W. 561, 81 Am. St. Rep. 604).

9. *Alabama.*— Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 25 So. 571, 77 Am. St. Rep. 30 (holding that a mortgage of such logs as the mortgagee may own subsequently to a default under the mortgage does not confer a lien on subsequently acquired logs, as against the mortgagor's creditors); Patapsco Guano Co. *v.* Ballard, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131; Eutaw Bank *v.* Alabama State Bank, 87 Ala. 163, 7 So. 91; Whittleshoffer *v.* Strauss, 83 Ala. 517, 3 So. 524; Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747; Leslie *v.* Hinson, 83 Ala. 266, 3 So. 443; Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349; Varnum *v.* State, 78 Ala. 28; Bush *v.* Garner, 73 Ala. 162; Hurst *v.* Bell, 72 Ala. 336; Columbus Iron Works Co. *v.* Renfro, 71 Ala. 577; Burns *v.* Campbell, 71 Ala. 271; Wilkinson *v.* Ketler, 69 Ala. 435; Collier *v.* Faulk, 69 Ala. 58; Seay *v.* McCormick, 68 Ala. 549; Elmore *v.* Simon, 67 Ala. 526; Grant *v.* Steiner, 65 Ala. 499; Rees *v.* Coats, 65 Ala. 256; Purcell *v.* Mather, 35 Ala. 570, 76 Am. Dec. 307.

Arkansas.— Summers *v.* Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057.

Connecticut.—Walker *v.* Vaughn, 33 Conn. 577.

Dakota.— Grand Forks Nat. Bank *v.* Minneapolis, etc., Elevator Co., 6 Dak. 357, 43 N. W. 806.

Georgia.— A mortgage is invalid as to future-acquired property in excess of the amount necessary to make the amount of goods equal to the stock on hand when the mortgage was given, it being provided by statute that the mortgage shall be valid to that extent. Chisolm *v.* Chittenden, 45 Ga. 213.

Illinois.—Roy *v.* Goings, 96 Ill. 361, 36 Am. Rep. 151 [*affirming* 6 Ill. App. 162]; Hunt *v.* Bullock, 23 Ill. 320; Standard Brewery *v.* Nudelman, 70 Ill. App. 356.

Kansas.— Long *v.* Hines, 40 Kan. 220, 19 Pac. 796, 10 Am. St. Rep. 192; Switzer *v.* Wilvers, 24 Kan. 384, 36 Am. Rep. 259. But see Campbell *v.* Quinton, 4 Kan. App. 317, 45 Pac. 914, holding that a mortgage of a stock of goods and future additions is valid as to

articles mortgaged, if a part only of the goods have been delivered to the mort-

such additions as soon as they are put in the store-room and become a part of the general stock covered by the mortgage, if put in before rights of third parties attach.

Kentucky.— Loth *v.* Carty, 85 Ky. 591, 9 Ky. L. Rep. 131, 4 S. W. 314; Ross *v.* Wilson, 7 Bush (Ky.) 29; Robinson *v.* Woodward, 20 Ky. L. Rep. 1142, 48 S. W. 1082.

Maine.—Kelley *v.* Goodwin, 95 Me. 538, 50 Atl. 711; Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395; Chapin *v.* Cram, 40 Me. 561 (holding that a clause in a mortgage of stock providing that all additions subsequently made should be held in the same manner as the goods then in store could not vest such additions in the mortgagee without some further act by the mortgagor); Head *v.* Goodwin, 37 Me. 181.

Maryland.— Baltimore First Nat. Bank *v.* Lindenstruth, 79 Md. 136, 28 Atl. 807, 47 Am. St. Rep. 366; Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170; Hamilton *v.* Rogers, 8 Md. 301.

Massachusetts.—Chesley *v.* Josselyn, 7 Gray (Mass.) 489; Pettis *v.* Kellogg, 7 Cush. (Mass.) 456 (where a person made a contract to deliver staves to A. After delivery of a part of them and payment of a part of the purchase-money by A, the latter mortgaged the whole of the staves to X. It was held that under the contract title in the goods did not vest until the delivery was complete, and therefore so far as respected the staves not yet delivered the mortgage was void); Codman *v.* Freeman, 3 Cush. (Mass.) 306; Barnard *v.* Eaton, 2 Cush. (Mass.) 294; Moody *v.* Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Jones *v.* Richardson, 10 Metc. (Mass.) 481 (a leading case on the subject, where it was held that a mortgage of goods which the mortgagor does not own, although he afterward acquires them, is void as against his attaching creditors); Bonsey *v.* Amee, 8 Pick. (Mass.) 236.

Michigan.— Ferguson *v.* Wilson, 122 Mich. 97, 80 N. W. 1006, 80 Am. St. Rep. 543. In Kingman *v.* Denison, 84 Mich. 608, 48 N. W. 26, 22 Am. St. Rep. 711, 11 L. R. A. 347, goods were consigned to M, who became insolvent before their arrival. When the carrier delivered them the store was in possession of D, a mortgagee of M, under a mortgage covering after-acquired property. The goods were sold under the mortgage and bid in by the mortgagee, from whom they were replevied by the consignor. It was held that as the goods had never come into possession of the consignee the consignor could assert his right of stoppage *in transitu* against the mortgagee, notwithstanding the mortgage covered after-acquired property. But see Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222; Eddy *v.* McCall, 71 Mich. 497, 39 N. W. 734, which hold that a mortgage can be given covering after-acquired property.

Mississippi.— Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682; Clary *v.* Lowry, 51 Miss. 879.

Missouri.— France *v.* Thomas, 86 Mo. 80; Littlefield *v.* Lemley, 75 Mo. App. 511. *Compare* Scudder *v.* Bailey, 66 Mo. App. 40, holding that a mortgagee of after-acquired property who has not been in possession of it cannot maintain replevin therefor, his only remedy being in equity.

Nebraska.— Steele *v.* Ashenfelter, 40 Nebr. 770, 59 N. W. 361, 42 Am. St. Rep. 694; Wedgwood *v.* Citizens' Nat. Bank, 29 Nebr. 165, 45 N. W. 289.

New Hampshire.— Pierce *v.* Emery, 32 N. H. 484.

New Jersey.— Looker *v.* Peckwell, 38 N. J. L. 253; Smithurst *v.* Edmunds, 14 N. J. Eq. 408.

New York.— Deeley *v.* Dwight, 132 N. Y. 59, 30 N. E. 258, 43 N. Y. St. 409, 18 L. R. A. 298; Kribbs *v.* Alford, 120 N. Y. 519, 24 N. E. 811, 31 N. Y. St. 564; Coats *v.* Donnell, 94 N. Y. 168; Wisner *v.* Ocumpaugh, 71 N. Y. 113; McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Hale *v.* Omaha Nat. Bank, 49 N. Y. 626 [*reversing* 33 N. Y. Super. Ct. 40]; Gardner *v.* McEwen, 19 N. Y. 123; Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55; Stevens *v.* Watson, 4 Abb. Dec. (N. Y.) 302; Mittnacht *v.* Kelly, 3 Abb. Dec. (N. Y.) 301, 3 Keyes (N. Y.) 407, 2 Transcr. App. (N. Y.) 342, 5 Abb. Pr. N. S. (N. Y.) 442; Anchor Brewery Co. *v.* Burns, 32 N. Y. App. Div. 272, 52 N. Y. Suppl. 1005; Willetts *v.* Brown, 42 Hun (N. Y.) 140; Farmers' L. & T. Co. *v.* Long Beach Imp. Co., 27 Hun (N. Y.) 89; Ludwig *v.* Kipp, 20 Hun (N. Y.) 265; Cooper *v.* Douglass, 44 Barb. (N. Y.) 409; Conderman *v.* Smith, 41 Barb. (N. Y.) 404; Comfort *v.* Kiersted, 26 Barb. (N. Y.) 472; Milliman *v.* Neher, 20 Barb. (N. Y.) 37; Otis *v.* Sill, 8 Barb. (N. Y.) 102; Beebe *v.* Richmond Light, etc., Co., 13 Misc. (N. Y.) 737, 35 N. Y. Suppl. 1, 69 N. Y. St. 230; Brunswick-Balke-Collender Co. *v.* Stevenson, 4 N. Y. Suppl. 123, 21 N. Y. St. 862; Levy *v.* Welsh, 2 Edw. (N. Y.) 438.

Ohio.— Chapman *v.* Weimer, 4 Ohio St. 481; Coe *v.* Peacock, 2 Ohio Dec. (Reprint) 239, 2 West. L. Month. 133; Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

Rhode Island.— Cook *v.* Corthell, 11 R. I. 482, 23 Am. Rep. 518; Williams *v.* Briggs, 11 R. I. 476, 23 Am. Rep. 518.

South Carolina.— Parker *v.* Jacobs, 14 S. C. 112, 37 Am. Rep. 724. But see Akers *v.* Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705 [*citing* Parker *v.* Jacobs, 14 S. C. 112, 37 Am. Rep. 724], holding that a mortgage of a stock of goods and future additions is valid and the lien attaches as soon as the goods are acquired. *Compare* Hirshkind *v.* Israel, 18 S. C. 157, where it was held that a second mortgagee cannot resist the lien of a prior mortgage on the subsequent additions to a stock of goods, where such additions were covered by its terms, without showing that such additions were in the store at the time of the execution of the second mortgage.

gagor;[10] but such a mortgage is valid between the parties thereto[11] and against all persons claiming under the mortgagor voluntarily, with notice, or in bankruptcy.[12] Actual knowledge is required, however, and the constructive knowl-

Tennessee.— Phelps *v.* Murray, 2 Tenn. Ch. 746. *Contra,* Judge *v.* Jones, 99 Tenn. 20, 42 S. W. 4.

Texas.—Dupree *v.* McClanahan, 1 Tex. App. Civ. Cas. § 594.

Vermont.— *Re* Allen, 65 Vt. 392, 26 Atl. 591.

Washington.— Moore *v.* Terry, 17 Wash. 185, 49 Pac. 234.

Wisconsin.— Case *v.* Fish, 58 Wis. 56, 15 N. W. 808; Hunter *v.* Bosworth, 43 Wis. 583; Single *v.* Phelps, 20 Wis. 398; Comstock *v.* Scales, 7 Wis. 159.

United States.—Wagner *v.* Watts, 2 Cranch C. C. (U. S.) 169, 28 Fed. Cas. No. 17,040. *Compare* New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434, holding that a mortgage by a railroad company of all future-acquired property attaches only to such interest as the company acquires, subject to any liens by which it comes into the company's possession. This rule applies to a case where the seller of the after-acquired property retains a lien on it for the purchase-price. Frank *v.* Denver, etc., R. Co., 23 Fed. 123.

Canada.— Fraser *v.* Macpherson, 34 N. Brunsw. 417.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 47.

Where a mortgage covers partly present and partly future property, although void as to the latter, it is nevertheless good as to the former. Codman *v.* Freeman, 3 Cush. (Mass.) 306; Gardner *v.* McEwen, 19 N. Y. 123; Van Heusen *v.* Radcliff, 17 N. Y. 580, 72 Am. Dec. 480.

10. Pettis *v.* Kellogg, 7 Cush. (Mass.) 456; Brunswick-Balke-Collender Co. *v.* Stevenson, 4 N. Y. Suppl. 123, 21 N. Y. St. 862, which hold that the later delivery of the goods does not validate the mortgage any more than in the ordinary case of after-acquired property. But see Greenway *v.* Fuller, 47 Mich. 557, 11 N. W. 384, holding that where the purchaser of merchandise mortgages it to raise money to pay the purchase-price, and the mortgage is given, payment made, and goods delivered on the same day, the mortgage will not be regarded as given on after-acquired property.

11. *Kansas.*— Dodge *v.* Smith, 5 Kan. App. 742, 46 Pac. 990.

Maine.— Williams *v.* Nealey, 81 Me. 447, 17 Atl. 404, holding that where the parties to the mortgage contract that the mortgagor may sell from the stock of goods mortgaged in the regular course of trade, replenishing the stock with new goods which shall be subject to the same lien, as between them the title to the newly acquired stock in trade vests in the mortgagee. See also Allen *v.* Goodnow, 71 Me. 420, a leading case, holding that in such a case the mortgagor will be estopped to set up the claim that the goods purchased to replace those sold were purchased on credit and not with the proceeds of the others.

Michigan.— A mortgage of future-acquired property is good as to property acquired between the date of the execution and the filing of the mortgage. Robson *v.* Michigan Cent. R. Co., 37 Mich. 70; American Cigar Co. *v.* Foster, 36 Mich. 368.

New York.— Perkins *v.* Batterson, 66 Hun (N. Y.) 583, 21 N. Y. Suppl. 815, 50 N. Y. St. 108 (holding that as between the parties a mortgage covering future-acquired property operates as a contract to give a lien upon the property to be acquired, taking effect as a mortgage as soon as the property is acquired by the mortgagor); Kennedy *v.* Watertown Nat. Union Bank, 23 Hun (N. Y.) 494; Ludwig *v.* Kipp, 20 Hun (N. Y.) 265.

North Carolina.— Brown *v.* Dail, 117 N. C. 41, 23 S. E. 45.

South Carolina.— Moore *v.* Byrum, 10 S. C. 452, 30 Am. Rep. 58.

12. *Alabama.*—Patapsco Guano Co. *v.* Ballard, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131; Mayer *v.* Taylor, 69 Ala. 403, 44 Am. Rep. 522; Fore *v.* Hibbard, 63 Ala. 410; Thrash *v.* Bennett, 57 Ala. 156.

Iowa.—Scharfenhurg *v.* Bishop, 35 Iowa 60.

Kansas.— Dodge *v.* Smith, 5 Kan. App. 742, 46 Pac. 990.

Michigan.— Cadwell *v.* Pray, 41 Mich. 307, 2 N. W. 52; Robson *v.* Michigan Cent. R. Co., 37 Mich. 70; American Cigar Co. *v.* Foster, 36 Mich. 368; People *v.* Bristol, 35 Mich. 28.

Minnesota.— Ludlum *v.* Rothschild, 41 Minn. 218, 43 N. W. 137.

Mississippi.— Davis *v.* Marx, 55 Miss. 376, where a debtor gave a deed of trust of a gray horse and all other live stock which he might own during the coming year. Later, with consent of the trustee, he exchanged the gray for a bay horse and then the bay horse to a third person for another horse, securing the difference in price of the last horse by a mortgage to the owner. The latter had knowledge of the first deed of trust. It was held that the trustee under the first deed had priority in the proceeds of the last horse to the amount of the value of the bay.

New Jersey.—Page *v.* Kendig, (N. J. 1887) 7 Atl. 878.

New York.— Reynolds *v.* Ellis, 103 N. Y. 115, 8 N. E. 392 [*affirming* 34 Hun (N. Y.) 47, 57 Am. Rep. 701]; Wisner *v.* Ocumpaugh, 71 N. Y. 113; Nestell *v.* Hewitt, 19 Abb. N. Cas. (N. Y.) 282. See also Wood *v.* Lester, 29 Barb. (N. Y.) 145, where it was held that a stipulation in a mortgage of a farm that the mortgagee should have a lien on all wood cut, and should have delivered to him such chattel mortgages as should be necessary to protect his lien, while not in itself constituting a chattel mortgage, yet was a valid agreement for a mortgage which would attach to the wood as it should be cut and might be enforced against the mortgagor and all per-

edge furnished by recording the mortgage is insufficient against a *bona fide* purchaser.[13]

b. Exceptions. An apparent exception has been made to the general rule where the after-acquired property is in renewal of, or in substitution for, goods on hand when the mortgage was executed, or is purchased with the proceeds of the sale of such goods,[14] but most courts apply the strict rule.[15]

sons claiming through him with notice of the lien, including an execution creditor of the mortgagor.

Texas.— McGee *v.* Fitzer, 37 Tex. 27.

Contra, Single *v.* Phelps, 20 Wis. 398.

Where a receiver has been appointed for the mortgagor company, it has been held that he stands in no better position than the mortgagor, and hence as against him the mortgagee's title to the after-acquired property is good. Perkins *v.* Batterson, 66 Hun (N. Y.) 583, 21 N. Y. Suppl. 815, 50 N. Y. St. 108.

13. *Arkansas.*— Tomlinson *v.* Greenfield, 31 Ark. 557.

Illinois.— Gittings *v.* Nelson, 86 Ill. 591.

Kansas.— Long *v.* Hines, 40 Kan. 216, 16 Pac. 339, 10 Am. St. Rep. 189; Cameron *v.* Marvin, 26 Kan. 612.

Maine.— Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395.

Massachusetts.— Jones *v.* Richardson, 10 Metc. (Mass.) 481, 493, where the court said: "The record of the mortgage deed is no sufficient notice of a legal incumbrance as to subsequently acquired property; because, by law, no such property could be sold or conveyed thereby; and it would furnish no notice that any property would be afterwards purchased, or, if purchased, that any act would be done to ratify the grant in that respect."

New Hampshire.— Cudworth *v.* Scott, 41 N. H. 456.

New York.— Cressey *v.* Sabre, 17 Hun (N. Y.) 120; Frost *v.* Willard, 9 Barb. (N. Y.) 440.

Ohio.— Chapman *v.* Weimer, 4 Ohio St. 481.

Wisconsin.— Mowry *v.* White, 21 Wis. 417.

Canada.— McAllister *v.* Forsyth, 12 Can. Supreme Ct. 1.

Contra, Fuller *v.* Rhodes, 78 Mich. 36, 43 N. W. 1085.

Where the owner of goods, knowing of the mortgage, impliedly allows the goods to be mingled with the mortgagor's stock, by making a settlement with the mortgagor and taking his notes for the goods, the mortgage will be held valid as to such goods. Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823.

14. Stephens *v.* Pence, 56 Iowa 257, 9 N. W. 215; Scharfenburg *v.* Bishop, 35 Iowa 60; Levy *v.* Welsh, 2 Edw. (N. Y.) 438 (where the after-acquired property was purchased with the proceeds of goods on hand when the mortgage was executed); Letourno *v.* Ringgold, 3 Cranch C. C. (U. S.) 103, 15 Fed. Cas. No. 8,282.

Statutory provisions.— By Ga. Code (1873) and Ga. Code (1882), § 1954, it is provided that a mortgage may cover a stock of goods in bulk, but changing in specifics, the lien attaching to goods subsequently purchased to take the place of those disposed of; but it has been held that this statute covers only an amount of goods equal to those on hand when the mortgage was made. Chisolm *v.* *v.* Chittenden, 45 Ga. 213. The lien holds, however, even where the goods were purchased on credit, unless they were already charged with a lien when acquired by the mortgagor. Goodrich *v.* Williams, 50 Ga. 425; Anderson *v.* Howard, 49 Ga. 313; Johnson *v.* Patterson, 2 Woods (U. S.) 443, 13 Fed. Cas. No. 7,403. See also Wardlaw *v.* Mayer, 77 Ga. 620, as to what description is necessary to cover goods within this statute.

15. *Illinois.*— Rhines *v.* Phelps, 8 Ill. 455.

Maine.— Chapin *v.* Cram, 40 Me. 561.

Maryland.— "All renewals of and substitutions for" (Baltimore First Nat. Bank *v.* Lindenstruth, 79 Md. 136, 28 Atl. 807, 47 Am. St. Rep. 366; Hamilton *v.* Rogers, 8 Md. 301) and where the subsequently acquired goods were purchased with the proceeds of those mortgaged (Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170).

Massachusetts.—Moody *v.* Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Jones *v.* Richardson, 10 Metc. (Mass.) 481. *Compare* Barnard *v.* Eaton, 2 Cush. (Mass.) 294, where the mortgage of a stock of goods provided that until default the mortgagor could make sales thereof, substituting other goods in their place, which should be subject to the same lien. The court held that the mortgage could not apply to goods not in existence when the mortgage was made, or not capable of being identified, or to goods purchased to replace those sold.

Missouri.— St. Louis Drug Co. *v.* Dart, 7 Mo. App. 590.

North Carolina.—Sharpe *v.* Pearce, 74 N. C. 600.

Rhode Island.—Williams *v.* Briggs, 11 R. I. 476, 23 Am. Rep. 518.

Tennessee.— Phelps *v.* Murray, 2 Tenn. Ch. 746.

Vermont.— *Re* Allen, 65 Vt. 392, 26 Atl. 591.

England.— Lazarus *v.* Andrade, 5 C. P. D. 318, 44 J. P. 697, 49 L. J. C. P. 847, 43 L. T. Rep. N. S. 30, 29 Wkly. Rep. 15.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 64, 206.

Substitution or exchange of the property by the parties to the mortgage cannot be made as against third persons unless the mortgagee takes possession before their rights intervene (Simmons *v.* Jenkins, 76 Ill. 479; Titus *v.* Mabee, 25 Ill. 257; Hunt *v.* Bullock, 23 Ill. 320; Davis *v.* Ransom, 18 Ill. 396; Bell *v.* Shrieve, 14 Ill. 462; Rhines *v.* Phelps, 8 Ill. 455; Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603; Powers *v.* Freeman, 2 Lans.

c. Potential Interests — (I) *Generally.* Where the mortgagor has a potential interest in the article to be produced or to be acquired in the future, the general rule is that he may mortgage it.[16] Thus he may mortgage future earnings or wages if he has a present contract whereby he expects to obtain them, whereas without such a contract an assignment thereof would be bad,[17] and a mortgage of present property will carry future property which is incident thereto;[18] but there must be a present interest and a mere hope or expectancy is not sufficient.[19]

(II) *Applications of Rule* — (A) *Crops* — (1) When Growing. The most frequent example of a mortgage of property in which the mortgagor has a potential interest is the mortgage of crops; and it is the almost universal rule that a mortgage of growing crops is valid;[20] and a crop is held to be a growing

(N. Y.) 127); but as between the parties themselves other property may be substituted for that included in the mortgage (Simmons *v.* Jenkins, 76 Ill. 479; Bell *v.* Shrieve, 14 Ill. 462).

Furniture is treated the same as stock in trade.— Thus, where a mortgage of furniture in a coffee-house contained a stipulation that if any of it should be sold and other property purchased in its place the latter should be subject to the same lien and the mortgagor would execute a new mortgage, this provision was held not to bind after-acquired property. Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395; Codman *v.* Freeman, 3 Cush. (Mass.) 306.

Burden of proof.— The burden is on the mortgagee to prove that the property was in the store when the mortgage was executed. Hamilton *v.* Rogers, 8 Md. 301. But see Preston *v.* Leighton, 6 Md. 88, holding that where a mortgage was given to A of a stock in trade with all additions thereto, and a third person later tortiously took possession of what property there was on hand, the burden was on him to show what portion of the goods on hand when the mortgage was executed passed into his hands.

16. Grantham *v.* Hawley, Hob. 186.

17. Purcell *v.* Mather, 35 Ala. 570, 76 Am. Dec. 307; Payne *v.* Mobile, 4 Ala. 333, 37 Am. Dec. 744; Stowell *v.* Bair, 5 Ill. App. 104; McArthur *v.* Garman, 71 Iowa 34, 32 N. W. 14; Lormer *v.* Allyn, 64 Iowa 725, 21 N. W. 149; Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357; Hartley *v.* Tapley, 2 Gray (Mass.) 565; Mulhall *v.* Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414.

A seaman entitled to a lay or share in the profits of a whaling voyage may make a valid mortgage thereof. Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357; Tripp *v.* Brownell, 12 Cush. (Mass.) 376; Gardner *v.* Hoeg, 18 Pick. (Mass.) 168.

18. Kribbs *v.* Alford, 9 N. Y. St. 617, where a mortgage of rights under a lease of lands, together with the oil wells, machinery, etc., thereon and those to be placed thereon was held valid as to the future oil wells put down by assignees of the lease.

Forage for cattle has been held to pass as an incident to the cattle it was to feed. Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31, construing Kansas law.

19. Paden *v.* Bellenger, 87 Ala. 575, 6 So. 351; Skipper *v.* Stokes, 42 Ala. 255, 94 Am. Dec. 646; Purcell *v.* Mather, 35 Ala. 570, 76 Am. Dec. 307. But see Sandwich Mfg. Co. *v.* Robinson, 83 Iowa 567, 49 N. W. 1031, 14 L. R. A. 126 [*citing* Jessup *v.* Bridge, 11 Iowa 572, 79 Am. Dec. 513]; Dunham *v.* Isett, 15 Iowa 284, where the doctrine has been modified to the extent of allowing mortgages of future earnings in the absence of the present contract. *Compare* McNeeley *v.* Welz, 20 N. Y. App. Div. 566, 47 N. Y. Suppl. 310, where a chattel mortgage included among other things the mortgagor's right, title, and interest "to a license to sell beer or to a renewal thereof," and it was held that this covered a liquor-tax certificate subsequently obtained by him under a law which did not go into effect until after the execution of the mortgage.

An account to be created in the future by a regular customer of a blacksmith, where the customer is under no obligation to trade with him, cannot be mortgaged. Purcell *v.* Mather, 35 Ala. 570, 76 Am. Dec. 307.

A fisherman has no potential interest in the fish he expects to catch, even though he owns a schooner and is about to start on a fishing voyage (Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357), so that a mere expectation to go on a sailing voyage will not justify a mortgage of the expected earnings (Cooper *v.* Douglass, 44 Barb. (N. Y.) 409). See also Robinson *v.* Macdonnell, 5 M. & S. 228, holding that the assignment of the freight and earnings of a ship fitted out for the whale fishery gives no rights at law to the oil obtained in a subsequent voyage.

20. *Alabama.*— Hamilton *v.* Maas, 77 Ala. 283; Boswell *v.* Carlisle, 70 Ala. 244; Booker *v.* Jones, 55 Ala. 266; Lehman *v.* Marshall, 47 Ala. 362; Robinson *v.* Mauldin, 11 Ala. 977; Adams *v.* Tanner, 5 Ala. 740.

Arkansas.— Robinson *v.* Kruse, 29 Ark. 575.

California.— Wilkerson *v.* Thorp, 128 Cal. 221, 60 Pac. 679. It is expressly provided by Cal. Civ. Code, § 2955 *et seq.*, that growing crops may be mortgaged, and it has been held that the manner provided by the statute is intended to be exclusive of other modes. Simpson *v.* Ferguson, 112 Cal. 180, 40 Pac. 104, 44 Pac. 484, 53 Am. St. Rep. 201.

Georgia.— Stephens *v.* Tucker, 55 Ga. 543, 58 Ga. 391. But see Stokes *v.* Hollis, 43 Ga. 262, where it was held that a mortgage of a growing crop of cotton does not pass any title or right of possession sufficient to authorize

one from the time when the seed is placed in the ground.[21] The mortgage lien attaches to the crops while growing and continues even after they have been gathered and removed from the land;[22] and, it has been held, follows the proceeds after a sale thereof.[23]

(2) When Unplanted. Where a mortgage is given on crops, the seeds to produce which have not been sown, it is held in some jurisdictions that the mortgage is void as being a mortgage on future property;[24] but in most cases such mortgages are upheld either by force of express legislative enactment[25] or on the

the mortgagee to bring trover for the recovery of the cotton.

Mississippi.— Cayce *v.* Stovall, 50 Miss. 396.

North Carolina.— Rawlings *v.* Hunt, 90 N. C. 270; Robinson *v.* Ezzell, 72 N. C. 231.

South Carolina.— Moore *v.* Byrum, 10 S. C. 452, 30 Am. Rep. 58.

Tennessee.— Williamson *v.* Steele, 3 Lea (Tenn.) 527, 31 Am. Rep. 652.

Texas.— Cook *v.* Steel, 42 Tex. 53.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 59.

The mortgagee's right is a legal one and after maturity of the mortgage he can maintain trover against the owner of the land who takes possession of the crop and converts it for rent (Robinson *v.* Kruse, 29 Ark. 575); or against a third person (White *v.* Pulley, 27 Fed. 436). See also Hamilton *v.* Maas, 77 Ala. 283, where it was held that the mortgagee could, in an action on the case, recover from the landlord who seized and sold the crops for his prior lien for rent, having notice of the mortgage, the excess of the proceeds over the claim of the landlord.

Until default the mortgagee of a growing crop has no such right of possession as to enable him to maintain trespass against an attaching creditor of the mortgagor. Boswell *v.* Carlisle, 70 Ala. 244.

21. *Alabama.*—Wilkinson *v.* Ketler, 69 Ala. 435.

Illinois.— Hansen *v.* Dennison, 7 Ill. App. 73.

Kentucky.— Hutchinson *v.* Ford, 9 Bush (Ky.) 318, 15 Am. Rep. 711.

New Hampshire.— Cudworth *v.* Scott, 41 N. H. 456.

New York.— Nestell *v.* Hewitt, 19 Abb. N. Cas. (N. Y.) 282.

North Carolina.— Cotten *v.* Willoughby, 83 N. C. 75, 35 Am. Rep. 564.

Contra, Lamson *v.* Moffat, 61 Wis. 153, 21 N. W. 62; Comstock *v.* Scales, 7 Wis. 159.

22. Rider *v.* Edgar, 54 Cal. 127; Keel *v.* Levy, 19 Oreg. 450, 24 Pac. 253.

23. Keel *v.* Levy, 19 Oreg. 450, 24 Pac. 253. But see Quiriaque *v.* Dennis, 24 Cal. 154, holding that delivery to the mortgagee is, as against subsequent purchasers, necessary after harvesting.

In California, by Cal. Civ. Code, § 2972, the lien continues so long as the crops remain on the land of the mortgagor, whether in their original state or converted into another product, but no longer, and the lien is extinguished by their removal from the land (Horgan *v.* Zanetta, 107 Cal. 27, 40 Pac. 22; Waterman *v.* Green, 59 Cal. 142); but the lien is not destroyed by the tortious removal by a third person, and the mortgagee may maintain an action against such person for conversion (Wilson *v.* Prouty, 70 Cal. 196, 11 Pac. 608).

24. *Alabama.*— Whittleshoffer *v.* Strauss, 83 Ala. 517, 3 So. 524; Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747; Marks *v.* Robinson, 82 Ala. 69, 2 So. 292; Hurst *v.* Bell, 72 Ala. 336; Columbus Iron Works Co. *v.* Renfro, 71 Ala. 577; Wilkinson *v.* Ketler, 69 Ala. 435; Seay *v.* McCormick, 68 Ala. 549; Elmore *v.* Simon, 67 Ala. 526; Grant *v.* Steiner, 65 Ala. 499; Rees *v.* Coats, 65 Ala. 256.

Georgia.— Redd *v.* Burrus, 58 Ga. 574.

Illinois.— Stowell *v.* Bair, 5 Ill. App. 104.

Kentucky.— Vinson *v.* Hallowell, 10 Bush (Ky.) 538. Unless it was sown before the mortgage was made. Hutchinson *v.* Ford, 9 Bush (Ky.) 318, 15 Am. Rep. 711.

Maine.— Shaw *v.* Gilmore, 81 Me. 396, 17 Atl. 314.

Wisconsin.— Merchants', etc., Sav. Bank *v.* Lovejoy, 84 Wis. 601, 55 N. W. 108.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 60.

25. *Alabama.*— By Ala. Acts (1889), p. 45 (Ala. Code, § 1064), the mortgage of an unplanted crop made on or after January 1 of the year in which it is to be grown conveys the legal title thereto as though already planted. Under this statute D, owner of land, mortgaged crops to P on January 4. On March 28 D deeded to A, who thereupon rented back to D, taking D's note for rent. It was held that P's mortgage was superior to the landlord's lien for rent, since A bought subject to the mortgage and with constructive notice thereof. Shows *v.* Brantley, 127 Ala. 352, 28 So. 716.

Arkansas.— Lambeth *v.* Ponder, 33 Ark. 707; Bell *v.* Radcliff, 32 Ark. 645; Jarratt *v.* McDaniel, 32 Ark. 598. But see Roberts *v.* Jacks, 31 Ark. 597, 25 Am. Rep. 584; Tomlinson *v.* Greenfield, 31 Ark. 557; Hamlett *v.* Tallman, 30 Ark. 505, which hold that, prior to act of Feb. 11, 1875, mortgages on unplanted crops were void.

Dakota.— Under Dak. Comp. Laws, § 4328, providing that an agreement might be made to create a lien on property not yet in existence, in which case the lien attached when the party agreeing to give it acquired an interest in the property, a mortgage on crops not yet planted was valid. Grand Forks Nat. Bank *v.* Minnesota, etc., Elevator Co., 6 Dak. 357, 43 N. W. 806. But see Bouton *v.* Haggart, 6 Dak. 32, 50 N. W. 197, holding that a mortgage of fu-

theory that the crop has a potential existence sufficient to give the mortgage validity.[26]

ture crops was not good against one to whom the mortgagor granted the land before the crops were planted, even though he had knowledge thereof.

Idaho.— Pierce *v.* Langdon, 2 Ida. 878, 28 Pac. 401, where, under a statute, it was held that the mortgagee's lien was superior to the rights of a subsequent sublessee of the mortgagor.

Mississippi.—Stadeker *v.* Loeb, 67 Miss. 200, 6 So. 687; McCown *v.* Mayer, 65 Miss. 537, 5 So. 98; Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682; White *v.* Thomas, 52 Miss. 49. Under Act of Feb. 18, 1867, § 7, crops to be produced within fifteen months could be mortgaged. Betts *v.* Ratliff, 50 Miss. 561. See also White *v.* Thomas, 52 Miss. 49, holding that as mortgages of future property were valid between the parties, the fact that the crops were not produced within fifteen months did not prevent their becoming subject to the operation of the contract as between the parties, when they came into being.

New Hampshire.— By N. H. Rev. Stat. (1891), c. 140, § 1, a mortgage of future crops is good, but at common law before the statute the opposite rule prevailed. Cudworth *v.* Scott, 41 N. H. 456.

North Carolina.— Brown *v.* Miller, 108 N. C. 395, 13 S. E. 167; Rountree *v.* Britt, 94 N. C. 104; Atkinson *v.* Graves, 91 N. C. 99; Rawlings *v.* Hunt, 90 N. C. 270; Harris *v.* Jones, 83 N. C. 317; Womble *v.* Leach, 83 N. C. 84; Cotten *v.* Willoughby, 83 N. C. 75, 35 Am. Rep. 564; Robinson *v.* Ezzell, 72 N. C. 231. Such a mortgage, however, is valid only as to crops planted within the year next succeeding the mortgage. Loftin *v.* Hines, 107 N. C. 360, 12 S. E. 197, 10 L. R. A. 490; Smith *v.* Coor, 104 N. C. 139, 10 S. E. 466; State *v.* Garris, 98 N. C. 733, 4 S. E. 633; Wooten *v.* Hill, 98 N. C. 48, 3 S. E. 846. See also Taylor *v.* Hodges, 105 N. C. 344, 11 S. E. 156, where it was held that a mortgage executed April 30, 1887, would convey a valid title to the crops grown in the year 1887.

North Dakota.— Hostetter *v.* Brooks Elevator Co., 4 N. D. 357, 61 N. W. 49; Merchants' Nat. Bank *v.* Mann, 2 N. D. 456, 51 N. W. 946. By N. D. Rev. Codes, § 4681, mortgages on crops attach only to crops next maturing after the delivery of the mortgage, the intention being to prevent mortgages on crops to be grown for an indefinite number of years. Schweinber *v.* Great Western Elevator Co., 9 N. D. 113, 81 N. W. 35.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 60.

26. *California.*— Wilkerson *v.* Thorp, 128 Cal. 221, 60 Pac. 679; Arques *v.* Wasson, 51 Cal. 620, 21 Am. Rep. 718. And the rule holds whether the mortgage is to secure existing or future indebtedness. Lemon *v.* Wolff, 121 Cal. 272, 53 Pac. 801.

Iowa.— Norris *v.* Hix, 74 Iowa 524, 38 N. W. 395; Wheeler *v.* Becker, 68 Iowa 723, 28 N. W. 40; Brown *v.* Allen, 35 Iowa 306; Scharfenburg *v.* Bishop, 35 Iowa 60. But see McMaster *v.* Emerson, 109 Iowa 284, 80 N. W. 389, where the court held that the crops must come into existence and be acquired by the mortgagor before the lien attaches; and consequently, where the mortgagor before planting the crops leased the land to a third person, the mortgagee had no lien on the crops raised by such lessee.

Minnesota.— Hogan *v.* Atlantic Elevator Co., 66 Minn. 344, 69 N. W. 1; Walter A. Wood Mowing, etc., Mach. Co. *v.* Minneapolis, etc., Elevator Co., 48 Minn. 404, 51 N. W. 378; Ambuehl *v.* Matthews, 41 Minn. 537, 43 N. W. 477; Ludlum *v.* Rothschild, 41 Minn. 218, 43 N. W. 137; Miller *v.* McCormick Harvesting Mach. Co., 35 Minn. 399, 29 N. W. 52; Minnesota Linseed Oil Co. *v.* Maginnis, 32 Minn. 193, 20 N. W. 85. But see Simmons *v.* Anderson, 44 Minn. 487, 47 N. W. 52, holding that a mortgage on crops not yet sown attaches only to such interest as the mortgagor has in the crops when they come into being. At present by statute (Minn. Gen. Stat. (1894), § 4154) mortgages of unplanted crops more than one year before the seed shall be sown are forbidden and void, unless such mortgage shall be given to secure the purchase-price of the land upon which the crops are planted. Under this statute a mortgage executed August 15 of the crops to be grown the next year is good. Plano Mfg. Co. *v.* Hallberg, 61 Minn. 528, 63 N. W. 1114.

Missouri.— Swinney *v.* Gouty, 83 Mo. App. 549, where the court held that the mortgage created an equitable lien sufficient to enable the mortgagee to maintain an action for conversion against one who bought the crop with knowledge of the mortgage, since in Missouri law and equity are administered in the same court and under the same form of action.

Nebraska.—Gandy *v.* Dewey, 28 Nebr. 175, 44 N. W. 106. But see Cole *v.* Kerr, 19 Nebr. 553, 26 N. W. 598, holding that such a mortgage is good between the parties but not as against third parties until the mortgagee takes possession.

New Jersey.— Cumberland Nat. Bank *v.* Baker, 57 N. J. Eq. 231, 40 Atl. 850.

New York.— Andrew *v.* Newcomb, 32 N. Y. 417; Harder *v.* Plass, 57 Hun (N. Y.) 540, 11 N. Y. Suppl. 226, 33 N. Y. St. 186; Smith *v.* Taber, 46 Hun (N. Y.) 313; Conderman *v.* Smith, 41 Barb. (N. Y.) 404; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9; Wood *v.* Lester, 29 Barb. (N. Y.) 145; Nestell *v.* Hewitt, 19 Abb. N. Cas. (N. Y.) 282. But see Rochester Distilling Co. *v.* Rasey, 142 N. Y. 570, 37 N. E. 632, 60 N. Y. St. 284, 40 Am. St. Rep. 635 [*affirming* 65 Hun (N. Y.) 512, 20 N. Y. Suppl. 583, 48 N. Y. St. 301], holding that a mortgage on future crops is void against a subsequent purchaser at an execution sale; and Cressey *v.* Sabre, 17 Hun (N. Y.) 120, holding a mortgage on a crop not planted invalid at law against a purchaser after it was gathered.

(3) Ownership of Land on Which Crop Is Raised — (a) In General. A mortgage of crops to be grown on land in which the mortgagor has no interest at the time of executing the mortgage is void,[27] but on the other hand it is not necessary that the mortgagor have an absolute title to the land. A person in possession as purchaser, but who has not yet paid the purchase-price, and consequently has only an equitable interest therein,[28] or a mortgagor of land after condition broken,[29] may either of them give a valid mortgage of the crops thereon.

(b) Leased Lands — aa. *Generally.* A landlord has no such interest in or title to crops grown on the rented land as can be made the subject of a valid chattel mortgage;[30] but a lessee of land whose term has commenced[31] has such an interest therein as will enable him to make a valid chattel mortgage of the crops to be grown thereon.[32] The right of a tenant to mortgage the crops depends upon the continuance of the lease, and hence if he mortgages crops to be grown at a later time than that for which he has hired the premises,[33] or if the lease is terminated before the crops are sown,[34] the mortgage is void; but if the crops are growing when the lease expires the mortgagee may have them.[35]

bb. *Land Cultivated on Shares.* Where the terms of a lease of land provide that the landlord shall receive a portion of the crop grown by the tenant as rent for the use of the demised premises it is ordinarily true that either the landlord[36] or the

South Dakota.— Meyer *v.* Davenport Elevator Co., 12 S. D. 172, 80 N. W. 189, where, however, defendant had actual notice of plaintiff's mortgage.

Tennessee.— Watkins *v.* Wyatt, 9 Baxt. (Tenn.) 250, 30 Am. Rep. 63 note, 40 Am. Rep. 90; Polk *v.* Foster, 7 Baxt. (Tenn.) 98.

Texas.—Silberberg *v.* Trilling, 82 Tex. 523, 18 S. W. 591; Willis *v.* Moore, 59 Tex. 628, 46 Am. Rep. 284; League *v.* Sanger, (Tex. Civ. App. 1901) 60 S. W. 898; Dupree *v.* McClanahan, 1 Tex. App. Civ. Cas. § 594.

United States.— Butt *v.* Ellett, 19 Wall. (U. S.) 544, 22 L. ed. 183 [*affirming* 1 Woods (U. S.) 214, 8 Fed. Cas. No. 4,384]; Senter *v.* Mitchell, 5 McCrary (U. S.) 147, 16 Fed. 206.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 60.

27. Paden *v.* Bellenger, 87 Ala. 575, 6 So. 351, where a mortgage on crops "to be grown in the year 1887, on my own land, or any other land in Etowah county" was held invalid as to lands in which the mortgagor had at the time no interest.

A mortgage of crops by one tenant in common of the crop passes only his interest. Keyser *v.* Maas, 111 Ala. 390, 21 So. 346. But see Holst *v.* Harmon, 122 Ala. 453, 26 So. 157, where a mortgage of crops was held to include crops grown by the mortgagor and his sister who was a member of his family and subsisted on supplies furnished by the mortgagee under the mortgage.

A mortgage by a father is superior to a subsequent mortgage by his minor son, given without consent or ratification of the father, on a crop which he assisted in raising in the same year on the same land. Cobb *v.* Daniel, 105 Ala. 335, 16 So. 882.

Whether one having a license to cut timber can mortgage it before it is cut *quære.* Sheldon *v.* Conner, 48 Me. 584, where the court were divided.

28. Russell *v.* Stevens, 70 Miss. 685, 12 So. 830; Stadeker *v.* Loeb, 67 Miss. 200, 6 So. 687.

Equitable title.— A mortgage of the crops by a purchaser of land to secure the purchase-price thereof is good against a subsequent purchaser from the mortgagor, notwithstanding the land is misdescribed in the deed. Fields *v.* Karter, 121 Ala. 329, 25 So. 800.

29. Kimball *v.* Sattley, 55 Vt. 285, 45 Am. Rep. 614.

30. Woolsey *v.* Jones, 84 Ala. 88, 4 So. 190; Broughton *v.* Powell, 52 Ala. 123; Hamilton *v.* Duty, 41 Ark. 414; Knaehel *v.* Wilson, 92 Iowa 536, 61 N. W. 178.

31. Before commencement of his term the lessee cannot mortgage the grass or crops to be grown on the granted premises. Page *v.* Larrowe, 22 N. Y. Suppl. 1099, 51 N. Y. St. 35.

32. *Alabama.*— Jones *v.* Webster, 48 Ala. 109, holding that the tenant of a farm on a three-years' lease may lawfully mortgage the crops to be grown during the term as security for the rent.

California.— Arques *v.* Wasson, 51 Cal. 620, 21 Am. Rep. 718.

Indiana.— Headrick *v.* Brattain, 63 Ind. 438.

Mississippi.— Everman *v.* Robb, 52 Miss. 653, 24 Am. Dec. 682.

New York.— Jencks *v.* Smith, 1 N. Y. 90.

Pennsylvania.— Fry *v.* Miller, 45 Pa. St. 441.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 58.

33. Brown *v.* Bolt, 116 Mich. 52, 74 N. W. 295.

34. Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340.

35. Fry *v.* Miller, 45 Pa. St. 441.

36. Riddle *v.* Dow, 98 Iowa 7, 66 N. W. 1066, 32 L. R. A. 811; Potts *v.* Newell, 22

tenant[37] may mortgage his interest therein before division. The tenant, however, can mortgage only his interest in the crop,[38] and consequently where by virtue of the contract of hiring,[39] or of some other event,[40] he acquires no title to any part of the crop, a mortgage thereof conveys nothing.

(B) *Increase of Animals.* The unborn offspring of domestic animals may properly be mortgaged along with the females which give them birth,[41] and a mortgage on the increase has been held valid, although the mother was not included therein;[42] but as against a purchaser without actual or constructive

Minn. 561 (where the landlord was to have one third the crop at the machine when threshed, and it was held that he could mortgage his interest in a certain crop, and that when the division was made title would vest in the mortgagee).

37. Beard *v.* State, 43 Ark. 284; Yates *v.* Kinney, 19 Nebr. 275, 27 N. W. 132. But see Chase *v.* McDonnell, 24 Ill. 236, where, under an agreement that the tenant should occupy the land, harvest the crops, and deliver one half to the landlord, keeping the other half for himself, it was held that he had no mortgageable interest in any part of the crop until he had performed his part of the agreement.

Effect of crop-sharing agreement on prior mortgage.—Where a mortgagor gave a mortgage on crops to be sown in the future, and then contracted with D to raise them, D to have two thirds of the crops for his labor, although title was to remain in the mortgagor until division, it was held that the mortgage did not attach to D's share. Christianson *v.* Nelson, 76 Minn. 36, 78 N. W. 875, 79 N. W. 647.

In Arkansas, under Mansfield Dig. Ark. § 4452, it has been held that where land is rented for a share in the crop the tenant or laborer may mortgage or dispose of his share as he will, independently of the landlord's consent. Parks *v.* Webb, 48 Ark. 293, 3 S. W. 521.

38. Sunol *v.* Molloy, 63 Cal. 369, where it was held that under a mortgage by a tenant the mortgagee got no title to the landlord's share of the crop and if he converted the whole thereof to his own use he was liable to the landlord for his share.

Where a lease provides that the hay is to be spent on the farm a mortgage thereof by the lessee gives the mortgagee no right to remove it. Jewell *v.* Woodman, 59 N. H. 520.

39. **Where the title to the whole crop remains in the lessor, who is to convert it into cash** and pay a portion of the net proceeds to the lessee, the latter has no mortgageable interest in the crop. Edelen *v.* Strong, 34 Mo. App. 287; Meacham *v.* Herndon, 86 Tenn. 366, 6 S. W. 741.

Where the title to the whole crop is to remain in the landlord until it is divided, no title passes to the tenant's mortgagee if no division takes place. Bidgood *v.* Monarch Elevator Co., 9 N. D. 627, 84 N. W. 561, 81 Am. St. Rep. 604; Larchwood Sav. Bank *v.* Canfield, 12 S. D. 330, 81 N. W. 630.

Where title to the crops is to remain in the landlord until certain advances are paid the tenant has no mortgageable interest therein until such advances are paid. Sentell *v.* Moore, 34 Ark. 687; Ponder *v.* Rhea, 32 Ark. 435; Sing Chong *v.* Hutchinson Plantation Co., 5 Hawaii 452; Hawkins *v.* Beakes, 80 Hun (N. Y.) 292, 30 N. Y. Suppl. 91, 61 N. Y. St. 830; Booher *v.* Stewart, 75 Hun (N. Y.) 214, 27 N. Y. Suppl. 114, 58 N. Y. St. 666, 31 Abb. N. Cas. (N. Y.) 224. *Compare* Wilkinson *v.* Ketler, 69 Ala. 435, where a reservation to the landlord in a parol contract of renting of the right to sell the crops to pay for advances by him was held to create merely a lien or parol mortgage conveying no legal title, and did not prevent the tenant from mortgaging the crops.

40. **Abandonment of the premises** by a tenant on shares before the crop is complete forfeits his claim thereto, and hence a chattel mortgage given by him in advance to pay for supplies conveys nothing. Beacom *v.* Boing, 126 N. C. 136, 35 S. E. 250.

If the tenant's right to the crops depends upon performance by him of all the terms of the lease a breach thereof will make void a mortgage previously given by him. Hawk *v.* Konouzki, 10 N. D. 37, 84 N. W. 563.

41. *Illinois.*— Gundy *v.* Biteler, 6 Ill. App. 510.

Iowa.— Thompson *v.* Anderson, 94 Iowa 554, 63 N. W. 355; Rogers *v.* Highland, 69 Iowa 504, 29 N. W. 429, 58 Am. Rep. 230.

Kansas.— Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145.

Kentucky.— Forman *v.* Proctor, 9 B. Mon. (Ky.) 124; Hughes *v.* Graves, 1 Litt. (Ky.) 317.

Maryland.— Cahoon *v.* Miers, 67 Md. 573, 11 Atl. 278; Evans *v.* Merriken, 8 Gill & J. (Md.) 39.

Mississippi.— Packwood *v.* William Atkinson, etc., Co., 79 Miss. 646, 31 So. 337.

New Hampshire.— Darling *v.* Wilson, 60 N. H. 59, 49 Am. Rep. 305.

North Carolina.—Fonville *v.* Casey, 5 N. C. 389, 4 Am. Dec. 559.

Tennessee.— McCarty *v.* Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262.

Canada.— Nicholson *v.* Temple, 20 N. Brunsw. 248.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 204.

Offspring not yet begotten.— It has been held that animals which have been neither littered nor conceived are without actual or potential being and hence cannot be mortgaged. Battle Creek Valley Bank *v.* Madison First Nat. Bank, (Nebr. 1901) 88 N. W. 145.

42. Sawyer *v.* Gerrish, 70 Me. 254, 35 Am. Rep. 323; Farrar *v.* Smith, 64 Me. 74; Oakes

knowledge of the mortgage the lien does not continue after a suitable period of nurture has elapsed.[43]

(c) *Product of Existing Chattels.* Where the future-acquired property consists of the product of present property belonging to the mortgagor, as the wool growing on the back of a sheep,[44] the produce of a dairy or farm,[45] the profits or earnings arising out of a steamboat or other chattel,[46] or the product of raw material,[47] the mortgage will take effect upon the property as soon as it comes into existence and will be perfectly binding at law.[48]

(d) *Property Subsequently Severed From the Realty.* It has been held that growing trees, fruit, grass, and shrubs, although unlike crops and other yearly products of the soil in that they are a part of the realty until severed therefrom, may nevertheless be conveyed by a chattel mortgage, the mortgage working a severance;[49] but this rule has not been applied to such articles as are parts of the

v. Moore, 24 Me. 214, 41 Am. Dec. 379; Moore *v.* Byrum, 10 S. C. 452, 30 Am. Rep. 58.

43. *Iowa.*— Winter *v.* Landphere, 42 Iowa 471.

Mississippi.— Packwood *v.* William Atkinson, etc., Co., 79 Miss. 646, 31 So. 337.

Missouri.— Rogers *v.* Gage, 59 Mo. App. 107.

New Hampshire.— Darling *v.* Wilson, 60 N. H. 59, 49 Am. Rep. 305, where a colt of the age of two years was held beyond the period of nurture.

Vermont.— Enright *v.* Dodge, 64 Vt. 502, 24 Atl. 768.

Wisconsin.— Funk *v.* Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576.

United States.— Cox *v.* Beck, 83 Fed. 269.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 204.

What constitutes notice of mortgagee's lien.— Where a duly recorded mortgage of a mare describes her as "in foal," a purchaser of the colt, when six months old and still following the mare, was held to take with notice of the mortgagee's lien and therefore subject to it. Edmonston *v.* Wilson, 49 Mo. App. 491.

Possession by the mortgagee before the period of nurture has passed will give him a valid title. Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309.

Mortgagee must select before it becomes impossible to identify the young by reason of separation from their mothers where the mortgage covers a stated number of animals of a larger herd and their offspring. Avery *v.* Popper, (Tex. 1898) 48 S. W. 572.

Reason for rule.— This qualification of the mortgagee's rights is apparently due to the fact that a recorded mortgage describing a female animal cannot possibly serve to inform an honest purchaser of the existence of any lien on offspring which has ceased to follow it. Meyer *v.* Cook, 85 Ala. 417, 5 So. 147.

A mortgage of the increase of slaves was held to be governed by the same principles. Hughes *v.* Graves, 1 Litt. (Ky.) 317; Evans *v.* Merriken, 8 Gill & J. (Md.) 39; Turnbull *v.* Middleton, Walk. (Miss.) 413.

44. Conderman *v.* Smith, 41 Barb. (N. Y.) 404; Hobbs *v.* Big Springs First Nat. Bank, 15 Tex. Civ. App. 398, 39 S. W. 331; Alferitz *v.* Ingalls, 83 Fed. 964.

45. Dairy products.—A mortgage on cows and their milk and the product thereof at the dairies where it may be made up is valid as to the dairy products. Betsinger *v.* Schuyler, 46 Hun (N. Y.) 349.

46. Stewart *v.* Fry, 3 Ala. 573; Sandwich Mfg. Co. *v.* Robinson, 83 Iowa 567, 49 N. W. 1031, 14 L. R. A. 126; Brown *v.* Dail, 117 N. C. 41, 23 S. E. 45; Sykes *v.* Hannawalt, 5 N. D. 335, 65 N. W. 682. But see McArthur *v.* Garman, 71 Iowa 34, 32 N. W. 14 [*following* Lormer *v.* Allyn, 64 Iowa 725, 21 N. W. 149], holding that the mortgage of a horse, covering "all earnings of the horse, whether by premiums or otherwise" would not extend to premiums earned after the execution of the mortgage.

47. Frank *v.* Playter, 73 Mo. 672.

48. Conderman *v.* Smith, 41 Barb. (N. Y.) 404.

49. Growing trees may be mortgaged as personalty. Douglas *v.* Shumway, 13 Gray (Mass.) 498; Claflin *v.* Carpenter, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318. *Compare* Wood *v.* Lester, 29 Barb. (N. Y.) 145, where a mortgage provided that the mortgagee should have a lien on all the wood cut on the land and that the mortgagor should from time to time execute such chattel mortgages as should be necessary to protect the same, and it was held that although the agreement could not take effect until the wood should be cut and severed from the realty, it attached instantly and could be enforced against the mortgagor and all persons claiming under him with notice.

Hay to be grown from roots already in the ground has a potential existence and is the proper subject of a mortgage. Nestell *v.* Hewitt, 19 Abb. N. Cas. (N. Y.) 282.

Plants and shrubs may be mortgaged and so it was held that a nursery stock, consisting of trees, shrubs, etc., planted for the purpose of trade, was personal property and that a chattel mortgage thereof worked a severance and was valid. Duffus *v.* Bangs, 122 N. Y. 423, 25 N. E. 980, 34 N. Y. St. 222 [*affirming* 43 Hun (N. Y.) 52]. See also Wintermute *v.* Light, 46 Barb. (N. Y.) 278, holding that wine plants could be mortgaged.

soil itself, such as clay for the making of bricks and ores that have not been mined.[50]

d. Ratification. Although a mortgage of future chattels is void at law, yet if the mortgagor after acquiring possession does some new act in furtherance of the original grant, showing an intention to have the property pass thereby, the mortgage becomes valid;[51] and an actual[52] transfer of possession to the mortgagee, either by voluntary delivery from the mortgagor or by the exercise of a power to take possession contained in the mortgage, is such a new act as will constitute a ratification of the mortgage.[53] Where the mortgagor receives a discharge in

50. Bricks and clay.— Where a mortgage was given of the clay in a bank and the bricks to be manufactured therefrom, the clay then being in its natural state and not set apart in any manner, it was held that the mortgagee had no lien on bricks subsequently manufactured as against one who purchased them after they were manufactured. T. B. Townsend Brick, etc., Co. *v.* Allen, 62 Kan. 311, 62 Pac. 1008, 84 Am. St. Rep. 388, 52 L. R. A. 323.

A mortgage on ores to be mined does not attach until the ore is actually mined. Galloway *v.* Blue Springs Min. Co., (Tenn. Ch. 1896) 37 S. W. 1016.

51. Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395; Head *v.* Goodwin, 37 Me. 181; Jones *v.* Richardson, 10 Metc. (Mass.) 481; Cole *v.* Kerr, 19 Nebr. 553, 26 N. W. 598.

An indorsement on the mortgage after the subsequently acquired goods have come into the mortgagor's possession to the effect that they shall be covered by the mortgage has been held to be sufficient ratification. Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395; Brown *v.* Thompson, 59 Me. 372.

52. The change in possession must be actual, and where the mortgagor delivers the goods to the mortgagee, who immediately returns them, the mortgagor continuing to retain possession and control, no title will have passed as against attaching creditors. Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395. See also Columbus Iron Works Co. *v.* Renfro, 71 Ala. 577, where it was held that delivery of a crop after it was harvested to a railroad for transportation to the mortgagee was sufficient ratification.

53. *Alabama.*— Keith *v.* Ham, 89 Ala. 590, 7 So. 234; Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 347, 87 Ala. 163, 7 So. 91; Marks *v.* Robinson, 82 Ala. 69, 2 So. 292; Columbus Iron Works Co. *v.* Renfro, 71 Ala. 577; Burns *v.* Campbell, 71 Ala. 271; Mayer *v.* Taylor, 69 Ala. 403, 44 Am. Rep. 522; Stern *v.* Simpson, 62 Ala. 194; Booker *v.* Jones, 55 Ala. 266.

Connecticut.— Walker *v.* Vaughn, 33 Conn. 577; Rowan *v.* Sharps' Rifle Mfg. Co., 29 Conn. 282.

Illinois.— Gregg *v.* Sanford, 24 Ill. 17, 76 Am. Dec. 719; Pinkstaff *v.* Cochran, 58 Ill. App. 72; Tennis *v.* Midkiff, 55 Ill. App. 642; Roy *v.* Goings, 6 Ill. App. 162. But see Simmons *v.* Jenkins, 76 Ill. 479 [*following* Titus *v.* Mabee, 25 Ill. 257; Hunt *v.* Bullock, 23 Ill. 320], holding that the mortgagee's lien is only an equitable one.

Kansas.—Cameron *v.* Marvin, 26 Kan. 612; Falk *v.* Decou, 8 Kan. App. 765, 61 Pac. 760.

Maine.— Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395.

Massachusetts.— Bennett *v.* Bailey, 150 Mass. 257, 22 N. E. 916; Blanchard *v.* Cooke, 144 Mass. 207, 11 N. E. 83; Chase *v.* Denny, 130 Mass. 566; Mitchell *v.* Black, 6 Gray (Mass.) 100; Moody *v.* Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Rowley *v.* Rice, 11 Metc. (Mass.) 333; Carrington *v.* Smith, 8 Pick. (Mass.) 419; Butterfield *v.* Baker, 5 Pick. (Mass.) 522.

Michigan.— Fuller *v.* Rhodes, 78 Mich. 36, 43 N. W. 1085; Leland *v.* Collver, 34 Mich. 418.

Missouri.— Barton *v.* Sitlington, 128 Mo. 164, 30 S. W. 514; Keating *v.* Hannenkamp, 100 Mo. 161, 13 S. W. 89; Petring *v.* Chrisler, 90 Mo. 649, 3 S. W. 405; France *v.* Thomas, 86 Mo. 80; Gregory *v.* Tavenner, 38 Mo. App. 627; Thompson *v.* Foerstel, 10 Mo. App. 290.

New York.— McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Kennedy *v.* Watertown Nat. Union Bank, 23 Hun (N. Y.) 494; Brown *v.* Platt, 8 Bosw. (N. Y.) 324; Beebe *v.* Richmond Light, etc., Co., 13 Misc. (N. Y.) 737, 35 N. Y. Suppl. 1, 69 N. Y. St. 230.

Ohio.— Francisco *v.* Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711; Chapman *v.* Weimer, 4 Ohio St. 481; Brown *v.* Webb, 20 Ohio 389; Coe *v.* Peacock, 2 Ohio Dec. (Reprint) 239, 2 West. L. Month. 133.

Rhode Island.— Cook *v.* Corthell, 11 R. I. 482, 23 Am. Rep. 518; Williams *v.* Briggs, 11 R. I. 476, 23 Am. Rep. 518.

South Carolina.— Moore *v.* Byrum, 10 S. C. 452, 30 Am. Rep. 58.

Vermont.— McLoud *v.* Wakefield, 70 Vt. 558, 43 Atl. 179; Peabody *v.* Landon, 61 Vt. 318, 17 Atl. 781, 15 Am. St. Rep. 903.

Wisconsin.— Lamson *v.* Moffat, 61 Wis. 153, 21 N. W. 62; Morrow *v.* Reed, 30 Wis. 81; Oliver *v.* Town, 28 Wis. 328; Farmers' L. & T. Co. *v.* Commercial Bank, 11 Wis. 207; Chynoweth *v.* Tenney, 10 Wis. 397.

United States.— American Surety Co. *v.* Worcester Cycle Mfg. Co., 100 Fed. 40; Miller *v.* Jones, 15 Nat. Bankr. Reg. 150.

Revocability of power to take possession. — Where the power is coupled with an interest, as would be the case if it covered existing property which would of course pass under the mortgage, the license seems irrevocable (McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Wood *v.* Manley, 11 A. & E. 34, 3 Jur. 1028, 9 L. J. Q. B. 27, 3 P. & D. 5, 39 E. C. L. 43; Wood *v.* Ledbitter, 9 Jur.

bankruptcy, or makes an assignment for the benefit of his creditors before possession is taken by the mortgagee, the opportunity for completing the lien is gone.[54]

2. IN EQUITY. It is the settled American rule, following an early decision of Judge Story,[55] that a mortgage of future property, although invalid at law, is good in equity as against the mortgagor and all persons claiming through him, with notice, or voluntarily, or in bankruptcy, even if the mortgagee has not taken possession of the property and the mortgagor has done no new act to confirm the mortgage.[56] The mortgage operates as a contract to assign as soon as the mort-

187, 14 L. J. Exch. 161, 13 M. & W. 838); but it has been held that the license to take possession of mortgaged property is revocable, and therefore a seizure by the mortgagor by force and against the will of the mortgagee would not make the mortgage valid as to after-acquired property (Single *v.* Phelps, 20 Wis. 398; Chynoweth *v.* Tenney, 10 Wis. 397).

Mere taking of possession by the mortgagee has been held not to amount to a ratification and a delivery by the mortgagor has been regarded as essential. Jones *v.* Richardson, 10 Metc. (Mass.) 481.

The seizure of later-acquired goods is authorized by a mortgage covering future-acquired property when there are no intervening paramount rights. Leland *v.* Collver, 34 Mich. 418.

54. *Hawaii.*— Phillips *v.* McChesney, 8 Hawaii 289.

Illinois.— Gregg *v.* Sanford, 24 Ill. 17, 76 Am. Dec. 719.

Massachusetts.— Chase *v.* Denny, 130 Mass. 566; Moody *v.* Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706.

Missouri.— Thompson *v.* Foerstel, 10 Mo. App. 290.

New York.— McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644.

South Carolina.— Moore *v.* Byrum, 10 S. C. 452, 30 Am. Rep. 58.

England.—Thompson *v.* Cohen, L. R. 7 Q. B. 527, 41 L. J. Q. B. 221, 26 L. T. Rep. N. S. 693; Carr *v.* Acraman, 11 Exch. 566, 25 L. J. Exch. 90.

55. Mitchell *v.* Winslow, 2 Story (U. S.) 630, 644, 17 Fed. Cas. No. 9,673, 6 Law Rep. 347, where Judge Story laid down the following rule: "It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily, or with notice, or in bankruptcy."

56. *Alabama.*— Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Whitteshoffer *v.* Strauss, 83 Ala. 517, 3 So. 524; Leslie *v.* Hinson, 83 Ala. 266, 3 So. 443; Barnet *v.* Warren, 82 Ala. 557, 2 So. 457; Smith *v.* Fields, 79 Ala. 335; Hamilton *v.* Maas, 77 Ala. 283; Hurst *v.* Bell, 72 Ala. 336; Rees *v.* Coats, 65 Ala. 256; Floyd *v.* Morrow, 26 Ala. 353; Robinson *v.* Mauldin, 11 Ala. 977.

Arkansas.— Little Rock, etc., R. Co. *v.* Page, 35 Ark. 304; Driver *v.* Jenkins, 30 Ark. 120; Apperson *v.* Moore, 30 Ark. 56, 21 Am. Rep. 170. See also Lemay *v.* Johnson, 35 Ark. 225, where a mortgage on future crops in which the date had been left blank under an agreement to date and acknowledge it when the crops were planted was held enforceable in equity as of its actual date.

Dakota.— Grand Forks Nat. Bank *v.* Minneapolis, etc., Elevator Co., 6 Dak. 357, 43 N. W. 806.

Illinois.— Gregg *v.* Sanford, 24 Ill. 17, 76 Am. Dec. 719.

Iowa.— Wheeler *v.* Becker, 68 Iowa 723, 28 N. W. 40; Hughes *v.* Wheeler, 66 Iowa 641, 24 N. W. 251; Phillips *v.* Both, 58 Iowa 499, 12 N. W. 481; Stephens *v.* Pence, 56 Iowa 257, 9 N. W. 215; Fejavary *v.* Broesch, 52 Iowa 88, 2 N. W. 963, 35 Am. Rep. 261; Scharfenburg *v.* Bishop, 35 Iowa 60.

Maine.— Kelley *v.* Goodwin, 95 Me. 538, 50 Atl. 711; Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395.

Michigan.— Preston Nat. Bank *v.* George T. Smith Middlings Purifier Co., 84 Mich. 364, 47 N. W. 502.

Minnesota.— Ludlum *v.* Rothschild, 41 Minn. 218, 43 N. W. 137.

Mississippi.— Cayce *v.* Stovall, 50 Miss. 396; Sillers *v.* Lester, 48 Miss. 513.

Missouri.— Keating *v.* Hannenkamp, 100 Mo. 161, 13 S. W. 89; France *v.* Thomas, 86 Mo. 80; Rutherford *v.* Stewart, 79 Mo. 216; Wright *v.* Bircher, 72 Mo. 179, 37 Am. Rep. 433; Page *v.* Gardner, 20 Mo. 507; Littlefield *v.* Lemley, 75 Mo. App. 511; Scudder *v.* Bailey, 66 Mo. App. 40; Smith-Wallace Shoe Co. *v.* Wilson, 63 Mo. App. 326, 1 Mo. App. Rep. 749; Gregory *v.* Tavenner, 38 Mo. App. 627; Hall *v.* Mullanphy Planing Mill Co., 16 Mo. App. 454; Thompson *v.* Foerstel, 10 Mo. App. 290.

New Jersey.— Cumberland Nat. Bank *v.* Baker, 57 N. J. Eq. 231, 40 Atl. 850; Page *v.* Kendig, (N. J. 1887) 7 Atl. 878; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311; Gevers *v.* Wright, 18 N. J. Eq. 330; Smithurst *v.* Edmunds, 14 N. J. Eq. 408.

New York.— Deeley *v.* Dwight, 132 N. Y. 59, 30 N. E. 258, 43 N. Y. St. 409, 18 L. R. A. 298 [*reversing* 16 Daly (N. Y.) 300, 11 N. Y. Suppl. 60, 32 N. Y. St. 616]; McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644 [*overruling* 62 Barb. (N. Y.) 316]; Anchor Brewing Co. *v.* Burns, 32 N. Y. App. Div. 272, 52 N. Y. Suppl. 1005.

gator acquires the property, which lien is enforced in equity as a lien attaching to the property, on the maxim that equity considers as done that which ought to be done;[57] but it has been held that a mortgage of future property will be enforced only as a right under the contract and not as a trust attached to the property.[58]

VIII. DELIVERY OF MORTGAGED CHATTELS AND POSSESSION BY THE MORTGAGEE.[59]

A. In General. Prior to recording acts a delivery either formal, constructive, or actual was necessary to the creation of a valid mortgage;[60] but since the

North Carolina.— Perry *v.* White, 111 N. C. 197, 16 S. E. 172.

Ohio.— Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

Rhode Island.— Williams *v.* Winsor, 12 R. I. 9; Groton Mfg. Co. *v.* Gardiner, 11 R. I. 626; Cook *v.* Corthell, 11 R. I. 482, 23 Am. Rep. 518.

South Carolina.— Perkins *v.* Loan, etc., Bank, 43 S. C. 39, 20 S. E. 759 (where the court held that a mortgage on future chattels was sufficient to charge such property, as soon as acquired, with an equitable lien which would prevail against an unrecorded purchase-money mortgage given by the mortgagor); Hirshkind *v.* Israel, 18 S. C. 157; Parker *v.* Jacobs, 14 S. C. 112, 37 Am. Rep. 724.

Tennessee.— Phelps *v.* Murray, 2 Tenn. Ch. 746, where, however, the court held that the facts did not bring the case within the rule.

Texas.— Dupree *v.* McClanahan, 1 Tex. App. Civ. Cas. § 594.

Vermont.— Peabody *v.* Landon, 61 Vt. 318, 17 Atl. 781, 15 Am. St. Rep. 903.

West Virginia.— Horner-Gaylord Co. *v.* Fawcett, 50 W. Va. 487, 40 S. E. 564.

United States.— Beall *v.* White, 94 U. S. 382, 24 L. ed. 173; Pennock *v.* Coe, 23 How. (U. S.) 117, 16 L. ed. 436 [*affirming* 5 Fed. Cas. No. 2,942, 6 Am. L. Reg. 27]; Auburn Nat. Shoe, etc., Bank *v.* Small, 7 Fed. 837; Brett *v.* Carter, 2 Lowell (U. S.) 458, 4 Fed. Cas. No. 1,844, 13 Alb. L. J. 361, 10 Am. L. Rev. 600, 3 Centr. L. J. 286, 22 Int. Rev. Rec. 152, 14 Nat. Bankr. Reg. 301, 2 N. Y. Wkly. Dig. 331; Schuelenburg *v.* Martin, 1 McCrary (U. S.) 348, 2 Fed. 747; Ellett *v.* Butt, 1 Woods (U. S.) 214, 8 Fed. Cas. No. 4,384.

England.— Lazarus *v.* Andrade, 5 C. P. D. 318, 44 J. P. 697, 49 L. J. C. P. 847, 43 L. T. Rep. N. S. 30, 29 Wkly. Rep. 15; Holroyd *v.* Marshall, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. 193, 7 L. T. Rep. N. S. 172, 11 Wkly. Rep. 171; Clements *v.* Mathews, 47 J. P. 21, 47 L. T. Rep. N. S. 251; Leatham *v.* Amor, 47 L. J. Q. B. 581, 38 L. T. Rep. N. S. 785, 26 Wkly. Rep. 739.

Contra, Case *v.* Fish, 58 Wis. 56, 15 N. W. 808; Lanyon *v.* Woodward, 55 Wis. 652, 13 N. W. 863; Hunter *v.* Bosworth, 43 Wis. 583; Chynoweth *v.* Tenney, 10 Wis. 397. See also Moody *v.* Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706, holding that where B executed to A a mortgage on a stock of goods and also of the proceeds of the same if sold, and all leather that might thereafter be manufactured from the proceeds of property then on hand and in whatever shape it might thereafter exist, so that the then existing and the future property and earnings of B's tan works might stand conveyed, pledged, and hypothecated to A, the latter had no legal or equitable lien on any property which was not in existence at the time of the mortgage, but which afterward came into B's hands, unless he had done some act by which he obtained possession of that property.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 62.

A mortgage of the property of a railroad company, including future receipts for transportation and subsequently acquired property, is valid in equity as to the subsequently acquired property (Pennock *v.* Coe, 23 How. (U. S.) 117, 16 L. ed. 436 [*affirming* 5 Fed. Cas. No. 2,942, 6 Am. L. Reg. 27]); and the same rule holds even though the mortgage does not operate upon property then in existence (Hamlin *v.* Jerrard, 72 Me. 62; Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486; Henshaw *v.* Bellows Falls Bank, 10 Gray (Mass.) 568).

57. Little Rock, etc., R. Co. *v.* Page, 35 Ark. 304; Sillers *v.* Lester, 48 Miss. 513.

58. Burns *v.* Campbell, 71 Ala. 271; Loth *v.* Carty, 85 Ky. 591, 9 Ky. L. Rep. 131, 4 S. W. 314; Zaring *v.* Cox, 78 Ky. 527; Vinson *v.* Hallowell, 10 Bush (Ky.) 538; Ross *v.* Wilson, 7 Bush (Ky.) 29; Otis *v.* Sill, 8 Barb. (N. Y.) 102.

59. The possession of a mortgagee of personal property is adverse to every person except the mortgagor from its commencement. Bobo *v.* McBeth, 2 Bailey (S. C.) 489.

60. Carrington *v.* Smith, 8 Pick. (Mass.) 419; Bonsey *v.* Amee, 8 Pick. (Mass.) 236; Butterfield *v.* Baker, 5 Pick. (Mass.) 522; Russell *v.* Fillmore, 15 Vt. 130; Sturgis *v.* Warren, 11 Vt. 433; Woodward *v.* Gates, 9 Vt. 358. *Compare* Smith *v.* Putney, 18 Me. 87, where the mortgage was executed and delivered in the room where the chattels covered thereby were situated, and it was held to be valid without a formal delivery of the property itself.

Where other property is substituted for that originally included in a mortgage, it has been held that a formal delivery of such substituted property is necessary to make the mortgage valid as to it. McDermott *v.* Yeatman, 16 Fed. Cas. No. 8,749, 5 Pittsb. Leg. J. (Pa.) 29.

Continued possession by the mortgagee was not essential to the validity of a mort-

passage of recording statutes no formal delivery of the mortgaged chattels is necessary when the instrument is recorded.[61]

B. As a Substitute For Recording. As transferring possession of the property to the mortgagee was the original means of assuring the validity of a chattel mortgage, and most statutes read that recording is necessary unless there is a change of possession, it follows that recording is not necessary when the mortgagee takes possession of the property at the time the mortgage is executed,[62] for an immediate and continuous change of possession is the best possible notice of the mortgagee's rights.[63]

C. Defects Cured by Possession.[64] Besides rendering registry unnecessary, it has been held that possession by the mortgagee will cure any defects in the instrument, such as insufficient description of the property[65] or improper execution of the mortgage,[66] whereby the record is prevented from giving the usual notice of the mortgagee's rights.

gage in the absence of statutory provisions requiring mortgages to be recorded. Ward *v.* Sumner, 5 Pick. (Mass.) 59. See *infra*, XI, B.

61. Frank *v.* Miner, 50 Ill. 444; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; Forbes *v.* Parker, 16 Pick. (Mass.) 462; Bullock *v.* Williams, 16 Pick. (Mass.) 33; McCoy *v.* Lassiter, 95 N. C. 88. See *infra*, X, B, 1.

62. *Georgia.*— Grice *v.* Haskins, 73 Ga. 700.

Illinois.— Giffert *v.* Wilson, 18 Ill. App. 214.

Indiana.— Fordice *v.* Gibson, 129 Ind. 7, 28 N. E. 303.

Iowa.— Fromme *v.* Jones, 13 Iowa 474.

Kansas.— Hausner *v.* Leebrick, 51 Kan. 591, 33 Pac. 375; Dolan *v.* Van Demark, 35 Kan. 304, 10 Pac. 848.

Maine.— Shreve *v.* Fenno, 49 Me. 78.

Maryland.— Bryan *v.* Hawthorne, 1 Md. 519.

Michigan.— A second mortgagee in possession was allowed to hold property against a prior mortgagee, neither party having recorded his mortgages. Vining *v.* Millar, 109 Mich. 205, 67 N. W. 126, 32 L. R. A. 442.

Mississippi.—Humphries *v.* Bartee, 10 Sm. & M. (Miss.) 282.

Missouri.— Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847 (where the mortgagee was a non-resident); Greeley *v.* Reading, 74 Mo. 309.

Nebraska.— Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370.

New Hampshire.— Clark *v.* Tarbell, 57 N. H. 328; Janvrin *v.* Fogg, 49 N. H. 340.

New York.— Knapp *v.* Alvord, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; Lee *v.* Huntoon, Hoffm. (N. Y.) 447.

Ohio.— Fuher *v.* Buckeye Supply Co., 5 Ohio S. & C. Pl. Dec. 187, 7 Ohio N. P. 420.

Wisconsin.— Morrow *v.* Reed, 30 Wis. 81.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 265, 446.

Both transfer of possession and record of the mortgage are not necessary to render a mortgage valid against third persons. Lumbert *v.* Woodward, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175.

Delivery of an indorsed bill of lading to a bank as collateral security for a loan puts the bank in the position of a mortgagee in possession and it is not necessary to file the papers as a chattel mortgage. Cincinnati First Nat. Bank *v.* Kelly, 57 N. Y. 34.

63. Parsell *v.* Thayer, 39 Mich. 467; Doyle *v.* Stevens, 4 Mich. 87.

64. Power of sale in mortgagee see *infra*, XI, H, 6.

65. Kelley *v.* Andrews, 102 Iowa 119, 71 N. W. 251; Dolan *v.* Van Demark, 35 Kan. 304, 10 Pac. 848; Parsons Sav. Bank *v.* Sargent, 20 Kan. 576; Trice *v.* Myton, 9 Kan. App. 710, 59 Pac. 1090; Falk *v.* Decou, 8 Kan. App. 765, 61 Pac. 760; Dawson *v.* Cross, 88 Mo. App. 292; Springfield Engine, etc., Co. *v.* Glazier, 55 Mo. App. 95; Frost *v.* Citizens' Nat. Bank, 68 Wis. 234, 32 N. W. 110; Morrow *v.* Reed, 30 Wis. 81.

66. *Arizona.*—Farmers', etc., Bank *v.* Orme, (Ariz. 1898) 52 Pac. 473.

Arkansas.— Garner *v.* Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715.

California.— Lemon *v.* Wolff, 121 Cal. 272, 53 Pac. 801.

Illinois.— Gaar *v.* Hurd, 92 Ill. 315.

Iowa.— Leggett, etc., Tobacco Co. *v.* Collier, 89 Iowa 144, 56 N. W. 417.

Kansas.—Leech *v.* Arkansas City Mfg. Co., 8 Kan. App. 621, 56 Pac. 134.

Missouri.— Nash *v.* Norment, 5 Mo. App. 545.

Vermont.— McLoud *v.* Wakefield, 70 Vt. 558, 43 Atl. 179.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 442 *et seq.*

What defects are cured.—It has been held that delivery of possession of the property to the mortgagee will render the mortgage valid when the defects in it are minor ones (Chapman *v.* Sargent, 6 Colo. App. 438, 40 Pac. 849); when the subject-matter of the mortgage was after-acquired property (Abraham *v.* Carter, 53 Ala. 8; Chase *v.* Denny, 130 Mass. 566); when the mortgage was not in statutory form and gave the mortgagee a power to sell at private sale (Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802); and where a mortgage was so defective that it amounted merely to an executory contract (Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518). *Compare* Cassiday *v.* Ball, 71 Ill. App. 181, where a mortgagee had given a

D. Sufficiency of Taking Possession — 1. GENERALLY. To constitute a sufficient delivery of the property to the mortgagee there must be an actual transfer of possession and control;[67] it should be absolute, unequivocal, and notorious, and such as to advise the world at large of the change,[68] as in the case of an absolute sale.[69] The possession of the mortgagee must be exclusive[70] and it should be

constable a license to seize a portion of the property covered by the mortgage and it was held that by taking possession the mortgagee waived this license and could claim the entire property.

67. *Indian Territory.*— Blanchard *v.* Ingram, 2 Indian Terr. 232, 48 S. W. 1066, where the delivery of an instrument in writing purporting to deliver possession of property forty-five miles away was held to be insufficient.

Kansas.— Frankhouser *v.* Fisher, 54 Kan. 738, 39 Pac. 705; Moore *v.* Shaw, 1 Kan. App. 103, 40 Pac. 929.

Michigan.— Haynes *v.* Leppig, 40 Mich. 602. *Compare* Stanton First Nat. Bank *v.* Summers, 75 Mich. 107, 42 N. W. 536, where the mortgagor assigned a lease of the mortgaged property to the assignee of the mortgage with authority to collect the rents accruing, and it was held that this did not constitute a sufficient change of possession when the mortgagor remained in actual possession of the property.

New Hampshire.— Smith *v.* Moore, 11 N. H. 55.

New York.— Steele *v.* Benham, 84 N. Y. 634 [*reversing* 21 Hun (N. Y.) 411]; Crandall *v.* Brown, 18 Hun (N. Y.) 461.

Wisconsin.— Morrow *v.* Reed, 30 Wis. 81, holding the transfer should be such that if the property were destroyed the loss would fall on the mortgagor.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 417.

A mental resolve of the mortgagor setting the goods aside for the mortgagee is not a sufficient change of possession. Moon Bros. Carriage Co. *v.* Porter, 76 Mo. App. 128.

Mere words will not effect a change of possession in law when there is none in fact. Woods *v.* Bugbey, 29 Cal. 466; Porter *v.* Parmley, 52 N. Y. 185 [*reversing* 34 N. Y. Super. Ct. 398, 13 Abb. Pr. N. S. (N. Y.) 104].

Colorable transfer insufficient.—The transfer was held to be insufficient where the parties went through the form of delivering a key which was returned, the goods were not removed, and the formal delivery was kept secret. Castleman *v.* Mayer, 55 N. Y. App. Div. 515, 67 N. Y. Suppl. 229. See also Watson *v.* Dealy, 28 Misc. (N. Y.) 544, 59 N. Y. Suppl. 623, where a landlady gave a mortgage on the furniture in the house to a boarder who remarked, "I am in possession but you may live here," and took the keys, but the landlady continued to run the boarding-house and it was held not to be a sufficient change of possession.

Doing all that can be reasonably done under the circumstances is not necessarily sufficient to constitute a change of possession and a charge that the property would then be considered as in the mortgagee's possession is misleading. Jones *v.* Hess, (Tex. Civ. App. 1898) 48 S. W. 46.

The presence of the mortgagee at a transfer of the mortgaged property which he permits the mortgagor to make to a third person is not equivalent to his taking actual possession thereof. Morris *v.* Devou, 2 Disn. (Ohio) 218.

68. *California.*—Woods *v.* Bugbey, 29 Cal. 466.

Colorado.—Wilcox *v.* Jackson, 7 Colo. 521, 4 Pac. 966; Burchinell *v.* Schoyer, 10 Colo. App. 117, 50 Pac. 217.

Connecticut.— Bishop *v.* Warner, 19 Conn. 460.

New York.— Steele *v.* Benham, 84 N. Y. 634 [*reversing* 21 Hun (N. Y.) 411].

Oregon.— Pierce *v.* Kelly, 25 Oreg. 95, 34 Pac. 963.

United States.— Strahorn-Hutton-Evans Commission Co. *v.* Quigg, 97 Fed. 735, 38 C. C. A. 395, construing law of Indian Territory.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 417.

69. Corning *v.* Records, 69 N. H. 390, 46 Atl. 462, 76 Am. St. Rep. 178; Smith *v.* Moore, 11 N. H. 55. But see Gaines *v.* Becker, 7 Ill. App. 315, where it was held that acts in taking possession of personal property under a writ of attachment or execution, which would make a levy valid as against subsequent purchasers or attaching creditors, is likewise a sufficient transfer under a chattel mortgage to prevent the mortgaged property from being taken in execution for the debts of the mortgagor.

Compliance with any condition precedent to the passing of title, such as measuring lumber from a larger mass, must be shown before there can be a delivery of the mortgaged property (Seckel *v.* Scott, 66 Ill. 106; Frost *v.* Woodruff, 54 Ill. 155); but it seems to be different where the mortgagee is given a power to select a certain amount from a homogeneous mass of coal (Weld *v.* Cutler, 2 Gray (Mass.) 195) or bricks (Crofoot *v.* Bennett, 2 N. Y. 258).

70. *Colorado.*— Atchison *v.* Graham, 14 Colo. 217, 23 Pac. 876.

Maine.— Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395; McKee *v.* Garcelon, 60 Me. 165, 11 Am. Rep. 200.

New Hampshire.—Flagg *v.* Pierce, 58 N. H. 348; Sumner *v.* Dalton, 58 N. H. 295.

New York.— Hale *v.* Sweet, 40 N. Y. 97.

Oregon.— Pierce *v.* Kelly, 25 Oreg. 95, 34 Pac. 963.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 417.

Possession by a common agent of both

continuous,[71] or he will not be protected by the mortgage as against creditors of the mortgagor.

2. As Affected by Nature of Property. The mortgagee need only take such possession as the nature of the property admits of, and removal of bulky or semi-stationary articles is not required;[72] so that it is sufficient for the mortgagee to accept a constructive delivery of the property and then continue his control over it by means of a custodian or keeper,[73] or by retaining the key to the room where the property is stored.[74] Some sort of continued custody in behalf of the mortgagee is essential, however, even though the property is in the open.[75]

3. By Agent — a. In General. It is sufficient for the mortgagee to retain possession through the medium of an agent, for the acts of control done by the agent are regarded in law as the acts of the mortgagee.[76] The agent must have

mortgagee and mortgagor has been held to be a sufficient transfer to protect the mortgagee against a creditor of the mortgagor who levied an attachment after the mortgageee had advertised and sold the property. Eaton *v.* Truesdail, 52 Ill. 307. See also Chicago Title, etc., Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4, where an agent, placed in charge of mortgaged property, subsequently agreed to hold possession as agent for other mortgagees, and it was held that, when the agent transferred possession on an order from the first mortgagee, the transferee held as agent for all parties.

71. Frankhouser *v.* Fisher, 54 Kan. 738, 39 Pac. 705; Moore *v.* Shaw, 1 Kan. App. 103, 40 Pac. 929; Heilbronner *v.* Lloyd, 17 Mont. 299, 42 Pac. 853; Moresi *v.* Swift, 15 Nev. 215; Look *v.* Comstock, 15 Wend. (N. Y.) 244.

A temporary loan to the mortgagor of the chattels covered by the mortgage does not render insufficient the possession of the mortgagee. Garner *v.* Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715; Eagle *v.* Rohrheimer, 21 Ill. App. 518; McMahill *v.* Humes, 21 Ill. App. 513; Farnsworth *v.* Shepard, 6 Vt. 521. In McMahill *v.* Humes, 21 Ill. App. 513, a mortgagor of horses merely hitched them to the mortgagee's rack for a half hour, and then borrowed them, and it was held that the mortgagee's possession was not long enough to apprise all parties of the change of ownership.

72. Laflin *v.* Griffiths, 35 Barb. (N. Y.) 58; Bismark Bldg., etc., Assoc. *v.* Bolster, 92 Pa. St. 123; Fry *v.* Miller, 45 Pa. St. 441.

73. Gaar *v.* Hurd, 92 Ill. 315; Gaines *v.* Becker, 7 Ill. App. 315; Jenney *v.* Jackson, 6 Ill. App. 32; Wright *v.* Tetlow, 99 Mass. 397; Carpenter *v.* Snelling, 97 Mass. 452 (even though the transaction was kept secret); Morse *v.* Powers, 17 N. H. 286. *Compare* Weld *v.* Cutler, 2 Gray (Mass.) 195, where there was a mortgage of four hundred tons of coal, part of a larger pile, and it was held that there was a sufficient delivery when the mortgagee took possession without removal and appointed the mortgagor his agent to sell the coal. But see Atchison *v.* Graham, 14 Colo. 217, 23 Pac. 876, where a mortgage covered horses in a livery-stable, and after default the mortgagee went to the stable and "checked off" the horses and left an agent in charge of them, and it was held not to be a sufficient change of possession, since the mortgagor still fed and cared for them and used them in his business.

74. Adlard *v.* Rodgers, 105 Cal. 327, 38 Pac. 889 (where the mortgagee also posted a notice of his claim on the door of the storeroom); Giffert *v.* Wilson, 18 Ill. App. 214 (where the mortgagee changed the lock).

Where the key was left with the mortgagor it was held that there was not a sufficient change of possession. Drury *v.* Moors, 171 Mass. 252, 50 N. E. 618. *Compare* National Bank *v.* Sprague, 20 N. J. Eq. 13, where the mortgagors gave the attorney for the mortgagees the keys, went with him through the hotel, opened the doors of the various rooms, and exhibited the mortgaged furniture, and it was agreed that the property covered by the mortgage should be considered as stored for the mortgagees, the attorney taking away a napkin as a symbol of the delivery of the whole, but the court held that this was not an actual and continued change of possession.

75. Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747 (ungathered crop); Doak *v.* Brubaker, 1 Nev. 218 (cattle running on a range); Menzies *v.* Dodd, 19 Wis. 343 (hay stacked on mortgagor's land).

Sufficiency of custody.— Mortgaged cordwood was piled by a roadside and the mortgagee visited the place daily for a week and afterward from one to three times a week and sold a small quantity of it, but it was held not to be a sufficient delivery against an attaching creditor of the mortgagor, because the wood was not marked in any way and no person was left in charge. Wilson *v.* Hill, 17 Nev. 401, 30 Pac. 1076.

Where the property is beyond the immediate control of any one it has been held a sufficient transfer to make a symbolical delivery without any continued custody by the mortgagee. Morrow *v.* Reed, 30 Wis. 81.

76. *Alabama.*— Columbus Iron Works Co. *v.* Renfro, 71 Ala. 577.

Colorado.— Horner *v.* Stout, 5 Colo. 166.

Illinois.—Williams *v.* Wallace, 64 Ill. App. 320; Gaines *v.* Becker, 7 Ill. App. 315.

Iowa.— Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659; Stewart *v.* Smith, 60 Iowa 275, 14 N. W 310.

Maine.— Wheeler *v.* Nichols, 32 Me. 233.

Massachusetts.— Citizens' Nat. Bank *v.* Oldham, 142 Mass. 379, 8 N. E. 115; Carpen-

authority to act for his principal in the premises,[77] and must not act in his own interest or behalf.[78]

b. Who May Be Agents. Although it cannot be said as a matter of law that the mortgagor can never retain possession as agent for the mortgagee,[79] he is generally regarded as incompetent to act as agent in accepting a delivery of the property.[80] Since the mortgagor's possession must be exclusive and mutual possession is not sufficient,[81] it is usually insufficient for the mortgagee to retain possession through a servant or employee of the mortgagor,[82] although there

ter *v.* Snelling, 97 Mass. 452; McPartland *v.* Read, 11 Allen (Mass.) 231.

Michigan.— Vining *v.* Millar, 109 Mich. 205, 67 N. W. 126, 32 L. R. A. 442.

Missouri.— Springfield Engine, etc., Co. *v.* Glazier, 55 Mo. App. 95; Joseph *v.* Boldridge, 43 Mo. App. 333.

Oregon.— *Re* Fisher, 25 Oreg. 64, 34 Pac. 1024.

Texas.— Adams *v.* Powell, (Tex. Civ. App. 1898) 44 S. W. 547.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 419.

What constitutes agency.—Where a mortgage provided for delivery of the property to the mortgagee at a certain place, it was held that delivery to a railroad company consigned to the mortgagee was not delivery to him because the company was not his agent. Parker *v.* Jacobs, 14 S. C. 112, 37 Am. Rep. 724. *Compare* Farmers' L. & T. Co. *v.* Baker, 20 Misc. (N. Y.) 387, 46 N. Y. Suppl. 266, where the holders of corporate bonds secured by a chattel mortgage on hotel furniture appointed a committee to look into the affairs of the corporation and the stock-holders appointed one of the committee to be manager of the hotel, but it was held that these proceedings did not give the bondholders possession of the property.

The possession of a receiver does not constitute a reduction to possession by a mortgagee, for the possession of the receiver is the possession of the court. New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 110 Fed. 491.

An officer taking possession in an action of replevin brought by the mortgagee is to be deemed his agent for the purpose of taking possession. Joseph *v.* Boldridge, 43 Mo. App. 333.

77. Lehman-Higginson Grocer Co. *v.* McClain, (Kan. 1901) 64 Pac. 1029, holding that an agent of the mortgagor who was left in possession of the chattels did not have authority to make a contract for a transfer of possession.

78. King *v.* Wallace, 78 Iowa 221, 42 N. W. 776, sustaining instructions in regard to possession by an agent.

79. *Hawaii.*—Harrison *v.* Marks, 11 Hawaii 506.

Kansas.— Dayton *v.* People's Sav. Bank, 23 Kan. 421.

Maine.— Cutter *v.* Copeland, 18 Me. 127.

Massachusetts.— Weld *v.* Cutler, 2 Gray (Mass.) 195.

Missouri.— State *v.* Flynn, 56 Mo. App. 236.

Nebraska.— Turner *v.* Killian, 12 Nebr. 580, 12 N. W. 101.

Utah.— Ewing *v.* Merkley, 3 Utah 406, 4 Pac. 244.

Wisconsin.— Cotton *v.* Marsh, 3 Wis. 221, holding that a mortgagee may without fraud redeliver the mortgaged property to the mortgagor.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 421.

80. *Iowa.*— Barr *v.* Cannon, 69 Iowa 20, 28 N. W. 413, where there was a contract that the mortgagor should gather mortgaged crops as agent for the mortgagee and there was held to be no delivery of possession although the mortgagor had gathered a small portion of the crops.

Kansas.— Swiggett *v.* Dodson, 38 Kan. 702, 17 Pac. 594.

Michigan.— Doyle *v.* Stevens, 4 Mich. 87.

Minnesota.— McCarthy *v.* Grace, 23 Minn. 182.

Nebraska.— Buckstaff Bros. Mfg. Co. *v.* Snyder, 54 Nebr. 538, 74 N. W. 863; Brunswick *v.* McClay, 7 Nebr. 137.

New York.— Steele *v.* Benham, 84 N. Y. 634 [*reversing* 21 Hun (N. Y.) 411]; Camp *v.* Camp, 2 Hill (N. Y.) 628; Tedesco *v.* Oppenheimer, 15 Misc. (N. Y.) 522, 37 N. Y. Suppl. 1073, 74 N. Y. St. 420, 2 N. Y. Annot. Cas. 411.

England.— Pickard *v.* Marriage, 1 Ex. D. 364, 45 L. J. Exch. 594, 35 L. T. Rep. N. S. 343, 24 Wkly. Rep. 886.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 421.

An attorney of the mortgagor may be appointed an agent for the mortgagee to take possession. Fletcher *v.* Martin, 126 Ind. 55, 25 N. E. 866.

The admission of an assignee of mortgaged property that he holds the property subject to the mortgagee's rights is not equivalent to constructive delivery of possession. Moser *v.* Claes, 23 Mo. App. 420.

81. See *supra*, VIII, D, 1.

82. *Illinois.*— Martin *v.* Sexton, 72 Ill. App. 395; Richards *v.* Matson, 51 Ill. App. 530.

Indiana.— Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

Iowa.— Iowa State Nat. Bank *v.* Taylor, 98 Iowa 631, 67 N. W. 677.

Massachusetts.— Moors *v.* Reading, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460, where the mortgagor's bookkeeper was appointed to retain possession of the property and an arrangement was entered into by which the bookkeeper was to deliver portions

is no objection in having the same clerks or salesmen continue their previous employment.[83]

4. TIME OF TAKING POSSESSION. It has been required that the mortgagee shall take immediate possession upon the execution of the instrument,[84] but there is authority for a more liberal rule which only requires that the mortgagee take possession before any adverse rights attach to the property[85] and the require-

of the goods to the mortgagor for current sales and new mortgages were to be executed on the additions to the stock, but it was held that this was not a sufficient transfer of possession to excuse a failure to record the mortgage.

Michigan.— Doyle *v.* Stevens, 4 Mich. 87.

New York.— Manufacturers', etc., Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9, where it was held, however, that a refusal to charge that "possession by the mortgagee by the bookkeeper of the mortgagor was not such a possession by the mortgagee as to remove the case from under the statute" was proper. *Compare* Porter *v.* Parmley, 52 N. Y. 185 [*reversing* 34 N. Y. Super. Ct. 398, 13 Abb. Pr. N. S. (N. Y.) 104], where it was arranged that property which had been in the custody of a firm of which the mortgagor was a member should be held by a partner of the mortgagor as agent for the mortgagee, the firm continuing to use the property, and it was held that this did not constitute a sufficient change of possession.

But see Armstrong *v.* Ford, 10 Wash. 64, 38 Pac. 866; Aberdeen First Nat. Bank *v.* Carter, 6 Wash. 494, 33 Pac. 824, where putting an employee of the mortgagor in charge to keep possession for the mortgagee, under circumstances clearly indicative of good faith, was held to constitute a sufficient change of possession.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 422.

Agent's change of allegiance.— Where property in the possession of a warehouseman as agent for the mortgagor was set apart in the warehouse for the mortgagee, it was held that this destroyed the privity between the warehouseman and the mortgagor and that the former became the agent of the mortgagee alone. Squires *v.* Payne, 6 Cal. 654.

83. Fink *v.* Ehrman, 44 Ark. 310; Lewis *v.* Alexander, (Tex. Civ. App. 1895) 31 S. W. 414. *Compare* Henshaw *v.* Bellows Falls Bank, 10 Gray (Mass.) 568, where the mortgagee of a railroad continued to employ in the management of the road the same persons who had been employed by the mortgagor corporation, and it was held that this did not prevent other acts of the mortgagee from constituting a valid and sufficient taking of possession.

Employing the mortgagor as clerk does not make the transfer of possession insufficient when another agent of the mortgagee is in possession of the property. *Re* Fisher, 25 Oreg. 64, 34 Pac. 1024. *Compare* Schneider *v.* Kraby, 97 Wis. 519, 73 N. W. 61, where a mortgagee took possession of a stock of goods, caused an inventory to be taken, opened a new book, received the proceeds of sales, paid expenses, and visited the store every day, and it was held that there was a sufficient change of possession, although he employed one of the mortgagors in the store and did not change the sign over the door.

84. Sidener *v.* Bible, 43 Ind. 230; Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277; Parshall *v.* Eggart, 52 Barb. (N. Y.) 367; Richardson *v.* End, 43 Wis. 316 (holding that to comply with a statute requiring immediate delivery there must be a delivery within such convenient time as was reasonably necessary). See also Burdick *v.* Coates, 22 R. I. 410, 48 Atl. 389, where mortgaged property was delivered to the mortgagee about three months after the execution of the instrument and it was held that the transaction was not a conditional sale which became absolute on delivery, so that the mortgage was invalid against an attachment levied on the property the day of the transfer.

Mortgagees are entitled to a reasonable time within which to take possession, but the burden is on them to show that they took possession within such reasonable time, and when they fail to sustain this burden they will be postponed to judgment creditors whose judgments were filed before the mortgages were executed. Robinson *v.* Hawley, 45 N. Y. App. Div. 287, 61 N. Y. Suppl. 138.

85. *Arizona.*— Farmers', etc., Bank *v.* Orme, (Ariz. 1898) 52 Pac. 473.

Arkansas.— Garner *v.* Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715.

California.— Lemon *v.* Wolff, 121 Cal. 272, 53 Pac. 801.

Colorado.— Chapman *v.* Sargent, 6 Colo. App. 438, 40 Pac. 849.

Illinois.— Ogden *v.* Minter, 91 Ill. App. 11.

Kansas.— Gagnon *v.* Brown, 47 Kan. 83, 27 Pac. 104; Cameron *v.* Marvin, 26 Kan. 612.

Michigan.— Waite *v.* Mathews, 50 Mich. 392, 15 N. W. 524.

Minnesota.— Prouty *v.* Barlow, 74 Minn. 130, 76 N. W. 946; Clarke *v.* National Citizens' Bank, 74 Minn. 58, 76 N. W. 965, 1125.

Mississippi.— Baldwin *v.* Flash, 59 Miss. 61.

Missouri.— Mallmann *v.* Harris, 65 Mo. App. 127, 2 Mo. App. Rep. 1163; Hardy *v.* Graham, 63 Mo. App. 40, 1 Mo. App. Rep. 600; Trimble *v.* Keer, etc., Mercantile Co., 56 Mo. App. 683.

New Jersey.— The statute requiring immediate delivery and actual change of possession in order to make a mortgage good does not vitiate a mortgage under which possession was taken several months after execution but prior to the execution of a second mortgage. National Bank *v.* Sprague, 21 N. J. Eq. 530.

ment for an immediate change of possession is satisfied by a transfer as soon as it can reasonably be made.[86]

5. Transfer of Part of Property. Delivery to the mortgagee of part of the property included in a mortgage will ordinarily render it valid as to the part delivered,[87] but under a statute declaring a mortgage void without delivery transfer of part of the property has been held insufficient and the mortgage was void even as to that part which was delivered.[88]

6. When the Property Is in the Hands of a Bailee.[89] When property covered by a mortgage is in the possession of a bailee of the mortgagor an actual delivery is not necessary to constitute a transfer of possession,[90] but the bailee must hold the property for the mortgagee in order to make the mortgage valid against third persons without record.[91]

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Texas.— Smith *v.* Connor, (Tex. Civ. App. 1898) 46 S. W. 267. See also Randolph *v.* Brown, 21 Tex. Civ. App. 617, 53 S. W. 825, where it was held to be sufficient for the mortgagee to take possession at any time before the rights of attaching creditors accrued, although the statute required that there should be an immediate delivery of possession.

Wisconsin.— Madison First Nat. Bank *v.* Damm, 63 Wis. 249, 23 N. W. 497.

United States.— Hauselt *v.* Harrison, 105 U. S. 401, 26 L. ed. 1075; Field *v.* Baker, 12 Blatchf. (U. S.) 438, 9 Fed. Cas. No. 4,762, 11 Nat. Bankr. Reg. 415.

Contra, see Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226, where a receiver of a corporation found a mortgagee in possession of assets of the company by virtue of an unrecorded mortgage and the receiver brought trover for the property and recovered.

Taking possession after the adverse lien attaches will not benefit the mortgagee. Brown *v.* Harris, 67 N. J. L. 207, 50 Atl. 689.

Mortgagee's possession as pledgee.— It has been held that when a mortgagee takes possession subsequently to the execution of the mortgage he holds the property by way of pledge (Falk *v.* Decou, 8 Kan. App. 765, 61 Pac. 760; Blumenthal *v.* Lynch, 25 Abb. N. Cas. (N. Y.) 85, 11 N. Y. Suppl. 382); and an attempt to sell under the mortgage does not render the pledge void (Blumenthal *v.* Lynch, 25 Abb. N. Cas. (N. Y.) 85, 11 N. Y. Suppl. 382). *Compare* Rowley *v.* Rice, 11 Metc. (Mass.) 333, where future-acquired property was mortgaged together with an existing stock of goods and the mortgagee subsequently took possession of the entire stock, and it was held that if the transaction was *bona fide* he could hold them as a pledge.

Claims accruing after execution of the mortgage.— Where a mortgagee takes possession of the mortgaged property subsequently to the execution of the instrument this will not make the mortgage valid against those creditors whose claims have accrued between the time when the instrument was executed and the time when possession was taken (Landis *v.* McDonald, 88 Mo. App. 335; Keet, etc., Dry Goods Co. *v.* Brown, 73 Mo. App. 245), although it is good against antecedent creditors (Landis *v.* McDonald, 88 Mo. App. 335).

After judgments have been obtained by creditors of the mortgagor and four years after the execution of the mortgage, it is too late for the mortgagee to render the mortgage valid by taking possession. Fraser *v.* Gilbert, 11 Hun (N. Y.) 634.

A bona fide second mortgagee, obtaining possession before a prior mortgagee who had failed to refile his mortgage at the end of a year as required by statute, was held to be entitled to priority. Brachmann *v.* Louis, 1 Disn. (Ohio) 288, 12 Ohio Dec. (Reprint) 627.

86. Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847, where possession was transferred at the end of a day. See also Keller *v.* Paine, 34 Hun (N. Y.) 167, where an agent was immediately sent to take possession of the property but before he arrived a creditor had levied on it and it was held that the mortgagee had exercised reasonable diligence in taking possession and was entitled to priority. *Compare* Chaffin *v.* Doub, 14 Cal. 384, holding that eight days was not an unreasonable time to take in removing mortgaged newmown hay from the mortgagor's land.

87. Stewart *v.* Smith, 60 Iowa 275, 14 N. W. 310.

88. Benedict *v.* Smith, 10 Paige (N. Y.) 126; Goodhue *v.* Berrien, 2 Sandf. Ch. (N. Y.) 630.

89. Upon the particular situation of the property depend what acts are necessary to create a change of possession sufficient to render valid an unrecorded mortgage. Morse *v.* Powers, 17 N. H. 286.

90. *Illinois.*— Hodges *v.* Hurd, 47 Ill. 363.

Kentucky.— Bourbon Bank *v.* Porter, 22 Ky. L. Rep. 429, 57 S. W. 609.

Maine.— Wheeler *v.* Nichols, 32 Me. 233.

Nevada.— Doak *v.* Brubaker, 1 Nev. 218.

New Hampshire.— Morse *v.* Powers, 17 N. H. 286.

New York.— Goodwin *v.* Kelly, 42 Barb. (N. Y.) 194; Nash *v.* Ely, 19 Wend. (N. Y.) 523.

But see Sheldon *v.* Warner, 26 Mich. 403, holding that delivery of bailed mortgaged property was nevertheless necessary when the custody of the bailee was such that delivery was possible.

91. Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Carpenter *v.* Graham, 42 Mich. 191, 3 N. W. 974; Ancona *v.* Rogers, 1 Ex. D. 285, 46 L. J. Exch. 121, 35 L. T. Rep.

7. DETERMINATION. The question whether there has been a sufficient delivery of mortgaged chattels to the mortgagee is ordinarily one of fact for the jury to determine,[92] and the burden of proving a transfer of possession is on the person who claims under the unrecorded mortgage.[93]

IX. WHAT LAW GOVERNS.

It sometimes happens that the nature, validity, construction, and effect of a mortgage has to be determined in a jurisdiction other than that where the contract was made. Where the place of contract and the *locus* of the property mortgaged coincide, the laws of that jurisdiction will govern the interpretation

N. S. 115, 24 Wkly. Rep. 1000. *Compare* Caulfield *v.* Van Brunt, 173 Pa. St. 428, 37 Wkly. Notes Cas. (Pa.) 538, 34 Atl. 230, where mortgaged property was sold with the consent of the mortgagee to a purchaser who had the right to return it if the goods were not satisfactory, the contract for the purchase-money was assigned to the mortgagee, and it was held that the mortgage was valid without record because the property was in the hands of a bailee who held for the mortgagee.

Necessity for notice to bailee.— Although there is authority to the effect that when property in the control of a bailee is mortgaged and the instrument is not recorded, it is not necessary to notify the bailee in order to effect a transfer of possession which would make the mortgage valid (Case *v.* Burrows, 54 Iowa 679, 7 N. W. 130; Sansee *v.* Wilson, 17 Iowa 582; Thomas *v.* Hillhouse, 17 Iowa 67), it has been held with better reason that it is essential to give notice to the bailee of the mortgagee's claim (Strahorn-Hutton-Evans Commission Co. *v.* Quigg, 97 Fed. 735, 38 C. C. A. 395). *Compare* Corning *v.* Records, 69 N. H. 390, 46 Atl. 462, 76 Am. St. Rep. 178, where the bailee was entitled to retain possession till the end of a specified term and it was held that it was not necessary to notify him because an attaching creditor of the bailor who executed the mortgage could not disturb his possession.

The notice was not sufficient where a mere demand was made on the bailee, which was not accompanied by a written notice that the mortgagee had taken possession of the property (Beskin *v.* Feigenspan, 32 N. Y. App. Div. 29, 52 N. Y. Suppl. 750), or where the attorney for the mortgagee merely told the mortgagor's tenant in possession that he took possession of the property for the mortgagee and that the tenant should not let it go out of his possession without authority from the law (Wild *v.* Porter, 59 N. Y. App. Div. 350, 69 N. Y. Suppl. 839).

The bailee of an attaching officer may by consenting to hold the goods as the agent of the mortgagee effect a sufficient change of possession to render record of a mortgage unnecessary. Wheeler *v.* Nichols, 32 Me. 233.

Property stored in warehouse.— Where plaintiff took a mortgage on flour, took the warehouseman's receipt therefor, and afterward requested the warehouseman to segregate the particular flour from a large quantity belonging to the mortgagor, it was held to be a good segregation to put plaintiff's mark on certain flour belonging to the mortgagor which stood separate from the rest (Squires *v.* Payne, 6 Cal. 654); but such acts would not constitute a delivery if the mortgagor himself were the warehouseman (Story *v.* Cordell, 13 Mont. 204, 33 Pac. 6), unless the mortgagee at once took possession of the warehouse under a mortgage of that also and retained exclusive possession of that and of the goods (Smith *v.* Skeary, 47 Conn. 47). See also Campodonico *v.* Oregon Imp. Co., 87 Cal. 566, 25 Pac. 763, where growing crops were to be stored with a warehouseman in the mortgagee's name, and it was held that a mistake of the warehouseman in issuing receipts in the name of the mortgagor did not prevent the transaction from constituting a valid transfer of possession.

92. Lydia Pinkham Medicine Co. *v.* Gibbs, 108 Ga. 138, 33 S. E. 945; Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275, 20 N. Y. St. 120. In Lydia Pinkham Medicine Co. *v.* Gibbs, 108 Ga. 138, 33 S. E. 945, both plaintiffs, when asked by the court whether there was any question of fact they wished to have submitted to the jury, insisted that a verdict be directed in their own favor, and it was held not to be error to direct a verdict under the circumstances.

A question of fact.— Whether there has been a transfer of possession is a question of fact and the finding of the superior court that there has not been a delivery is a finding of fact and is final. Citizens' Nat. Bank *v.* Oldham, 142 Mass. 379, 8 N. E. 115.

93. Frankhouser *v.* Fisher, 54 Kan. 738, 39 Pac. 705; Swiggett *v.* Dodson, 38 Kan. 702, 17 Pac. 594; Baker *v.* Pottle, 48 Minn. 479, 51 N. W. 383; McCarthy *v.* Grace, 23 Minn. 182. See also Anderson *v.* Brenneman, 44 Mich. 198, 6 N. W. 222, holding that where only symbolical delivery of mortgaged chattels is made, and they are left where the right of possession is uncertain, doubts must be decided in favor of creditors of the mortgagor, and against the mortgagee, since the latter could have protected himself fully by filing the mortgage.

Sufficient evidence to go to the jury on the question of possession was held to have been given in Latimer *v.* Wheeler, 30 Barb. (N. Y.) 485.

of the mortgage on the doctrine of comity.[94] In cases where the property is situ-

94. *Alabama.*—Beall *v.* Williamson, 14 Ala. 55.

Arkansas.— Hall *v.* Pillow, 31 Ark. 32.

Connecticut.— Ballard *v.* Winter, 39 Conn. 179; Vanbuskirk *v.* Hartford F. Ins. Co., 14 Conn. 583. *Compare* Chillingsworth *v.* Eastern Tinware Co., 66 Conn. 306, 33 Atl. 1009, where the mortgagor resided outside the state but the property was in the state and the court held that the law of Connecticut governed in determining the validity of the mortgage.

Georgia.— Tucker *v.* Toomer, 36 Ga. 138.

Illinois.— Mumford *v.* Canty, 50 Ill. 370, 99 Am. Dec. 525; Armitage-Herschell Co. *v.* Potter, 93 Ill. App. 602; Farmers', etc., Bank *v.* Arnold, 58 Ill. App. 349; Clough *v.* Kyne, 40 Ill. App. 234.

Indiana.— Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258; Blystone *v.* Burgett, 10 Ind. 28, 68 Am. Dec. 658.

Iowa.— Simms *v.* McKee, 25 Iowa 341; Smith *v.* McLean, 24 Iowa 322; Arnold *v.* Potter, 22 Iowa 194.

Kansas.— Handley *v.* Harris, 48 Kan. 606, 29 Pac. 1145, 30 Am. St. Rep. 322, 17 L. R. A. 703; Ramsey *v.* Glenn, 33 Kan. 271, 6 Pac. 265.

Maine.— Stirk *v.* Hamilton, 83 Me. 524, 22 Atl. 391.

Maryland.— Wilson *v.* Carson, 12 Md. 54. *Compare* Fouke *v.* Fleming, 13 Md. 392, where a non-resident's mortgage of chattels in the state, acknowledged and recorded according to the laws of the state while he was temporarily therein, was held to be valid as against his attaching creditors, in the absence of proof of laws of his own state rendering it otherwise.

Massachusetts.— Rhode Island Cent. Bank *v.* Danforth, 14 Gray (Mass.) 123; Langworthy *v.* Little, 12 Cush. (Mass.) 109; Rice *v.* Cobb, 9 Cush. (Mass.) 302.

Minnesota.— Keenan *v.* Stimson, 32 Minn. 377, 20 N. W. 364.

Mississippi.— Barker *v.* Stacy, 25 Miss. 471.

Missouri.— Feurt *v.* Rowell, 62 Mo. 524; Smith *v.* Hutchings, 30 Mo. 380; Arkansas City Bank *v.* Cassidy, 71 Mo. App. 186. *Compare* Beckham *v.* Carter, 19 Mo. App. 596, where a second mortgage executed in another state after the first mortgagee had taken possession on default was held to be valid in Missouri, if valid in such other state, although it would be invalid if executed in Missouri.

New Hampshire.— Lathe *v.* Schoff, 60 N. H. 34; Cushman *v.* Luther, 53 N. H. 562; Ferguson *v.* Clifford, 37 N. H. 86.

New York.— Edgerly *v.* Bush, 81 N. Y. 199 [*reversing* 16 Hun (N. Y.) 80]; Nichols *v.* Mase, 25 Hun (N. Y.) 640; Tyler *v.* Strang, 21 Barb. (N. Y.) 198; Martin *v.* Hill, 12 Barb. (N. Y.) 631.

North Carolina.— Hornthal *v.* Burwell, 109 N. C. 10, 13 S. E. 721, 26 Am. St. Rep. 556, 13 L. R. A. 740; Hicks *v.* Skinner, 71 N. C. 539, 17 Am. Rep. 16.

Ohio.— Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62.

Oklahoma.— Richardson *v.* Shelby, 3 Okla. 68, 41 Pac. 378.

South Carolina.— Ryan *v.* Clanton, 3 Strobh. (S. C.) 411.

Texas.— Blythe *v.* Crump, (Tex. Civ. App. 1902) 66 S. W. 885.

Vermont.— Norris *v.* Sowles, 57 Vt. 360; Cobb *v.* Buswell, 37 Vt. 337; Jones *v.* Taylor, 30 Vt. 42 [*overruling* Skiff *v.* Solace, 23 Vt. 279]; Taylor *v.* Boardman, 25 Vt. 581.

Virginia.— Craig *v.* Williams, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934.

United States.— Shapard *v.* Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675; Alferitz *v.* Ingalls, 83 Fed. 964.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 2, 151, 185, 186.

The legal foreclosure of a valid mortgage in one jurisdiction passes a valid title which is good in any other jurisdiction to which the property has been removed, even though the property is in the hands of a *bona fide* purchaser for value. Taylor *v.* Boardman, 25 Vt. 581.

Must not interfere with policy of law.— In order that the doctrine of comity shall be applied to uphold mortgages valid by the laws of another jurisdiction, it is required that the effect of sustaining the mortgage shall not interfere with the settled policy of the *lex fori* (Dearing *v.* McKinnon Dash, etc., Co., 165 N. Y. 78, 58 N. E. 773, 80 Am. St. Rep. 708 [*affirming* 33 N. Y. App. Div. 31, 53 N. Y. Suppl. 513]; Hughes *v.* Abston, 105 Tenn. 70, 58 S. W. 296), contravene the criminal laws of the state, or sanction vice or immorality (Wolf *v.* Shannon, 50 Ill. App. 396).

A denial of this doctrine of supporting mortgages by comity because they constituted a valid contract by the laws of the jurisdiction where the instrument was executed is found in two states. Delop *v.* Windsor, 26 La. Ann. 185; Sherman State Bank *v.* Carr, 15 Pa. Super. Ct. 346; Armitage *v.* Spahn, 4 Pa. Dist. 270; MacCabe *v.* Blymyre, 9 Phila. (Pa.) 615, 29 Leg. Int. (Pa.) 117; McKaig *v.* Jones, 2 Pa. L. J. Rep. 123, 3 Pa. L. J. 365. *Compare* Boydson *v.* Goodrich, 49 Mich. 65, 12 N. W. 913; Montgomery *v.* Wight, 8 Mich. 143, which hold that, where chattels are mortgaged in one jurisdiction and left in the possession of the mortgagor who brings them into the state, record of the mortgage in the foreign jurisdiction is no notice to purchasers in Michigan. See also Cook *v.* Hager, 3 Colo. 386, where a statute requiring a mortgagor of chattels to acknowledge before a justice in the county where he resides was held to render invalid mortgages by a non-resident.

Presumption of similarity of law.— It has been held that the courts of one jurisdiction in determining the validity of a mortgage executed in another will presume that the *lex loci contractus* is the same as the *lex fori*. Bain *v.* Arnold, 33 Mo. App. 631.

ated in one jurisdiction and the mortgage is executed in another, the law of the place where the property is situated will usually govern.[95]

X. FILING, RECORDING, AND REGISTRATION.

A. Statutory Provisions. The object of the almost universal statutes requiring that a mortgage unaccompanied by a change of possession must be recorded to be valid against third persons is to prevent fraud and deception.[96] As such statutes would have no extraterritorial effect, they have been held not to require the filing of instruments executed in another jurisdiction;[97] but an act requiring deeds and conveyances of personal property to be recorded has been held to apply to mortgages.[98] No matter how strict the requirements of the

95. *Alabama.*— Hardaway *v.* Semmes, 38 Ala. 657.

Iowa.— Aultman, etc., Mach. Co. *v.* Kennedy, 114 Iowa 444, 87 N. W. 435.

Kansas.— Mackey *v.* Pettyjohn, 6 Kan. App. 57, 49 Pac. 636.

Maryland.— Pleasanton *v.* Johnson, 91 Md. 673, 47 Atl. 1025.

New Hampshire.— Clark *v.* Tarbell, 58 N. H. 88.

New York.— Whitman *v.* Conner, 40 N. Y. Super. Ct. 339. *Compare* Fairbanks *v.* Bloomfield, 5 Duer (N. Y.) 434, where it was held that the provisions of the Revised Statutes apply only to mortgages executed within this state or relating to property at the time within its jurisdiction.

Tennessee.— Louisville Bank *v.* Hill, 99 Tenn. 42, 41 S. W. 349. *Compare* Parks *v.* Branch Crookes Saw Co., 104 Tenn. 23, 55 S. W. 305, where a conveyance by a non-resident corporation of chattels in the state in trust for the benefit of certain creditors was held valid as against non-resident creditors, where it was executed in the state of the corporation's residence and was valid in such state.

United States.— Green *v.* Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109 (where mortgagor, mortgagee, and adverse claimant of property all lived in one state, but the property was located in another); Pyeatt *v.* Powell, 51 Fed. 551, 10 U. S. App. 200, 2 C. C. A. 367.

Contra, Fowler *v.* Bell, (Tex. Civ. App. 1896) 35 S. W. 822. And *compare* Runyon *v.* Groshon, 12 N. J. Eq. 86, where the property was mortgaged in New York but subsequently brought into New Jersey where the parties to the mortgage resided, and it was held that the New Jersey law governed the mortgage.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 2, 151, 185, 186.

Successive statutes in same jurisdiction.— Where a mortgage was executed on the day that a new law relating to mortgages was passed, it was held that the mortgage must be governed by the old law. Lienau *v.* Moran, 5 Minn. 482.

96. Horner *v.* Stout, 5 Colo. 166.

Limitations of effect.— The chattel mortgage act, providing for the recording of mortgages, does not thereby validate mortgages declared invalid by the prior act in reference to assignments for creditors. Duncan *v.* Taylor, 63 Tex. 645.

97. Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249; Craig *v.* Williams, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934. But see Hardaway *v.* Semmes, 38 Ala. 657, where it was held that a mortgage must be recorded if the property had a fixed *situs* within the state at the time the mortgage was executed, even though the parties reside in another jurisdiction.

98. Magee *v.* Carpenter, 4 Ala. 469; McGregor *v.* Hall, 3 Stew. & P. (Ala.) 397. But see Standefer *v.* Chisholm, 1 Stew. & P. (Ala.) 449; Killough *v.* Steele, 1 Stew. & P. (Ala.) 262, which hold that, under the registry acts of Alabama, a mortgage of personal property need not be recorded.

Early statutes applicable to chattel mortgages.— An early act of Virginia in regard to recording transfers was held to apply to chattel mortgages as well as to conveyances of land, and without record one was invalid against creditors (Hodgson *v.* Butts, 3 Cranch (U. S.) 140, 2 L. ed. 391), and an early Hawaiian statute was held to require the recording of chattel mortgages as well as those on real estate (Hardy *v.* Ruggles, 1 Hawaii 409); but prior to 1839 mortgages of personal property on consideration good and valuable at law did not need to be recorded in Arkansas (Merrill *v.* Dawson, Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469. To same effect see Kitchell *v.* Bratton, 2 Ill. 300, construing an early statute in Illinois).

No application to preceding mortgages has been the decision regarding the retroactive effect of a recording statute (Foster *v.* Berkey, 8 Minn. 351), and the law in force at the time the mortgage is executed is applicable (Lienau *v.* Moran, 5 Minn. 482).

Construction of statutes.— Although it has been held that the words "in good faith for value" in a recording statute apply only to subsequent encumbrancers and purchasers and not to creditors (W. W. Kimball Co. *v.* Kirby, 4 S. D. 152, 55 N. W. 1110), it was decided in another jurisdiction that the words "without notice" in the code applied to creditors as well as to subsequent purchasers (Bacon *v.* Thompson, 60 Iowa 284, 14 N. W. 312; Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56; McGavran *v.* Haupt, 9 Iowa 83). *Compare* Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867, where it was held that a

recording act are, they are not objectionable as interfering with the right of property.[99]

B. Effect of Recording — 1. Equivalent to Change of Possession. Where a mortgage is recorded change of possession is not necessary to the validity of the instrument,[1] for registration supplies the place of a transfer of possession,[2] even where the deed expressly provides that the grantee shall take and hold the property,[3] and fully rebuts any inference of fraud which might otherwise arise from the continued possession of the grantor.[4]

comma in the statute should be transposed so that three classes would be protected from unrecorded transfers, to wit: (1) creditors, (2) subsequent purchasers in good faith, (3) subsequent encumbrancers for value and in good faith.

99. Burdick *v.* Coates, 22 R. I. 410, 48 Atl. 389.

Repeal or modification by subsequent statutes.— It has been held that a statute declaring that unrecorded chattel mortgages should be void was not modified by a later act making mortgages good between the parties and those having actual notice of them because the latter act applied only to real-estate mortgages. Cardenas *v.* Miller, 108 Cal. 250, 39 Pac. 783, 49 Am. St. Rep. 84, 41 Pac. 472. The act to prevent secret sales, etc., of goods and chattels was held not to be changed by alterations in the law regarding the registration of transfers of real estate (Cannon *v.* McMichael, 6 Mackey (D. C.) 225; Gill *v.* Griffith, 2 Md. Ch. 270), and an act providing that failure to pay the debt secured would not vest in the mortgagee a right to possession did not do away with the necessity of delivery or record within twenty days after the execution of the instrument (Hope *v.* Johnston, 28 Fla. 55, 9 So. 830). See also Brown *v.* Harris, 67 N. J. L. 207, 50 Atl. 689, where a subsequent act was held not to repeal an earlier one relating to the recording of chattel mortgages and the court discuss the principles of construction which govern in such cases. *Compare* Otis *v.* Sill, 8 Barb. (N. Y.) 102; Porter *v.* Parmly, 43 How. Pr. (N. Y.) 445; Wood *v.* Lowry, 17 Wend. (N. Y.) 492 (in which cases it was held that an act requiring chattel mortgages to be filed did not repeal the statute relating to fraudulent conveyances); Shepardson *v.* Cary, 29 Wis. 34; Shepardson *v.* Green, 21 Wis. 539 (in which cases it was held that an act concerning warehouse receipts and bills of lading did not repeal or modify the act making it necessary to record a chattel mortgage when there was no transfer of possession).

1. *California.*— Berson *v.* Nunan, 63 Cal. 550.

Indiana.— Lumbert *v.* Woodard, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175.

Iowa.— Hughes *v.* Cory, 20 Iowa 399.

Kansas.— Butler *v.* Case, 53 Kan. 262, 36 Pac. 330.

Maine.— Andrews *v.* Marshall, 48 Me. 26; Smith *v.* Smith, 24 Me. 555.

Massachusetts.— Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; Bullock *v.* Williams, 16 Pick. (Mass.) 33.

Mississippi.— Hundley *v.* Buckner, 6 Sm. & M. (Miss.) 70.

Missouri.— Corning *v.* Rinehart Medicine Co., 46 Mo. App. 16.

New Hampshire.— Call *v.* Gray, 37 N. H. 428, 75 Am. Dec. 141.

New Jersey.— Fletcher *v.* Bonnet, 51 N. J. Eq. 615, 28 Atl. 601.

New York.— Lee *v.* Huntoon, Hoffm. (N. Y.) 447.

North Dakota.—Union Nat. Bank *v.* Oium, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533.

Oregon.— Nicklin *v.* Betts Spring Co., 11 Oreg. 406, 5 Pac. 51, 50 Am. Rep. 477.

Texas.— Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155.

United States.— Aldrich *v.* Ætna Ins. Co., 8 Wall. (U. S.) 491, 19 L. ed. 473; Jones *v.* Sleeper, 13 Fed. Cas. No. 7,496, 2 N. Y. Leg. Obs. 131.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 247, 371.

2. *Alabama.*—Cooper *v.* Berney Nat. Bank, 99 Ala. 119, 11 So. 760; Howell *v.* Carden, 99 Ala. 100, 10 So. 640.

Hawaii.— Hardy *v.* Ruggles, 1 Hawaii 409.

Iowa.— Kuhn *v.* Graves, 9 Iowa 303.

Minnesota.— Keenan *v.* Stimson, 32 Minn. 377, 20 N. W. 364. But see Horton *v.* Williams, 21 Minn. 187, where it was held that filing a mortgage was not legally equivalent to actual delivery of the property.

Wisconsin.— Cotton *v.* Marsh, 3 Wis. 221; Donaldson *v.* Johnson, 2 Pinn. (Wis.) 482, 2 Chandl. (Wis.) 160.

United States.— Morris *v.* Brush, 2 Woods (U. S.) 354, 17 Fed. Cas. No. 9,828, 14 Nat. Bankr. Reg. 371. See also Broom *v.* Armstrong, 137 U. S. 266, 11 S. Ct. 73, 34 L. ed. 648 [*affirming* 5 Utah 176, 13 Pac. 364], where registry of a mortgage was held to be such a substitute for change of possession that a recorded mortgage with no transfer of the property was valid in spite of a statute providing that every sale or assignment of chattels not followed by continuous change of possession shall be conclusive evidence of fraud.

Contra, Thompson *v.* Van Vechten, 5 Abb. Pr. (N. Y.) 458.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 247, 371.

3. State *v.* Cooper, 79 Mo. 464.

Effect of holding possession contrary to the terms of the instrument see *infra*, XI, B.

4. *Dakota.*— Reichert *v.* Simons, 6 Dak. 239, 42 N. W. 657.

Iowa.— Smith *v.* McLean, 24 Iowa 322.

2. Constructive Notice. Under the provisions of the registration acts the record of a chattel mortgage, being practically equivalent to a change of possession, furnishes constructive notice of its contents to creditors of the mortgagor and to subsequent purchasers of the property[5] from the time of its admission to

Mississippi.— Hundley *v.* Buckner, 6 Sm. & M. (Miss.) 70.

Missouri.— Miller *v.* Whitson, 40 Mo. 97.

United States.— Robinson *v.* Elliott, 22 Wall. (U. S.) 513, 22 L. ed. 758.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 247, 371.

The burden of proving good faith is taken from the shoulders of the mortgagee as effectually by recording as it would be by a transfer of possession (Marsh *v.* Burley, 13 Nebr. 261, 13 N. W. 279; Cotton *v.* Marsh, 3 Wis. 221), for after record retention of possession is not of itself fraudulent (Feurt *v.* Rowell, 62 Mo. 524; Cotton *v.* Marsh, 3 Wis. 221).

5. *Alabama.*— Chadwick *v.* Russell, 117 Ala. 290, 23 So. 524; Whittleshoffer *v.* Strauss, 83 Ala. 517, 3 So. 524.

California.— Berson *v.* Nunan, 63 Cal. 550.

Idaho.— Shields *v.* Ruddy, 2 Ida. 884, 28 Pac. 405, where the instrument recorded was a lease giving a lien for rent.

Illinois.— Sword *v.* Low, 122 Ill. 487, 13 N. E. 826.

Indiana.— Baldwin *v.* Boyce, 152 Ind. 46, 51 N. E. 334.

Iowa.— Root *v.* Schaffner, 39 Iowa 375, where a mortgage of her personal property by a married woman was recorded.

Kansas.—Brown *v.* James H. Campbell Co., 44 Kan. 237, 24 Pac. 492, 21 Am. St. Rep. 274.

Kentucky.— State Bank *v.* Vance, 4 Litt. (Ky.) 168; Hughes *v.* Graves, 1 Litt. (Ky.) 317.

Michigan.— Eddy *v.* McCall, 71 Mich. 497, 39 N. W. 734; Doyle *v.* Stevens, 4 Mich. 87.

Minnesota.— Eddy *v.* Caldwell, 7 Minn. 225; Lienau *v.* Moran, 5 Minn. 482.

Missouri.— Miller *v.* Whitson, 40 Mo. 97; Long *v.* Uhlich, 14 Mo. App. 594.

New York.— Rowland *v.* West, 62 Hun (N. Y.) 583, 17 N. Y. Suppl. 330, 43 N. Y. St. 698 (where the notice was to a mortgagee of the realty upon which the chattels were situated); Smith *v.* Taber, 46 Hun (N. Y.) 313 (instrument filed being a lease reserving a lien on crops); Kribbs *v.* Alford, 9 N. Y. St. 617.

South Carolina.— Quattlebaum *v.* Taylor, 45 S. C. 512, 23 S. E. 617.

Texas.— Oxsheer *v.* Watt, (Tex. Civ. App. 1897) 42 S. W. 121.

Wyoming.— Rock Springs Nat. Bank *v.* Luman, (Wyo. 1896) 43 Pac. 514, where the mortgagor was given power to sell and the notice was held to apply to the proceeds against one who knew they came from a sale of the mortgaged property.

United States.— Fowler *v.* Merril, 11 How. (U. S.) 375, 13 L. ed. 736 [*affirming* Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469] (holding record was not notice in Arkansas prior to 1839); Miller *v.* Jones, 17 Fed. Cas. No. 9,576, 15 Nat. Bankr. Reg. 150.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 246.

The absence of actual notice does not affect the rights of the mortgagee. Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Brown *v.* James H. Campbell Co., 44 Kan. 237, 24 Pac. 492, 21 Am. St. Rep. 274; Head *v.* Ward, 1 J. J. Marsh. (Ky.) 280; Hamill *v.* Gillespie, 48 N. Y. 556. *Compare* Kribbs *v.* Alford, 120 N. Y. 519, 24 N. E. 811, 31 N. Y. St. 564, where the purchaser made a timely search of the records and was postponed to the rights of the mortgagee, although the search failed to disclose the existence of the mortgage. See also Canada *v.* Southwick, 16 Pick. (Mass.) 556, where the mortgagee conducted litigation for the mortgagor against an attaching creditor without giving the creditor notice of the mortgage and he was held not to be postponed because the mortgage was duly recorded.

Record is notice although there are hidden defects in the instrument (Meckel Bros. Co. *v.* De Witt, 23 Ohio Cir. Ct. 174), the instrument recorded was in terms an absolute sale (Nicklin *v.* Betts Spring Co., 11 Oreg. 406, 5 Pac. 51, 50 Am. Rep. 477), the mortgagees are non-residents of the state (Foster *v.* Perkins, 42 Me. 168), and although the property is simply described as twenty cattle on a certain farm (Bell *v.* Prewitt, 62 Ill. 361) or by reference to another mortgage which was in fact on file but that circumstance was not stated (Newman *v.* Tymeson, 13 Wis. 172, 80 Am. Dec. 735). *Compare* Close *v.* Hodges, 44 Minn. 204, 46 N. W. 335, where record of a mortgage of all crops on certain described land was held to be notice to one who bought after the grain raised had been threshed.

Mistakes in date of instrument.— Although it has been held that record was constructive notice where the mortgage was by mistake dated a year later than the recording (Jacobs *v.* Denison, 141 Mass. 117, 5 N. E. 526) or a year prior to the date of the instrument accompanying it (Partridge *v.* Swazey, 46 Me. 414), where a mortgage of all the material "now in a shipyard" was recorded as being dated seven months earlier than its actual date, it was held not to be valid to defeat a purchaser's title (Stedman *v.* Perkins, 42 Me. 130).

Assumed name.— It has been held that record of a mortgage was constructive notice, although the instrument was executed under an assumed name. Fromme *v.* Jones, 13 Iowa 474; Alexander *v.* Graves, 25 Nebr. 453, 41 N. W. 290, 13 Am. St. Rep. 501. *Contra*, Mackey *v.* Cole, 79 Wis. 426, 48 N. W. 520, 24 Am. St. Rep. 728.

Failure to state the amount secured has

record,[6] provided the mortgage was attested and acknowledged as required by local statutes.[7]

C. Necessity For Recording[8] — **1. Between the Parties.** Since the object of filing a chattel mortgage is merely to obtain priority of lien,[9] failure to record does not in any degree affect the validity between the parties thereto[10] or their

been held to prevent the record of a mortgage from giving constructive notice of its contents to third persons (Bergman *v.* Bogda, 46 Ill. App. 351); but an instrument in blank as to amount was held sufficient to put all persons on inquiry (Hollenbeck *v.* Woodford, 13 Ind. App. 113, 41 N. E. 348).

Where equitable title only is transferred by a conveyance the filing of the instrument in the proper office is constructive notice of its contents. Truss *v.* Harvey, 120 Ala. 636, 24 So. 927.

Notice to subvendee of the mortgaged property has been held to be given by the registration of the mortgage. Oswald *v.* Hayes, 42 Iowa 104; Faxon *v.* Ridge, 87 Mo. App. 299; Quattlebaum *v.* Taylor, 45 S. C. 512, 23 S. E. 617.

Purchasers at an execution sale are not entitled to receive actual notice from the mortgagee where the instrument has been recorded. Steele *v.* Adams, 21 Ala. 534; Dalian *v.* Hollacher, 2 Tex. App. Civ. Cas. § 528.

Record does not give constructive notice of the contents where the mortgage is fraudulent (Niepschield *v.* Reuss, 92 Ill. App. 636), where the property upon which the lien is claimed is not described in the mortgage (Packers' Nat. Bank *v.* Chicago, etc., R. Co., 114 Iowa 621, 87 N. W. 653; Hinchman *v.* Town, 10 Mich. 508; Wynne *v.* Admire, (Tex. Civ. App. 1896) 37 S. W. 33; Rogers *v.* Gage, 59 Mo. App. 107, 1 Mo. App. Rep. 21), or where the document is not a recordable instrument (Schuster *v.* Jones, 22 Ky. L. Rep. 568, 58 S. W. 595). *Compare* Anderson *v.* Liston, 69 Minn. 82, 72 N. W. 52, where recording a second mortgage was held not to be notice to a prior mortgagee whose mortgage was given to secure future advances, even though the making of such advances was optional.

Recording is not notice to an auctioneer who sells the property in the regular course of business and turns over the proceeds to the mortgagor without actual notice. Frizzell *v.* Rundle, 88 Tenn. 396, 12 S. W. 918, 17 Am. St. Rep. 908.

An attaching creditor's belief that a mortgage was void will not defeat the constructive notice given by record. Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56.

6. Heflin *v.* Slay, 78 Ala. 180; Dawson *v.* Higgins, 50 Ala. 49.

7. *Hawaii.*— Lenehan *v.* Akana, 6 Hawaii 538.

Illinois.— Frank *v.* Miner, 50 Ill. 444.

Missouri.— Riehl *v.* Noel, 89 Mo. App. 178.

North Dakota.— Donovan *v.* St. Anthony, etc., Elevator Co., 8 N. D. 585, 80 N. W. 772, 73 Am. St. Rep. 779, 46 L. R. A. 721.

Oklahoma.—Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249; Campbell *v.* Richardson, 6 Okla. 375, 51 Pac. 659.

Virginia.— Moore *v.* Auditor, 3 Hen. & M. (Va.) 232.

But see Bickley *v.* Keenan, 60 Ala. 293, where the opposite conclusion was reached because no acknowledgment was necessary.

Requirements as to acknowledgment, etc. see *supra*, IV, B.

8. **Void as to all third persons.**— Under the provisions of one recording act it has been held that a mortgage is void as to everyone except the parties to it when it is not filed and a transfer of possession of the property does not accompany the instrument. Albert *v.* Van Frank, 87 Mo. App. 511.

9. Marshall *v.* Crawford, 45 S. C. 189, 22 S. E. 792.

The invalidity of an unrecorded chattel mortgage, as against third persons, arises merely from the want of notice of the lien. Niagara County Nat. Bank *v.* Lord, 33 Hun (N. Y.) 557.

10. *Arkansas.*— Hampton *v.* State, 67 Ark. 266, 54 S. W. 746; Watson *v* Thomson Lumber Co., 49 Ark. 83, 4 S. W. 62; Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494.

California.— Ruggles *v.* Cannedy, (Cal. 1898) 53 Pac. 911; Lemon *v.* Wolff, 121 Cal. 272, 53 Pac. 801.

Colorado.— Morse *v.* Morrison, (Colo. App. 1901) 66 Pac. 169.

Illinois.— Porter *v.* Dement, 35 Ill. 478; Fuller *v.* Paige, 26 Ill. 358, 79 Am. Dec. 379; Griffin *v.* Wertz, 2 Ill. App. 487.

Indiana.— McTaggart *v.* Rose, 14 Ind. 230.

Maine.— Shaw *v.* Wilshire, 65 Me. 485.

Maryland.— Clagett *v.* Salmon, 5 Gill & J. (Md.) 314; Hudson *v.* Warner, 2 Harr. & G. (Md.) 415.

Massachusetts.— Simpson *v.* McFarland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602.

Minnesota.— McNeil *v.* Finnegan, 33 Minn. 375, 23 N. W. 540.

Missouri.— Balke *v.* Swift, 53 Mo. 85; Johnson *v.* Jeffries, 30 Mo. 423.

Nebraska.—Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370.

New Hampshire.—Smith *v.* Moore, 11 N. H. 55.

New Jersey.— Williamson *v.* New Jersey Southern R. Co., 26 N. J. Eq. 398; National Bank *v.* Sprague, 20 N. J. Eq. 13.

New York.— Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290; Hayman *v.* Jones, 7 Hun (N. Y.) 238; Westcott *v.* Gunn, 4 Duer (N. Y.) 107; Zimmer *v.* Wheeler, 2 N. Y. St. 325; Thompson *v.* Van Vechten, 5 Abb. Pr. (N. Y.) 458; Pancoast *v.* American Heating, etc., Co., 66 How. Pr. (N. Y.) 49.

North Carolina.— Williams *v.* Jones, 95 N. C. 504.

North Dakota.— Union Nat. Bank *v.* Oium,

legal representatives after their death,[11] nor does lack of record make a mortgage invalid against a trespasser,[12] or against any person other than purchasers of the property and creditors of the mortgagor.[13]

2. Against Assignees of the Mortgagor. The diversity of opinion as to the right of an assignee in bankruptcy or insolvency to avoid a chattel mortgage for want of record cannot be entirely explained from the difference in recording statutes for the decisions on the point are in conflict.[14] As a voluntary assignee

3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533.

Ohio.— Stewart *v.* Hopkins, 30 Ohio St. 502; Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741; Wilson *v.* Leslie, 20 Ohio 161.

Pennsylvania.— Hosie *v.* Gray, 71 Pa. St. 198, mortgage of a leasehold.

South Carolina.— McGowan *v.* Reid, 27 S. C. 262, 3 S. E. 337; McKnight *v.* Gordon, 13 Rich. Eq. (S. C.) 222, 94 Am. Dec. 164.

Texas.— Keller *v.* Smalley, 63 Tex. 512; Parker *v.* American Exch. Nat. Bank, (Tex. Civ. App. 1894) 27 S. W. 1071; Ranck *v.* Howard-Sansom Co., 3 Tex. Civ. App. 507, 22 S. W. 773.

Washington.— Darland *v.* Levins, 1 Wash. 582, 20 Pac. 309.

Wisconsin.— Manson *v.* Phœnix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573.

Wyoming.— Schlessinger *v.* Cook, 9 Wyo. 256, 62 Pac. 152.

United States.— Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816; Sawyer *v.* Turpin, 91 U. S. 114, 23 L. ed. 235; Douglass *v.* Vogeler, 6 Fed. 53; *In re* Barman, 2 Fed. Cas. No. 999, 14 Nat. Bankr. Reg. 125, 3 N. Y. Wkly. Dig. 111.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 152.

Failure to record is no defense to foreclosure suit, whether set up by the original mortgagor (Reynolds *v.* Quick, 128 Ind. 316, 27 N. E. 621) or by one who had purchased the property from the mortgagor and assumed the mortgage debt (Dwight *v.* Scranton, etc., Lumber Co., 69 Mich. 127, 36 N. W. 752).

11. *Arkansas.*— Martin *v.* Ogden, 41 Ark. 186. *Compare* Wolff *v.* Perkins, 51 Ark. 43, 9 S. W. 432, where it was held that an unrecorded mortgage of chattels could be enforced after the legal title had vested in the widow of the mortgagor under the Arkansas statute conferring on the widow the right to the estate of the husband when less than three hundred dollars in value.

Illinois.— Griffin *v.* Wertz, 2 Ill. App. 487.

Indiana.— Mayer *v.* Myers, 129 Ind. 366, 27 N. E. 740.

Kentucky.— Bourbon Bank *v.* Porter, 22 Ky. L. Rep. 429, 57 S. W. 609.

Nebraska.— Becker *v.* Anderson, 11 Nebr. 493, 9 N. W. 640.

North Carolina.— Williams *v.* Jones, 95 N. C. 504.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 152.

Where the mortgagor died insolvent, while in possession of the property, it has been held that the personal representatives may claim the property against an unrecorded mortgage. Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741; Whiteley *v.* Weber, 2 Ohio Cir. Ct. 336, 1 Ohio Cir. Dec. 517. *Compare* Weed *v.* Standley, 12 Fla. 166, where a like result was reached on similar facts because the statute provided that an unrecorded mortgage should "not be valid for any purpose whatsoever." But see Bourbon Bank *v.* Porter, 22 Ky. L. Rep. 429, 57 S. W. 609, where an unrecorded mortgage was held to be valid against an executor of an insolvent estate, although the only change of possession was effected by notifying a bailee in possession of the property of the mortgagee's rights.

A widow's claim for dower in the property of her husband after his death is postponed to the right of a holder of an unrecorded mortgage. Wolff *v.* Perkins, 51 Ark. 43, 9 S. W. 432; McClure *v.* Owens, 32 Ark. 443.

12. Wright *v.* Brown, 11 Hawaii 401; Pratt *v.* Harlow, 16 Gray (Mass.) 379; Johnson *v.* Jeffries, 30 Mo. 423; Moses *v.* Walker, 2 Hilt. (N. Y.) 536.

13. Fuller *v.* Brownell, 48 Nebr. 145, 67 N. W. 6; Sanford *v.* Munford, 31 Nebr. 792, 48 N. W. 876; Scruggs *v.* Burruss, 25 W. Va. 670.

14. **An assignee cannot avoid** a chattel mortgage for want of record.

Massachusetts.— Briggs *v.* Parkman, 2 Metc. (Mass.) 258, 37 Am. Dec. 89, where the mortgage was recorded before the time when title to the property passed to the trustee. *Compare* Folsom *v.* Clemence, 111 Mass. 273, where a provision in a bankruptcy act which required that a mortgage should be executed six months before the filing of the petition in order to be valid against the bankrupt's assignee was held not to make it necessary to record the mortgage prior to the six-months' period.

New Hampshire.— Hodgdon *v.* Libby, 69 N. H. 136, 43 Atl. 312.

Texas.— Scott *v.* Alford, 53 Tex. 82, where the mortgage had been recorded before the assignee was appointed and the latter failed to show that he represented creditors who were hindered by the mortgage.

Vermont.— McLoud *v.* Wakefield, 70 Vt. 558, 43 Atl. 179, where possession was taken by the mortgagee before the filing of the petition, and the mortgage itself was made more than four months prior thereto.

United States.— Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816; Auburn Shoe, etc., Bank *v.* Small, 7 Fed. 837; Platt *v.* Preston, 3 Fed. 394; Carlisle *v.* Davis, 9 Ben. (U. S.) 18, 5 Fed. Cas. No. 2,411 (where bankruptcy proceedings were commenced before the default in refiling the chattel mortgage); Coggeshall *v.* Potter, Holmes (U. S.) 75, 6 Fed. Cas. No. 2,955, 6 Nat. Bankr. Reg. 10; *Ex p.* Dalby,

is not a purchaser[15] the common doctrine is that assignees under a voluntary assignment cannot raise the objection that a chattel mortgage executed by their assignor was not recorded;[16] but even a voluntary assignee is to a limited extent a representative of creditors and has been held to have a prior right to a mortgagee whose mortgage has not been recorded.[17]

1 Lowell (U. S.) 431, 6 Fed. Cas. No. 3,540, 3 Nat. Bankr. Reg. 731; Winsor *v.* McLellan, 2 Story (U. S.) 492, 30 Fed. Cas. No. 17,887, 6 Law Rep. 440; *In re* Lambert, 14 Fed. Cas. No. 8,026, 1 Chic. Leg. N. 210, 2 Nat. Bankr. Reg. 426. But see BANKRUPTCY, 5 Cyc. 347, note 60.

England.—Brown *v.* Heathcote, 1 Atk. 160; Sherrington *v.* Yates, 1 D. & L. 1032, 13 L. J. Exch. 249, 12 M. & W. 855; Mitford *v.* Mitford, 9 Ves. Jr. 87.

An assignee can avoid a mortgage for want of record.

California.— Ruggles *v.* Cannedy, (Cal. 1898) 53 Pac. 911.

Colorado.— Goodrich *v.* Michael, 3 Colo. 77.

District of Columbia.— Colbert *v.* Baetjer, 4 App. Cas. (D. C.) 416.

Kansas.— Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084, where the mortgage was both unrecorded and fraudulent.

Massachusetts.— Bingham *v.* Jordan, 1 Allen (Mass.) 373, 79 Am. Dec. 748.

Michigan.— Wakeman *v.* Barrows, 41 Mich. 363, 2 N. W. 50.

Vermont.— Blair *v.* Ritchie, 72 Vt. 311, 47 Atl. 1074.

United States.— Leavenworth Second Nat. Bank *v.* Hunt, 11 Wall. (U. S.) 391, 20 L. ed. 190; Adams *v.* Indianapolis Merchants' Nat. Bank, 9 Biss. (U. S.) 396, 2 Fed. 174; *In re* Gurney, 7 Biss. (U. S.) 414, 11 Fed. Cas. No. 5,873, 9 Chic. Leg. N. 255, 4 L. & Eq. Rep. 28, 15 Nat. Bankr. Reg. 373; *In re* Leland, 10 Blatchf. (U. S.) 503, 15 Fed. Cas. No. 8,234 (where the mortgagee had become absolutely entitled by reason of a breach of the condition of the mortgage); Moore *v.* Young, 4 Biss. (U. S.) 128, 17 Fed. Cas. No. 9,782; *In re* Werner, 5 Dill. (U. S.) 119, 29 Fed. Cas. No. 17,416. See also BANKRUPTCY, 5 Cyc. 347, note 60.

A receiver has a right to have a mortgage set aside in favor of general creditors because of a long delay in filing. Rudd *v.* Robinson, 54 Hun (N. Y.) 339, 7 N. Y. Suppl. 535, 27 N. Y. St. 98.

15. Keller *v.* Smalley, 63 Tex. 512. See, generally, ASSIGNMENTS, 4 Cyc. 1.

16. *District of Columbia.*—Colbert *v.* Baetjer, 4 App. Cas. (D. C.) 416.

Iowa.— Roberts *v.* Austin, 26 Iowa 315, 96 Am. Dec. 146.

Kentucky.— Cincinnati Leaf Tobacco Warehouse Co. *v.* Combs, 22 Ky. L. Rep. 523, 58 S. W. 420.

Maine.— Williamson *v.* Nealey, 81 Me. 447, 17 Atl. 404.

Michigan.— Brown *v.* Brabb, 67 Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549; Wakeman *v.* Barrows, 41 Mich. 363, 2 N. W. 50. *Compare* Putnam *v.* Reynolds, 44 Mich. 113, 6 N. W. 198.

Missouri.— Jacobi *v.* Jacobi, 101 Mo. 507, 14 S. W. 736; Riddle *v.* Norris, 46 Mo. App. 512.

New Jersey.— Shaw *v.* Glen, 37 N. J. Eq. 32.

New York.— Van Heusen *v.* Radcliff, 17 N. Y. 580, 72 Am. Dec. 480; Dorthy *v.* Servis, 46 Hun (N. Y.) 628; Niagara County Nat. Bank *v.* Lord, 33 Hun (N. Y.) 557.

Rhode Island.— Wilson *v.* Esten, 14 R. I. 621 (provided the mortgage was not withheld from record to give mortgagor fictitious credit); Williams *v.* Winsor, 12 R. I. 9.

Texas.— Keller *v.* Smalley, 63 Tex. 512.

Wisconsin.— Singer *v.* Wambold, 82 Wis. 233, 52 N. W. 178; Hawks *v.* Pritzlaff, 51 Wis. 160, 7 N. W. 303.

United States.— Rumsey *v.* Town, 20 Fed. 558.

Creditors still retain their rights.— Where a debtor after executing a chattel mortgage which was not recorded made a voluntary assignment for the benefit of creditors, it was held that a creditor who extended credit between the time when the mortgage was executed and the time when the assignment was made could maintain a proceeding to avoid the mortgage, and this right could not be defeated by claiming that it had passed to the assignee because the assignee only succeeded to rights which the debtor had. Rumsey *v.* Town, 20 Fed. 558. To same effect see Wimpfheimer *v.* Perrine, 61 N. J. Eq. 126, 47 Atl. 769.

17. *Indiana.*— Lockwood *v.* Slevin, 26 Ind. 124, based on statute which declared that a mortgage not recorded within ten days should be "absolutely" void.

Michigan.— Kennedy *v.* Dawson, 96 Mich. 79, 55 N. W. 616, where some of the claims against the assigned estate arose during the period that the mortgage was withheld from record. *Compare* Putnam *v.* Reynolds, 44 Mich. 113, 6 N. W. 198, where the same result was reached because the proceeding was in equity to foreclose.

Montana.— Story *v.* Cordell, 13 Mont. 204, 33 Pac. 6.

North Carolina.— Brem *v.* Lockhart, 93 N. C. 191.

Ohio.— Hanes *v.* Tiffany, 25 Ohio St. 549, where the affidavit accompanying a mortgage was defective and this was held to render it void against an assignee. *Compare* Lindemann *v.* Ingham, 36 Ohio St. 1.

Competition for priority between creditor, mortgagee, and assignee.— Where an attachment was a superior lien to a prior mortgage because it was not recorded, subsequent record of the mortgage was held not to render it valid against an assignee who was entitled to avoid the attachment because it was made within four months of bankruptcy (Beamer

3. Against Creditors — a. In General. Contests between creditors of a mortgagor and a mortgagee with an unrecorded mortgage usually arise in some action against the creditor who has seized the property upon judicial process, or in setting up a defense to foreclosure proceedings; and the law is that an unrecorded mortgage leaves the property as open to seizure by creditors upon an attachment writ,[18] or by virtue of an execution issued on a judgment recovered against the

v. Freeman, 84 Cal. 554, 24 Pac. 169); but where a first mortgage was invalid against general creditors for failure to refile, but valid against a properly filed second mortgagee who had notice of it, the court held that the assignee of the mortgage had no interest in the controversy and could not take advantage of the invalidity of the first mortgagee's claim (Huber Mfg. Co. *v.* Sweny, 57 Ohio St. 169, 48 N. E. 879). *Compare* Tremaine *v.* Mortimer, 128 N. Y. 1, 27 N. E. 1060, 38 N. Y. St. 740 [*affirming* 57 N. Y. Super. Ct. 340, 7 N. Y. Suppl. 681, 28 N. Y. St. 584], where a creditor levied on property covered by an unrecorded chattel mortgage after the mortgagor had made a general assignment of all his property and it was held, without passing on the rights of the assignee, that the levying creditor could not affirm that the mortgage was valid against the assignment so that nothing passed to the assignee and yet invalid as to him in order that he might come in ahead of the assignment.

18. *Alabama.*— Hurt *v.* Redd, 64 Ala. 85; Hardaway *v.* Semmes, 38 Ala. 657.

Arkansas.— Cross *v.* Fombey, 54 Ark. 179, 15 S. W. 461, where attachment lien dated from time writ was placed in officer's hands and prevailed, although mortgage was recorded before writ was served.

California.— Cardenas *v.* Miller, 108 Cal. 250, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84.

Connecticut.— Pond *v.* Skidmore, 40 Conn. 213, provided there was unreasonable and unexplained delay in the filing.

Illinois.— Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43; Strassheim *v.* Krueger, 69 Ill. App. 41.

Indian Territory.— McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043.

Iowa.— Singer Sewing Mach. Co. *v.* Holcomb, 40 Iowa 33.

Kansas.— Wm. B. Grimes Dry Goods Co. *v.* McKee, 51 Kan. 704, 33 Pac. 594; Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 566, 33 Pac. 363; Ramsey *v.* Glenn, 33 Kan. 271, 6 Pac. 265.

Maryland.— Clagett *v.* Salmon, 5 Gill & J. (Md.) 314.

Massachusetts.— Hawes *v.* Weeden, 180 Mass. 106, 61 N. E. 802; Potter *v.* Boston Locomotive Works, 12 Gray (Mass.) 154.

Michigan.—Johnson *v.* Stellwagen, 67 Mich. 10, 34 N. W. 252; Talcott *v.* Crippen, 52 Mich. 633, 18 N. W. 392 (holding that good faith on the part of the mortgagee would not protect him).

Missouri.— Rock Island Nat. Bank *v.* Powers, 134 Mo. 432, 34 S. W. 869, 35 S. W. 1132; Lowrance *v.* Barker, 82 Mo. App. 125.

Nebraska.— Meyer *v.* Miller, 51 Nebr. 620, 71 N. W. 315.

New Hampshire.— Hodgdon *v.* Libby, 69 N. H. 136, 43 Atl. 312; Stowe *v.* Meserve, 13 N. H. 46; Low *v.* Pettengill, 12 N. H. 337.

New Jersey.— McInnes *v.* McInnes Brick Mfg. Co., (N. J. 1897) 38 Atl. 182.

New York.— Ely *v.* Carnley, 19 N. Y. 496; Johnson *v.* Crofoot, 53 Barb. (N. Y.) 574, 37 How. Pr. (N. Y.) 59; Ledoux *v.* East River Silk Co., 19 Misc. (N. Y.) 440, 44 N. Y. Suppl. 489; Camp *v.* Camp, 2 Hill (N. Y.) 628. But see Wescott *v.* Gunn, 4 Duer (N. Y.) 107, where it was held that "creditor" in the statute meant judgment creditor and that an attaching creditor could not prevail.

North Carolina.— Murchison *v.* White, 30 N. C. 52.

Ohio.— Cass *v.* Rothman, 42 Ohio St. 380; Thorne *v.* Wilmington First Nat. Bank, 37 Ohio St. 254.

Oregon.— Maxwell *v.* Bolles, 28 Oreg. 1, 41 Pac. 661, where, pending the seizure of separate chattels by attaching officer, the mortgage was recorded and the mortgagee prevailed as to the unseized articles. But see Marks *v.* Miller, 21 Oreg. 317, 28 Pac. 14, 14 L. R. A. 190, where it was held that a mortgagee's failure to record his mortgage or take possession of the property did not make the mortgage invalid against a levying creditor, provided it was executed in good faith and for a valuable consideration.

Rhode Island.— Good *v.* Rogers, 19 R. I. 1, 31 Atl. 264.

South Carolina.— Herring *v.* Cannon, 21 S. C. 212, 53 Am. Rep. 661; McKnight *v.* Gordon, 13 Rich. Eq. (S. C.) 222, 94 Am. Dec. 164.

Tennessee.— Woodward *v.* Crump, 95 Tenn. 369, 32 S. W. 195; Barfield *v.* Cole, 4 Sneed (Tenn.) 464.

Washington.— Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867; Hall *v.* Matthews, 8 Wash. 407, 36 Pac. 262.

West Virginia.— Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510; Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171.

Wisconsin.— Strong *v.* Hoskin, 85 Wis. 497, 55 N. W. 852.

Contra, Union Nat. Bank *v.* Oium, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533, unless the creditor's claim accrued between the time of execution and the time of record.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 436.

Distress for rent seems equivalent to attachment in this respect. Brown *v.* Harris, 67 N. J. L. 207, 50 Atl. 689.

A purchaser from the mortgagee under a power of sale contained in a mortgage is in no better position against the creditors of the mortgagor than the mortgagee would be

mortgagor[19] as if no mortgage existed; and to this extent it is true that an unrecorded mortgage is void as to creditors.

b. Effect of Late Filing. Mere delay in filing is not an incurable defect, and as soon as the filing is completed the general rule is that the mortgage becomes valid and operative against general creditors of the mortgagor whose claims antedate the execution of the mortgage.[20] *A fortiori* late filing has this effect where the claim arose subsequently to the registration of the instrument,[21]

in when the mortgage has not been recorded and there is no change of possession. Davis *v.* Dugy, 3 Tex. App. Civ. Cas. § 334.

19. *Georgia.*— Green *v.* Franklin, 86 Ga. 360, 12 S. E. 585; Thompson *v.* Morgan, 82 Ga. 548, 9 S. E. 534 (holding that it was not necessary for the levying creditor to give the bond required by the code before one could contest the validity of a mortgage).

Illinois.— Gaff *v.* Harding, 48 Ill. 148; Stephenson *v.* Browning, 48 Ill. 78; Gregg *v.* Sanford, 24 Ill. 17, 76 Am. Dec. 719.

Kansas.— Jewell *v.* Simpson, 38 Kan. 362, 16 Pac. 450.

Nebraska.— Spaulding *v.* Johnson, 48 Nebr. 830, 67 N. W. 874; Farmers', etc., Bank *v.* Anthony, 39 Nebr. 343, 57 N. W. 1029.

New York.— Yenni *v.* McNamee, 45 N. Y. 614; Hayman *v.* Jones, 7 Hun (N. Y.) 238; Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179.

Ohio.— Wilson *v.* Leslie, 20 Ohio 161.

Pennsylvania.— Sturtevant's Appeal, 34 Pa. St. 149, mortgage of leasehold estate and not properly recorded because lease was not deposited with mortgage.

Wisconsin.— Wagg-Anderson Woolen Co. *v.* Dunn, 92 Wis. 409, 66 N. W. 354.

United States.— Stevenson *v.* Texas, etc., R. Co., 105 U. S. 703, 26 L. ed. 1215 (construing Texas law); Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 436.

Writ of execution need not be levied.— A chattel mortgage not filed until after delivery of a writ of execution, but before levy of the same, is junior to the lien of the execution. Williams *v.* Mellor, 12 Colo. 1, 19 Pac. 839; Self *v.* Sandford, 4 Ill. App. 328; Hale *v.* Sweet, 40 N. Y. 97; Stewart *v.* Beale, 7 Hun (N. Y.) 405.

Between the levy of an execution and the sheriff's sale a mortgage on a leasehold was recorded, but it was held that the creditor making the levy was entitled to priority over the mortgagee when he had no notice of the mortgage at the time the execution was issued. Lefever *v.* Armstrong, 15 Pa. Super. Ct. 565.

20. *Alabama.*— Troy *v.* Smith, 33 Ala. 469.

Florida.— Reese *v.* Taylor, 25 Fla. 283, 5 So. 821, unless the delay did not amount to laches.

Illinois.— Bushnell *v.* Wood, 85 Ill. 88.

Michigan.—Johnson *v.* Stellwagen, 67 Mich. 10, 34 N. W. 252, where it was held that a mortgage given in renewal of an unrecorded mortgage was not for that reason invalid.

Missouri.— Woolner *v.* Levy, 48 Mo. App. 469.

Nebraska.—Forrester *v.* Kearney Nat. Bank, 49 Nebr. 655, 68 N. W. 1059.

New Jersey.— Roe *v.* Meding, 53 N. J. Eq. 350, 33 Atl. 394.

New York.— Clark *v.* McDuffie, 21 N. Y. Suppl. 174, 49 N. Y. St. 535. *Compare* Hicks *v.* Williams, 17 Barb. (N. Y.) 523, holding that where the statute does not direct as to the time within which a chattel mortgage shall be filed, the courts cannot declare a mortgage void because it was not filed at the time of its execution.

Ohio.— Stewart *v.* Hopkins, 30 Ohio St. 502; Wilson *v.* Leslie, 20 Ohio 161; Retzsch *v.* W. C. Retzsch Printing Co., 19 Ohio Cir. Ct. 631, 10 Ohio Cir. Dec. 537.

Oregon.— Maxwell *v.* Bolles, 28 Oreg. 1, 41 Pac. 661.

Texas.— Maverick *v.* Bohemian Club, (Tex. Civ. App. 1896) 36 S. W. 147.

United States.— Johnson *v.* Patterson, 2 Woods (U. S.) 443, 13 Fed. Cas. No. 7,403.

Canada.— Balkwell *v.* Beddome, 16 U. C. Q. B. 203.

Contra, Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86; Amerige *v.* Hussey, 151 Mass. 300, 24 N. E. 46.

Where the person competing for priority had actual notice of the mortgage late filing is good. Clark *v.* McDuffie, 21 N. Y. Suppl. 174, 49 N. Y. St. 535.

Where competing claim arose during time that mortgage was withheld from record, subsequent filing did not entitle it to priority. Kennedy *v.* Dawson, 96 Mich. 79, 55 N. W. 616; Hume *v.* Eagon, 83 Mo. App. 576.

Not a badge of fraud.— Failure to file a chattel mortgage for record promptly is not a badge of fraud. Sprague *v.* Gardiner, 5 S. D. 256, 58 N. W. 559; Black Hills Mercantile Co. *v.* Gardiner, 5 S. D. 246, 58 N. W. 557.

Between the parties delay in recording a chattel mortgage does not affect its validity. Janes *v.* Penny, 76 Ga. 796; Wescott *v.* Gunn, 4 Duer (N. Y.) 107.

Extent of validity.—A mortgage unrecorded will have effect against any other title inferior to it, except a sale or mortgage of the same goods from the same person recorded before it. Youngblood *v.* Norton, 1 Strobh. Eq. (S. C.) 122.

21. Eales *v.* Francis, 115 Mich. 636, 73 N. W. 894; Eddy *v.* McCall, 71 Mich. 497, 39 N. W. 734; Meyer Bros. Drug Co. *v.* Self, 77 Mo. App. 284; Wimpfheimer *v.* Perrine, (N. J. 1901) 50 Atl. 356 [*affirming* 61 N. J. Eq. 126, 47 Atl. 769]; Roe *v.* Meding, 53 N. J. Eq. 350, 33 Atl. 394; Maverick *v.* Bohemian Club, (Tex. Civ. App. 1896) 36 S. W. 147; Vickers

but where there has been an agreement to withhold a mortgage from the records for the purpose of giving the mortgagor fictitious credit, this amounts to a fraud upon the creditors of the mortgagor which will not be cured by the subsequent registration of the instrument.[22]

e. Necessity For Lien. Although recording statutes usually provide that an unrecorded mortgage is void as to creditors, the prevailing doctrine only makes the mortgage void against those creditors who obtain a lien on the mortgaged property by attachment or levy of execution before the instrument is filed for record.[23] This rule only applies, however, to creditors who became such

v. Carnahan, 4 Tex. Civ. App. 305, 23 S. W. 338.

22. *Iowa.*— Bloomfield Woolen Mills *v.* Allender, 101 Iowa 181, 70 N. W. 115; Mull *v.* Dooley, 89 Iowa 312, 56 N. W. 513. *Compare* Everingham *v.* Harris, 99 Iowa 447, 68 N. W. 804, where a bill of sale of the mortgaged property was held not to be rendered fraudulent against general creditors of the mortgagor by the fact that the mortgage had been withheld from record when the assignee who took the bill of sale was without knowledge of the mortgage.

Kansas.— Lehman-Higginson Grocer Co. *v.* McClain, (Kan. 1901) 64 Pac. 1029.

Missouri.— Lowrance *v.* Barker, 82 Mo. App. 125.

Nebraska.— National Bank of Commerce *v.* Bryden, 59 Nebr. 75, 80 N. W. 276; Ackerman *v.* Ackerman, 50 Nebr. 54, 69 N. W. 388.

Oregon.— Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146.

South Carolina.— Marshall *v.* Crawford, 45 S. C. 189, 22 S. E. 792, holding that in the absence of an agreement to withhold the instrument from record it was not void but lost priority as to subsequent liens.

Tennessee.— Boze *v.* Nichols, (Tenn. Ch. 1898) 51 S. W. 122, where a purchaser for the consideration of an antecedent debt prevailed over the mortgagee.

United States.—Lyon *v.* Council Bluffs Sav. Bank, 29 Fed. 566, construing Iowa law. *Contra, In re* Schmitt, 109 Fed. 267, 6 Am. Bankr. Rep. 150, construing Ohio law, where the mortgage became valid and effective from the time of filing against general creditors who became such while the mortgage was by agreement withheld from the record.

Canada.— Clarkson *v.* McMaster, 25 Can. Supreme Ct. 96, holding that the mortgage was void *ab initio* on grounds of policy.

Agreements to withhold from record have been held to be valid where they were between the parties (Logan *v.* Slade, 28 Fla. 699, 10 So. 25), or against creditors who have not been injured thereby (Carpenter Paper Co. *v.* News Pub. Co., (Nebr. 1901) 87 N. W. 1050); and in one case where there was no actual fraud and the mortgagee did not know that the mortgagor was incurring further obligations (*In re* Shirley, 112 Fed. 301, 50 C. C. A. 252 [*affirming In re* Schmitt, 109 Fed. 267, 6 Am. Bankr. Rep. 150]).

Constructive fraud was inferred against creditors from the circumstance that a chattel mortgage was withheld from record until just before an application was made for a receiver. Retzsch *v.* Retzsch Printing Co., 5 Ohio S. & C. Pl. Dec. 574, 7 Ohio N. P. 605.

23. *Arkansas.*— Martin *v.* Ogden, 41 Ark. 186.

California.— Lemon *v.* Wolff, 121 Cal. 272, 53 Pac. 801.

Colorado.— Morse *v.* Morrison, (Colo. App. 1901) 66 Pac. 169, where the creditor competing with the unregistered mortgage had actual possession of the property.

Iowa.— Thomas *v.* Farley Mfg. Co., 76 Iowa 735, 39 N. W. 874.

Minnesota.— Coykendall *v.* Ladd, 32 Minn. 529, 21 N. W. 733, where an insurance policy on destroyed mortgaged property ran to the mortgagee, and an attaching creditor of the mortgagor who attempted to garnishee it was unsuccessful because he had acquired no lien against the property.

Missouri.— Barton *v.* Sitlington, 128 Mo. 164, 30 S. W. 514.

Nebraska.— Carpenter Paper Co. *v.* News Pub. Co., (Nebr. 1901) 87 N. W. 1050.

New Jersey.— The owner in possession of chattels subject to a mortgage which is void for want of registration may sell the goods with the mortgagee's consent and pay the proceeds to the mortgagee on account of the debt as against a judgment creditor who has failed to make a levy. National Shoe, etc., Bank *v.* August, 54 N. J. Eq. 182, 33 Atl. 803.

New Mexico.— Wolcott *v.* Ashenfelter, 5 N. M. 442, 23 Pac. 780, 8 L. R. A. 691.

New York.— Jones *v.* Graham, 77 N. Y. 628; Button *v.* Rathbone, 43 Hun (N. Y.) 147; Kennedy *v.* Watertown Nat. Union Bank, 23 Hun (N. Y.) 494; Ebling *v.* Husson, 54 N. Y. Super. Ct. 377. See also Robinson *v.* Kaplan, 21 Misc. (N. Y.) 686, 47 N. Y. Suppl. 1083, where it was held that failure to refile a mortgage did not render it void against a mere general creditor.

Ohio.— Isaacs *v.* Union Cent. L. Ins. Co., 11 Ohio Dec. (Reprint) 454, 27 Cinc. L. Bul. 72, where the mortgaged property was put in the hands of another creditor as a pledge but he was not allowed to hold it against an unrecorded mortgage.

Texas.—Berkey, etc., Furniture Co. *v.* Sherman Hotel Co., 81 Tex. 135, 16 S. W. 807; Overstreet *v.* Manning, 67 Tex. 657, 4 S. W. 248; Brothers *v.* Mundell, 60 Tex. 240; Moore *v.* Masterson, 19 Tex. Civ. App. 308, 46 S. W. 855.

Wisconsin.— Ullman *v.* Duncan, 78 Wis. 213, 47 N. W. 266, 9 L. R. A. 683; Manson *v.* Phœnix Ins. Co., 64 Wis. 26, 24 N. W. 407,

before the mortgage was executed, and where credit was extended to the mortgagor during the time that the mortgage was withheld from record, it has been held that the mortgage is void alike as to creditors with or without liens.[24]

54 Am. Rep. 573 (garnishment of insurance money on policy running in favor of mortgagee).

United States.— People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754.

Contra, Sidener *v.* Bible, 43 Ind. 230; Roe *v.* Meding, 53 N. J. Eq. 350, 33 Atl. 394; Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571. And see Scarry *v.* Bennett, 2 Ind. App. 167, 28 N. E. 231, where a pledgee of mortgaged property for an antecedent debt was allowed to prevail over the unrecorded mortgage.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 432.

Creditors of a deceased insolvent have been allowed to contest an unrecorded mortgage. Rock Springs First Nat. Bank *v.* Ludvigsen, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934, 80 Am. St. Rep. 928. *Contra,* Mayer *v.* Myers, 129 Ind. 366, 27 N. E. 740.

What constitutes a lien.— Although a creditor must ordinarily acquire his lien by levying on the property (Thomas *v.* Farley Mfg. Co., 76 Iowa 735, 39 N. W. 874), it has been held that a sufficient lien is acquired to justify a creditor in holding property against an unrecorded mortgage by an adjudication that the mortgagor is a bankrupt (*In re* Gurney, 7 Biss. (U. S.) 414, 11 Fed. Cas. No. 5,873, 9 Chic. Leg. N. 255, 4 L. & Eq. Rep. 28, 15 Nat. Bankr. Reg. 373), by a statutory provision that the assets of an insolvent estate be distributed ratably (Currie *v.* Knight, 34 N. J. Eq. 485), by possession of the property by a receiver appointed in a suit by a creditor (Smith *v.* Fletcher, (Ark. 1889) 11 S. W. 824; *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163), or by the allowance of his claim by an assignee of the mortgagor (Jewet *v.* Preist, 34 Mo. App. 509). But see Lane *v.* Lutz, 3 Abb. Dec. (N. Y.) 19, 1 Keyes (N. Y.) 203, where the court had directed that a receiver should sell fraudulently conveyed property subject to encumbrances, and it was held that the lien of an unrecorded mortgage was valid against a judgment creditor.

24. *California.*— Ruggles *v.* Cannedy, (Cal. 1898) 53 Pac. 911.

Georgia.— Maddox *v.* Wilson, 91 Ga. 39, 16 S. E. 213, where property was transferred to the subsequent creditor as a pledge.

Iowa.— H. E. Spencer Co. *v.* Papach, 103 Iowa 513, 70 N. W. 748, 72 N. W. 665, where, however, the mortgage was recorded so promptly that the doctrine of relation back prevented the creditors from succeeding.

Michigan.— Kennedy *v.* Dawson, 96 Mich. 79, 55 N. W. 616; Crippen *v.* Jacobson, 56 Mich. 386, 23 N. W. 56. See also Watson *v.* Meade, 98 Mich. 330, 57 N. W. 181, for a summary of the cases in that state on this and similar points.

North Dakota.— Sykes *v.* Hannawalt, 5 N. D. 335, 65 N. W. 682.

Wisconsin.— Sanger *v.* Guenther, 73 Wis. 354, 41 N. W. 436.

Contra, American L. & T. Co. *v.* Olympia Light, etc., Co., 72 Fed. 620, construing Washington statute.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 435.

Rule in Missouri.— Under Mo. Rev. Stat. (1899), § 3404, unless a mortgage is recorded or possession taken under it, it is void as to all persons. The interpretation of this is to the effect that if a creditor's claim antedates the mortgage, such creditor must obtain a lien before the mortgage is recorded or possession is taken; but if the creditor's claim arises subsequently to the mortgage he can obtain priority over the mortgage, even though possession is taken before he obtains judgment, because the concealment of the mortgage gave the mortgagor a false credit and justice demands that the creditors must take precedence over the mortgagee. Landis *v.* McDonald, 88 Mo. App. 335.

Rule in New York.— Although it was formerly regarded as necessary for a creditor whose claim antedated the execution of a mortgage to obtain a lien on the mortgaged property before record in order to prevail against the mortgagee (Sullivan *v.* Miller, 106 N. Y. 635, 13 N. E. 772; Kennedy *v.* Watertown Nat. Union Bank, 23 Hun (N. Y.) 494; Stewart *v.* Beale, 7 Hun (N. Y.) 405), it was held that a lien was unnecessary where the claim arose during the time that the mortgage was withheld from record (Stewart *v.* Beale, 7 Hun (N. Y.) 405; Smith *v.* Clarendon, 3 Silv. Supreme (N. Y.) 136, 140, 6 N. Y. Suppl. 809, 25 N. Y. St. 219), provided the creditors eventually secured a specific interest in the property by levy of attachment or execution (Smith *v.* Clarendon, 3 Silv. Supreme (N. Y.) 136, 140, 6 N. Y. Suppl. 809, 25 N. Y. St. 219); and this distinction between claims antedating and postdating the mortgage has been abandoned and the law now is that an unrecorded mortgage is void as to creditors with or without liens (Karst *v.* Gane, 136 N. Y. 316, 32 N. E. 1073, 49 N. Y. St. 740 [*affirming* 61 Hun (N. Y.) 533, 16 N. Y. Suppl. 385, 41 N. Y. St. 361]; Bullard *v.* Kenyon, 24 N. Y. Suppl. 374, 53 N. Y. St. 731 [*reversing* 66 Hun (N. Y.) 628, 21 N. Y. Suppl. 9, 49 N. Y. St. 132]), provided they get judgment and levy on the property before a *bona fide* absolute transfer of it has been made (Stephens *v.* Perrine, 143 N. Y. 476, 39 N. E. 11, 62 N. Y. St. 843 [*reversing* 69 Hun (N. Y.) 578, 24 N. Y. Suppl. 21, 53 N. Y. St. 261]; Crouse *v.* Schoolcraft, 51 N. Y. App. Div. 160, 64 N. Y. Suppl. 640. See also Castleman *v.* Mayer, 55 N. Y. App. Div. 515, 67 N. Y. Suppl. 229, where the same doctrine was applied in the case of a

d. Who Are Creditors. The person who seeks to establish a superior equity to a mortgage, unrecorded but *bona fide*, must ordinarily show that he belongs to the class of creditors who are entitled to attack the mortgage because it was not duly recorded.[25]

4. Against Purchasers — a. In General. Another class of persons who compete with the mortgagee for rights in the mortgaged property are included under the general term purchasers, and the law is that with the mortgagor in possession of the property registration is essential in order that a mortgage be valid against *bond fide* purchasers of the property from the mortgagor,[26] or against subsequent

fraudulent mortgage; and *compare* Talman *v.* Smith, 39 Barb. (N. Y.) 390, on doctrine of *bona fide* sale). The reason is that although a creditor must acquire a lien on the property before attacking the mortgage it is not the existence of such lien which makes the mortgage void as to him, but he can assert an interest in the mortgaged property only as he could assert an interest in any other property of the debtor. Farmers' L. & T. Co. *v.* Baker, 20 Misc. (N. Y.) 387, 46 N. Y. Suppl. 266. See also Industrial Loan Assoc. *v.* Saul, 34 Misc. (N. Y.) 188, 68 N. Y. Suppl. 837, where it was held that a warehouseman in possession of mortgaged chattels was in a similar position to a judgment creditor in making an attack on a mortgage for lack of registration. An illustration of the effect of requiring a lien is found in a case where a creditor sued the mortgagee at law for damages caused by the foreclosure of an unrecorded mortgage and failed to recover because he had no specific interest in the property which was damaged. Murtha *v.* Curley, 47 N. Y. Super. Ct. 393. *Compare* Field *v.* Ingreham, 15 Misc. (N. Y.) 529, 37 N. Y. Suppl. 1135, 74 N. Y. St. 306, where an unrecorded mortgage was held to be void against an existing contract creditor, although the property was such that the mortgagor could have claimed it as exempt.

Rule in Canada.— A creditor need not have a lien to attack an unrecorded mortgage whether his claim antedates or postdates the execution of the mortgage. Clarkson *v.* McMaster, 25 Can. Supreme Ct. 96.

When claims originate.— It has been held that a creditor's claim arose during the period that the mortgage was withheld from record when he took renewal notes during that period (Cutler *v.* Steele, 85 Mich. 627, 48 N. W. 631; Sanger *v.* Guenther, 73 Wis. 354, 41 N. W. 436), or did anything on the basis of the non-existence of the unrecorded mortgage (Root *v.* Harl, 62 Mich. 420, 29 N. W. 29). *Compare* Dempsey *v.* Pforzheimer, 86 Mich. 652, 49 N. W. 465, 13 L. R. A. 388, where the subsequent creditor who was entitled to avoid a mortgage was allowed priority, although he accepted a mortgage on the same property to secure his claim instead of taking legal proceedings.

25. St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497, 55 N. W. 60; Adoue *v.* Jemison, 65 Tex. 680 (where the sole interest of the creditor was by reason of the mortgage).

Creditors.— Where a liability for indorsing negotiable paper has not become fixed the indorser is not a creditor within the provisions of the statute (Karst *v.* Gane, 61 Hun (N. Y.) 533, 16 N. Y. Suppl. 385, 41 N. Y. St. 361), and a person claiming under a contract which merely gives him the right to take possession of the stock in trade of another and conduct the business with a provision that property thereafter acquired should be shared was held to be neither a creditor nor a purchaser (Balcom *v.* Julien, 22 How. Pr. (N. Y.) 349); but it has been held that one who takes from the executors of an estate a note of a third person to the testator as part of his patrimony becomes on that date a creditor of the maker within the meaning of the Michigan statute (Cutler *v.* Huston, 158 U. S. 423, 15 S. Ct. 868, 39 L. ed. 1040). See also Cutler *v.* Steele, 85 Mich. 627, 48 N. W. 631, where it was held that a creditor could attack a mortgage, although the renewal note to secure his debt was given by the mortgagor as indorser instead of as principal debtor.

Creditor need not show that he could not make good his claim out of other property belonging to the debtor than that which is covered by the mortgage. Ruggles *v.* Cannedy, (Cal. 1898) 53 Pac. 911.

Claimant with laborer's lien.— A creditor who has availed himself of his right to file a lien is an encumbrancer by operation of law and stands on the footing of a creditor from the time his claim accrued, and not merely of an encumbrancer from the time his lien was filed; so he can prevail over a defective mortgage, although he knew of its existence at the time the lien was filed. Blumauer *v.* Clock, 24 Wash. 596, 64 Pac. 844.

26. *Alabama.*— Dearing *v.* Lightfoot, 16 Ala. 28, where the unauthorized act of an agent in selling was ratified by the principal before the purchaser knew of the mortgage.

Kansas.— Frankhouser *v.* Worrall, 51 Kan. 404, 32 Pac. 1097; Tyler *v.* Safford, 31 Kan. 608, 3 Pac. 333.

Kentucky.— Baldwin *v.* Owen, 21 Ky. L. Rep. 352, 51 S. W. 438.

Maine.— Kelley *v.* Goodwin, 95 Me. 538, 50 Atl. 711; Beeman *v.* Lawton, 37 Me. 543.

Mississippi.— Harmon *v.* Short, 8 Sm. & M. (Miss.) 433.

South Carolina.—Ryan *v.* Clanton, 3 Strobh. (S. C.) 411.

South Dakota.— La Crosse Boot, etc., Mfg. Co. *v.* Mons Anderson Co., 13 S. D. 301, 83 N. W. 331.

Tennessee.— Hurt *v.* Reeves, 5 Hayw. (Tenn.) 49.

mortgagees without notice or knowledge of the existence of the previous mortgage.[27]

b. Who Are Purchasers. To constitute a person a purchaser, it is necessary that he should pay a valuable consideration or incur a fixed liability therefor;[28] and it is usually held that a preëxisting indebtedness does not constitute a valuable consideration.[29]

Washington.—Carstens *v.* Moyer, 22 Wash. 61, 60 Pac. 51.

United States.— Where the mortgage of a vessel allowed it to remain in the possession of the mortgagor and to stand in the mortgagor's name on the shipping list, it was held that a *bona fide* purchaser from the mortgagor was entitled to prevail over the claims of the mortgagor. The Romp, Olcott (U. S.) 196, 20 Fed. Cas. No. 12,030; The Mary, 1 Paine (U. S.) 671, 16 Fed. Cas. No. 9,187.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 255.

27. *District of Columbia.*— Weightman *v.* Washington Critic Co., 4 App. Cas. (D. C.) 136.

Georgia.— Kelly *v.* Shepherd, 79 Ga. 706, 4 S. E. 880.

Maryland.— G. Ober, etc., Co. *v.* Keating, 77 Md. 100, 26 Atl. 501.

Michigan.— Dempsey *v.* Pforzheimer, 86 Mich. 652, 49 N. W. 465, 13 L. R. A. 388.

Missouri.— Block *v.* Chase, 15 Mo. 344.

United States.— Van Winkle *v.* Crowell, 146 U. S. 42, 13 S. Ct. 18, 36 L. ed. 880; New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305 (construing Texas statute).

See 9 Cent. Dig. tit. "Chattel Mortgages," § 255.

Mortgagee is a purchaser, within the meaning of the recording acts (Manny *v.* Woods, 33 Iowa 265), to the extent of his claim (Plaisted *v.* Holmes, 58 N. H. 619).

Both purchasers and subsequent mortgagees have been said to be entitled to priority over an unrecorded mortgage provided they act in good faith.

Florida.— Logan *v.* Slade, 28 Fla. 699, 10 So. 25.

Georgia.— Cumming *v.* Early, R. M. Charlt. (Ga.) 140.

Iowa.— Singer Sewing Mach. Co. *v.* Holcomb, 40 Iowa 33.

Maine.— Shaw *v.* Wilshire, 65 Me. 485.

Michigan.— Damm *v.* Mason, 98 Mich. 237, 57 N. W. 123.

New York.— Thompson *v.* Blanchard. 4 N. Y. 303; Betsinger *v.* Schuyler, 46 Hun (N. Y.) 349; Wescott *v.* Gunn, 4 Duer (N. Y.) 107.

North Carolina.— Dukes *v.* Jones, 51 N. C. 14.

South Carolina.— Sternberger *v.* McSween, 14 S. C. 35.

Virginia.— Bird *v.* Wilkinson, 4 Leigh (Va.) 266.

Washington.— Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 255.

Priority between successive mortgages see *infra*, XIV, B, 5 [7 Cyc.].

28. Nix *v.* Wiswell, 84 Wis. 334, 54 N. W. 620; Funk *v.* Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576.

An attaching creditor is not a purchaser within the meaning of Wis. Rev. Stat. (1898), §§ 2241, 2242. Karger *v.* Steele-Wedeles Co., 103 Wis. 286, 79 N. W. 216.

Where a person contracted to sell property which he did not own and subsequently acquired the property and gave a mortgage to secure the purchase-price, it was held that the mortgage need not be recorded to be good against such antecedent purchaser. Anonymous, 7 Ohio Dec. (Reprint) 158, 1 Cinc. L. Bul. 186.

29. *Alabama.*— Boyd *v.* Beck, 29 Ala. 703.

New Jersey.— Wilson *v.* Lippincott, (N. J. 1899) 44 Atl. 989; Milton *v.* Boyd, 49 N. J. Eq. 142, 22 Atl. 1078.

New York.— Thompson *v.* Van Vechten, 27 N. Y. 568; Doig *v.* Haverly, 92 Hun (N. Y.) 176, 37 N. Y. Suppl. 455, 72 N. Y. St. 728; Wiles *v.* Clapp, 41 Barb. (N. Y.) 645; Tiffany *v.* Warren, 37 Barb. (N. Y.) 571, 24 How. Pr. (N. Y.) 293 [*reversing* 1 West. L. Month. 131]; Bueb *v.* Geraty, 28 Misc. (N. Y.) 134, 59 N. Y. Suppl. 249. *Compare* Baskins *v.* Shannon, 3 N. Y. 310.

Ohio.— Isaacs *v.* Union Cent. L. Ins. Co., 11 Ohio Dec. (Reprint) 454, 27 Cinc. L. Bul. 72.

Texas.— Bowen *v.* Lansing Wagon Works, 91 Tex. 385, 43 S. W. 872; Overstreet *v.* Manning, 67 Tex. 657, 4 S. W. 248; Belcher *v.* Cassidy Bros. Live-Stock Commission Co., (Tex. Civ. App. 1901) 62 S. W. 924; Austin First Nat. Bank *v.* Western Mortg., etc., Co., 6 Tex. Civ. App. 59, 24 S. W. 691.

Washington.— Howard *v.* Gemming, 10 Wash. 30, 38 Pac. 766.

United States.— People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754.

Contra, Lushton State Bank *v.* O. S. Kelley Co., 47 Nebr. 678, 66 N. W. 619; Walter A. Wood Mowing, etc., Mach. Co. *v.* Lee, 9 S. D. 69, 68 N. W. 170. *Compare* Sheldon *v.* Warner, 26 Mich. 403, where it was held that a fixed indebtedness incurred after the execution of an unrecorded mortgage afforded a valuable consideration for a subsequent mortgage which entitled it to prevail.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 258.

Taking goods in payment of a preëxisting indebtedness has been held to constitute the one so taking a purchaser for value. Horton *v.* Williams, 21 Minn. 187; Button *v.* Rathbone, 118 N. Y. 666, 23 N. E. 122, 27 N. Y. St. 938.

5. Effect of Notice — a. On Rights of Purchasers. When a contest arises between a mortgagor and a purchaser of the mortgaged property the knowledge or lack of knowledge of the purchaser regarding the existence of the mortgage becomes at once a material and important circumstance, for, except in a few jurisdictions, it is held that a mortgage is valid against a purchaser with notice thereof, although it has not been recorded,[30] or has not been renewed or

The consideration was sufficient where the time of payment of a preëxisting indebtedness was extended (Hale *v.* Omaha Nat. Bank, 39 N. Y. Super. Ct. 207; McKinney *v.* Williams, (Tex. Civ. App. 1898) 45 S. W. 335), where notes were surrendered (Powers *v.* Freeman, 2 Lans. (N. Y.) 127), where money was advanced at the time of executing the mortgage (Zimmer *v.* Wheeler, 2 N. Y. St. 325) and the balance of the purchase-money secured by a note (Perkins *v.* Frank, (Tex. Civ. App. 1901) 64 S. W. 236).

One purchasing at an execution sale for a valuable consideration and without notice an unrecorded mortgage is entitled to protection as a subsequent purchaser. McKnight *v.* Gordon, 13 Rich. Eq. (S. C.) 222, 94 Am. Dec. 164.

Question for jury.— Where two mortgagees with mortgages executed by different persons were competing for priority and the mortgage which was prior in time was not on file, it was held to be a question for the jury to determine whether the person executing the second mortgage was a *bona fide* purchaser from the first mortgagor. Manistee First Nat. Bank *v.* Marshall, etc., Bank, 108 Mich. 114, 65 N. W. 604.

30. *Alabama.*— Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Boyd *v.* Beck, 29 Ala. 703; Smith *v.* Zurcher, 9 Ala. 208.

California.— Wilkerson *v.* Thorp, 128 Cal. 221, 60 Pac. 679; Fette *v.* Lane, (Cal. 1894) 37 Pac. 914 (holding, where defendant's second mortgage for seed furnished was made before he had notice of plaintiff's prior unrecorded mortgage on the same crops, that defendant had a prior lien to the extent of the seed furnished, but could not enforce against plaintiff liens for advances furnished the mortgagor after notice of the first mortgage).

Colorado.— Cassidy *v.* Harrelson, 1 Colo. App. 458, 29 Pac. 525. *Compare* Dole *v.* Akron Bank, 8 Colo. App. 127, 45 Pac. 226, where a purchaser who was informed of a mortgage on the property bought without making inquiries and was allowed to hold against the mortgage, although it had not been paid, since it had expired by limitation five months before, had not been renewed, and the mortgagee had not taken possession.

Illinois.— Hathorn *v.* Lewis, 22 Ill. 395, where the mortgage had not been properly acknowledged.

Iowa.— Luce *v.* Moorehead, 77 Iowa 367, 42 N. W. 328; Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411, in which cases record did not give constructive notice to a purchaser because the description of the mortgaged property was insufficient.

Kansas.—American Lead Pencil Co. *v.* Champion, 57 Kan. 352, 46 Pac. 696; Neerman *v.* Caldwell, 50 Kan. 61, 31 Pac. 608; Casner *v.* Crawford, 4 Kan. App. 687, 46 Pac. 41.

Maryland.— Hudson *v.* Warner, 2 Harr. & G. (Md.) 415, unless the first mortgagee has led the purchaser to believe that the prior encumbrance has been removed.

Michigan.— Read *v.* Horner, 90 Mich. 152, 51 N. W. 207; Num *v.* Paulus, 48 Mich. 190, 12 N. W. 40; Doyle *v.* Stevens, 4 Mich. 87.

Minnesota.—Nickerson *v.* Wells Stone Mercantile Co., 71 Minn. 230, 73 N. W. 959, 74 N. W. 891; Tolbert *v.* Horton, 31 Minn. 518, 18 N. W. 647.

Nebraska.— Wagner *v.* Steffin, 38 Nebr. 392, 56 N. W. 993; Weeping Water Electric Light Co. *v.* Haldeman, 35 Nebr. 139, 52 N. W. 892; Bartholomew *v.* Fisher, 34 Nebr. 98, 51 N. W. 599; Russell *v.* Longmoor, 29 Nebr. 209, 45 N. W. 624.

New Hampshire.— Piper *v.* Hilliard, 58 N. H. 198; Clark *v.* Tarbell, 57 N. H. 328; Patten *v.* Moore, 32 N. H. 382.

New Jersey.— Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571; Sayre *v.* Hewes, 32 N. J. Eq. 652; Williamson *v.* New Jersey Southern R. Co., 26 N. J. Eq. 398.

New York.— Gildersleeve *v.* Landon, 73 N. Y. 609; Zimmer *v.* Wheeler, 2 N. Y. St. 325; Sanger *v.* Eastwood, 19 Wend. (N. Y.) 514; Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306.

Ohio.— Simons *v.* Pierce, 16 Ohio St. 215; Paine *v.* Mason, 7 Ohio St. 198; Miller *v.* Toledo Bank, 1 Ohio Dec. (Reprint) 392, 8 West. L. J. 536; Smith *v.* Simper, 15 Ohio Cir. Ct. 375, 8 Ohio Cir. Dec. 308.

Oklahoma.— Campbell *v.* Richardson, 6 Okla. 375, 51 Pac. 659.

Pennsylvania.— Coble *v.* Nonemaker, 78 Pa. St. 501.

Tennessee.—Polk *v.* Foster, 7 Baxt. (Tenn.) 98, where the mortgage was on unplanted crops.

Texas.— Freiberg *v.* Magale, 70 Tex. 116, 7 S. W. 684; Snyder *v.* Austin First Nat. Bank, (Tex. Civ. App. 1895) 32 S. W. 162; Bell *v.* Gammon, 3 Tex. App. Civ. Cas. § 404; Hull *v.* Quest, 2 Tex. Unrep. Cas. 564.

Washington.— Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872; Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867; Darland *v.* Levins, 1 Wash. 582, 20 Pac. 309.

Wisconsin.— Nix *v.* Wiswell, 84 Wis. 334, 54 N. W. 620; Funk *v.* Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576.

United States.— People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754; Moore *v.* Simonds, 100 U. S. 145, 25

refiled according to statutory requirements.[31] But the wording of some recording statutes has been so distinct and the declaration that unrecorded mortgages are void has been put in such unambiguous language that in those jurisdictions a purchaser is not affected by notice of an unrecorded mortgage.[32]

b. On Rights of Creditors. In those states where a purchaser is not affected by his knowledge of an unrecorded mortgage, a creditor's knowledge is also immaterial, and to this list must be added jurisdictions which distinguish between purchasers and creditors and make notice material in respect to the former and immaterial as to the latter.[33] There remain some jurisdictions however, where

L. ed. 590; Wilbur *v.* Almy, 12 How. (U. S.) 180, 13 L. ed. 944 [*reversing* 2 Woodb. & M. (U. S.) 371, 1 Fed. Cas. No. 256]; The Independence, 9 Ben. (U. S.) 395, 13 Fed. Cas. No. 7,013, 55 How. Pr. (N. Y.) 205.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 264.

The purchase-money must be paid before the purchaser receives notice of the unrecorded mortgage in order to entitle him to prevail against the mortgagee. Cummings *v.* Tovey, 39 Iowa 195.

Effect of second mortgagee's notice of first mortgage on execution creditor.— Where an execution was levied on property after a second mortgage had been given to a mortgagee who had notice of a prior unrecorded mortgage, it was held that the execution creditor was entitled to priority to the extent of the first mortgage, that the residue of the judgment should be paid *pari passu* with the second mortgage, and that what remained should be applied in payment of the first mortgage. Hoag *v.* Sayre, 33 N. J. Eq. 552.

31. *Kansas.*— Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145; Schnavely *v.* Bishop, 8 Kan. App. 301, 55 Pac. 667.

Michigan.— Wetherell *v.* Spencer, 3 Mich. 123.

Nebraska.— Ransom *v.* Schmela, 13 Nebr. 73, 12 N. W. 926.

New York.— Lewis *v.* Palmer, 28 N. Y. 271; Hill *v.* Beebe, 13 N. Y. 556; Thompson *v.* Van Vechten, 6 Bosw. (N. Y.) 373; Gregory *v.* Thomas, 20 Wend. (N. Y.) 17. *Contra,* Jones *v.* Howell, 3 Rob. (N. Y.) 438.

Ohio.— Huber Mfg. Co. *v.* Sweney, 11 Ohio Cir. Ct. 193, 5 Ohio Cir. Dec. 331; Welte *v.* Faller, 7 Ohio Dec. (Reprint) 456, 3 Cinc. L. Bul. 347, 5 Ohio Dec. (Reprint) 590, 6 Am. L. Rec. 766.

United States.— Riederer *v.* Pfaff, 61 Fed. 872.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 270.

32. *Arkansas.*— McKennon *v.* May, 39 Ark. 442, both as to original filing and renewal.

Illinois.— Frank *v.* Miner, 50 Ill. 444; Roberts *v.* Kingsbury, 71 Ill. App. 451 (where the mortgage was both unacknowledged and unrecorded); People *v.* Hamilton, 17 Ill. App. 599. But see Fuller *v.* Paige, 26 Ill. 358, 79 Am. Dec. 379, where it was held that the purchaser would be postponed if he had knowledge of the unrecorded mortgage and purchased with an intention to cheat the mortgagee.

Indiana.— Kennedy *v.* Shaw, 38 Ind. 474; Lockwood *v.* Slevin, 26 Ind. 124.

Kentucky.—McGowen *v.* Hoy, 5 Litt. (Ky.) 239.

Maine.— Garland *v.* Plummer, 72 Me. 397.

Massachusetts.— Smith *v.* Howard, 173 Mass. 88, 53 N. E. 143; Bingham *v.* Jordan, 1 Allen (Mass.) 373, 79 Am. Dec. 748; Travis *v.* Bishop, 13 Metc. (Mass.) 304.

Missouri.— Rawlings *v.* Bean, 80 Mo. 614; Bryson *v.* Penix, 18 Mo. 13; State *v.* Sitlington, 51 Mo. App. 252. *Compare* Mead *v.* Maberry, 62 Mo. App. 557, 1 Mo. App. Rep. 559, where it was suggested that notice would postpone the purchaser if he bought expressly subject to the mortgage.

Texas.— Lewis *v.* Bell, (Tex. Civ. App. 1897) 40 S. W. 747.

Vermont.— Longey *v.* Leach, 57 Vt. 377, where the claim of which a purchaser had notice was merely a lien and not a mortgage.

Wisconsin.— Parroski *v.* Goldberg, 80 Wis. 339, 50 N. W. 191.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 264.

33. A levying creditor is not postponed by notice of an unrecorded mortgage.

California.— Cardenas *v.* Miller, 108 Cal. 250, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84.

Colorado.— Burchinell *v.* Gorsline, 11 Colo. App. 22, 52 Pac. 413, where the mortgage was not properly refiled.

Illinois.— Porter *v.* Dement, 35 Ill. 478.

Indiana.— Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Lockwood *v.* Slevin, 26 Ind. 124.

Indian Territory.— McFadden *v.* Blocker, (Indian Terr. 1900) 54 S. W. 873.

Kansas.— Swiggett *v.* Dodson, 38 Kan. 702, 17 Pac. 594, where there had been a failure properly to refile the mortgage.

Maine.— Rich *v.* Roberts, 48 Me. 548.

Massachusetts.— Shapleigh *v.* Wentworth, 13 Metc. (Mass.) 358; Denny *v.* Lincoln, 13 Metc. (Mass.) 200, where this opinion was expressed with some doubt.

Missouri.— Bevans *v.* Bolton, 31 Mo. 437; Martin-Perrin Mercantile Co. *v.* Perkins, 63 Mo. App. 310, 1 Mo. App. Rep. 762; Mead *v.* Maberry, 62 Mo. App. 557, 1 Mo. App. Rep. 559; Hughes *v.* Menefee, 29 Mo. App. 192.

Nevada.— Simpson *v.* Harris, 21 Nev. 353, 31 Pac. 1009.

New Jersey.— Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571; Sayre *v.* Hewes, 32 N. J. Eq. 652 (commenting on the difference in this respect between creditors and purchasers).

New York.—Stevens *v.* Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590; Farmers' L. & T. Co. *v.* Hen-

creditors are put on a par with purchasers and are held to be postponed to an unrecorded mortgage of which they had actual knowledge.[34]

c. Express Postponement. It is universally held that an express postponement of adverse interests to an existing mortgage will be effectnal to give the mortgagee priority. Thus, a second encumbrancer whose mortgage expressly recites that it is subject to a prior one on the same property will not be allowed to contest the validity of such prior mortgage for want of record,[35] for defective

drickson, 25 Barb. (N. Y.) 484; McDonald *v.* City Trust Safe-Deposit, etc., Co., 32 Misc. (N. Y.) 644, 66 N. Y. Suppl. 475; Dunham *v.* Silberstein, 32 Misc. (N. Y.) 642, 66 N. Y. Suppl. 476; Zimmer *v.* Wheeler, 2 N. Y. St. 325; Barker *v.* Doty, 4 Alb. L. J. 63. But see Beebe *v.* Richmond Light, etc., Co., 13 Misc. (N. Y.) 737, 35 N. Y. Suppl. 1, 69 N. Y. St. 230, where a mortgage covering realty and personalty, although not filed, was held to be a lien on personalty prior to that of a judgment of a creditor of the mortgagor who had notice of it. *Compare* Rochester Commercial Bank *v.* Davy, 81 Hun (N. Y.) 200, 30 N. Y. Suppl. 718, 62 N. Y. St. 681, where a failure to refile a chattel mortgage was held not to invalidate it against creditors who had actual notice of its existence.

Ohio.— Honk *v.* Condon, 40 Ohio St. 569. But see Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306.

Oklahoma.—Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249; Campbell *v.* Richardson, 6 Okla. 375, 51 Pac. 659.

Texas.— Freiberg *v.* Magale, 70 Tex. 116, 7 S. W. 684, noticing the difference between creditors and purchasers in regard to the effect of notice.

Washington.— Baxter *v.* Smith, 2 Wash. Terr. 97, 4 Pac. 35.

Wisconsin.— Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61, 61 N. W. 299; Strong *v.* Hoskin, 85 Wis. 497, 55 N. W. 852.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 433.

34. *Iowa.*— Aultman, etc., Mach. Co. *v.* Kennedy, 114 Iowa 444, 87 N. W. 435; Kern *v.* Wilson, 82 Iowa 407, 48 N. W. 919; Bacon *v.* Thompson, 60 Iowa 284, 14 N. W. 312 [*overruling* Kessey *v.* McHenry, 54 Iowa 187, 6 N. W. 262]; Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56; McGavran *v.* Haupt, 9 Iowa 83.

Kentucky.— Baldwin *v.* Crow, 86 Ky. 679, 9 Ky. L. Rep. 836, 7 S. W. 146.

Maryland.— Gill *v.* Griffith, 2 Md. Ch. 270.

New Hampshire.— Piper *v.* Hilliard, 58 N. H. 198; Tucker *v.* Tilton, 55 N. H. 223. But see Stowe *v.* Meserve, 13 N. H. 46, where notice after the creditor had procured process and was proceeding to levy was insufficient to postpone him.

Texas.— Hull *v.* Quest, 2 Tex. Unrep. Cas. 564.

United States.— Crooks *v.* Stuart, 2 McCrary (U. S.) 13, 7 Fed. 800, construing Iowa statute and state decisions thereon.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 433.

A purchaser at an execution sale has been held not to be postponed to an unrecorded mortgage of which he had actual knowledge. Stevens *v.* Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590. *Contra,* Railsback *v.* Patton, 34 Nebr. 490, 52 N. W. 277.

35. *Arkansas.*—Ohio *v.* Byrne, 59 Ark. 280, 27 S. W. 243.

Colorado.— Citizens' Coal, etc., Co. *v.* Stanley, 6 Colo. App. 181, 40 Pac. 693.

Iowa.— Where one mortgage was expressly postponed to another, it has been held that the postponed mortgagee cannot even object that the other was not delivered till after his own had taken effect. Tollerton, etc., Co. *v.* Anderson, 108 Iowa 217, 78 N. W. 822.

Massachusetts.—Pecker *v.* Silsby, 123 Mass. 108; Howard *v.* Chase, 104 Mass. 249. See also Eaton *v.* Tuson, 145 Mass. 218, 13 N. E. 488, where a mortgage of personal property recited that it was subject to another unrecorded mortgage to a third person and another mortgage to the same mortgagee referred to the previous mortgage for its description of the property, and it was held that the last mortgage was subject to the unrecorded mortgage to the third person.

Michigan.— Wakeman *v.* Barrows, 41 Mich. 363, 2 N. W. 50.

Minnesota.— Tolbert *v.* Horton, 33 Minn. 104, 22 N. W. 126.

Missouri.— Young *v.* Evans-Snyder-Buel Commission Co., 158 Mo. 395, 59 S. W. 113; Crawford *v.* Harter, 22 Mo. App. 631.

New York.— McCrea *v.* Hopper, 35 N. Y. App. Div. 572, 55 N. Y. Suppl. 136 [*affirmed* in 165 N. Y. 633, 59 N. E. 1125].

Contra, Ellis *v.* White, 3 Hawaii 205.

Failure to file proper renewal affidavits has been held not to invalidate a mortgage against a subsequent mortgage taken before the time for refiling had arrived, when such second mortgage was expressly postponed. Flory *v.* Comstock, 61 Mich. 522, 28 N. W. 701; McCrea *v.* Hopper, 35 N. Y. App. Div. 572, 55 N. Y. Suppl. 136 [*affirmed* in 165 N. Y. 633, 59 N. E. 1125]; Potter *v.* Traders' Nat. Bank, 70 Hun (N. Y.) 53, 23 N. Y. Suppl. 1079, 53 N. Y. St. 432.

Of what recital is not notice.— It has been held that a recital in a bill of sale that property is subject to a chattel mortgage of particular date is not notice of a verbal agreement between the seller and mortgagee to substitute other property for that described in the mortgage. Wynne *v.* Admire, 4 Tex. Civ. App. 45, 23 S. W. 418. *Compare* Clark *v.* Barnes, 72 Iowa 563, 34 N. W. 419, where a recital that a mortgage was made subject to a mortgage recorded at P, coupled with a warranty against other encumbrances, was

execution,[36] for insufficient description of the property,[37] or on the ground that it is fraudulent.[38] Where a sale of mortgaged property is made expressly subject to the mortgage, it is also true that the purchaser is postponed thereto in spite of defects which would invalidate the instrument.[39]

d. What Constitutes Notice — (i) *In General.* It is usually considered sufficient to postpone a person claiming in competition with a mortgagee for him to have constructive notice of the unrecorded mortgage,[40] or to know of facts which would put him to inquiry;[41] but there is authority for more rigid requirements

held not to be notice of an unrecorded mortgage.

Sufficiency of recital.— It has been held sufficient for the recital of a prior encumbrance to be put in an affidavit of good faith executed by the mortgagor and attached to the second mortgage (Eastern Brewing Co. *v.* Feist, 21 Misc. (N. Y.) 681, 48 N. Y. Suppl. 29); and where mortgaged chattels were purchased at a greatly reduced price subject to all the liabilities that are against them in the way of debt either by note, judgment, or mortgage, the purchaser was considered as having purchased only the equity of redemption therein (Carter *v.* Bennett, 6 Fla. 214). *Compare* Garrison *v.* Quick, 38 N. Y. App. Div. 93, 57 N. Y. Suppl. 895, where a person in possession of a watch, under a bill of sale, as security for a debt, jointly with the owner executed a mortgage thereon to a third person, which recited that it was subject to the debt secured by the bill of sale, and agreed with the mortgagee to deliver the watch to him in case of default. It was held that the chattel mortgage and agreement to deliver the watch were a second mortgage, and on default the holder was not obliged to deliver the watch until the payment of his claim.

A recital of postponement to recorded mortgages only postpones to mortgages which are recorded in the proper county. Whitney *v.* Browne, 180 Mass. 597, 62 N. E. 979.

36. Young *v.* Evans-Snyder-Buell Commission Co., 158 Mo. 395, 59 S. W. 113. See also Dwight *v.* Scranton, etc., Lumber Co., 69 Mich. 127, 36 N. W. 752, where the defect cured by express postponement was lack of authority in the individuals assuming to execute the mortgage.

37. Wood River Bank *v.* Kelley, 29 Nebr. 590, 46 N. W. 86; Hardwick *v.* Atkinson, 8 Okla. 608, 58 Pac. 747.

38. *Indiana.*— Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358; Anderson *v.* Oscamp, 10 Ind. App. 166, 37 N. E. 1055.

Iowa.— Singer Piano Co. *v.* Barnard, 113 Iowa 664, 83 N. W. 725.

Kansas.— Burnham *v.* Citizens Bank, 55 Kan. 545, 40 Pac. 912; Dodge *v.* Smith, 5 Kan. App. 742, 46 Pac. 990.

New Jersey.— Perrine *v.* Jamesburg First Nat. Bank, 55 N. J. L. 402, 27 Atl. 640.

Texas.— Godair *v.* Tillar, 19 Tex. Civ. App. 541, 47 S. W. 553.

39. Kellogg *v.* Secord, 42 Mich. 318, 3 N. W. 868; Ludlum *v.* Rothschild, 41 Minn. 218, 43 N. W. 137; Mead *v.* Maberry, 62 Mo. App. 557, 1 Mo. App. Rep. 559 (where the purchaser assumed liability for the mortgage debt); Potter *v.* Traders' Nat. Bank, 70 Hun (N. Y.) 53, 23 N. Y. Suppl. 1079, 53 N. Y. St. 432.

Taking right, title, and interest.— The holder of a second chattel mortgage, who takes only the right, title, and interest of the mortgagor in the property, cannot attack the validity of the filing of the first mortgage. Rosenbaum *v.* Foss, 7 S. D. 83, 63 N. W. 538. *Compare* Tuite *v.* Stevens, 98 Mass. 305, where an assignee conveyed all his right, title, and interest in property covered by a chattel mortgage, and it was held that he transferred only the equity of redemption and not the assignee's right to contest the validity of the mortgage.

Agreements as to priority have been held binding and to control the order of preference without regard to the time when the instrument was filed or the sufficiency of record.

Idaho.— Wells *v.* Alturas Commercial Co., (Ida. 1899) 56 Pac. 165.

Kansas.— Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145.

Minnesota.—Chadbourn *v.* Rahilly, 28 Minn. 394, 10 N. W. 420.

New Jersey.— Cumberland Nat. Bank *v.* Baker, 57 N. J. Eq. 231, 40 Atl. 850.

New York.— Wray *v.* Fedderke, 43 N. Y. Super. Ct. 335. *Compare* McLeod *v.* Miner, 38 N. Y. App. Div. 115, 56 N. Y. Suppl. 714, where plaintiff advanced a sum to pay off a mortgage on a stock of goods in consideration of an interest in the business, and it was held that the mortgage was not postponed to the lien for advances, although it was not paid off according to the agreement.

40. Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56, holding that actual notice of an unrecorded chattel mortgage is where a purchaser either knows of its existence or is conscious of having the means of knowledge, and does not use them, whether his knowledge is the result of a direct communication or is gathered from facts and circumstances. *Contra*, see Day *v.* Munson, 14 Ohio St. 488.

41. Frick *v.* Fritz, (Iowa 1902) 88 N. W. 961; Aultman, etc., Mach. Co. *v.* Kennedy, 114 Iowa 444, 87 N. W. 435; Stowe *v.* Meserve, 13 N. H. 46; Mack *v.* Phelan, 92 N. Y. 20.

Failure to inquire must arise from bad faith, and not merely from negligence in order to charge a person with constructive notice. Millar *v.* Olney, 69 Mich. 560, 37 N. W. 558.

The circumstances were sufficient to charge a claimant with notice where he admitted

and it has been held that notice must be full, clear, and explicit so as to designate the specific property bound by the mortgage by marks or numbers, or by other description, capable of identifying it.[42] It seems to be sufficient, however, if notice is received at any time before the actual payment of the purchase-money.[43]

(II) *Agent's Knowledge.* Although many considerations enter in, the general rule is that the knowledge of an agent or attorney regarding an unrecorded or defective chattel mortgage is the knowledge of his employer.[44]

(III) *Subvendees.* While one who purchases from a second mortgagee with knowledge of a prior unrecorded mortgage and of the claims to preference

that he knew of the mortgage but did not know that it was unpaid (McCormick *v.* Venable, 12 N. Y. Suppl. 152, 34 N. Y. St. 717), where the mortgagor and a third person both testified that the claimant was informed of the mortgage (Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872), where the answer to interrogatories stated that no notice had been communicated to him but failed to state whether he had "seen" the mortgage or not (Miles *v.* Blanton, 3 Dana (Ky.) 525), where the attaching creditor was told that if he attached "it would be him and the bank [mortgagee] for it" (Aultman, etc., Mach. Co. *v.* Kennedy, 114 Iowa 444, 87 N. W. 435), and where the purchaser was a cousin of the mortgagor and knew when he received his mortgage that the mortgagor had theretofore given a mortgage on the same chattels, and it did not affect the result that the mortgagor said the first mortgage had been paid and the purchaser examined the records and found no mortgage on file (Goodwin *v.* Bayerle, 18 Misc. (N. Y.) 62, 41 N. Y. Suppl. 20). *Compare* Williams *v.* Bresnahan, 66 Mich. 634, 33 N. W. 739, holding that the question of actual notice was properly left to the jury where a clause to the effect that the goods were "free and clear from all liens, conveyances, incumbrances," etc., had been erased from claimant's mortgage.

Knowledge was held not sufficient to put a claimant on inquiry where he was informed that there was a mortgage but was told that it was on other property (Simpson *v.* Huison, 88 Ala. 527, 7 So. 264), where he had knowledge of an unrecorded lease which conferred a mortgage lien on crops by an unusual covenant to that effect (Wilkerson *v.* Thorp, 128 Cal. 221, 60 Pac. 679), and where he knew merely of the existence of a debt for unpaid purchase-money of land upon which the mortgaged cotton he bought was raised (Bell *v.* Tyson, 74 Ala. 353). See also Hesser *v.* Wilson, 36 Iowa 152, where a person furnished materials to a manufacturer to be manufactured for him and the manufacturer mortgaged them to a creditor without knowledge of the adverse rights, and it was held that mere knowledge of the contract of manufacture would not charge the creditor with notice.

A purchaser was not charged with notice by reason of a public sale under an improperly recorded chattel mortgage which took place in another part of the county from that where he lived (London *v.* Youmans, 31 S. C. 147, 9 S. E. 755, 17 Am. St. Rep. 17), or by the execution of an instrument in writing purporting to deliver possession of cattle forty-five miles away (Blanchard *v.* Ingram, 2 Indian Terr. 232, 48 S. W. 1066). *Compare* Lawrence *v.* McKenzie, 88 Iowa 432, 55 N. W. 505, where knowledge by a creditor that certain persons were in possession of defendant's books of account and claimed them as mortgagee's was held not to charge him with notice that such persons claimed the accounts themselves. See also Marsden *v.* Cornell, 2 Hun (N. Y.) 449, where a mortgage had not been renewed as required by statute, and it was held that one purchasing the property with knowledge of the mortgage, but without notice of the amount due thereon, was a *bona fide* purchaser.

42. Denny *v.* Lincoln, 13 Metc. (Mass.) 200; Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396.

43. Gardner *v.* Roach, 111 Iowa 413, 82 N. W. 897; Cummings *v.* Tovey, 39 Iowa 195; Marsh *v.* Armstrong, 20 Minn. 81, 18 Am. Rep. 355; Towler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736 [*affirming* Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469].

Prepayment.— Where a mortgagor ordered machinery for a purchaser who prepaid him, an unrecorded mortgage for the purchase-price in favor of the seller prevailed against the claims of the purchaser for he was not a subsequent purchaser in good faith. Deeley *v.* Dwight, 16 Daly (N. Y.) 300, 11 N. Y. Suppl. 60, 32 N. Y. St. 616. *Compare* City Bank *v.* Easton Boot, etc., Co., 187 Pa. St. 30, 42 Wkly. Notes Cas. (Pa.) 409, 40 Atl. 1026, where the purchase-money was paid prior to a delivery of the goods and it was held that notice given after the goods were shipped but before they arrived would not postpone the purchaser.

Only to payments before notice does the protection afforded to a *bona fide* purchaser extend. Kohl *v.* Lynn, 34 Mich. 360.

44. Frick *v.* Fritz, (Iowa 1902) 88 N. W. 961; McClelland *v.* Saul, 113 Iowa 208, 84 N. W. 1034, 86 Am. St. Rep. 370; Kalamazoo First Nat. Bank *v.* Guntermann, 94 Mich. 125, 53 N. W. 919; Littauer *v.* Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572. But see McCarthy *v.* Grace, 23 Minn. 182, where the fact that the sheriff making a levy on property covered by a chattel mortgage was the mortgagee therein was held to be no notice to the levying creditor of the mortgage.

See, generally, Attorney and Client, 4 Cyc. 889; Principal and Agent.

made by the holders thereof will be postponed to the first mortgage,[45] a subpurchaser without notice of the unrecorded mortgage will take free from such encumbrance, even though his vendor had notice.[46] It is also held that a subpurchaser with notice of the unrecorded mortgage will nevertheless take the property free from encumbrance when the vendor,[47] execution creditor,[48] or attaching creditor[49] through whom he claims obtained his rights against the property without notice of the adverse interests.

(iv) *Burden of Proof.* The burden of proving notice seems to rest on the attacking party, and so it is held that a mortgagee claiming against a purchaser in possession must show that the latter had actual knowledge of the mortgage;[50] but where a subsequent encumbrancer attempted to enforce his lien it was necessary to show that he took without knowledge of the prior encumbrance.[51]

6. Modifying Circumstances[52] **— a. Form of the Instrument** — (i) *Generally.* The requirements for recording mortgages are not affected by the form of the instrument. So registration is necessary to make a transfer valid against creditors where it assumes the form of an absolute sale given to secure a debt,[53] or a sale of

45. Tiffany *v.* Warren, 37 Barb. (N. Y.) 571, 24 How. Pr. (N. Y.) 293 [*reversing* 1 West. L. Month. 131].

46. Cumming *v.* Early, R. M. Charlt. (Ga.) 140; John Caplice Co. *v.* Beauchamp, 22 Mont. 258, 56 Pac. 278; London *v.* Youmans, 31 S. C. 147, 9 S. E. 775, 17 Am. St. Rep. 17.

47. Tyler *v.* Safford, 31 Kan. 608, 3 Pac. 333; McKnight *v.* Gordon, 13 Rich. Eq. (S. C.) 222, 94 Am. Dec. 164.

Purchasers from the mortgagee's vendee, executor, and widow have been held entitled to the protection given to *bona fide* purchasers by the statute in relation to the refiling of the mortgages. Fox *v.* Burns, 12 Barb. (N. Y.) 677.

Subpurchaser after record.— Where a subvendee purchased after record of the mortgage from a subsequent encumbrancer who obtained his mortgage before the prior one was recorded but with actual notice thereof, it was held that the unrecorded mortgage would prevail. Hoagland *v.* Shampanore, 37 N. J. Eq. 588.

48. Herring *v.* Cannon, 21 S. C. 212, 53 Am. Rep. 661.

49. Piper *v.* Hilliard, 52 N. H. 209.

50. Dayton State Bank *v.* Felt, 99 Iowa 532, 68 N. W. 818, 61 Am. St. Rep. 253; Carson, etc., Lumber Co. *v.* Bunker, 83 Iowa 751, 49 N. W. 1003; Shay *v.* Security Bank, 67 Minn. 287, 69 N. W. 920; Rogers *v.* Pierce, 12 Nebr. 48, 10 N. W. 535 (where the mortgagee was claiming against the rights of a subvendee); La Crosse Boot, etc., Mfg. Co. *v.* Mons Anderson Co., 9 S. D. 560, 70 N. W. 877. But see La Crosse Boot, etc., Mfg. Co. *v.* Mons Anderson Co., 14 S. D. 597, 86 N. W. 641 [*reversing* 13 S. D. 301, 83 N. W. 331] where it was held error to instruct that plaintiff suing a purchaser in conversion must prove that the purchaser had actual notice of the mortgage before the purchase.

51. Diemer *v.* Guernsey, 112 Iowa 393, 83 N. W. 1047; McNeil *v.* Finnegan, 33 Minn. 375, 23 N. W. 540; Ransom *v.* Schmela, 13 Nebr. 73, 12 N. W. 926. *Compare* Caulfield *v.* Curry, 63 Mich. 594, 30 N. W. 191, where a subsequent mortgagee alleged that a prior duly recorded mortgage was fraudulent and he was required to show that he took his mortgage without actual knowledge of the existing encumbrance.

No issue as to actual notice is raised where the mortgagee alleges that the mortgage was duly recorded before plaintiff's purchase, as he indicates that he intends to rely on the record as notice. Barrett *v.* Fisch, 76 Iowa 553, 41 N. W. 310, 14 Am. St. Rep. 238.

Proof of good faith.— Payment of a valuable consideration has been held to be a circumstance from which it could be inferred that a purchaser bought without notice (Wright *v.* Larson, 51 Minn. 321, 53 N. W. 712, 38 Am. St. Rep. 504; Farmington Bank *v.* Ellis, 30 Minn. 270, 15 N. W. 243), and the payment of a small consideration only, which is inadequate to the value of the property, has been held to show a lack of good faith (McNeil *v.* Finnegan, 33 Minn. 375, 23 N. W. 540); but mere inadequacy of price is not conclusive against the good faith of the purchaser (Boydson *v.* Goodrich, 49 Mich. 65, 12 N. W. 913). *Compare* Luce *v.* Moorchead, 77 Iowa 367, 42 N. W. 328, where an attempt was made to prove that a list of mortgages had been given to plaintiff before he advanced his money, and it was held that evidence as to what was said at that time concerning such mortgages was admissible, although some of them were executed by third persons.

Failure of a purchaser to take immediate possession has been held not to invalidate the sale against a prior unrecorded mortgage. Bennett *v.* Earll, 21 Wend. (N. Y.) 117; Glasscock *v.* Batton, 6 Rand. (Va.) 78, 18 Am. Dec. 703.

52. Mortgagee's lack of beneficial interest. — A chattel mortgage may be filed for registration in spite of the fact that the debt is not due to the mortgagee himself for his own benefit. Brodie *v.* Ruttan, 16 U. C. Q. B. 207.

An unstamped mortgage may be recorded. Hardy *v.* Ruggles, 1 Hawaii 457.

53. *Arkansas.*—Rogers *v.* Vaughan, 31 Ark. 62.

the property accompanied by a lease back to the vendor;[54] and though the transaction is put in the language of a conditional sale if it is in effect a mortgage security,[55] it must be recorded to be valid against third persons.[56] Where the terms of a lease include an agreement which is in reality a chattel mortgage it is both proper and necessary that the instrument be recorded as a chattel mortgage.[57]

Kentucky.— Lobban *v.* Garnett, 9 Dana (Ky.) 389, where the absolute bill of sale was accompanied by a defeasance on a separate instrument and it was held that both must be lodged for record.

Maine.— Shaw *v.* Wilshire, 65 Me. 485. *Contra,* Knight *v.* Nichols, 34 Me. 208.

Massachusetts.— Potter *v.* Boston Locomotive Works, 12 Gray (Mass.) 154.

Missouri.—Kollock *v.* Emmert, 43 Mo. App. 566.

Montana.— Story *v.* Cordell, 13 Mont. 204, 33 Pac. 6.

Nebraska.— Conway *v.* St. Joseph Iron Co., 33 Nebr. 454, 50 N. W. 326.

New York.— Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275, 20 N. Y. St. 120; Thompson *v.* Blanchard, 4 N. Y. 303; Witherbee *v.* Taft, 51 N. Y. App. Div. 87, 64 N. Y. Suppl. 347; Kings County Bank *v.* Courtney, 69 Hun (N. Y.) 152, 23 N. Y. Suppl. 542, 53 N. Y. St. 324; Preston *v.* Southwick, 42 Hun (N. Y.) 291. *Compare* Wooster *v.* Sherwood, 25 N. Y. 278 [*distinguished* in Gillet *v.* Roberts, 57 N. Y. 28, and *explained* in Menzies *v.* Dodd, 19 Wis. 343], where it was held to be unnecessary to record an instrument which the court said was an executed sale in the nature of a mortgage.

North Carolina.— Dukes *v.* Jones, 51 N. C. 14.

Rhode Island.— Harris *v.* Chaffee, 17 R. I. 193, 21 Atl. 104.

South Carolina.— McKnight *v.* Gordon, 13 Rich. Eq. (S. C.) 222, 94 Am. Dec. 164.

Tennessee.— Barfield *v.* Cole, 4 Sneed (Tenn.) 464.

Virginia.— Bird *v.* Wilkinson, 4 Leigh (Va.) 266.

Washington.— Van Brocklin *v.* Queen City Printing Co., 19 Wash. 552, 53 Pac. 822.

West Virginia.— Zanhizer *v.* Hefner, 47 W. Va. 418, 35 S. E. 4.

Contra, Cecil *v.* Gavan, 65 Ga. 689; Corning *v.* Records, 69 N. H. 390, 46 Atl. 462, 76 Am. St. Rep. 178; *Ex p.* Fitz, 2 Lowell (U. S.) 519, 9 Fed. Cas. No. 4,837. And *compare* Tift *v.* Dunn, 80 Ga. 14, 5 S. E. 256, where a bill of sale was accompanied by a bond on the part of the vendee to reconvey upon repayment of the debt, and it was held that such an instrument need not be recorded as the law stood in 1881.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 155.

A bill of sale in payment of a debt need not be recorded to be valid against creditors of the seller. Volckers *v.* Sturke, 18 Misc. (N. Y.) 457, 42 N. Y. Suppl. 84.

54. Seim *v.* Hale, 67 Ill. App. 364; *In re* Raymond Bag Co., 8 Ohio S. & C. Pl. Dec. 688; Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160; Frank *v.* Denver, etc., R. Co., 23 Fed. 123. But see Neidig *v.* Eifler, 18 Abb. Pr. (N. Y.) 353, where a lease of chattels at a specified rent with an agreement that they should be the property of the lessee upon payment of the rent for a specified period was held not to be a chattel mortgage requiring registration to give it validity against subsequent purchasers.

A receipt given for property by a debtor not a warehouseman to take effect as security was held to be within the statute requiring conveyances of chattels intended to operate as mortgages to be recorded. Thorne *v.* Wilmington First Nat. Bank, 37 Ohio St. 254.

55. See *supra,* III, C, 1, 2.

56. *Illinois.*— Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43.

Kentucky.— Barney, etc., Mfg. Co. *v.* Hart, 8 Ky. L. Rep. 223, 1 S. W. 414.

Michigan.— Damm *v.* Mason, 98 Mich. 237, 57 N. W. 123.

South Carolina.— Herring *v.* Cannon, 21 S. C. 212, 53 Am. Rep. 661.

Tennessee.—Byrd *v.* Wilcox, 8 Baxt. (Tenn.) 65.

Texas.— Williams *v.* Farmers' Nat. Bank, 22 Tex. Civ. App. 581, 56 S. W. 261.

Wisconsin.— Cadle *v.* McLean, 48 Wis. 630, 4 N. W. 755.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 426 *et seq.*

Necessity and effect of recording conditional sales generally see SALES.

57. *Iowa.*— Singer Sewing Mach. Co. *v.* Holcomb, 40 Iowa 33.

Kansas.— T. B. Townsend Brick, etc., Co. *v.* Allen, 9 Kan. App. 230, 59 Pac. 683.

New York.— Betsinger *v.* Schuyler, 46 Hun (N. Y.) 349; Reynolds *v.* Ellis, 34 Hun (N. Y.) 47; Johnson *v.* Crofoot, 53 Barb. (N. Y.) 574, 37 How. Pr. (N. Y.) 59. *Compare* Hare *v.* Follet, 17 N. Y. Suppl. 559, where it was held necessary to record an agreement for cultivation of land on shares which provided that title to all property raised should remain in the owner of the land till the fulfilment of the contract.

Ohio.— Smith *v.* Worman, 19 Ohio St. 145. But see Schoenberger *v.* Mount, 1 Handy (Ohio) 566, 12 Ohio Dec. (Reprint) 292, where it was held that a lease reciting: "The furniture of the house to be held as security for the rent. Messrs. Little & Co. hold now a chattel mortgage on it, and they agree to this arrangement," need not be recorded as a chattel mortgage.

United States.— Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 156; and, generally, LANDLORD AND TENANT.

Instruments entitled to record.— A pledge

(II) *Collateral Agreements.* Although a mortgage is accompanied by a collateral agreement, the latter need not be filed for record where it does not constitute part of the mortgage,[58] and lack of record of the accompanying agreement has been held not to prevent the court from construing the agreement and the mortgage to be a single contract.[59]

b. Nature of Property[60]—(I) *In General.* Where a mortgage covers both real and personal property it seems to be necessary to record it as a chattel mortgage in order to give the mortgagee a valid lien against a creditor on the personal property included;[61] but a chattel-mortgage statute has been held inapplicable to railway mortgages of rolling-stock and movable property.[62]

(II) *Choses in Action.* Since recording statutes commonly require that

is not a mortgage within the meaning of the registry acts. Doak *v.* State Bank, 28 N. C. 309.

58. Singer *v.* Wambold, 82 Wis. 233, 52 N. W. 178; and cases cited *infra*, this note.

A collateral agreemeent was held not to be part of the mortgage it accompanied where it provided that all collections and accounts on future sales should belong to the mortgagee and that the mortgagor should be the agent of the mortgagee for the sale of the goods (Singer *v.* Wambold, 82 Wis. 233, 52 N. W. 178), where it provided for the payment of the debt in monthly instalments (Shuler *v.* Boutwell, 18 Hun (N. Y.) 171), where it took the form of a receipt reciting that the property was subject to a prior mortgage which the mortgagor agreed to have released (National Bank of Commerce *v.* Morris, 114 Mo. 225, 21 S. W. 511, 35 Am. St. Rep. 754, 19 L. R. A. 463), or where the mortgage was given to secure the performance of a written agreement (Byram *v.* Gordon, 11 Mich. 531).

Schedules.— It has been held unnecessary to record a schedule of personal property referred to in a mortgage but not declared to be a part of it or to be annexed thereto (Hardy *v.* Ruggles, 1 Hawaii 457; Chapin *v.* Cram, 40 Me. 561), or a schedule which was referred to in a mortgage of a stock of goods in the following manner "As is more particularly shown by an inventory . . . hereto attached" (Lund *v.* Fletcher, 39 Ark. 325, 43 Am. Rep. 270). But see Sawyer *v.* Pennell, 19 Me. 167, where it was held that a chattel mortgage was not recorded, within Me. Stat. (1839), c. 390, if a schedule referred to in the mortgage as constituting a part thereof was not recorded in the town-clerk's office together with the mortgage proper.

59. Blakeslee *v.* Rossman, 43 Wis. 116.

60. Exempt property.— Where the property covered by a chattel mortgage is exempt from seizure by the mortgagor's creditors it is not necessary that the mortgage be recorded to be good against creditors, even though possession is not transferred. Waite *v.* Mathews, 50 Mich. 392, 15 N. W. 524.

61. *Massachusetts.*— Douglas *v.* Shumway, 13 Gray (Mass.) 498.

Michigan.— Ramsdell *v.* Citizens' Electric Light, etc., Co., 103 Mich. 89, 61 N. W. 275.

New Jersey.— Knickerbocker Trust Co. *v.* Penn Cordage Co., 62 N. J. Eq. 624, 50 Atl. 459.

New York.—Sheldon *v.* Wickham, 50 N. Y. Suppl. 314. See also New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 88 Hun (N. Y.) 569, 34 N. Y. Suppl. 890, 69 N. Y. St. 55, where a statute declaring it unnecessary to file, as a chattel mortgage, a recorded mortgage of any electric light company on real and personal property was held to apply to a mortgage of a gas and electric light company.

Washington.— Dunsmuir *v.* Port Angeles Gas, etc., Co., 24 Wash. 104, 63 Pac. 1095; Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 16 Wash. 499, 48 Pac. 333, 737.

Contra, Faxon *v.* Ridge, 87 Mo. App. 299; Jennings *v.* Sparkman, 39 Mo. App. 663; Anthony *v.* Butler, 13 Pet. (U. S.) 423, 10 L. ed. 229 (construing Rhode Island law).

See 9 Cent. Dig. tit. "Chattel Mortgages," § 157.

Growing wood and timber standing on the land of the mortgagor has been held to be personal property in so far as the determination of the place where the mortgage should be recorded is concerned. Douglas *v.* Shumway, 13 Gray (Mass.) 498; Claflin *v.* Carpenter, 4 Metc. (Mass.) 580, 38 Am. Dec. 381.

A mortgage on a dock, no interest in the land on which it stood being transferred, was held to be void for want of record as against an execution levied on the land by a judgment creditor of the mortgagor. Tuck *v.* Olds, 29 Fed. 738.

62. Hammock *v.* Farmers' L. & T. Co., 105 U. S. 77, 26 L. ed. 1111. See also Eastman *v.* Foster, 8 Metc. (Mass.) 19, where a building erected on the land of one who had given a bond to the builder to convey the land to him was held not to be personal property of the builder within the meaning of the recording statutes.

Record of equitable title unnecessary.—The statute making mortgages void as against subsequent purchasers and creditors if not recorded in due time refers to the legal title and does not destroy equities arising on unrecorded mortgages of equitable titles to the property. State Bank *v.* Vance, 4 Litt. (Ky.) 168.

Property not in esse.— It has been held that the statutes requiring mortgages of personal property to be registered do not apply to contracts relating to goods thereafter to be manufactured. Trost *v.* Willard, 9 Barb. (N. Y.) 440.

mortgages of "goods and chattels" shall be recorded to be valid against third persons, the rule is universal that choses in action are not within the provisions of such acts because they are not goods and chattels.[63]

(III) *Crops.* It has been held that the record of a mortgage on ungrown crops does not furnish constructive notice thereof;[64] but the contrary rule is law in some jurisdictions and record will be constructive notice,[65] where the mortgage of this kind of property is held to be within the provisions of the recording acts.[66] While it was decided that record was notice of a mortgage on a growing crop to one who bought before the crop was severed from the realty,[67] it is law in the same jurisdiction that one purchasing the crop after it has been harvested and placed in a warehouse is not charged with notice by reason of the record.[68]

(IV) *Leasehold Interests.* The statutes relating to registration of chattel mortgages apply only to mortgages of personal property and not to mortgages of leasehold interests or of chattels real,[69] which must ordinarily be registered as

63. *Kentucky.*— Newby *v.* Hill, 2 Metc. (Ky.) 530; Vanmeter *v.* McFaddin, 8 B. Mon. (Ky.) 435; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

Maine.— Putnam *v.* White, 76 Me. 551, where a permit to cut timber was the instrument assigned by way of mortgage. But see Garland *v.* Plummer, 72 Me. 397, where it was held that a title by purchase from the mortgagor of a chose in action or fund that represents mortgaged property took precedence over the rights of a mortgagee with an unrecorded mortgage.

Massachusetts.— Marsh *v.* Woodbury, 1 Metc. (Mass.) 436.

Michigan.— Farrell Foundry, etc., Co. *v.* Preston Nat. Bank, 93 Mich. 582, 53 N. W. 831. But see Gamble *v.* Ross, 88 Mich. 315, 50 N. W. 379; Hurd *v.* Brown, 37 Mich. 484.

New Jersey.— Bleakley *v.* Nelson, 56 N. J. Eq. 674, 39 Atl. 912; Bacon *v.* Bonham, 27 N. J. Eq. 209; Williamson *v.* New Jersey Southern R. Co., 26 N. J. Eq. 398.

New York.— Niles *v.* Mathusa, 162 N. Y. 546, 57 N. E. 184 [*affirming* 20 N. Y. App. Div. 483, 47 N. Y. Suppl. 38]; Central Trust Co. *v.* West India Imp. Co., 48 N. Y. App. Div. 147, 62 N. Y. Suppl. 853; Chester *v.* Jumel, 53 Hun (N. Y.) 629, 5 N. Y. Suppl. 809, 24 N. Y. St. 214; Tilden *v.* Tilden, 26 Misc. (N. Y.) 672, 57 N. Y. Suppl. 864. But see Tyler *v.* Strang, 21 Barb. (N. Y.) 198, where an interest in a contract was assigned as security and was held to be a chattel mortgage of the property to be used in completing the contract, so that it was void against creditors because not properly filed.

North Carolina.— Canton Chemical Co. *v.* Johnson, 98 N. C. 123, 3 S. E. 723.

Wisconsin.— Rommerdahl *v.* Jackson, 102 Wis. 444, 78 N. W. 742.

See also Woodward *v.* Crump, 95 Tenn. 369, 32 S. W. 195, where a rent contract was assigned as security for a note and it was held necessary to have the assignment recorded to make it valid against creditors of the lessor.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 160.

Future earnings.— It has been held that registration is necessary in the case of a mortgage of future earnings of a threshing rig in order that the mortgage should be good against the mortgagor's creditors. Sykes *v.* Hannawalt, 5 N. D. 335, 65 N. W. 682.

64. Long *v.* Hines, 40 Kan. 216, 16 Pac. 339, 10 Am. St. Rep. 189; Polk *v.* Foster, 7 Baxt. (Tenn.) 98. *Contra,* Butler *v.* Hill, 1 Baxt. (Tenn.) 375. *Compare* Underwood *v.* Ainsworth, 72 Miss. 328, 18 So. 379, where it is held that a deed of trust of crops to be raised is not a conveyance or transfer, within Tenn. Code, § 2294, making a "transfer or conveyance of goods and chattels or lands" between husband and wife void as to third persons unless recorded.

65. Smith *v.* Fields, 79 Ala. 335; Duke *v.* Strickland, 43 Ind. 494; Wright *v.* E. M. Dickey Co., 83 Iowa 332, 49 N. W. 984; Hogan *v.* Atlantic Elevator Co., 66 Minn. 344, 69 N. W. 1.

66. Harder *v.* Plass, 57 Hun (N. Y.) 540, 11 N. Y. Suppl. 226, 33 N. Y. St. 186; Whiting *v.* Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598. *Contra,* Hamilton *v.* Harrison, 46 U. C. Q. B. 127, where it was held that a mortgage of growing crops was not within the chattel mortgage act because such crops were incapable of delivery or change of possession without a transfer of the land. *Compare* Short *v.* Ruttan, 12 U. C. Q. B. 79, where the recording statutes were held to apply to a mortgage of timber already cut but not to one of timber to be cut in the future.

67. Chicago Lumber Co. *v.* Hunter, 58 Nebr. 328, 78 N. W. 619.

68. Gillilan *v.* Kendall, 26 Nebr. 82, 42 N. W. 281, 18 Am. St. Rep. 766. *Compare* Fines *v.* Bolin, 36 Nebr. 621, 54 N. W. 990, where the mortgagee prevailed because the purchaser was charged with actual notice.

Rule in California.— Under the statute of California it was held that a mortgage on growing crops should be executed and recorded like a mortgage on real estate and would then be valid, although there was no delivery of possession (Quiriaque *v.* Dennis, 24 Cal. 154); but the continuance of the lien after the crop has been harvested depends on an actual delivery of the property to the mortgagee (Goodyear *v.* Williston, 42 Cal. 11).

69. *New Jersey.*— Deane *v.* Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292; Decker *v.* Clarke, 26 N. J. Eq. 163.

mortgages of real estate;[70] for the determination of the place of record depends on the subject-matter of the mortgage rather than upon the interest of the party in it.[71]

D. Place of Filing — 1. GENERALLY. Under many statutes regarding the recording of chattel mortgages, it has been decided that the place for record is determined by the place of the mortgagor's residence within certain town, township, or county lines,[72] at the time of the execution of the instrument,[73] providing the mortgagor is a resident of the state,[74] and that it is immaterial where the

New York.— Booth *v.* Kehoe, 71 N. Y. 341. *Compare* State Trust Co. *v.* Casino Co., 5 N. Y. App. Div. 381, 39 N. Y. Suppl. 258, where a corporation mortgaged a leasehold estate and personal property and it was held that this mortgage was not within a statute which rendered recording unnecessary where a mortgage on real and personal property was executed by a corporation because no real estate was included in the mortgage. See also State Trust Co. *v.* Casino Co., 18 Misc. (N. Y.) 327, 41 N. Y. Suppl. 1.

Ohio.— Gaylord *v.* Cincinnati German Bldg. Assoc., No. 3, 2 Cinc. Super. Ct. 163; Miller *v.* Toledo Bank, 1 Ohio Dec. (Reprint) 392, 8 West. L. J. 536.

South Carolina.— Connolly *v.* Stewart, 1 Brev. (S. C.) 271.

Canada.— Frazer *v.* Lazier, 9 U. C. Q. B. 679.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 158.

70. Spielmann *v.* Kliest, 36 N. J. Eq. 199; Decker *v.* Clarke, 26 N. J. Eq. 163; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Lefever *v.* Armstrong, 15 Pa. Super. Ct. 565. *Compare* Bismark Bldg., etc., Assoc. *v.* Bolster, 92 Pa. St. 123.

71. Connolly *v.* Stewart, 1 Brev. (S. C.) 271.

72. *Arkansas.*—Watson *v.* Thompson Lumber Co., 49 Ark. 83, 4 S. W. 62.

Indiana.—Wright *v.* Bundy, 11 Ind. 398.

Illinois.— Henderson *v.* Morgan, 26 Ill. 431, where the locality taken as a recording unit was an election district.

Kentucky.— Coppage *v.* Johnson, 107 Ky. 620, 21 Ky. L. Rep. 1357, 55 S. W. 424; Vaughn *v.* Bell, 9 B. Mon. (Ky.) 447.

Maine.—York *v.* Murphy, 91 Me. 320, 39 Atl. 992.

Michigan.— Reynolds *v.* Case, 60 Mich. 76, 26 N. W. 838; Briggs *v.* Leitelt, 41 Mich. 79, 1 N. W. 942.

Missouri.— Bevans *v.* Bolton, 31 Mo. 437; Ray County Sav. Bank *v.* Holman, 63 Mo. App. 492, 2 Mo. App. Rep. 856; Martin-Perrin Mercantile Co. *v.* Perkins, 63 Mo. App. 310.

New Hampshire.— Stowe *v.* Meserve, 13 N. H. 46.

New Jersey.— Bleakley *v.* Nelson, 56 N. J. Eq. 674, 39 Atl. 912.

New York.— Gould *v.* Bowne, 4 N. Y. Leg. Obs. 423.

North Carolina.— Weaver *v.* Chunn, 99 N. C. 431, 6 S. E. 370.

Vermont.— Woodward *v.* Gates, 9 Vt. 358.

United States.— Platt *v.* U. S. Patent Button, etc., Mfg. Co., 9 Blatchf. (U. S.) 342, 19 Fed. Cas. No. 11,222, 5 Fish. Pat. Cas. 265, Merw. Pat. Inv. 132, 1 Off. Gaz. 524 (construing New York statute); Bond *v.* Ross, 1 Brock. (U. S.) 316, 3 Fed. Cas. No. 1,623 (construing Virginia statute).

See 9 Cent. Dig. tit. "Chattel Mortgages," § 163.

Under a statute requiring a mortgage on property in the actual possession of the mortgagor to be filed in the county where the holder of the property resides, it has been held that a mortgagor was not in the "actual possession" of the property when he had left it in charge of his brother who added to the stock, made sales of it, and paid debts with the proceeds. King *v.* Wallace, 78 Iowa 221, 42 N. W. 776.

73. Reynolds *v.* Case, 60 Mich. 76, 26 N. W. 838; Powers *v.* Freeman, 2 Lans. (N. Y.) 127; Hicks *v.* Williams, 17 Barb. (N. Y.) 523. But see Harris *v.* Jones, 83 N. C. 317, where a mortgagor contemplated moving to the county where the property was situated before he executed the instrument and it was held that registration in that county was valid when he did actually move there shortly after the filing. *Compare* Avery *v.* Wilson, 47 S. C. 78, 25 S. E. 286, where the same result was reached on practically similar facts.

Change of residence by the mortgagor does not render necessary a new registry of the mortgage. Harris *v.* Alden, 104 N. C. 86, 10 S. E. 127.

74. Golden *v.* Cockril, 1 Kan. 259, 81 Am. Dec. 510; Wilson *v.* Carson, 12 Md. 54; Langworthy *v.* Little, 12 Cush. (Mass.) 109.

Non-residents of the state have been denied the advantages of provisions in recording statutes and compelled to rely on a change of possession (Cook *v.* Hager, 3 Colo. 386; Arkansas City Bank *v.* Cassidy, 71 Mo. App. 186; Smith *v.* Moore, 11 N. H. 55. *Compare* Watson *v.* Thompson Lumber Co., 49 Ark. 83, 4 S. W. 62, where a mortgage filed by a foreign corporation was held not to give it priority over a creditor who sued before foreclosure, for the corporation had no residence within the state, and mortgages must be filed in the county where the mortgagor resided); but a more usual doctrine seems to be that in the absence of the mortgagor from the state the mortgage should be recorded in the locality where the mortgaged property is (Hardaway *v.* Semmes, 38 Ala. 657; Hunt *v.* Bowen, 75 Ga. 662; Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258; Whitney *v.* Browne, 180 Mass. 597, 62 N. E. 979) at the time of the execution and delivery of the

mortgagee resides,[75] or where the mortgaged property is located.[76] Under the provisions of other acts, however, courts have held that the place for record is determined by the *situs* of the property,[77] or of a greater part thereof.[78] When the county of the mortgagor's residence and the county where the property is are not identical, it has been held that record must be made in both counties,[79] or that it may be made in either county at the option of the mortgagee.[80]

2. DETERMINATION OF MORTGAGOR'S RESIDENCE. To establish the fact that a mortgage was properly recorded it must be proved that the mortgagor resided in the recording district where the mortgage was filed.[81] Although recitals in the instrument as to residence have been held to be sufficient to make out a *prima facie* case,[82] they are not evidence of such residence[83] and do not preclude third persons from showing that such place was not in fact the residence of the mortgagor.[84] It has been held sufficient, however, to prove a transient residence

mortgage (Marquette First Nat. Bank *v.* Weed, 89 Mich. 357, 50 N. W. 864. See also Stirk *v.* Hamilton, 83 Me. 524, 22 Atl. 391, where it was held that the burden was on a mortgagee suing an attaching officer in trover to show that a mortgage executed by a nonresident mortgagor was recorded in the place where the property was at the time the mortgage was executed).

75. Stowe *v.* Meserve, 13 N. H. 46; Fishburne *v.* Kunhardt, 2 Speers (S. C.) 556, where the instrument was executed in the state where the mortgagee resided, but it was held that this did not make record in such state necessary.

76. Ray County Sav. Bank *v.* Holman, 63 Mo. App. 492, 2 Mo. App. Rep. 856; Gould *v.* Bowne, 4 N. Y. Leg. Obs. 423; Bond *v.* Ross, 1 Brock. (U. S.) 316, 3 Fed. Cas. No. 1,623 (construing Virginia statute).

77. Oxsheer *v.* Watt, (Tex. Civ. App. 1897) 42 S. W. 121; Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

Situation of property.— Where horses were kept and used in a state during the traveling season of three months they were held to be "situate" in the state within the meaning of the recording laws, although they belonged to a livery-stable keeper who resided in another state. Lathe *v.* Schoff, 60 N. H. 34. *Compare* Lucado *v.* Tutwiler, 28 Gratt. (Va.) 39, where a canal-boat was mortgaged which plied between points in two counties and record of the mortgage in one of these counties was held sufficient, although the mortgagor resided in the other county.

Ungrown crops.— Under a statute providing that mortgages shall be filed in the town, city, or village where the property is situated it has been held that a mortgage of crops to be raised in the future could properly be filed in the recording district where the land on which the crops were to be raised was situated. Miller *v.* McCormick Harvesting Mach. Co., 35 Minn. 399, 29 N. W. 52; Hostetter *v.* Brooks Elevator Co., 4 N. D. 357, 61 N. W. 49. *Compare* Minnesota Agricultural Co. *v.* Northwestern Elevator Co., 58 Minn. 536, 60 N. W. 671, where seed was sown partly in a village and partly in a town outside a village and the seed-grain contract was filed only with the town-clerk, and the court held that there was no lien on grain raised in the village.

78. Singleton *v.* Young, 3 Dana (Ky.) 559, where the residence of the mortgagor coincided with the place where most of the property was located.

The existence of property outside the registration district which is covered by the same mortgage does not affect the validity of the record as to the property within the recording district. Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254; *In re* Soldiers Business Messenger, etc., Co., 3 Ben. (U. S.) 204, 22 Fed. Cas. No. 13,163, 2 Am. L. T. Bankr. Rep. 87, 2 Nat. Bankr. Reg. 519.

79. Lundberg *v.* Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

The presumption as to the situs of the property has been held to be, in the absence of evidence, that it is identical with the place of residence of the mortgagor. Horton *v.* Williams, 21 Minn. 187. But see Tabor *v.* Sampson, 7 Colo. 426, 4 Pac. 45, where record was held to be invalid in the absence of any evidence to show that the property or a greater part thereof was located within the county where record was made.

80. Springfield Third Nat. Bank *v.* Bond, 64 Kan. 346, 67 Pac. 818; Oxsheer *v.* Watt, 91 Tex. 402, 44 S. W. 67 [*affirming* (Tex. Civ. App. 1897) 42 S. W. 121]; Oxsheer *v.* Tandy, 11 Tex. Civ. App. 142, 32 S. W. 372.

81. Bither *v.* Buswell, 51 Me. 601; Smith *v.* Jenks, 1 Den. (N. Y.) 580. See also Stirk *v.* Hamilton, 83 Me. 524, 22 Atl. 391, where a person claiming under a mortgage executed in a city in another state and recorded there was required to show not only that the mortgagor resided there but that he had his principal place of business in such city.

Proof of residence subsequent to the record of the mortgage is not sufficient. Clough *v.* Kyne, 40 Ill. App. 234.

82. Brown *v.* Corbin, 121 Ind. 455, 23 N. E. 276; Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250.

83. Nickerson *v.* Wells-Stone Mercantile Co., 71 Minn. 230, 73 N. W. 959, 74 N. W. 891.

84. Baumann *v.* Libetta, 3 Misc. (N. Y.) 518, 23 N. Y. Suppl. 1, 52 N. Y. St. 492; Chandler *v.* Bunn, Lalor (N. Y.) 167.

within the county,[85] although a temporary absence does not have the opposite effect.[86]

3. INSTRUMENTS EXECUTED BY JOINT MORTGAGORS. Where a mortgage is executed by a firm or by other joint owners of the property and the place of record is determined by the residence of the mortgagor, the law is that the mortgage must be recorded in every recording district where any one of the joint mortgagors resides.[87]

4. RECORDING DISTRICTS. Ordinarily recording districts are determined by county, town, or township lines, and there is no difficulty in determining their exact boundaries.[88]

85. Fouke *v.* Fleming, 13 Md. 392.

The principal office of a corporation has been held to determine the place of its residence for the purpose of registration. Wright *v.* Bundy, 11 Ind. 398.

86. Briggs *v.* Leitelt, 41 Mich. 79, 1 N. W. 942.

What constitutes residence.—A person executed a mortgage in Big Rapids on August 3 and it was recorded there on August 13, the mortgagor being there at that time. The previous July the mortgagor had left his home in Grand Rapids intending to change his residence to Big Rapids and leaving directions for the sale of his home in Grand Rapids. His family remained in Grand Rapids till August when they joined him in Big Rapids and remained till the following spring when they all returned to Grand Rapids. It was held that the residence of the mortgagor continued to be in Grand Rapids and that the record of the mortgage in Big Rapids was not notice to creditors. Cass *v.* Gunnison, 68 Mich. 147, 36 N. W. 45. *Compare* Brittenham *v.* Robinson, 18 Ind. App. 502, 48 N. E. 616, where a person executed a mortgage in Indiana and it was recorded there, and three months later his family moved there from Pennsylvania. The mortgagor remained in Indiana all the time and intended to make it his permanent residence. It was held that the mortgage was properly filed in Indiana as that was the place of residence of the mortgagor.

87. *Indiana.*— Granger *v.* Adams, 90 Ind. 87; Morris *v.* Ellis, 16 Ind. App. 679, 46 N. E. 41.

Maine.— Rich *v.* Roberts, 50 Me. 395, 48 Me. 548; Morrill *v.* Sanford, 49 Me. 566.

New York.— Bueb *v.* Geraty, 36 Misc. (N. Y.) 161, 72 N. Y. Suppl. 1071 [*affirming* 64 N. Y. Suppl. 1132]. But see Nelson *v.* Neil, 15 Hun (N. Y.) 383, where it was held that a chattel mortgage executed by a joint-stock association need only be filed for record in the office of the town-clerk where the company's business is principally conducted.

Ohio.— Westlake *v.* Westlake, 47 Ohio St. 315, 24 N. E. 412; Aultman *v.* Guy, 41 Ohio St. 598. See also Devine *v.* Taylor, 12 Ohio Cir. Ct. 723, where it was held that each copy of the mortgage put on file must contain the sworn statement of the mortgagee, not merely a copy of the statement on the original.

United States.— Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816 (construing New York statute); Kane *v.* Rice, 14 Fed. Cas. No. 7,609, 10 Nat. Bankr. Reg. 469 (construing Michigan statute).

See 9 Cent. Dig. tit. "Chattel Mortgages," § 164.

Where one mortgagor is a non-resident it has been held sufficient to file the mortgage in the township where the resident mortgagor has his domicile (Smith *v.* Burnett, 3 Ohio Cir. Ct. 594, 2 Ohio Cir. Dec. 344), especially where that coincides with the seat of business of the firm making the mortgage (Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254).

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

Adjudication on specific boundaries.—It has been held that although a mortgagor resided in that part of Brooklyn township which was also in the city of Cleveland, the mortgage must be deposited in the clerk's office of Brooklyn township (Canfield *v.* Lathrop, 4 Ohio Dec. (Reprint) 51, 1 Clev. L. Rec. 67), and that chattel mortgages upon property in Flatbush, King's county, should be filed in the office of the clerk of that town and not in the office of the register of King's county (Martin *v.* Rothschild, 42 Hun (N. Y.) 410). *Compare* Griffin *v.* Karter, 116 Ala. 160, 22 So. 484, where it was held that certain legislative acts divided Blount county into two recording districts and that a record of a mortgage of personalty executed by a resident of the western division and recorded in the eastern division did not import notice.

Overlapping districts.— Where a township or part of a township is annexed to the corporate limits of a city or village where the office of the county recorder is kept, but is not a part of the township in which the office is kept, such recorder's office does not become the place for deposit of chattel mortgages executed by residents of such annexed territory; the act of February 24, 1846, and the amendments thereto, making the office of the county recorder the place for deposit of chattel mortgages only when the instrument is executed by a resident of the township where such office is kept. Curtiss *v.* McDougal, 26 Ohio St. 66.

Incorporated villages and boroughs.— Although the statute provides that in each town chattel mortgages shall be filed in the office of the town-clerk thereof, it does not require the filing of mortgages in the office of the recorder of incorporated villages, the proper place for such filing being the office of the town-clerk of the township in which the village was situated. Moriarty *v.* Gul-

E. Sufficiency of Filing — 1. In General. A chattel mortgage is usually recorded by delivering the instrument itself or a true copy thereof[89] to the registration officer; and if the delivery is to the person in charge[90] of the proper recording office[91] and is accompanied by directions to such person to record it,[92] that constitutes a sufficient registry of the mortgage, for the mortgagee is not

lickson, 22 Minn. 39. See also Bannon *v.* Bowler, 34 Minn. 416, 26 N. W. 237, where the act requiring chattel mortgages to be filed with the clerks or recorders of cities or villages where the mortgaged property was situated was held not to include boroughs created under special acts of the legislature.

89. True copies.— Filing a copy was held not to be constructive notice of a mortgage where the copy filed contained a clerical mistake as to the amount (Ely *v.* Carnley, 19 N. Y. 496); but an immaterial clerical defect in the copy would not affect the validity of the filing (Gillespie *v.* Brown, 16 Nebr. 457, 20 N. W. 632).

Acknowledgment of the copy has been held necessary to entitle it to record. Porter *v.* Dement, 35 Ill. 478; Cross *v.* Carstens, 49 Ohio St. 548, 31 N. E. 506.

Copies cannot be filed in South Dakota unless the original has been filed in some other county where part of the property is situated. W. W. Kimball Co. *v.* Kirby, 4 S. D. 152, 55 N. W. 1110. *Compare* Rosenbaum *v.* Foss, 4 S. D. 184, 56 N. W. 114, where a statute providing for the filing of copies where record in several counties was necessary was held not to do away with the necessity of having the original on file somewhere.

When the mortgage of a lease is deposited for record it has been held that the lease must be deposited with the mortgage. Hilton's Appeal, 116 Pa. St. 351, 9 Atl. 342; Gill *v.* Weston, 110 Pa. St. 305, 1 Atl. 917.

90. Oats *v.* Walls, 28 Ark. 244, holding that it did not devolve upon a party to show that his deed was put into the hands of the recorder or his regular deputy; the one in charge and performing the duties of the office had sufficient authority for such purpose. *Compare* Keating *v.* Retan, 80 Mich. 324, 45 N. W. 141, where it was held that the deposit of a chattel mortgage among the files in the city clerk's office, and an entry of the filing in the city clerk's record book, constitute notice of the rights of the mortgagee, although the indorsement on the mortgage shows that it was filed with a deputy clerk, whose appointment was unauthorized by the city charter.

Where no one is present, merely leaving the mortgage on the clerk's table in the recording office does not constitute a sufficient filing. Crouse *v.* Johnson, 65 Hun (N. Y.) 337, 20 N. Y. Suppl. 177, 47 N. Y. St. 559.

Where the recording officer was outside the township, sitting as a juror, mortgages left with him were not filed within the meaning of the statute. *In re* Jones, 8 Ohio S. & C. Pl. Dec. 708, 7 Ohio N. P. 225.

91. Record in the wrong county will not charge a subsequent *bona fide* purchaser with notice. Wallen *v.* Rossman, 45 Mich. 333, 7 N. W. 901; London *v.* Youmans, 31 S. C. 147, 9 S. E. 775, 17 Am. St. Rep. 17.

Deposit in the proper office for registration is equivalent to recording a chattel mortgage.

Alabama.— Seibold *v.* Rogers, 110 Ala. 438, 18 So. 312; Heflin *v.* Slay, 78 Ala. 180.

Arkansas.— Case *v.* Hargadine, 43 Ark. 144.

California.— Meherin *v.* Oaks, 67 Cal. 57, 7 Pac. 47.

Minnesota.—Appleton Mill Co. *v.* Warder, 42 Minn. 117, 43 N. W. 791.

Rhode Island.— Parker *v.* Palmer, 13 R. I. 359.

Texas.— Freiberg *v.* Brunswick-Balke-Collender Co., (Tex. App. 1890) 16 S. W. 784.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 169.

92. Town *v.* Griffith, 17 N. H. 165; Low *v.* Pettengill, 12 N. H. 337 (where the mortgage was intrusted to the mortgagor to be filed, who requested the clerk to "keep it out of sight for a few days" and it was held the clerk had no authority to record it till the instructions were withdrawn). But see Case *v.* Jewett, 13 Wis. 498, 80 Am. Dec. 752, where the mortgagor requested the recording clerk to place the mortgage at the bottom of the pile where it could not be seen, and it was held that such action was beyond the scope of his authority, and that the mortgagee would not be prejudiced thereby.

Instructions as to recording.— Under the Arkansas statute which provides that a mortgage indorsed, "This instrument is to be filed but not recorded," with the signature of the mortgagee, shall be filed by the recorder and become a lien on the property it covers, it has been held sufficient to indorse on the mortgage "This is to be filed" (Price *v.* Skillern, 60 Ark. 112, 29 S. W. 37), or "To be filed but not recorded" (State *v.* Smith, 40 Ark. 431) when followed by the mortgagee's signature. But see Dedman *v.* Earle, 52 Ark. 164, 12 S. W. 330, where a mortgage was given to the recorder with oral instructions that it was to be filed but not recorded and it was held not to be filed for record till instructions were given to record it.

Instructions must come from mortgagor.— Where a mortgagor sent a mortgage to the register on Saturday without the knowledge of the mortgagee and instructed the clerk to "keep the inclosed in your possession" and on the following day the mortgagee went to the register, got the mortgage and accepted it, and returned it to the clerk for record, it was held that the mortgage could not be considered as deposited till Monday morning. Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 566, 33 Pac. 363.

responsible for the mistake, carelessness, negligence, or criminality of the recording officer.[93]

2. Effect of Withdrawal From the Files. Since filing a mortgage often takes the place of the more elaborate and expensive operation of having it copied into a book of records, withdrawal from the files will destroy the validity of the registration, provided the mortgagee is responsible for such withdrawal,[94] and has

93. *Arkansas.*—Case *v.* Hargadine, 43 Ark. 144.

California.— Meherin *v.* Oaks, 67 Cal. 57, 7 Pac. 47.

Indiana.— Chandler *v.* Scott, 127 Ind. 226, 26 N. E. 797, 10 L. R. A. 374, where the clerk supposed that a mortgage had been recorded and returned it so indorsed to the mortgagee who was held to be protected from that date.

Massachusetts.— Jordan *v.* Farnsworth, 15 Gray (Mass.) 517, where the clerk himself searched the records and told an attaching officer that the mortgage had not been recorded.

Michigan.— People *v.* Bristol, 35 Mich. 28, where it was further held that the failure of the clerk to demand his statutory fees would not affect the validity of the record.

Minnesota.—Appleton Mill Co. *v.* Warder, 42 Minn. 117, 43 N. W. 791.

Missouri.— Faxon *v.* Ridge, 87 Mo. App. 299.

Texas.—Ames Iron Works *v.* Chinn, 15 Tex. Civ. App. 88, 38 S. W. 247; Parker *v.* Panhandle Nat. Bank, 11 Tex. Civ. App. 702, 34 S. W. 196; Cleveland *v.* Empire Mills, 6 Tex. Civ. App. 479, 25 S. W. 1055.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 168 *et seq.*

Errors by recording officer.— It has been held that a mortgage was sufficiently filed in spite of a mistake by the recording officer in putting down a wrong name in place of the mortgagor's (Seibold *v.* Rogers, 110 Ala. 438, 18 So. 312), in reversing the names of the parties (T. B. Townsend Brick, etc., Co. *v.* Allen, 9 Kan. App. 230, 59 Pac. 683), in misstating the date of the maturity of the mortgage debt where the contestant purchased the property before either the true date or the mistaken date (Buck *v.* Young, 1 Ind. App. 558, 27 N. E. 1106), in stating in the certificate of record that the mortgage was recorded in full instead of being deposited with the clerk as provided by law (Grounds *v.* Ingram, 75 Tex. 509, 12 S. W. 1118), or in failing to make an indorsement of filing on the mortgage itself (Bailey *v.* Costello, 94 Wis. 87, 68 N. W. 663). *Compare* Perry *v.* Bragg, 111 N. C. 159, 16 S. E. 10, where the failure of the clerk of the superior court to affix his seal as required by statute did not prevent the subsequent record of the instrument from being sufficient.

Record standing in the handwriting of the mortgagor does not affect the validity of registration. Merrill *v.* Dawson, Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469.

Compliance with statute.— The record of chattel mortgages in separate volumes of the numerical series kept in the offices for all purposes, in which volume only conveyances of personal property are recorded, as indicated on the back of such volume, was held to be a substantial compliance with the requirements of a recording statute. Hume Bank *v.* Hartsock, 56 Mo. App. 291. The provisions of a recording statute requiring a town-clerk to enter in his book certain facts touching each chattel mortgage filed in his office have been held directory only and the validity of the mortgage depends on the filing alone. Smith *v.* Waggoner, 50 Wis. 155, 6 N. W. 568. The absence of a memorandum of leaving the mortgage has been held not to affect the validity of the record (Holman *v.* Doran, 56 Ind. 358); and it has been held unnecessary that the mortgage should be spread upon the record (Craig *v.* Dimock, 47 Ill. 308). *Compare* Griswold *v.* Sheldon, 4 N. Y. 581, where the court queried whether a mortgage upon a stock of goods written in a book lettered "Day Book" containing an inventory of the goods and store accounts, and deposited in a desk in the clerk's office where personal mortgages are kept, in pigeonholes, was properly filed.

Recording bill of sale as such does not answer the requirements of the statute as to mortgages, so as to render it valid as such. Hill *v.* Marston, 178 Mass. 285, 59 N. E. 766.

Ratification of unauthorized record is valid, provided the act of recording was ratified before the rights acquired in derogation attached to the property. Blair *v.* Ritchie, 72 Vt. 311, 47 Atl. 1074. *Compare In re* Guyer, 69 Iowa 585, 29 N. W. 826, where one agreeing to accept a mortgage for a debt from a merchant, executed by him whenever he becomes financially embarrassed, was held thereby to authorize the merchant to have such mortgage recorded for him when executed on such contingency.

Where actual knowledge is conveyed by an imperfect record of a mortgage it will charge one with notice of the mortgage. Piper *v.* Hilliard, 58 N. H. 198. *Compare* Hulsizer *v.* Opdyke, (N. J. 1888) 13 Atl. 669, where claimants of property who were charged with actual knowledge of the execution of a mortgage were not allowed to take advantage of imperfections in the record.

94. Jones *v.* Parker, 73 Me. 248; Dawson *v.* Cross, 88 Mo. App. 292; Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306; Gruner *v.* Star Printing Co., 40 Wis. 523. *Compare* Swift *v.* Hall, 23 Wis. 532, where an agent, sent to see whether a mortgage was on file, misunderstood his instructions and removed it from the files and it was held that the lien thereof continued against one who with knowledge of the facts attached the property while the mortgage was absent from the files.

no valid excuse therefor.[95] But it is held, in accordance with the general rule that the mortgagee is not responsible for the misconduct of the recording officer, that an unauthorized withdrawal will not impair the sufficiency of the recording.[96]

3. Necessity For Indexing. Since the mortgagee is only required to deposit a mortgage for record and is not prejudiced by the negligence or mistakes of the recording officer, it follows that the failure of the clerk to index the mortgage does not invalidate the record.[97]

4. After Removal of the Property —a. To Another County. Where the removal of mortgaged property does not transfer it to another jurisdiction, no doctrine of comity need be relied on to decide that the original filing, made before the removal, is sufficient; and so in the absence of statute it is held that refiling after removal is not necessary.[98] Statutes requiring a refiling after removal have been held to apply only to cases where the removal was made with the consent of the mortgagee.[99]

The reason for the rule has been said to be because the statute does not require the indexing of the filing of chattel mortgages as it does of mortgages of real estate. Dawson *v.* Cross, 88 Mo. App. 292.

After a mortgage has been recorded in extenso withdrawal from the files does not impair the effect of the filing. Stevenson *v.* Colopy, 48 Ohio St. 237, 27 N. E. 296.

95. Rogers *v.* Dwight, 71 Hun (N. Y.) 547, 25 N. Y. Suppl. 39, 54 N. Y. St. 920, holding that the circumstance that the mortgagee had been ordered to produce the mortgage by a *duces tecum* furnished a valid excuse.

Withdrawal for the purpose of foreclosure is not a purpose affording a valid excuse for the withdrawal of a mortgage. Warner *v.* Comstock, 55 Mich. 615, 22 N. W. 64; Ward *v.* Watson, 24 Nebr. 592, 39 N. W. 615.

96. Marlet *v.* Hinman, 77 Wis. 136, 45 N. W. 953, 20 Am. St. Rep. 102. See also Kaye *v.* Crawford, 22 Wis. 320, where the mortgage was lost from the files and the mortgagee prevailed over a purchaser whose good faith was not clearly established.

Proof of withdrawal.— It has been held that there was a presumption against an alleged withdrawal of a mortgage from the files (Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31), for the clerk cannot properly let it be taken away even by the mortgagee himself, and an entry by the clerk of the withdrawal upon the margin of an index is unofficial (Woodruff *v.* Phillips, 10 Mich. 500). See also Wilson *v.* Leslie, 20 Ohio 161, where the withdrawal of a mortgage for seven hours was held not to invalidate the filing because there was fraudulent collusion by an attorney to enable an attachment to be levied while the mortgage was withdrawn.

97. *Alabama.*— Turner *v.* McFee, 61 Ala. 468.

Minnesota.—Gorham *v.* Summers, 25 Minn. 81; Moriarty *v.* Gullickson, 22 Minn. 39.

Nebraska.— Jordan *v.* Hamilton County Bank, 11 Nebr. 499, 9 N. W. 654.

New Hampshire.— Chase *v.* Bennett, 58 N. H. 426.

New York.— Dikeman *v.* Puckhafer, 1 Daly (N. Y.) 489, 1 Abb. Pr. N. S. (N. Y.) 32.

Texas.— Freiberg *v.* Magale, 70 Tex. 116, 7 S. W. 684.

But see Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497, where a chattel mortgage was delivered to the recorder at six-thirty P. M. and was not indexed till eight-thirty the next morning, and it was held that the recording was not complete against a third person who attached the property till the latter time, even though it was the custom of the recorder to postpone indexing mortgages received late in the day.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 171.

98. *Connecticut.*— Pease *v.* Odenkirchen, 42 Conn. 415.

Maine.— Barrows *v.* Turner, 50 Me. 127.

Massachusetts.— Brigham *v.* Weaver, 6 Cush. (Mass.) 298.

Mississippi.— Elson *v.* Barrier, 56 Miss. 394.

Missouri.— Feurt *v.* Rowell, 62 Mo. 524; Bevans *v.* Bolton, 31 Mo. 437.

Nebraska.— Grand Island Banking Co. *v.* Frey, 25 Nebr. 66, 40 N. W. 599, 13 Am. St. Rep. 478; Cool *v.* Roche, 20 Nebr. 550, 31 N. W. 367.

New Hampshire.— Hoit *v.* Remick, 11 N. H. 285; Offutt *v.* Flagg, 10 N. H. 46.

Ohio.— Johnson *v.* Nelson, 2 Ohio Dec. (Reprint) 487, 3 West. L. Month. 306.

Virginia.— Crouch *v.* Dabney, 2 Gratt. (Va.) 415. *Compare* Bryan *v.* Cole, 10 Leigh (Va.) 497, where the same result was reached but the effect of the decision was lessened by the fact that the mortgage was filed in the county of removal before creditors obtained a lien on the property.

Wisconsin.— Bailey *v.* Costello, 94 Wis. 87, 68 N. W. 663.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 166.

99. Spikes *v.* Brown, (Tex. Civ. App. 1899) 49 S. W. 725; Vickers *v.* Carnahan, 4 Tex. Civ. App. 305, 23 S. W. 338. *Contra*, Turner *v.* Caldwell, 15 Wash. 274, 46 Pac. 235. *Compare* Ladd *v.* Alcorn, 71 Miss. 395, 14 So. 266, where it was held that a statute requiring the refiling of a mortgage after removal of the property to another county did not apply to a case where the purchaser's title accrued in the county of original record.

b. To Another State.[1] Where a mortgage has been duly recorded and the property is left in the possession of the mortgagor, it is usually held not to be necessary to record the instrument again in the event that the mortgagor removes the property to another state;[2] but there are some statutory provisions to the effect that new record shall be made within a certain time after the property arrives in the new jurisdiction.[3]

Fraudulent connivance of the mortgagor and mortgagee at the removal of the mortgaged property from the premises will destroy the lien of the mortgage. McNichols *v.* Fry, 62 Mo. App. 13, 1 Mo. App. Rep. 707.

In construing a statute requiring refiling within six months after the removal of the property, it has been held that a mortgage was effective against one who purchased within the six-months' period, although the mortgage was never recorded (Malone *v.* Bedsole, 93 Ala. 41, 9 So. 520), and where the property had been out of the county of original record for more than six months but not in any one county for that length of time, the mortgage was valid without refiling (Wilkinson *v.* King, 81 Ala. 156, 8 So. 189; Hundley *v.* Calloway, 45 W. Va. 516, 31 S. E. 937). *Compare* Reed *v.* Spikes, (Tex. App. 1890) 15 S. W. 122, where it was held that the Chattel Mortgage Act (Tex. Gen. Laws (1879), c. 127) did not repeal article 4341, requiring the refiling of a mortgage within four months after the property had been removed to another county with the mortgagee's consent.

Necessity for original record.— It has been held that due registration after the removal of the property renders the mortgage valid for all purposes, although there was no registry in the county where the property was when the mortgage was executed. Fassett *v.* Wise, 115 Cal. 316, 47 Pac. 47, 1095, 36 L. R. A. 505; Mumford *v.* Harris, 8 Colo. App. 51, 44 Pac. 772; Ames Iron Works *v.* Chinn, 15 Tex. Civ. App. 88, 38 S. W. 247. *Contra*, Pollak *v.* Davidson, 87 Ala. 551, 6 So. 312. *Compare* Lane *v.* Mason, 5 Leigh (Va.) 520, where record of a mortgage was made in a county and the property was shortly after removed to that county, and it was held the record did not comply with the statute and hence was void against a subsequent encumbrancer.

1. What law governs see *supra*, IX.

2. *Arkansas.*— Hall *v.* Pillow, 31 Ark. 32.

Connecticut.— Pease *v.* Odenkirchen, 42 Conn. 415.

Illinois.—Rosenbaum *v.* Dawes, 77 Ill. App. 295, where the rule is followed but the doctrine of interstate comity severely criticized.

Iowa.— Simms *v.* McKee, 25 Iowa 341; Smith *v.* McLean, 24 Iowa 322.

Kansas.— Ord Nat. Bank *v.* Massey, 48 Kan. 762, 30 Pac. 124, 17 L. R. A. 127; Handley *v.* Harris, 48 Kan. 606, 29 Pac. 1145, 30 Am. St. Rep. 322, 17 L. R. A. 703.

Minnesota.— Keenan *v.* Stimson, 32 Minn. 377, 20 N. W. 364.

Mississippi.—Barker *v.* Stacy, 25 Miss. 471.

Missouri.— National Bank of Commerce *v.* Morris, 114 Mo. 255, 21 S. W. 511, 35 Am. St. Rep. 754, 19 L. R. A. 463; Feurt *v.* Rowell, 62 Mo. 524; Lafayette County Bank *v.* Metcalf, 29 Mo. App. 384.

New Hampshire.— Offutt *v.* Flagg, 10 N. H. 46.

North Carolina.— Hornthal *v.* Burwell, 109 N. C. 10, 13 S. E. 721, 26 Am. St. Rep. 556, 13 L. R. A. 740.

North Dakota.— Wilson *v.* Rustad, 7 N. D. 330, 75 N. W. 260, 66 Am. St. Rep. 649.

Ohio.— Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Winslow *v.* Troy Iron, etc., Factory, 1 Disn. (Ohio) 229, 12 Ohio Dec. (Reprint) 591.

Oklahoma.—Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249.

Texas.— Griffith *v.* Morrison, 58 Tex. 46, where the property was removed but not the mortgagor.

Contra, Zollikoffer *v.* Briggs, 19 La. 521; Verdier *v.* Leprete, 4 La. 41; Corbett *v.* Littlefield, 84 Mich. 30, 47 N. W. 581, 22 Am. St. Rep. 681, 11 L. R. A. 95; Boydson *v.* Goodrich, 49 Mich. 65, 12 N. W. 913; Montgomery *v.* Wight, 8 Mich. 143.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 166.

The question of consent by the mortgagee to the removal is often unnoticed in the decisions, but it seems fair to assume that the removal must be without his consent, for there are decisions to this effect. Hall *v.* Pillow, 31 Ark. 32; Kanaga *v.* Taylor, 7 Ohio St. 134, 70 Am. Dec. 62. But see Handley *v.* Harris, 48 Kan. 606, 29 Pac. 1145, 30 Am. St. Rep. 322, 17 L. R. A. 703, where the mortgagee learned of the removal soon after it occurred and was held not to be barred by laches because he neglected for five months to assert his right to the property.

Where not recorded in first state before the property has been removed the mortgagee will be postponed to those who acquire rights in the property after its removal and before the mortgage has been recorded in the new jurisdiction. Carroll *v.* Nisbet, 9 S. D. 497, 70 N. W. 634; Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146. *Compare* Jaffray *v.* Greenbaum, 64 Iowa 492, 20 N. W. 775, where a stock of goods in another state, which had been conveyed to trustees by an unrecorded conveyance to secure certain creditors, was subsequently brought into this state and added to another stock of goods conveyed to the same trustees for the same purpose, and it was held that the possession of the whole stock under the conveyance duly recorded in the state was constructive notice to other creditors of the interest of such trustees.

3. Johnson *v.* Hughes, 89 Ala. 588, 8 So. 147 (holding that, although a mortgage was

F. Time of Filing — 1. IN GENERAL. It has been held that a mortgage need only be filed as soon as it can be with reasonable diligence and exertion in order to satisfy statutes requiring record to be "forthwith"[4] or "immediate,"[5] and this amounts to almost the same as a requirement that filing shall be within a reasonable time.[6] Where a certain number of days is given in which to record a mortgage, the period begins to run only from the time when the instrument is delivered,[7] and in computing time the day of execution is excluded and the day of recording included.[8]

2. WHEN RECORDING RELATES BACK. Where there has been compliance with the requirement of a statute either that a mortgage should be filed "forthwith," "within a reasonable time," or within a specified time, it is held that the filing relates back to the time the instrument was executed and cuts out intermediate claimants.[9]

not recorded in the state to which the property had been removed, it would take precedence over an attachment levy which was made within the time allowed for such registration. *Compare* Beall *v.* Williamson, 14 Ala. 55, where it was held that an earlier statute requiring record of a mortgage on property brought into the state did not apply to purchasers, so that a mortgage valid in the state where it was executed would prevail over the rights of a purchaser, although not recorded, in Alabama); Hubbard *v.* Andrews, 76 Ga. 177 (holding that a foreclosure against property brought into the state was valid against the rights of a *bona fide* purchaser, when the foreclosure was made within the six-months' period allowed for registration of property after removal. *Compare* Peterson *v.* Kaigler, 78 Ga. 464, 3 S. E. 655, where it was held to be necessary to register a mortgage when the property was only casually brought into the state and returned after a short period); Blythe *v.* Crump, (Tex. Civ. App. 1902) 66 S. W. 885 (holding that record was unnecessary in the state to which the property had been removed where sufficient time for registration did not elapse between the removal and the sale of the property to a third person).

4. Freiberg *v.* Brunswick-Balke-Collender Co., (Tex. Civ. App. 1890) 16 S. W. 784.

Filing forthwith.— A mortgage executed at eleven P. M. and filed the following morning at seven immediately upon the opening of the clerk's office was held to be filed with reasonable diligence (Baker *v.* Smelser, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163 [*reversing* 6 Tex. Civ. App. 751, 26 S. W. 905]); and in the absence of intervening rights filing the mortgage within four days of execution was a sufficient compliance (Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145); but where a chattel mortgage was mailed to the recorder in due course and should have reached him the same day but did not arrive till the third day, this was held insufficient to support a finding that it was filed forthwith (Hackney *v.* Schow, 21 Tex. Civ. App. 613, 53 S. W. 713). *Compare* Cameron Ice Co. *v.* Wallace, 21 Tex. Civ. App. 141, 50 S. W. 628, where a delay caused by the absence of the clerk was held not to invalidate the filing because it was not forthwith.

5. Roe *v.* Meding, 53 N. J. Eq. 350, 33 Atl. 394.

6. Way *v.* Braley, 44 Mo. App. 457, holding that a mortgage executed on Saturday at a place seventeen miles from the recording office and filed the following Tuesday was filed within a reasonable time. *Compare* Wilson *v.* Milligan, 75 Mo. 41, where it was held that if a mortgagee, having an opportunity to record his mortgage, postponed doing so until a future time he did not record it within a reasonable time.

Where the time was not indicated by the statute within which record should be made, it was held to be sufficient to record a mortgage within two days after it was executed. Davis Gasoline Engine Works Co. *v.* McHugh, (Iowa 1902) 88 N. W. 948.

Death of the mortgagor does not prevent the subsequent recording of a mortgage executed by him. Williams *v.* Jones, 95 N. C. 504.

The exact time of filing is for the jury to determine when plaintiff alleges that the mortgage under which he claims was recorded before the levy of defendant's execution. Turner *v.* Langdon, 85 Mo. 438.

7. Hornbrook *v.* Hetzel, 27 Ind. App. 79, 60 N. E. 965; Orcutt *v.* Moore, 134 Mass. 48, 45 Am. Rep. 278.

8. Towell *v.* Hollweg, 81 Ind. 154. See also Miller *v.* Henshaw, 4 Dana (Ky.) 325, where it was held to be a sufficient compliance with a statute requiring mortgages to be lodged for record in the proper office "within sixty days after execution," if such deed was left at the proper office on the sixtieth day.

A statute requiring transfer of possession within twenty days unless the mortgage is recorded has been held not to put a limit on the time for recording the mortgage, although the right to perfect the mortgage lien by record may be lost by laches. Hope *v.* Johnston, 28 Fla. 55, 9 So. 830.

Premature record.— Under a statute making mortgages of personal property valid if recorded, although the mortgagor retain possession, it has been held that a registry made before the passage of the statute is sufficient. Fowler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736.

9. *Delaware.*—Hanson *v.* Cochran, 9 Houst. (Del.) 184, 31 Atl. 880.

G. Proof of Record. The fact that a chattel mortgage has been recorded may be shown by the certificate of the recording officer[10] or by his indorsement upon the mortgage.[11] Such a certificate has been held to be conclusive as to the time of record[12] and as to what the recorded instrument contained.[13]

Indiana.—McCarthy *v.* Seisler, 130 Ind. 63, 29 N. E. 407.

Iowa.— H. E. Spencer Co. *v.* Papach, 103 Iowa 513, 70 N. W. 748, 72 N. W. 665.

Missouri.— Huiser *v.* Beck, 55 Mo. App. 668; Way *v.* Braley, 44 Mo. App. 457.

Ohio.— Davis *v.* Bowman, 25 Oreg. 189, 35 Pac. 264, where the effect of the decision was to sustain the doctrine of relation back, although the court rested it on another ground.

South Carolina.— Talmadge *v.* Oliver, 14 S. C. 522, where a subsequent mortgagee brought an action against the prior one before the time allowed by law had elapsed and therefore failed.

Texas.— Baker *v.* Smelser, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163 [*reversing* 6 Tex. Civ. App. 751, 26 S. W. 905].

Contra, Smith-Frazer Boot, etc., Co. *v.* Ware, 47 Kan. 483, 28 Pac. 159; Drew *v.* Streeter, 137 Mass. 460. And *compare* Scales *v.* Fewell, 10 N. C. 18, where a bill of sale not registered within a year from its execution, if registered afterward, under the act giving further time for registration, was held not to have relation back to defeat a levy made after the execution of the bill of sale, but before the statute giving further time had been enacted.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 161.

In Canada the rule stated in the text is now in force by virtue of a statute. For the conflict on the point which formerly existed between the queen's bench division and common pleas division see Feehan *v.* Toronto Bank, 10 U. C. C. P. 32.

10. Head *v.* Goodwin, 37 Me. 181; Fuller *v.* Cunningham, 105 Mass. 442; Ferguson *v.* Clifford, 37 N. H. 86.

11. Freiberg *v.* Brunswick-Balke-Collender Co., (Tex. App. 1890) 16 S. W. 784. *Compare* Drexel *v.* Murphy, 59 Nebr. 210, 80 N. W. 813. But see Griffis *v.* Whitson, 3 Kan. App. 437, 43 Pac. 813, where the indorsement on a mortgage by the clerk was held to be proof that it had been recorded, but as the mortgage was in court away from the records, it was further required that the mortgagee prove that the mortgage was on file at the time when defendant's levy on the property had been made.

12. Head *v.* Goodwin, 37 Me. 181; Holmes *v.* Sprowl, 31 Me. 73; Jacobs *v.* Denison, 141 Mass. 117, 5 N. E. 526 (where the date of the mortgage was a year subsequent to the date of the indorsement); Fuller *v.* Cunningham, 105 Mass. 442. But see Holman *v.* Doran, 56 Ind. 358 (where parol evidence as to time was admitted to contradict the entry by the recorder because the officer was not required to make such an entry); Jones *v.* Parker, 73 Me. 248 (where it was held that the entry of the date upon the back of a mortgage only showed the date of record by inference and could be overcome by evidence showing the contrary).

Sufficiency of indorsement.— Although it has been required that the time when a mortgage is received must be noted "in the book" of records and on the mortgage (Handley *v.* Howe, 22 Me. 560), it is immaterial that the latter is marked "Entered" instead of "Received" (Monaghan *v.* Longfellow, 81 Me. 298, 17 Atl. 74); and the words "filed for record" have been held to indicate sufficiently that a permanent deposit of the mortgage was made (Cook *v.* Halsell, 65 Tex. 1. *Contra,* Brothers *v.* Mundell, 60 Tex. 240, where the words "for record" were held to be wrong and to invalidate the filing because the instrument should have been filed for permanent deposit so as to be at the disposal of any inquirer). It has also been held that the indorsement of the clerk upon a mortgage was not invalidated by his own omission to specify the book in which record was made (Head *v.* Goodwin, 37 Me. 181), or to state the time of day when the instrument was filed (McLarren *v.* Thompson, 40 Me. 284; Bishop *v.* Cook, 13 Barb. (N. Y.) 326); but the certificate was insufficient when it stated that an instrument was filed in the register's office which "purported to be a copy of such chattel mortgage," and that a copy of such mortgage was "a true copy of the original mortgage on file in this office" (Richardson *v.* Shelby, 3 Okla. 68, 41 Pac. 378). *Compare* Stevens *v.* Whittier, 43 Me. 376 (where the following entry was held sufficient: "East Livermore, Aug. 13, 8 P. M. Received 8 P. M., August 13, 1853. Book 1st, page 158 and 159. Attest, A. Barton, Town Clerk. Fees, 29, paid,"); Fuller *v.* Rounceville, 31 N. H. 512 (where the following entry was held sufficient: "Rec'd June 4, 1850, 6 o'clock forenoon, and recorded page 38, vol. 2, and examined by me. Wm. B. Crane, Town Clerk.").

Unauthorized indorsement by the clerk, contrary to the instructions of the one who gave him the mortgage, has no effect and hence cannot be used to show that the instrument was recorded. Town *v.* Griffith, 17 N. H. 165.

13. Adams *v.* Pratt, 109 Mass. 59, where a chattel mortgage contained a certificate of record, and below such certificate a memorandum referring by asterisks to the mortgage. The body of the mortgage did not contain a complete description of the property, but the memorandum furnished the necessary description. It was held that if the asterisks and note were part of the mortgage at the time it was made and before it was left for record the certificate of record was conclusive evidence that such memorandum and the asterisks were recorded when the mortgage was recorded.

[X, G]

H. Renewal and Refiling[14] — **1. In General.** In several states there are statutory provisions requiring that a chattel mortgage must be refiled within a specified number of years after the original record[15] in order to be valid against third persons;[16] but it has been held that a single refiling at the end of the first period was a compliance with the statute and that a second refiling was not necessary at the end of a subsequent period.[17]

2. Sufficiency of Renewal — a. Generally. The renewal statement required for the continuation of a chattel mortgage may by some statutes be indorsed on the original mortgage,[18] or on a true copy thereof,[19] which is then put on file; but in others such an indorsement is insufficient and it is required that a separate statement of the interests of the parties be filed.[20] The renewal statement must be made by the mortgagee and an unauthorized statement by the mortgagor

The burden of proving that a mortgage has been recorded is on the mortgagee. State *v.* Griffen, 16 Ind. App. 555, 45 N. E. 935.

14. Effect of notice as obviating necessity for refiling see *supra*, X, C, 5, a.

15. Krum *v.* Downey, 98 Mich. 511, 57 N. W. 575; Briggs *v.* Mette, 42 Mich. 12, 3 N. W. 231; McCarthy *v.* Grace, 23 Minn. 182. See also Jones Chatt. Mortg. (4th ed.) § 190.

One-year period.— Arkansas, Kansas, Michigan, Minnesota, Montana, New Mexico, New York, Ohio, Oregon, and also Colorado when the amount secured exceeds two thousand five hundred dollars. See Jones Chatt. Mortg. (4th ed.) § 190.

Two-year period.— Wisconsin. See Jones Chatt. Mortg. (4th ed.) § 190.

Three-year period.— North Dakota, South Dakota. See Jones Chatt. Mortg. (4th ed.) § 190.

Refiling act repealed.—The object of the act of 1880, respecting chattel mortgages, which is to save the necessity of refiling, is, under the terms of the act, accomplished by filing the mortgage, or a copy of it, with the affidavit required by the act of 1878, and by having the original mortgage duly acknowledged and recorded. State *v.* Vosseller, 43 N. J. L. 553. *Compare* Ransom *v.* Schmela, 13 Nebr. 73, 12 N. W. 926, where it was held that a mortgage not refiled as directed by Rev. Stat. (1866), c. 43, § 74, still retained its priority against a subsequent mortgagee in good faith, because the act requiring refiling had been repealed before a renewal could be effected.

A mortgage on unplanted crops is valid against a *bona fide* purchaser for value, if recorded when given, and need not be again filed for record after the crops come into existence. Grand Forks Nat. Bank *v.* Minneapolis, etc., Elevator Co., 6 Dak. 357, 43 N. W. 806.

16. Moore *v.* Shaw, 1 Kan. App. 103, 40 Pac. 929, holding that a mortgagee who had failed to refile his mortgage could not replevy the property from a levying officer.

Between the parties failure to refile or renew does not invalidate a mortgage. Laubenheimer *v.* McDermott, 5 Mont. 512, 6 Pac. 344; Sanford *v.* Munford, 31 Nebr. 792, 48 N. W. 876; Fish *v.* New York Water Proof Paper Co., 29 N. J. Eq. 16; Tremaine *v.* Mortimer, 128 N. Y. 1, 27 N. E. 1060, 38 N. Y. St. 740; Deering *v.* Hanson, 7 N. D. 288, 75 N. W. 249. See also Steward *v.* Cole, 43 Hun (N. Y.) 164, where it was held that a failure to refile a copy of a chattel mortgage did not render it void against the mortgagor or against his receiver appointed in supplementary proceedings instituted against him on a judgment recovered after the expiration of the year and before a copy had been refiled. But see Fenton *v.* Blythe, 25 Q. B. D. 417, 59 L. J. Q. B. 589, 63 L. T. Rep. N. S. 453, 39 Wkly. Rep. 79, where it was held that failure to renew a bill of sale every five years according to the statutory requirements avoided it entirely even between the grantor and grantee.

17. Glassford *v.* Harshaw, 4 N. J. L. J. 118; Newell *v.* Warren, 44 N. Y. 244 [*reversing* 44 Barb. (N. Y.) 258]; Wisser *v.* O'Brien, 35 N. Y. Super. Ct. 149, 44 How. Pr. (N. Y.) 209. *Contra*, Briggs *v.* Mette, 42 Mich. 12. 3 N. W. 231; Seaman *v.* Eager, 16 Ohio St. 209.

The New York statute now requires successive annual refiling. N. Y. Laws (1873), c. 501.

18. Stockham *v.* Allard, 4 Thomps. & C. (N. Y.) 279; Paine *v.* Mason, 7 Ohio St. 198; Rehak *v.* Wilcox, 4 Ohio Dec. (Reprint) 379, 2 Clev. L. Rep. 65, 7 Ohio Dec. (Reprint) 585, 4 Cinc. L. Bul. 79. See also Smith *v.* Cooper, 22 Hun (N. Y.) 11, where the indorsement by a mortgagor at the direction of the mortgagee of a signed, sealed, and dated statement, properly sworn to before a notary, to the effect that "this chattel mortgage is hereby renewed for one year from this date" was held to be a valid renewal.

Recording a mortgage which has previously been filed but not recorded is not a sufficient renewal of the record. Davis *v.* Perry, 64 Ark. 369, 42 S. W. 768.

19. Marsden *v.* Cornell, 2 Hun (N. Y.) 449, holding that a copy alone without indorsements was insufficient.

Indorsement on mortgage not necessary.— It has been held not to be necessary to indorse payments on the mortgage or the copy thereof filed with the township clerk, but that it is enough to file an affidavit of the amount paid at the end of the year. Anderson *v.* Cook, 100 Mich. 621, 59 N. W. 423.

20. McCrea *v.* Hopper, 35 N. Y. App. Div. 572, 55 N. Y. Suppl. 136 [*affirmed* in 165 N. Y. 633, 59 N. E. 1125].

of the property is therefore insufficient to answer the requirements of the statute.[21]

b. Contents of Renewal Statement. The statement exhibiting the interest of the mortgagee in the property is sufficient if it is made in good faith, with reasonable care, and is substantially accurate;[22] but it was held to be faulty where it failed entirely to state the amount due,[23] understated it by a large amount,[24] or failed to designate the time and place of the original filing.[25]

c. Form of Renewal Statement. It has been held that the jurat attached to a renewal statement could be administered by a deputy city clerk,[26] and that the oath need not appear on the affidavit but that it may be shown by evidence *aliunde* that the statements were made on oath duly administered.[27] Where a jurat

21. Newell *v.* Warner, 44 Barb. (N. Y.) 258.

22. Patterson *v.* Gillies, 64 Barb. (N. Y.) 563. But see Theriot *v.* Prince, 1 Edm. Sel. Cas. (N. Y.) 219, where it was held that the statement of interest must be positive and distinct.

Estoppel beyond amount claimed.—Although an affidavit for renewal erroneously understates the sum due to the mortgagee he is estopped to claim a larger amount against a purchaser who relied on the statement contained in the affidavit. Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396; Rice *v.* Kahn, 70 Wis. 323, 35 N. W. 465.

23. Fitch *v.* Humphrey, 1 Den. (N. Y.) 163; Matter of Brocamp, 2 Ohio Cir. Ct. 372, 1 Ohio Cir. Dec. 537.

24. Ely *v.* Carnley, 3 E. D. Smith (N. Y.) 489.

Sufficiency of statement of amount of mortgagee's interest.— It was held sufficient where it was stated in an affidavit of renewal that a certain named sum "constitutes the amount of interest" of the mortgagees in the property mentioned therein (Manwaring *v.* Jenison, 61 Mich. 117, 27 N. W. 899), or that the amount mentioned in a mortgage constituted the mortgagee's interest therein (Miller *v.* Jones, 17 Fed. Cas. No. 9,576, 15 Nat. Bankr. Reg. 150), but where the mortgage secured an unexpired lease and there was nothing to show whether any rent remained due a statement that the mortgagee's interest remained unchanged and was hereby renewed for the amount above written was insufficient (Briggs *v.* Mette, 42 Mich. 12, 3 N. W. 231). *Compare* Platt *v.* Stewart, 13 Blatchf. (U. S.) 481, 19 Fed. Cas. No. 11,220, where it was held that a statement in renewal of a mortgage given to secure rent that "the interests of the parties, . . . remain unchanged, except so far as the same have been altered by the payment of rent accrued" was insufficient, under N. Y. Laws (1833), c. 279, § 3.

Statement of extension of the debt must be made in the affidavit for renewal, and it is not sufficient to state the time to which the mortgage is extended. Cope *v.* Minnesota Type Foundry Co., 21 Mont. 18, 52 Pac. 617. See also Chafey *v.* Mathews, 104 Mich. 103, 62 N. W. 141, 27 L. R. A. 558, where the mortgage showed on its face that it was to a continuing indemnity, and it was held unnecessary to state in the affidavit of renewal the actual amount of the matured indebtedness so long as the obligations, matured and unmatured, exceeded the sum stated.

Annexing other instruments.— Separate instruments may be construed together to furnish a sufficient statement for renewal, and this was done where affidavits were made by mortgagee and mortgagor at the same time and on the same paper, which made it apparent that there was an agreement to extend time for payment of the indebtedness and enabled creditors to know the time of such extension (Hamilton *v.* Seeger, 75 Ill. App. 599), but not where no reference was made to a prior agreement between the parties which was written on a different sheet of paper, even though this agreement was filed along with the statement (Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396).

No enumeration of the mortgagors is required in a renewal affidavit and it is sufficient to state the amount of the claim secured and that it is just and unpaid and a statement is annexed showing the interest of the mortgagee in the property at the time it is made. O. S. Kelly Co. *v.* Lobenthal, 15 Ohio Cir. Ct. 343, 8 Ohio Cir. Dec. 300.

25. David Stevenson Brewing Co. *v.* Eastern Brewing Co., 22 N. Y. App. Div. 523, 48 N. Y. Suppl. 89.

A description of the property in a renewal statement by reference to a prior mortgage on file and the schedule thereto attached "and all other goods and chattels" in a certain building is insufficient. Platt *v.* Stewart, 13 Blatchf. (U. S.) 481, 19 Fed. Cas. No. 11,220, construing New York statute.

26. Tower *v.* Welker, 93 Mich. 332, 53 N. W. 527.

Sufficiency of signature to jurat.— Where the jurat to a renewal affidavit was signed "W. F. Cooley, Recorder," and the record showed the existence of the village of M; that there was in said village an office of village recorder; that the affidavit was filed in the office where the original mortgage was filed; that said C certified on said affidavit the proper venue; that it was filed in his office, and affixed to his signature was the word "Recorder," it was a sufficient designation of his office to render the affidavit valid. Camp *v.* Murphy, 68 Minn. 378, 71 N. W. 1.

27. Cox *v.* Stern, 170 Ill. 442, 48 N. E. 906, 62 Am. St. Rep. 385 [*affirming* 71 Ill. App. 194].

is attached to a renewal affidavit, it seems to be necessary that it stated the venue of the proceedings.[28]

d. Time of Refiling — (i) *In General.* Where a certain period, such as thirty days, is given within which to refile a mortgage, any effort to renew the record before the period commences is ineffectual,[29] and it has been held that refiling after the period has elapsed is of no avail either;[30] but there are other decisions to the effect that late refiling makes the mortgage valid from the date thereof.[31]

(ii) *How Computed.* A mortgage is refiled in apt time if it is renewed on the day the debt matures;[32] and it has been held that days of grace are to be reckoned in if the instrument secured by the mortgage is entitled to grace.[33] Although the last day of the period be Sunday, it is to be counted nevertheless;[34] but it has been held that fractions of a day are to be disregarded.[35]

3. When Refiling Is Not Necessary — a. Generally. It has been held that a mortgagee's failure to refile a chattel mortgage is not excused by the mortgagor's removal from the state[36] or by the fact that the mortgage has become

28. Griffin *v.* Forrest, 49 Mich. 309, 13 N. W. 603, holding that where an affidavit for the renewal of a chattel mortgage described the mortgage as filed "with the clerk of the township of Bridgeport in Saginaw county, Michigan," and the attestation clause was "Subscribed and sworn to before me this 20th day of August, 1879, at Bridgeport," the venue was sufficiently given.

29. *New Jersey.*— Heinselt *v.* Smith, 34 N. J. L. 215; National Bank *v.* Sprague, 20 N. J. Eq. 13.

New York.— Industrial Loan Assoc. *v.* Saul, 34 Misc. (N. Y.) 188, 68 N. Y. Suppl. 837.

Ohio.— Biteler *v.* Baldwin, 42 Ohio St. 125.

Oregon.— J. I. Case Threshing Mach. Co. *v.* Campbell, 14 Oreg. 460, 13 Pac. 324.

Wisconsin.— Rice *v.* Kahn, 70 Wis. 323, 35 N. W. 465.

Canada.— Beatty *v.* Fowler, 10 U. C. Q. B. 382.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 177.

30. Industrial Loan Assoc. *v.* Saul, 34 Misc. (N. Y.) 188, 68 N. Y. Suppl. 837; Herder *v.* Walther, 9 N. Y. Suppl. 926, 29 N. Y. St. 410; Cooper *v.* Koppes, 45 Ohio St. 625, 15 N. E. 662; Seaman *v.* Eager, 16 Ohio St. 209; Whiteley *v.* Weber, 2 Ohio Cir. Ct. 336, 1 Ohio Cir. Dec. 517; Fought *v.* Hiet, 8 Ohio Dec. (Reprint) 1, 5 Cinc. L. Bul. 10.

No revival of a mortgage after default in refiling is possible, it has been held. Crawford *v.* Trigg, (Ark. 1891) 15 S. W. 185; Swiggett *v.* Dodson, 38 Kan. 704, 17 Pac. 594; Lockwood *v.* Crawford, 29 Kan. 286; Herder *v.* Walther, 9 N. Y. Suppl. 926, 29 N. Y. St. 410; Cooper *v.* Koppes, 45 Ohio St. 625, 15 N. E. 662; Biteler *v.* Baldwin, 42 Ohio St. 125.

31. Nixon *v.* Stanley, 33 Hun (N. Y.) 247; Newell *v.* Warner, 44 Barb. (N. Y.) 258; Swift *v.* Hart, 12 Barb. (N. Y.) 530; Rehak *v.* Wilcox, 4 Ohio Dec. (Reprint) 379, 7 Ohio Dec. (Reprint) 585, 2 Clev. L. Rep. 65, 4 Cinc. L. Bul. 79.

32. Hamilton *v.* Seeger, 75 Ill. App. 599.

Effect of maturity of collateral indebtedness.— Where a note given as collateral to another indebtedness was itself secured by a mortgage, it was not necessary to renew the record of the mortgage on the maturity of the principal indebtedness, when that occurred before the maturity of the collateral note. Clause Printing-Press Co. *v.* Chicago Trust, etc., Bank, 145 Ind. 682, 44 N. E. 256.

33. Gilbert *v.* Sprague, 88 Ill. App. 508.

34. Nitchie *v.* Townsend, 2 Sandf. (N. Y.) 299; Paine *v.* Mason, 7 Ohio St. 198.

35. Griffin *v.* Forrest, 49 Mich. 309, 13 N. W. 603; Seaman *v.* Eager, 16 Ohio St. 209; Thomson *v.* Quirk, 18 Can. Supreme Ct. 695. *Contra*, Lockwood *v.* Crawford, 29 Kan. 286, holding that the year within which the affidavit for the renewal of a chattel mortgage must be filed begins to run from the hour of the day on which the mortgage was originally filed.

Refiling the same day a year later has been held to be sufficient when the refiling was earlier in the day than the original filing (*In re* Landman, 5 Ohio S. & C. Pl. Dec. 398), but when the refiling was later in the day than the original filing it was insufficient (Lockwood *v.* Crawford, 29 Kan. 286). But see Thomson *v.* Quirk, 18 Can. Supreme Ct. 695, where it was held to be sufficient if the second filing was made any time during the day a year hence on which the mortgage was originally filed.

Refiling a fixed number of days before the lapse of time.— It has been held to be a sufficient compliance with the statute in regard to time of filing when the refiling was made one day (Armstrong *v.* Ausman, 11 U. C. Q. B. 498), and when it was made seventeen days (Burchinell *v.* Gorsline, 11 Colo. App. 22, 52 Pac. 413; Burrill *v.* S. N. Wilcox Lumber Co., 65 Mich. 571, 32 N. W. 824) before the period for refiling expired.

36. Richardson *v.* Shelby, 3 Okla. 68, 41 Pac. 378.

Filing after removal of no avail.— Under the statute requiring the filing of a copy of a chattel mortgage after one year from the filing of the original in the clerk's office of the town where the mortgagor resides, a refiling in the town in which he formerly resided is

absolute;[37] but advertising the property for sale before default in refiling under a power of sale contained in a mortgage renders renewal unnecessary.[38]

b. Execution of New Mortgage. It has been held that taking a new mortgage within the time for refiling the old one will continue the lien on the property if the transaction is *bona fide*,[39] for a copy refiled is to be regarded in effect as a new mortgage,[40] and a failure to refile will not invalidate a subsequent mortgage on the same property and between the same parties,[41] except as to those creditors who levied during the continuance of the default.[42]

c. Possession by Mortgagee. It is unnecessary to refile a chattel mortgage when the mortgagee has taken possession before the time for refiling arrives,[43] or before the lien of the competing creditor has attached to the property,[44] even though after default by the mortgagor of the condition of the mortgage,[45] or after the period for refiling has elapsed.[46]

d. Rights Accruing Before Default — (i) *In General.* When the rights of contesting parties in mortgaged property become fixed by the levy on the property,[47] or by an assignment thereof,[48] before the time for refiling arrives, such rights will not be affected by a subsequent failure to renew the record.

(ii) *By Purchase.* It is usually held that a person who purchases mortgaged property within the period when the mortgage is valid without refiling cannot later object that the instrument was not properly filed at the time when renewal should have been made,[49] for the term "subsequent purchaser" in

of no avail when he has become a non-resident of the state. Dillingham *v.* Bolt, 37 N. Y. 198, 4 Transcr. App. (N. Y.) 110, 4 Abb. Pr. N. S. (N. Y.) 221.

Death of the mortgagor with no administration of his estate did not prevent a subsequent purchaser from his widow from acquiring a superior right to a mortgage, notwithstanding a default in refiling which had occurred subsequently to the death but prior to the purchase. Fox *v.* Burns, 12 Barb. (N. Y.) 677.

37. Gould *v.* Bowne, 4 N. Y. Leg. Obs. 423.

38. Otis *v.* Sill, 8 Barb. (N. Y.) 102.

Consent by mortgagor to sale of the goods will not give validity to an instrument void against creditors for failure properly to refile. Barker *v.* Leeson, 1 Ont. 114.

39. Meyerfeld *v.* Strube, 9 Ohio S. & C. Pl. Dec. 514. *Contra*, Osborn *v.* Alexander, 17 Abb. N. Cas. (N. Y.) 132 note.

40. Nitchie *v.* Townsend, 2 Sandf. (N. Y.) 299.

41. Lee *v.* Huntoon, Hoffm. (N. Y.) 447.

42. Walker *v.* Henry, 85 N. Y. 130. *Compare* Jaqueth *v.* Merritt, 29 Hun (N. Y.) 584, where first and second mortgages upon chattels were made at different times, and duly filed, and after a year from the filing of the first mortgage, a mortgage upon the same chattels, to the first mortgagee, was filed, but the first mortgage was not refiled. The second mortgagee sold at public sale, and it was held that his purchaser took a good title thereto, as against the first and third mortgages.

43. *Missouri.*— Frank *v.* Playter, 73 Mo. 672.

New Jersey.— National Bank *v.* Sprague, 21 N. J. Eq. 530.

New York.— Tremaine *v.* Mortimer, 128 N. Y. 1, 27 N. E. 1060, 38 N. Y. St. 740; Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. 360.

North Dakota.— Union Nat. Bank *v.* Oium, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533.

Wisconsin.— Bates *v.* Wilbur, 10 Wis. 415.

Canada.— Ross *v.* Elliott, 11 U. C. C. P. 221.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 176.

44. Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 5 S. W. 292; Dayton *v.* People's Sav. Bank, 23 Kan. 421; Commercial Bank *v.* Davy, 81 Hun (N. Y.) 200, 30 N. Y. Suppl. 718, 62 N. Y. St. 681; Bowdish *v.* Page, 81 Hun (N. Y.) 170, 30 N. Y. Suppl. 691, 62 N. Y. St. 676.

Necessity for lien in favor of competing creditor see *supra*, X, C, 3, c.

45. Porter *v.* Parmly, 34 N. Y. Super. Ct. 398, 13 Abb. Pr. N. S. (N. Y.) 104.

46. Dayton *v.* People's Sav. Bank, 23 Kan. 421.

47. Edson *v.* Newell, 14 Minn. 228; Case *v.* Jewett, 13 Wis. 498, 80 Am. Dec. 752; Newman *v.* Tymeson, 12 Wis. 448; Bates *v.* Wilbur, 10 Wis. 415. *Contra*, Thompson *v.* Van Vechten, 6 Bosw. (N. Y.) 373. *Compare* Marsden *v.* Cornell, 62 N. Y. 215, where it was held that one who converted mortgaged property before the time for refiling and became a purchaser thereof by paying a judgment recovered against him by the mortgagor could not complain that the mortgage had not been properly refiled.

48. Matter of Brocamp, 5 Ohio Cir. Ct. 372, 1 Ohio Cir. Dec. 537.

49. *Kansas.*— Miltonvale State Bank *v.* Kuhnle, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129; Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Howard *v.* Hutchinson First Nat. Bank, 44 Kan. 549, 24

a renewal statute means purchasers subsequent to the time of the refiling of the mortgage.[50]

XI. FRAUD AT COMMON LAW AND UNDER THE RECORDING ACTS.

A. At Common Law. Formerly a sale without a transfer of possession was fraudulent *per se* in England, but the modern rule there and in many of the jurisdictions of the United States makes retention of possession by the vendor after a sale only *prima facie* evidence of fraud and admits of explanation and of proof that the transfer was in fact *bona fide*.[51] As a frequent purpose of a mortgage is to give security and at the same time to permit the mortgagor to have the benefit of the mortgaged property, there is a strong reason why retention of possession by a mortgagor should not amount to fraud at law in the absence of any recording statutes.[52] In some cases it has only been necessary to decide that

Pac. 983, 10 L. R. A. 537; Corbin *v.* Kincaid, 33 Kan. 649, 7 Pac. 145.

Michigan.—Wade *v.* Strachan, 71 Mich. 459, 39 N. W. 582 [*overruling* Briggs *v.* Mette, 42 Mich. 12, 3 N. W. 231]; Flory *v.* Comstock, 61 Mich. 522, 28 N. W. 701.

Minnesota.— Edson *v.* Newell, 14 Minn. 228.

Missouri.— Frank *v.* Playter, 73 Mo. 672.

Nebraska.— The statute whereby a chattel mortgage ceases to be valid after the expiration of five years from the filing thereof only protects persons whose rights accrue after the five-year period. Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 286, 77 N. W. 677.

New Jersey.— National Bank *v.* Sprague, 21 N. J. Eq. 530.

New York.— Dillingham *v.* Bolt, 37 N. Y. 198, 4 Transcr. App. (N. Y.) 110, 4 Abb. Pr. N. S. (N. Y.) 221; Thompson *v.* Van Vechten, 27 N. Y. 568; Manning *v.* Monaghan, 23 N. Y. 539; Meech *v.* Patchin, 14 N. Y. 71; Wiles *v.* Clapp, 41 Barb. (N. Y.) 645; Dillingham *v.* Ladue, 35 Barb. (N. Y.) 38; Latimer *v.* Wheeler, 30 Barb. (N. Y.) 485; Manning *v.* Monaghan, 10 Bosw. (N. Y.) 231.

Wisconsin.— Nix *v.* Wiswell, 84 Wis. 334, 54 N. W. 620; Ullman *v.* Duncan, 78 Wis. 213, 47 N. W. 266, 9 L. R. A. 683; Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394; Lowe *v.* Wing, 56 Wis. 31, 13 N. W. 892.

Contra, Crawford *v.* Trigg, (Ark. 1891) 15 S. W. 185; Day *v.* Munson, 14 Ohio St. 488.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 438 *et seq.*

A subvendee deriving title from one who purchased within the period during which the mortgage was valid without refiling cannot object to a subsequent failure to renew the mortgage. Wiles *v.* Clapp, 41 Barb. (N. Y.) 645; Dillingham *v.* Ladue, 35 Barb. (N. Y.) 38. But see Beskin *v.* Feigenspan, 32 N. Y. App. Div. 29, 52 N. Y. Suppl. 750, where a subsequent purchaser in good faith, after the time for refiling had elapsed, from one who had purchased before the time for renewal had arrived, was held to acquire a valid title by reason of the failure to renew the record. *Compare* American Box Mach. Co. *v.* Zentgraf, 45 N. Y. App. Div. 522, 61 N. Y. Suppl. 417, 7 N. Y. Annot. Cas. 182, where the purchaser at a foreclosure sale under a second mortgage which had been executed before it became necessary to refile the first mortgage was not allowed to impeach the first mortgage because it was not properly refiled.

50. Latimer *v.* Wheeler, 30 Barb. (N. Y.) 485; Wolff *v.* Rausch, 22 Misc. (N. Y.) 108, 48 N. Y. Suppl. 716.

51. See, generally, SALES; and Jones Chatt. Mortg. (4th ed.) § 319.

52. *Alabama.*— Magee *v.* Carpenter, 4 Ala. 469; Killough *v.* Steele, 1 Stew. & P. (Ala.) 262.

Connecticut.— Swift *v.* Thompson, 9 Conn. 63, 21 Am. Dec. 718. But see Ballard *v.* Winter, 39 Conn. 179, where it was said that the rule of law which required change of possession to accompany mortgages of personal property was not a mere rule of evidence but of positive law.

Indiana.— Hankins *v.* Ingols, 4 Blackf. (Ind.) 35; Watson *v.* Williams, 4 Blackf. (Ind.) 26, 28 Am. Dec. 36; Jordan *v.* Turner, 3 Blackf. (Ind.) 309.

Iowa.— Hughes *v.* Cory, 20 Iowa 399.

Kansas.—Arkansas City Bank *v.* Swift, 57 Kan. 460, 46 Pac. 950. But see *contra, infra,* this note.

Kentucky.— Ross *v.* Wilson, 7 Bush (Ky.) 29; Lyons *v.* Field, 17 B. Mon. (Ky.) 543; Vernon *v.* Morton, 8 Dana (Ky.) 247; Snyder *v.* Hitt, 2 Dana (Ky.) 204; Head *v.* Ward, 1 J. J. Marsh. (Ky.) 280; Bucklin *v.* Thompson, 1 J. J. Marsh. (Ky.) 223.

Maine.— Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472; Cutter *v.* Copeland, 18 Me. 127; Smith *v.* Putney, 18 Me. 87; Lane *v.* Borland, 14 Me. 77, 31 Am. Dec. 33; Lunt *v.* Whitaker, 10 Me. 310; Gleason *v.* Drew, 9 Me. 79. See also Reed *v.* Jewett, 5 Me. 96, where the same result was reached, although the mortgage was an absolute bill of sale on its face. But see *contra, infra,* this note.

Massachusetts.— Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; Adams *v.* Wheeler, 10 Pick. (Mass.) 199; Ward *v.* Sumner, 5 Pick. (Mass.) 59; Homes *v.* Crane, 2 Pick. (Mass.) 607.

Mississippi.— Stamps *v.* Gilman, 43 Miss. 456.

Nebraska.— Pyle *v.* Warren, 2 Nebr. 241.

New Hampshire.—Hoit *v.* Remick, 11 N. H. 285; North *v.* Crowell, 11 N. H. 251; Ash *v.*

the retention of possession is not fraudulent where it was provided for by the terms of the deed.[53]

B. Under the Recording Acts[54] — **1. In General.** As the principal object of recording statutes is to do away with the necessity for a transfer of possession, it follows that when a mortgage is properly recorded it is not invalid because it stipulated that the mortgagor should remain in possession.[55] In a few states reten-

Savage, 5 N. H. 545; Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25.

New Jersey.— Runyon *v.* Groshon, 12 N. J. Eq. 86. See also Hall *v.* Snowhill, 14 N. J. L. 8, where the court held that a mortgagee out of possession could maintain an action against a third person who converted it but expressly refrained from deciding whether the mortgage was valid against creditors of the mortgagor.

New York.— Newell *v.* Warren, 44 N. Y. 244; Fairbanks *v.* Bloomfield, 5 Duer (N. Y.) 434; Lewis *v.* Stevenson, 2 Hall (N. Y.) 63; Cole *v.* White, 26 Wend. (N. Y.) 511; Gardner *v.* Adams, 12 Wend. (N. Y.) 297; Ferguson *v.* Union Furnace Co., 9 Wend. (N. Y.) 345; Marsh *v.* Lawrence, 4 Cow. (N. Y.) 461; Bissell *v.* Hopkins, 3 Cow. (N. Y.) 166, 15 Am. Dec. 259. But see *contra, infra,* this note.

North Carolina. — Hardy *v.* Skinner, 31 N. C. 191.

Ohio.— Hooban *v.* Bidwell, 16 Ohio 509, 47 Am. Dec. 386.

Pennsylvania.—Luckenbach *v.* Brickenstein, 5 Watts & S. (Pa.) 145. But see *contra, infra,* this note.

South Carolina.— State Bank *v.* Gourdin, Speers Eq. (S. C.) 439.

Tennessee.— Wiley *v.* Lashlee, 8 Humphr. (Tenn.) 716, where the bill of sale was absolute on its face.

Vermont.— Spaulding *v.* Austin, 2 Vt. 555. But see *contra, infra,* this note.

United States. — Mitchell *v.* Winslow, 2 Story (U. S.) 630, 17 Fed. Cas. No. 9,673, 6 Law Rep. 347; Fletcher *v.* Morey, 2 Story (U. S.) 555, 9 Fed. Cas. No. 4,864; Almy *v.* Wilbur, 2 Woodb. & M. (U. S.) 371, 1 Fed. Cas. No. 256. But see *contra, infra,* this note.

Contra.— *Illinois.*— Constant *v.* Matteson, 22 Ill. 546; Kitchell *v.* Bratton, 2 Ill. 300; Thornton *v.* Davenport, 2 Ill. 296, 29 Am. Dec. 358. *Compare* Letcher *v.* Norton, 5 Ill. 575, where it was held that a mortgage without change of possession would not be fraudulent *per se* when the instrument itself provided that possession should remain with the mortgagor.

Indian Territory.— McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043.

Kansas.— Golden *v.* Cockril, 1 Kan. 259, 81 Am. Dec. 510, *dictum* made after the passing of a recording act. But see *contra, supra,* this note.

Maine. — Goodenow *v.* Dunn, 21 Me. 86, holding delivery actual or symbolical was necessary to the validity of a mortgage. But see *contra, supra,* this note.

New York.— Beekman *v.* Bond, 19 Wend. (N. Y.) 444. But see *contra, supra,* this note.

Pennsylvania.— Roberts' Appeal, 60 Pa. St. 400; Welsh *v.* Bekey, 1 Penr. & W. (Pa.) 57; Clow *v.* Woods, 5 Serg. & R. (Pa.) 275, 9 Am. Dec. 346; Merchants Bank *v.* Petersburg R. Co., 12 Phila. (Pa.) 482, 34 Leg. Int. (Pa.) 240. But see *contra, supra,* this note.

Vermont.— Russell *v.* Fillmore, 15 Vt. 130; Sturgis *v.* Warren, 11 Vt. 433; Woodward *v.* Gates, 9 Vt. 358. But see *contra, supra,* this note.

United States.— Crooks *v.* Stuart, 2 McCrary (U. S.) 13, 7 Fed. 800. But see *contra, supra,* this note.

See 9 Cent. Dig. tit. "Chattel Mortgages," §§ 142, 367 *et seq.*

53. *Alabama.* — Planters', etc., Bank *v.* Willis, 5 Ala. 770; Ravisies *v.* Alston, 5 Ala. 297.

Arkansas.— Martin *v.* Ogden, 41 Ark. 186.

Illinois. — Thompson *v.* Yeck, 21 Ill. 73; Letcher *v.* Norton, 5 Ill. 575; Thornton *v.* Davenport, 2 Ill. 296, 29 Am. Dec. 358.

Indiana. — Jordan *v.* Turner, 3 Blackf. (Ind.) 309.

New York.— Miller *v.* Lockwood, 32 N. Y. 293; Gardner *v.* Adams, 12 Wend. (N. Y.) 297; Barrow *v.* Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354.

United States.— Fowler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736 [*affirming* Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469]; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 375.

54. Effect of recording statutes.— "But the adoption of these laws has not changed the effect of a mortgage at common law with or without a change of possession. If there be a change of possession, then no record or filing of the mortgage is necessary; but if there be no such change of possession, and no record or filing of the mortgage, the effect of the omission is the same now that it was at common law; there is, as is generally said, a presumption of fraud which may be removed by evidence that there was no fraud in fact." Jones Chatt. Mortg. (4th ed.) § 322 [*citing* Hull *v.* Carnley, 2 Duer (N. Y.) 99; Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171].

55. *Alabama.*— Kidd *v.* Morris, 127 Ala. 393, 30 So. 508.

Colorado.— Lee *v.* Stanard, 15 Colo. App. 101, 61 Pac. 234.

Connecticut.— The statute making it unnecessary to deliver the property where a mortgage covering household furniture has been recorded has been held to apply to furniture which was used in a hotel where the mortgagor and his family made their home. Croswell *v.* Allis, 25 Conn. 301.

tion of possession by the mortgagor makes the mortgage *prima facie* fraudulent even when the mortgage is recorded,[56] but this presumption of fraud may be rebutted by proof of actual good faith[57] and lasts only so long as the mortgagor continues in possession.[58] The presumption of fraud does not arise where the property mortgaged is not capable of delivery.[59]

2. PRESUMPTIONS. A failure to make an immediate delivery of mortgaged

Dakota.— McKay *v.* Shotwell, 6 Dak. 124, 50 N. W. 622.

Iowa.— Gilmore *v.* Kilpatrick-Koch Dry Goods Co., 101 Iowa 164, 70 N. W. 175; Goldsmith *v.* Willson, 67 Iowa 662, 25 N. W. 870.

New York.— Frost *v.* Mott, 34 N. Y. 253; Hull *v.* Carnley, 2 Duer (N. Y.) 99; Russell *v.* Butterfield, 21 Wend. (N. Y.) 300 (mortgage securing purchase-money). But see Hanford *v.* Artcher, 4 Hill (N. Y.) 271; Wood *v.* Lowry, 17 Wend. (N. Y.) 492.

North Carolina.—Boone *v.* Hardie, 83 N. C. 470.

Tennessee.— Madisonville Bank *v.* McCoy, (Tenn. Ch. 1897) 42 S. W. 814.

Texas.— Meyer Bros. Drug Co. *v.* Rather, (Tex. Civ. App. 1895) 30 S. W. 812; Johnston *v.* Luling Mfg. Co., (Tex. Civ. App. 1894) 24 S. W. 996.

United States.— Hill *v.* Ryan Grocery Co., 78 Fed. 21, 41 U. S. App. 714, 23 C. C. A. 624.

Retention of possession contrary to the face of the mortgage has been held sufficient to render the transaction fraudulent as to creditors of the mortgagor. Jordan *v.* Turner, 3 Blackf. (Ind.) 309. *Contra*, Lonsdale *v.* Fairbrother, 10 R. I. 327.

56. Horton *v.* Williams, 21 Minn. 187; South Omaha Nat. Bank *v.* Chase, 30 Nebr. 444, 46 N. W. 513; Severance *v.* Leavitt, 16 Nebr. 439, 20 N. W. 273; Marsh *v.* Burley, 13 Nebr. 261, 13 N. W. 279; Brunswick *v.* McClay, 7 Nebr. 137; Ewing *v.* Merkley, 3 Utah 406, 4 Pac. 244 (statutory). See also New York cases cited *supra*, note 55.

Rule in California.— Under the statutes of California the mortgagee must have actual possession of the mortgaged property in order to prevail over creditors of the mortgagor, without regard to the actual good faith or the payment of a valuable consideration (Woods *v.* Bughey, 29 Cal. 466); and the mortgagee's possession must be consistent with the face of the deed in order to avail him against creditors of the mortgagor (Meyer *v.* Gorham, 5 Cal. 322). A mortgage will not be validated by the mortgagee's taking possession before a creditor's lien attaches. Edmondson *v.* Hyde, 2 Sawy. (U. S.) 205, 8 Fed. Cas. No. 4,285, 5 Am. L. T. Rep. (U. S. Cts.) 380, 7 Nat. Bankr. Reg. 1. But see Matter of Fischer, 94 Cal. 523, 29 Pac. 961, holding that where a mortgage of certain property was valid without a transfer of possession, it would not be invalidated because it included property of a different nature which must be delivered to effect a valid mortgage.

57. Braley *v.* Byrnes, 25 Minn. 297; Denver First Nat. Bank *v.* Lowrey, 36 Nebr. 290, 54 N. W. 987; Lorton *v.* Fowler, 18 Nebr. 224, 24 N. W. 685; Pyle *v.* Warren, 2 Nebr. 241; Hull *v.* Carnley, 2 Duer (N. Y.) 99. *Compare* Heilbronner *v.* Lloyd, 17 Mont. 299, 42 Pac. 853, holding that when a chattel mortgage was valid on its face evidence that the mortgagor retained possession was material only as bearing on the question of good faith.

Considerations valuable at law.— Under the statute of frauds a mortgage given for a valuable consideration is not made void by the mortgagor retaining possession; but if given for a consideration not considered valuable in law possession must be taken by the mortgagee or the mortgage must be recorded. King *v.* Bailey, 8 Mo. 332.

Question of fraud is for the jury where a mortgagor is permitted to remain in possession under a recorded mortgage. Heidiman Benoist Saddlery Co. *v.* Schott, 59 Nebr. 20, 80 N. W. 47.

No explanation need be given as to why the possession was left with the mortgagor; it is sufficient to prove good faith. Denver First Nat. Bank *v.* Lowrey, 36 Nebr. 290, 54 N. W. 987.

Only a purchaser without notice can claim the benefit of the statute raising a presumption of fraud where the mortgagor is suffered to remain in possession, and a person has no standing to object till he shows that he paid value and acted in good faith. Sanford *v.* Jensen, 49 Nebr. 766, 69 N. W. 108.

58. Chaffee *v.* Atlas Lumber Co., 43 Nebr. 224, 61 N. W. 637, 47 Am. St. Rep. 753.

59. Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309. *Compare* Tregear *v.* Etiwanda Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. Rep. 245, where the mortgage embraced land and a certificate of stock.

Sufficiency of averments of fraud.— The averments in a bill seeking to have a mortgage set aside and annulled on the ground of fraud "that said mortgage was made and received with the intent to hinder, delay, and defraud" the creditors of the mortgagor, and "that said mortgage reserves a benefit to the grantor," is not a sufficient averment of fraud, in the absence of substantive and traversable allegations of other facts and circumstances showing the fraud complained of. Kidd *v.* Morris, 127 Ala. 393, 30 So. 508.

Partial invalidity.— Where a mortgage was given in part to defraud creditors, it is void *in toto* (Marbourg *v.* Lewis Cook Mfg. Co., 32 Kan. 629, 5 Pac. 181; Winstead *v.* Hulme, 32 Kan. 568, 4 Pac. 994), and the same doctrine has been applied where a mortgage was fraudulent in part under the statute of frauds (Russell *v.* Winne, 37 N. Y. 591, 5 Transcr. App. (N. Y.) 52, 4 Abb. Pr. N. S.

property and follow it with a continued change of possession was generally regarded as a suspicious circumstance and has been held to make the transfer *prima facie* void as to creditors,[60] so that the burden of proof is on the party claiming under the mortgage;[61] but such possession has been held not to amount to *prima facie* evidence but to be merely a circumstance for the consideration of the jury.[62]

3. Province of Court and Jury. Since the doctrine in most jurisdictions is that retention does not render a mortgage fraudulent *per se*, the question of actual fraud should be submitted to a jury,[63] and where there is a valid consideration for the mortgage the retention of possession by the mortgagor need not be explained in order that the question of fraud be submitted to the jury.[64] Even in those states where the retention of possession is fraudulent *per se*, the question whether possession was retained must be submitted to the jury.[65] The finding of the jury on the question of fraud is conclusive,[66] except where the court is justified in granting a new trial.[67]

4. Reserving to Mortgagor the Right to Retain Possession. A stipulation in a mortgage that the mortgagor may remain in possession of the mortgaged property for a time does not render the mortgage invalid,[68] but is only one circum-

(N. Y.) 384, 97 Am. Dec. 755. But see State *v.* Tasker, 31 Mo. 445, holding that a mortgage could be void in part and valid in part under the statute of frauds).

60. Adams *v.* Wheeler, 10 Pick. (Mass.) 199; Homes *v.* Crane, 2 Pick. (Mass.) 607; Shreve *v.* Miller, 29 N. J. L. 250; Allen *v.* Cowan, 28 Barb. (N. Y.) 99; Gardner *v.* Adams, 12 Wend. (N. Y.) 297; Divver *v.* McLaughlin, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655; Walker *v.* Snediker, Hoffm. (N. Y.) 145; Levy *v.* Welsh, 2 Edw. (N. Y.) 438; Hardy *v.* Skinner, 31 N. C. 191. *Contra*, Layson *v.* Rowan, 7 Rob. (La.) 1; Maney *v.* Killough, 7 Yerg. (Tenn.) 439.

61. State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; Darnell *v.* Mack, 46 Nebr. 740, 65 N. W. 805; Smith *v.* Acker, 23 Wend. (N. Y.) 653. But see Warren *v.* His Creditors, 3 Wash. 48, 28 Pac. 257, holding that where a mortgage was *prima facie* valid the burden of proof was on the party attacking it.

Statutory presumption against mortgagee does not extend to his vendee, so that the latter need not prove affirmatively the good faith of the transfer in order to prevail against creditors of the mortgagor. Marsh *v.* Armstrong, 20 Minn. 81, 18 Am. Rep. 355.

62. Bucklin *v.* Thompson, 1 J. J. Marsh. (Ky.) 223; Cutter *v.* Copeland, 18 Me. 127; North *v.* Crowell, 11 N. H. 251.

Leaving property with the mortgagor with the intent that he shall make money thereby has been held not to be conclusive evidence of a fraudulent purpose. Bumpas *v.* Dotson, 7 Humphr. (Tenn.) 310, 46 Am. Dec. 81.

63. *Connecticut.*— Patten *v.* Smith, 4 Conn. 450, 10 Am. Dec. 166.

Indiana.— Hankins *v.* Ingols, 4 Blackf. (Ind.) 35.

Michigan.— Jackson *v.* Dean, 1 Dougl. (Mich.) 519.

Missouri.— Bennett *v.* Wolcott, 19 Mo. 654.

Nebraska.— Hedman *v.* Anderson, 6 Nebr. 392, but where all the facts are determined relative to the retention of possession the question of fraud is one of law for the court.

New Jersey.— Shreve *v.* Miller, 29 N. J. L. 250.

New York.— Miller *v.* Lockwood, 32 N. Y. 293; Allen *v.* Cowan, 23 N. Y. 502, 80 Am. Dec. 316 [*reversing* 28 Barb. (N. Y.) 99]; Butler *v.* Miller, 1 N. Y. 496; Hollacher *v.* O'Brien, 5 Hun (N. Y.) 277; Swift *v.* Hart, 12 Barb. (N. Y.) 530; Willis *v.* Orser, 6 Duer (N. Y.) 322; Murray *v.* Burtis, 15 Wend. (N. Y.) 212.

United States.— Brett *v.* Carter, 2 Lowell (U. S.) 458, 4 Fed. Cas. No. 1,844, 13 Alb. L. J. 361, 10 Am. L. Rev. 600, 3 Centr. L. J. 286, 22 Int. Rev. Rec. 152, 14 Nat. Bankr. Reg. 301, 2 N. Y. Wkly. Dig. 331, construing Massachusetts law.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 392.

64. Thompson *v.* Blanchard, 4 N. Y. 303; Fuller *v.* Acker, 1 Hill (N. Y.) 473; Butler *v.* Van Wyck, 1 Hill (N. Y.) 438. *Contra*, Smith *v.* Acker, 23 Wend. (N. Y.) 653; Doane *v.* Eddy, 16 Wend. (N. Y.) 523.

What constitutes a sufficient explanation.— It is not a sufficient explanation of the continued retention of possession by the mortgagor that "he wished to use the mortgaged chattel" (Randall *v.* Cook, 17 Wend. (N. Y.) 53), or that it was necessary to enable him to pursue his vocation, as where a horse belonging to a traveling missionary was mortgaged (Doane *v.* Eddy, 16 Wend. (N. Y.) 523).

65. Funk *v.* Staats, 24 Ill. 632.

66. Stewart *v.* Slater, 6 Duer (N. Y.) 83.

67. Griswold *v.* Sheldon, 4 N. Y. 581. *Compare* McLachlan *v.* Wright, 3 Wend. (N. Y.) 348, holding that the court would not reverse the finding of a jury that a secret mortgage by an insolvent mortgagor who remained in possession and acted as absolute owner was fraudulent.

68. Prior *v.* White, 12 Ill. 261; Letcher *v.* Norton, 5 Ill. 575; O'Neil *v.* Patterson, 52

stance to go to the jury along with the other facts of the case on the question of fraud.[69]

C. Duress.[70] When a mortgage is obtained under threats of illegal action which would be to the detriment of the mortgagor, the instrument is held to be executed under duress and cannot be foreclosed.[71] Such a defense is personal to the mortgagor, however, and cannot be raised by his creditors for the purpose of having the mortgage set aside.[72]

D. Fraud on the Mortgagor. Where a chattel mortgage is signed and delivered, it must be deemed valid until the contrary is shown by a clear preponderance of the evidence; but where there is sufficient evidence to raise the question of fraud in the procurement of the mortgage it should be submitted to the jury.[73] Where fraud against the mortgagor in the procurement of the mortgage

Ill. App. 26; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Weber *v.* Armstrong, 70 Mo. 217; Nicholson *v.* Golden, 27 Mo. App. 132. *Contra,* Gaylor *v.* Harding, 37 Conn. 508, where the mortgaged property was not specifically described. *Compare* Age-Herald Co. *v.* Potter, 109 Ala. 675, 19 So. 725, where a mortgage was given on the consideration of past indebtedness and future advances, and the mortgagor was to be entitled to possession for a long period of years, and it was held that the mortgage was fraudulent without regard to the actual intent of the parties.

69. Jessup *v.* Bridge, 11 Iowa 572, 79 Am. Dec. 513; Torbert *v.* Hayden, 11 Iowa 435; Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472.

What constitutes an authority to retain possession.— Where a chattel mortgage specifically defines the circumstances under which the mortgagee shall become entitled to the possession of the property, the law implies an agreement that it is to remain meantime in the mortgagor. Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56.

70. **Rescission by infant.**— A sale of personal property to a minor, and the giving back of a mortgage to secure the purchase-money, is in law one transaction, and the mortgage cannot be rescinded unless the sale is rescinded also. Heath *v.* West, 28 N. H. 101; Curtiss *v.* McDougal, 26 Ohio St. 66.

71. **As to duress generally** see CONTRACTS.

What constitutes duress.— It was held to constitute duress for a creditor fraudulently to obtain possession of his debtor's property and to refuse to surrender it unless a mortgage was executed for a larger amount than was owed (Lightfoot *v.* Wallis, 12 Bush (Ky.) 498) and for a judgment creditor to go to his debtor at night and threaten to remove household goods to satisfy an execution unless a mortgage were executed, where the debtor was sick and needy (McAffrey *v.* Richards, (Tenn. Ch. 1900) 59 S. W. 1064).

Duress by sheriff.— Threats by a sheriff to levy unless a mortgage were executed to secure a claim put in his hands for collection were held to amount to duress under the statutes of Michigan in regard to sheriffs (Van Dusen *v.* King, 106 Mich. 133, 64 N. W. 9), but a mortgage to secure to an officer final costs in a criminal suit, with the understanding that the officer would pay a fine imposed on the mortgagor in the suit, was not void as given in duress where no warrant had been issued for the arrest of the mortgagor (Converse *v.* Safford, 17 Kan. 15).

Ratification of mortgage.— Where a chattel mortgagor, without objection, allows the mortgagee to take possession of the property, knowing that he will incur expenses in advertising the same for sale as mortgaged property, and the mortgagee does incur such expenses, the mortgagor is estopped to claim that the mortgage is void because made under duress. Sornborger *v.* Sanford, 34 Nebr. 498, 52 N. W. 368. *Compare* Sanford *v.* Sornborger, 26 Nebr. 295, 41 N. W. 1102.

Duress was properly pleaded and therefore could be set up as a defense in Riggs *v.* Wilson, 30 S. C. 172, 8 S. E. 848.

72. Marion Distilling Co. *v.* Ellis, 63 Mo. App. 17.

73. Hall *v.* Scott, 59 Wis. 236, 18 N. W. 8. *Compare* Watkins *v.* Stockett, 6 Harr. & J. (Md.) 435, holding that fraud in obtaining an absolute conveyance of slaves to secure a loan of money may be inferred from facts and circumstances, from the character of the contract, or from the condition and circumstances of the parties.

What constitutes fraud.— Where a creditor induces his debtor to execute a mortage by a promise to furnish further advances and the mortgagee does not furnish such advances and had no intention of doing so at the time of the making of the mortgage, this furnishes a ground on which the mortgagor can avoid the instrument. Crowley *v.* Langdon, 127 Mich. 51, 86 N. W. 391; Gross *v.* McKee, 53 Miss. 536. But see Louchheim *v.* Gill, 17 Ind. 139, where an uneducated man was induced to sign a mortgage on the representation that it was a note, but this was held not to be a sufficient misrepresentation of fact to vitiate the instrument.

The mortgagor's certificate or declaration that a mortgage is valid is no defense for the mortgagee where the mortgagor sets up fraud, for the mortgagor may show that he was induced by fraud to give the certificate. Wilcox *v.* Howell, 44 N. Y. 398, holding that such a certificate was not negotiable.

Duty of mortgagor.— Where a mortgagor was induced to give a new mortgage by false representations regarding the property in-

is sufficiently established by the evidence the mortgage cannot be enforced against him.[74]

E. Mortgages of Consumable Property. Where the property covered by a mortgage was consumable and was intended by the parties to be consumed by the mortgagor, the transaction is *prima facie* colorable and fraudulent,[75] but it has been held that such an arrangement did not amount to a fraud at law or fraud *per se*.[76] *A fortiori* the transaction will be sustained if made in actual good faith and the property was only consumable in part.[77] However, there may be chattels so transient in their existence that they cannot generally be mortgaged.[78]

F. Possession by Mortgagor After Default. Although it has been held that a chattel mortgage is not void merely because the mortgagor is allowed to retain possession of the property after condition broken,[79] such possession is

cluded therein, he could not set up this fraud in an action of detinue brought by the mortgagee without tendering back the original mortgage. Henderson *v.* Boyett, 126 Ala. 172, 28 So. 86.

74. Case *v.* Ingle, (Indian Terr. 1901) 61 S. W. 994.

75. Robbins *v.* Parker, 3 Metc. (Mass.) 117; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; Farmers' Bank *v.* Douglass, 11 Sm. & M. (Miss.) 469; Simpson *v.* Mitchell, 8 Yerg. (Tenn.) 416; Sommerville *v.* Horton, 4 Yerg. (Tenn.) 540, 26 Am. Dec. 242; Darwin *v.* Handley, 3 Yerg. (Tenn.) 502.

No fraud was shown where the mortgagee allowed an insignificant amount of mortgaged hay to be fed to horses belonging to the mortgagor but took possession before adverse liens were acquired and acted throughout in good faith. Spurr *v.* Fisher, 46 N. Y. App. Div. 454, 61 N. Y. Suppl. 854 [*affirmed* in 168 N. Y. 593, 60 N. E. 1120].

Live stock on a farm has been held not to be necessarily consumable, when considered as the subject-matter of a chattel mortgage. Masson *v.* Anderson, 3 Baxt. (Tenn.) 290.

Machinery, tools, and fixtures of a manufacturing establishment have been held not to be consumable property so as to render a mortgage thereof fraudulent when the mortgagor retained the right to use the property. State *v.* Tasker, 31 Mo. 445.

Permission to consume a mortgaged crop in producing another was held not to render a mortgage thereof fraudulent. Kidd *v.* Morris, 127 Ala. 393, 30 So. 508.

76. Pugh *v.* Harwell, 108 Ala. 486, 18 So. 535; Graham *v.* Lockhart, 8 Ala. 9; Elmes *v.* Sutherland, 7 Ala. 262; Lincoln Sav. Bank *v.* Ewing, 12 Lea (Tenn.) 598. *Contra*, Harris *v.* Wemple, 63 Ill. App. 577.

Consumable exempt property, although conveyed by a mortgage giving the mortgagor the right to use, does not raise any inference of fraud. Patten *v.* Smith, 4 Conn. 450, 10 Am. Dec. 166.

Where the use involves the consumption of part of the things transferred by the mortgage it has been held that the instrument is avoided as to the whole. Hedges *v.* Polhemus, 9 Misc. (N. Y.) 680, 30 N. Y. Suppl. 556, 62 N. Y. St. 267. *Compare* Ewing *v.* Cargill, 13 Sm. & M. (Miss.) 79, where it was held that, in the absence of a stipulation that the mortgagor could use the property, the mortgage would not be void and that a *bona fide* purchaser from the trustee would be protected.

Where part of the goods are perishable the mortgage is not void but the fact may be considered by the jury on the question of fraud. Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472. But see Andrews *v.* Partee, 79 Miss. 80, 29 So. 788, where permitting the mortgagor to use part of mortgaged property for his own benefit was held to make a mortgage fraudulent, although the mortgagee acted in good faith.

77. Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 472; Brockenbrough *v.* Brockenbrough, 31 Gratt. (Va.) 580; Quarles *v.* Kerr, 14 Gratt. (Va.) 48.

78. Sommerville *v.* Horton, 4 Yerg. (Tenn.) 540, 26 Am. Dec. 242.

79. *Alabama.*— Mitcham *v.* Schuessler, 98 Ala. 635, 13 So. 617; Simerson *v.* Decatur Branch Bank, 12 Ala. 205.

Colorado.— Morse *v.* Morrison, (Colo. App. 1901) 66 Pac. 169, holding that a mortgagee's failure to take possession after default did not postpone his claim to that of a landlord who had no lien and was not in the position of a *bona fide* purchaser.

Iowa.— Pennington *v.* Jones, 57 Iowa 37, 10 N. W. 274, where crops were insufficiently described in a mortgage and the failure of the mortgagee to take possession after default caused him to lose his lien.

Kansas.— Brown *v.* James H. Campbell Co., 44 Kan. 237, 24 Pac. 492, 21 Am. St. Rep. 274.

Kentucky.— Head *v.* Ward, 1 J. J. Marsh. (Ky.) 280.

Maryland.— Hudson *v.* Warner, 2 Harr. & G. (Md.) 415.

Massachusetts.— Shurtleff *v.* Willard, 19 Pick. (Mass.) 202.

New York.— Porter *v.* Parmley, 34 N. Y. Super. Ct. 398, 13 Abb. Pr. N. S. (N. Y.) 104.

South Carolina.— Marshall *v.* Crawford, 45 S. C. 189, 22 S. E. 792; Fishburne *v.* Kunhardt, 2 Speers (S. C.) 556; Maples *v.* Maples, Rice Eq. (S. C.) 300.

Virginia.— Rose *v.* Burgess, 10 Leigh (Va.) 193.

United States.—Merrill *v.* Dawson, Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469.

prima facie evidence of fraud,[80] and there is authority for the rule that the neglect of the mortgagee to reduce the property to possession within a reasonable time destroys his lien against intervening rights.[81] After the title of the mort-

See 9 Cent. Dig. tit. "Chattel Mortgages," § 377.

80. *Alabama.*— Steele *v.* Adams, 21 Ala. 534; Beall *v.* Williamson, 14 Ala. 55.

Indiana.— Hankins *v.* Ingols, 4 Blackf. (Ind.) 35.

Mississippi.— Retention of possession by the mortgagor after default might be evidence of fraud. Bogard *v.* Gardley, 4 Sm. & M. (Miss.) 302.

Nevada.— Streeter *v.* Johnson, 23 Nev. 194, 44 Pac. 819.

New York.—Hall *v.* Tuttle, 8 Wend. (N. Y.) 375.

Tennessee.— Maney *v.* Killough, 7 Yerg. (Tenn.) 439.

Contra, Fowler *v.* Merrill, 11 How. (U. S.) 375, 13 L. ed. 736 [*affirming* Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469], provided such possession is consistent with the deed.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 377.

The institution of foreclosure proceedings with reasonable diligence rebuts any presumption of fraud arising from retention of possession by the mortgagor after default. Simerson *v.* Decatur Branch Bank, 12 Ala. 205. *Compare* Armstrong *v.* Broom, 5 Utah 176, 13 Pac. 364, where foreclosure proceedings were instituted within the ninety-day period allowed for the mortgagor to remain in possession after default and a *lis pendens* was also filed within that period, and this was held to be sufficient to protect the interest of the mortgagee against creditors who levied an execution on the property while it was still in the possession of the mortgagor.

Retention prolonged an unreasonable time after default by the mortgagor in the condition of the mortgage becomes a badge of fraud. Sandlin *v.* Anderson, 76 Ala. 403; Benedict *v.* Renfro, 75 Ala. 121, 51 Am. Rep. 429; Hopkins *v.* Scott, 20 Ala. 179; Simerson *v.* Decatur Branch Bank, 12 Ala. 205. *Compare* Mitcham *v.* Schuessler, 98 Ala. 635, 13 So. 617, where it was held that indulgence by the mortgagee for an unreasonable time after the law day was a circumstance to be considered by the jury in determining the *bona fide* of the mortgage in its inception.

After mortgagee has intervened as a claimant of the mortgaged property, possession thereof by the mortgagor does not raise an inference of fraud. Sandlin *v.* Anderson, 82 Ala. 330, 3 So. 28.

Fraud per se.— Suffering property covered by a chattel mortgage to remain in the hands of the mortgagor for an unreasonable time after default is a fraud *per se*, and is not open to explanation. Stanley *v.* Citizens' Coal, etc., Co., 24 Colo. 103, 49 Pac. 35 (statutory); Reed *v.* Eames, 19 Ill. 594; Bock *v.* Schindler, 85 Ill. App. 361. But see Wilson *v.* Rountree, 72 Ill. 570, where possession by the mortgagor was held not to be fraud *per se* where the mortgagee merely had an election to declare a default.

81. Elliott *v.* Colorado Springs First Nat. Bank, 2 Colo. App. 164, 30 Pac. 53; Hewitt *v.* General Electric Co., 164 Ill. 420, 45 N. E. 725 [*affirming* 61 Ill. App. 168]; Atkins *v.* Byrnes, 71 Ill. 326; Burnham *v.* Muller, 61 Ill. 453; Meixsell *v.* Williamson, 35 Ill. 529; St. Louis Iron, etc., Works *v.* Kimball, 53 Ill. App. 636.

Giving a new mortgage has been held not to be an excuse for a mortgagee's failure to take possession of the mortgaged property after the maturity of a former mortgage. Brereton *v.* Bennett, 15 Colo. 254, 25 Pac. 310.

When default occurs.— By Ill. Rev. Stat. c. 20, § 3, a chattel mortgage is only valid for two years, and it is necessary for the mortgagee to take possession then whether the mortgage debt has matured or not (Cook *v.* Thayer, 11 Ill. 617), and if by the terms of a mortgage the debt matures in a less time the mortgagee must take possession at maturity (Burnham *v.* Muller, 61 Ill. 453). *Compare* Jones *v.* Noel, 139 Ill. 377, 28 N. E. 805 [*affirming* 38 Ill. App. 374], where it was held that under Starr & C. Stat. Ill. p. 1633, par. 4, which provides that a chattel mortgage shall only be good until the maturity of the entire debt secured, a mortgage conditioned upon the mortgagor paying, "on or before two years from date," certain notes, all of which fell due before the expiration of said two years, was not valid as to third persons after the maturity of the notes unless the mortgagee took possession. And see *supra,* V, C, 10, b.

What constitutes a reasonable time.— The time within which a mortgagee must take possession after default to relieve himself of the imputation of fraud depends upon the circumstances of each case (Arnold *v.* Stock, 81 Ill. 407; Reed *v.* Eames, 19 Ill. 594), and the mortgagee must obtain possession as soon as he can reasonably do so (Cass *v.* Perkins, 23 Ill. 382). It was held that a mortgagee had not satisfied the requirements in this respect when he did not take possession of the mortgaged property till two months (Brereton *v.* Bennett, 15 Colo. 254, 25 Pac. 310; Lemen *v.* Robinson, 59 Ill. 115), till three months (Baer *v.* Hansen, (Colo. App. 1901) 66 Pac. 448), or till nine months (Shannon *v.* Wolf, 173 Ill. 253, 50 N. E. 682 [*reversing* 68 Ill. App. 486]) after the maturity of the mortgage indebtedness. But see Buckley *v.* Lampett, 24 Ill. 604, holding it sufficient to render valid the mortgage where the mortgagee endeavored to take possession on the day following default, and continued his efforts until successful. And *compare* Reese *v.* Mitchell, 41 Ill. 365, where possession taken two days after default was held not to be within a reasonable time where a constable

gagee has been made absolute by foreclosure, there seems to be no objection to a return of the property into the custody of the former mortgagor.[82]

had levied on the property in the meantime. See also Hay *v.* W. W. Kimball Co., 55 Ill. App. 263, holding that a delay of one day after maturity in taking possession of a mortgaged piano would postpone the mortgagee to one who purchased the piano from the mortgagor on the day after maturity.

Permissible delay in taking possession after default.— It has been held sufficient for a mortgagee to take possession of the mortgaged property within two days (Crocker *v.* Burns, 13 Colo. App. 54, 56 Pac. 199), within four days (Wooley *v.* Fry, 30 Ill. 158), within ten days (Gray *v.* Helm, 60 Miss. 131), or within thirty days (Perry *v.* Bragg, 111 N. C. 159, 16 S. E. 10) of the time when default in performance of the condition of the mortgage occurs. *Compare* Allen *v.* Steiger, 17 Colo. 552, 31 Pac. 226, where debts secured by a chattel mortgage matured on Saturday and it was held to be due diligence for the mortgagee to take possession on the Monday next following.

Delay of five months after decree of foreclosure does not entitle the purchaser of the mortgaged property at an execution sale to restrain sale under foreclosure decree rendered prior to the execution sale. Hamilton *v.* Carter, 12 Wash. 510, 41 Pac. 911.

A purchaser before the maturity of the mortgage will prevail over the claim of the mortgagee where he purchased in ignorance of the mortgagee's rights and the mortgagee extends credit to the mortgagor from year to year after the maturity of the mortgage till the latter became insolvent. Cleckley *v.* Hull, 30 Ga. 838. But see Sondheimer *v.* Graeser, 172 Ill. 293, 50 N. E. 174 [*affirming* 72 Ill. App. 41], where a purchaser before maturity of the mortgage was not allowed to prevail because of the retention of possession after default; and the court looked to the real person in interest and not the nominal plaintiff in determining who was making the objection.

Who may raise objection.— Between the parties retention of possession after condition broken does not affect the validity of the mortgage (Hallack *v.* Tritch, 11 Fed. Cas. No. 5,956, 10 Chic. Leg. N. 219, 17 Nat. Bankr. Reg. 293); but it has been held that notice of the existence of the mortgage will not prevent a creditor (Stanley *v.* Citizens' Coal, etc., Co., 24 Colo. 103, 49 Pac. 35) or a purchaser (Lemen *v.* Robinson, 59 Ill. 115) from raising this objection.

Until maturity of a junior mortgage the junior mortgagee can derive no advantage from the delay of the first mortgagee to foreclose. Cunningham *v.* N. O. Nelson Mfg. Co., 17 Ill. App. 510; Lyman *v.* Smith, 21 Wis. 674. *Compare* Lanier *v.* Driver, 24 Ala. 149, holding that as the junior encumbrancer may enforce his mortgage after its maturity, he cannot complain of the negligence of prior encumbrancers subsequent to that time.

Personal representatives of a deceased mortgagor are not third persons against whom the mortgagee loses his rights, unless he takes possession upon a default in performance of a condition in the mortgage. Sumner *v.* McKee, 89 Ill. 127.

Rights of third persons affected by mortgagee's delay.— A mortgagee should take or endeavor to take possession of the mortgaged chattels immediately upon maturity of the debt, and if he fails to exercise due diligence in this particular he will lose his lien as against a purchaser from the mortgagor during the default. Travis *v.* McCormick, 1 Mont. 148, 347.

Contest between successive mortgagees.—A second mortgagee, who takes possession as soon as his debt is due, will be preferred to a first mortgagee who has permitted the debtor to retain the property for an unreasonable time after his debt matured (Ballinger *v.* Rezner, 60 Ill. App. 43); and where two persons having chattel mortgages on the same property permit the property to remain in the possession of the mortgagor an unreasonable length of time after the maturity of their respective mortgages, the one first acquiring possession of the property is entitled to priority of lien (Atkins *v.* Byrnes, 71 Ill. 326; Constant *v.* Matteson, 22 Ill. 546). But see McCreary *v.* Hannah, 60 Ill. App. 449, where it was held that a first mortgagee need not take possession till the maturity of a second mortgage made prior to default in the condition of the first mortgage. See also Smalley *v.* Ellet, 36 Ill. 500, where the objection that the first mortgagee allowed the property to remain in the mortgagor's possession was not established by the evidence.

82. Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458; Hanford *v.* Obrecht, 49 Ill. 146; Cunningham *v.* Hamilton, 25 Ill. 228; Funk *v.* Staats, 24 Ill. 632. *Contra*, Williams *v.* Kelsey, 6 Ga. 365, where there was no delivery to the purchaser at the foreclosure sale and the property remained continuously in the mortgagor's possession. But see Weiller *v.* Johnston, 65 Ga. 743, where the mortgagor in possession surrendered the mortgaged property in satisfaction of the debt and it was held that a valid title passed although possession never changed.

Evidence of fraud in fact.— Where a mortgagee let the mortgaged property to the mortgagor after foreclosure, it was held that this was a circumstance more or less cogent from which the jury might determine actual fraud, although it did not amount to fraud in law. Reynolds *v.* Patterson, 4 Ill. App. 183.

Sufficiency of delivery.— Where a constable foreclosing a mortgage put the goods in a room belonging to the mortgagor but retained the keys himself, there was a sufficient change of possession, although the servant of the mortgagor was temporarily left in charge (Dorland *v.* Bradley, 66 Ill. 412); and where there was a *bona fide* delivery of keys and of gibs of an engine without which it could not run, to the mortgagee, and he

G. Who Can Attack Mortgage as Fraudulent. Only creditors of the mortgagor and subsequent purchasers of the property who act in good faith can assail a chattel mortgage for fraud,[83] and it has been held that the attacking party must show himself to be something more than a mere creditor at large,[84] and a levy must be made on the chattels before their delivery to the mortgagee.[85]

H. Power of Sale in Mortgagor — 1. In General. On principle and public policy it should not be regarded as fraud *per se* to give a mortgagor a power of sale, but only as a circumstance for the consideration of the jury.[86]

2. Doctrines of State Courts. In Alabama, if the proceeds of sales made by virtue of a power of sale in a mortgage are required by a provision in the mortgage to be turned over to the mortgagee at stated periods, the mortgage is not fraudulent *per se*,[87] but a collateral agreement for turning over the proceeds has

intrusted them to a person whom he employed to take them to the mill in the morning and bring them away at night, there was held to be a sufficient change of possession, although the same operatives remained in the mill (Funk *v.* Staats, 24 Ill. 632).

83. Howe *v.* Cochran, 47 Minn. 403, 50 N. W. 368; Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659; Carroll Exch. Bank *v.* Carrollton First Nat. Bank, 50 Mo. App. 92; Pyle *v.* Warren, 2 Nebr. 241. *Compare* Cook, etc., Co. *v.* Hunt, 18 Tex. Civ. App. 314, 45 S. W. 153, holding that creditors not named as beneficiaries in a deed of trust could not question the validity of a subsequent deed on the ground that the prior deed had been executed. See also Hazlett *v.* Babcock, 64 Minn. 254, 66 N. W. 971, holding that the statutory presumption of fraud arising from the continued possession of the mortgagor only arose in favor of creditors of the mortgagor and purchasers from him.

A subsequent mortgagee must show that he accepted his mortgage without actual knowledge of the prior encumbrance which he alleges is fraudulent, but the constructive knowledge from record does not preclude him from raising the objection of fraud. Caulfield *v.* Curry, 63 Mich. 594, 30 N. W. 191. To same effect see American Lead Pencil Co. *v.* Champion, 57 Kan. 352, 46 Pac. 696, where the second mortgage was expressly subject to the prior one.

84. Howe *v.* Cochran, 47 Minn. 403, 50 N. W. 368; Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659; People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754 (holding that a second mortgagee in possession must be considered as a mere creditor at large). But see Hibbard *v.* Cribb, 80 Wis. 398, 49 N. W. 823, 15 L. R. A. 768, holding that where a chattel mortgage was declared valid for part only of the mortgage debt, the holder of a valid second mortgage on the same property was entitled to the benefit of the amount of the reduction of the first mortgage debt, as against the mortgagor's creditors, who proceed by garnishment to test the validity of such mortgages. And *compare* Noyes *v.* Ross, 23 Mont. 425, 59 Pac. 367, 75 Am. St. Rep. 543, 47 L. R. A. 400, holding that an unauthorized sale of the mortgaged property was valid against a creditor who had no lien on the property.

85. Sherwin *v.* Gaghagen, 39 Nebr. 238, 57 N. W. 1005. *Contra*, Dutcher *v.* Swartwood, 15 Hun (N. Y.) 31.

Mode of procedure.— An unsecured creditor seeking to avoid a chattel mortgage should file a bill making the personal representative of the mortgagor and the mortgagee parties, and asserting his right to satisfaction of his debt out of the mortgagor's property. Stewart *v.* Fry, 3 Ala. 573.

A creditor cannot intervene in a foreclosure suit for the purpose of showing that a mortgage had been paid or is fraudulent unless he has a lien on the property by levy of execution. Yetzer *v.* Young, 3 S. D. 263, 52 N. W. 1054.

86. Etheridge *v.* Sperry 139 U. S. 266, 11 S. Ct. 565, 35 L. ed. 171; Brett *v.* Carter, 2 Lowell (U. S.) 458, 4 Fed. Cas. No. 1,844, 13 Alb. L. J. 361, 10 Am. L. Rev. 600, 3 Centr. L. J. 286, 22 Int. Rev. Rec. 152, 14 Nat. Bankr. Reg. 301, 2 N. Y. Wkly. Dig. 331. See also Jones Chatt. Mortg. (4th ed.) § 425, where it is said "that the doctrine of absolute fraud arising in a mortgage of merchandise from the mortgagor's retaining possession, with a power of disposal in the usual course of trade, is not supported by any preponderance of authority; that it is contrary to sound principles of jurisprudence; that it has no reason for its existence, derived from general observation and experience; that it is contrary to sound policy; and that the qualifications of the doctrine made by leading courts have in large measure destroyed its force, and are indicative that these courts wish themselves well rid of the whole of it." For further discussion of authorities and principles in regard to this topic see 6 So. Law Rev. 112.

87. Thornton *v.* Cook, 97 Ala. 630, 12 So. 403; Murray *v.* McNealy, 86 Ala. 234, 5 So. 565, 11 Am. St. Rep. 33; Benedict *v.* Renfro, 75 Ala. 121, 51 Am. Rep. 429. See also Adkins *v.* Bynum, 109 Ala. 281, 19 So. 400, holding that a mortgage securing the purchase-price of a stock of goods, covering only goods purchased, is not rendered void as to creditors by a stipulation that the mortgagor may sell from the mortgaged property in the course of trade.

Release of the proceeds by the mortgagee after they have been turned over to him does not invalidate the mortgage, in the absence

been held not to prevent an inference of fraud at law.[88] *A fortiori* the absence of any provision for accounting renders such a mortgage fraudulent and void as to creditors.[89]

In Arkansas leaving the mortgagor in possession of a stock of goods with a power of sale does not make a mortgage fraudulent when the proceeds of sales are to be turned over weekly to the mortgagees,[90] but in the absence of such an agreement for an accounting the mortgage is presumptively fraudulent,[91] and it has been held that a mortgage on a stock of goods from which sales are made by the mortgagor and to which goods are added by him is fraudulent in law and invalid.[92]

In Colorado, where a mortgagor is allowed by the terms of a mortgage to remain in possession of mortgaged property and sell it as his own, this constitutes fraud in law and renders the instrument invalid;[93] and a collateral permission to sell or apply proceeds of sales for the mortgagor's benefit has the same effect.[94]

In Connecticut, where no rights of third persons intervened, it was held that a mortgagee was entitled to a decree declaring a lien on the goods at the time the bill to foreclose was filed, although the mortgage gave the mortgagor a power of sale.[95]

In Dakota, where the only purpose for which the mortgagor could sell was for the purpose of replenishing his stock, the mortgage was not fraudulent in law,[96]

of knowledge that there were other creditors of the mortgagor. Goetter *v.* Smith, 104 Ala. 481, 16 So. 534.

An actual appropriation of the proceeds of sales of the mortgaged stock to the benefit of the mortgagor is sufficient proof of an actual fraudulent intent, and extrinsic evidence of bad motive is not necessary. McDermott *v.* Eborn, 90 Ala. 258, 7 So. 751.

88. Roden *v.* Norton, 128 Ala. 129, 29 So. 637; Hayes *v.* Westcott, 91 Ala. 143, 8 So. 337, 24 Am. St. Rep. 875, 11 L. R. A. 488; Owens *v.* Hobbie, 82 Ala. 466, 3 So. 145; Renfro *v.* Goetter, 78 Ala. 311.

Notwithstanding a private agreement that the proceeds are to be turned over to the mortgagees, a power of sale implied from leaving a mortgagor in possession of a stock of goods is a reservation of a benefit to the mortgagor and stamps the mortgage as fraudulent in law against creditors. Roden *v.* Norton, 128 Ala. 129, 29 So. 637.

An implied power to sell arises from the fact that a stock of merchandise is left in the possession of the mortgagor. Benedict *v.* Renfro, 75 Ala. 121, 51 Am. Rep. 429.

The early doctrine in Alabama made a mortgage containing a power for the mortgagor to sell presumptively fraudulent and required proof of good faith to render the instrument valid. Price *v.* Mazauge, 31 Ala. 701; Constantine *v.* Twelves, 29 Ala. 607; Wiley *v.* Knight, 27 Ala. 336; Tickner *v.* Wiswall, 9 Ala. 305.

89. Cross *v.* Berry, 132 Ala. 92, 31 So. 36. See also Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 25 So. 571, 77 Am. St. Rep. 30, where a mortgage authorizing the mortgagor to manufacture lumber from the logs covered thereby and sell it for his own use was held to be void.

90. Adler-Goldman Commission Co. *v.* Phillips, 63 Ark. 40, 37 S. W. 297 (where a small sum was to be reserved out of the proceeds for the support of the mortgagors); Gauss *v.* Orr, 46 Ark. 129.

Mortgagor selling as agent for the mortgagee has been held to make the mortgage valid. Felner *v.* Wilson, 55 Ark. 77, 17 S. W. 587.

91. Gauss *v.* Doyle, 46 Ark. 122; Fink *v.* Ehrman, 44 Ark. 310. *Compare* Martin *v.* Ogden, 41 Ark. 186, where the presumption of fraud prevailed and the opinion tends to the view that it could not have been rebutted.

The question is one of fact whether a mortgage is fraudulent where the mortgagor is left in possession with a power of sale. Collins *v.* Lightle, 50 Ark. 97, 6 S. W. 596.

92. Lund *v.* Fletcher, 39 Ark. 325, 43 Am. Rep. 270, holding that the mortgage was not void *in toto* but remained valid as to the fixtures in the store which were not renewed periodically.

93. Hall *v.* Johnson, 21 Colo. 414, 42 Pac. 660; Brasher *v.* Christophe, 10 Colo. 284, 15 Pac. 403; Roberts *v.* Johnson, 5 Colo. App. 406, 39 Pac. 596; Harbison *v.* Tufts, 1 Colo. App. 140, 27 Pac. 1014.

94. Wilson *v.* Voight, 9 Colo. 614, 13 Pac. 726; Wilcox *v.* Jackson, 7 Colo. 521, 4 Pac. 966; City Nat. Bank *v.* Goodrich, 3 Colo. 139; Wile *v.* Butler, 4 Colo. App. 154, 34 Pac. 1110.

What constitutes a permission to sell.— Where a mortgage provided that the mortgagor was to remain in possession but was not to sell without the written consent of the mortgagee, a further provision that the mortgagor might retain and use the mortgaged property was held not to be a written consent to sell, although part of the mortgaged property was a stock of merchandise. Estes *v.* Denver First Nat. Bank, 15 Colo. App. 526, 63 Pac. 788.

95. Allen *v.* Windham Cotton Mfg. Co., 87 Fed. 786, construing Connecticut law.

96. McKay *v.* Shotwell, 6 Dak. 124, 50 N. W. 622, where the mortgagors were not

but a secret parol trust in favor of the mortgagor was held to render the mortgage void.[97]

In the District of Columbia, formerly, the reservation in a mortgage of a right for the mortgagor to dispose of the property rendered the transaction fraudulent and void,[98] but now the contrary rule is in force by reason of decisions in the supreme court of the United States.[99]

In Florida a mortgage of a stock of goods allowing the mortgagor to sell at his discretion without accounting for the proceeds has been held to be fraudulent *per se* as to creditors,[1] but the defense of fraud arising from such a provision cannot be raised by an assignee of the mortgagor[2] or by anybody except a third person whose claim is founded on a valuable consideration.[3]

In Georgia a mortgage with power of sale in the mortgagor is not fraudulent *per se*, for the code authorizes mortgages which shall attach to additions purchased to replenish stock;[4] but the mortgage can only cover goods equal to the amount on hand at the time the mortgage was executed.[5]

In Hawaii a clause in a mortgage of stock in trade allowing the mortgagor to retain possession till default and to sell the goods in the ordinary course of business is not conclusive evidence of fraud, but is open to examination.[6]

In Idaho, in the absence of a provision for turning the proceeds of sales over to the mortgagee, a provision in a mortgage giving the mortgagor authority to remain in possession and to sell makes it absolutely void as to creditors.[7]

In Illinois, where a mortgagor is authorized to remain in possession of a mortgaged stock of merchandise and to sell it at retail for his own benefit, the mortgage is absolutely void.[8] The agreement for such sale need not be contained in

authorized to apply any part of the proceeds of sales to their own use.

97. Pierre First Nat. Bank *v.* Comfort, 4 Dak. 167, 28 N. W. 855.

98. Fox *v.* Davidson, 1 Mackey (D. C.) 102; Smith *v.* Kenney, 1 Mackey (D. C.) 12.

99. See *infra*, XI, H, 3.

1. Rogers *v.* Munnerlyn, 36 Fla. 591, 18 So. 669; Pensacola First Nat. Bank *v.* Wittich, 33 Fla. 681, 15 So. 552; Logan *v.* Logan, 22 Fla. 561, 1 Am. St. Rep. 212.

Agreement — How shown.—Agreements allowing the mortgagor to sell may be contained in the mortgage or proved by extrinsic evidence. Pensacola First Nat. Bank *v.* Wittich, 33 Fla. 681, 15 So. 552; Logan *v.* Logan, 22 Fla. 561, 1 Am. St. Rep. 212.

2. Einstein *v.* Shouse, 24 Fla. 490, 5 So. 380.

3. McCoy *v.* Boley, 21 Fla. 803.

4. Wardlaw *v.* Mayer, 77 Ga. 620 [*citing* Ga. Code (1882), § 1954]; Johnson *v.* Patterson, 2 Woods (U. S.) 443, 13 Fed. Cas. No. 7,403.

The lien upon the goods sold is lost and does not attach to the proceeds of the sales. Ainsworth *v.* Mobile Fruit, etc., Co., 102 Ga. 123, 29 S. E. 142.

5. Goodrich *v.* Williams, 50 Ga. 425 (holding that the lien of the mortgage would attach to the newly acquired property, even though it had not been paid for if it came into the mortgagor's hands free from any legal liens); Anderson *v.* Howard, 49 Ga. 313; Chisolm *v.* Chittenden, 45 Ga. 213 (holding that the lien would not attach to goods obtained by the mortgagor upon fraudulent misrepresentations).

Additions must be made by the mortgagor, and where the mortgagor entered into a partnership which replenished the stock it was held that the lien would not attach to additions then acquired. Anderson *v.* Howard, 49 Ga. 313.

6. Phillips *v.* McChesney, 8 Hawaii 289; Hardy *v.* Ruggles, 1 Hawaii 409 (holding that incoming stock not purchased with proceeds of sales from the mortgaged stock would not be subject to the mortgage lien). *Compare* Spencer *v.* Bartow, 3 Hawaii 719, where it was held that a mortgage upon incoming stock other than that which can be shown to have been bought and paid for with the proceeds of sales from stock on hand at the time the mortgage was executed is void as to creditors.

7. Lewiston Nat. Bank *v.* Martin, 2 Ida. 700, 23 Pac. 920. But see Wells *v.* Alturas Commercial Co., (Ida. 1899) 56 Pac. 165, where a mortgage on merchandise, under the terms of which the mortgagor retained possession and sold in the usual course of trade, applying proceeds of sale, less expenses thereof, to the mortgage debt, was held to be valid as against junior mortgages of the same kind, taken with actual notice of such former mortgage.

8. Huschle *v.* Morris, 131 Ill. 587, 23 N. E. 643 [*affirming* 31 Ill. App. 545]; Dunning *v.* Mead, 90 Ill. 376; Greenebaum *v.* Wheeler, 90 Ill. 296; Simmons *v.* Jenkins, 76 Ill. 479; Read *v.* Wilson, 22 Ill. 376, 74 Am. Dec. 159; Pinkstaff *v.* Cochran, 58 Ill. App. 72; Mann *v.* Reed, 49 Ill. App. 406; Orebaugh *v.* Davis, 44 Ill. App. 598; Swaim *v.* Humphreys, 42 Ill. App. 370; Rhode *v.* Matthai, 35 Ill. App. 147; Yager *v.* Mersinger, 15 Ill. App. 262; *In re* Forbes, 5 Biss. (U. S.) 510, 9 Fed. Cas. No. 4,922.

the instrument, and is equally effectual to invalidate the mortgage when shown to exist from attendant circumstances,[9] and it does not render the mortgage valid to require the mortgagor to account to the mortgagee for the proceeds of all sales,[10] or to hold them as agent for the mortgagee.[11]

In Indiana, under the statute making fraud a question of fact,[12] a mortgage giving the mortgagor a power to sell the mortgaged stock of goods and requiring him to account for the proceeds to the mortgagee is not fraudulent as a matter of law,[13] and, in the absence of evidence to the contrary, it will be presumed that the mortgagor was required to account for the proceeds of sales.[14]

In Iowa a mortgage on a stock of goods which allows the mortgagor to make sales therefrom is not fraudulent *per se*,[15] even though the terms of the mortgage do not require the mortgagor to account for the proceeds of sales.[16]

9. Simmons *v.* Jenkins, 76 Ill. 479; Davis *v.* Ransom, 18 Ill. 396. *Compare* Dunning *v.* Mead, 90 Ill. 376, where the agreement permitting the sale was executed soon after the giving of the mortgage.

Agreements allowing sale.—It has been held that allowing a mortgagor to remain in possession of a stock of wines did not necessarily imply a power to sell, although he was a trader in liquors (Cleaves *v.* Herbert, 61 Ill. 126), and an agreement for sale was not established by facts showing that the mortgaged goods were not separated from the other stock belonging to the mortgagor and that the other stock was not of sufficient value to pay the mortgage debt (McCormick Harvesting Mach. Co. *v.* Dirreen, 38 Ill. App. 203); but where the mortgagee knowingly permitted the mortgagor to make sales in the ordinary course of trade the mortgage was void (Barnet *v.* Fergus, 51 Ill. 352, 99 Am. Dec. 547; Schemerhorn *v.* Mitchell, 15 Ill. App. 418).

Allowing the mortgagor to continue the business, pay employees, and support his family from the proceeds makes the mortgage void. Greenebaum *v.* Wheeler, 90 Ill. 296.

10. Deering *v.* Washburn, 141 Ill. 153, 29 N. E. 558 [*affirming* 39 Ill. App. 434]. But see Goodheart *v.* Johnson, 88 Ill. 58, where the mortgagor was permitted to sell only at public sale and receive the notes and cash paid therefor, and it was held that this agreement did not render the mortgage void, for nothing was permitted which was inconsistent with the mortgagee's claims.

11. Dunning *v.* Mead, 90 Ill. 376.

12. The former doctrine in Indiana was that a mortgage giving the mortgagor a power to sell without requiring him to apply the proceeds toward payment of the mortgage debt was fraudulent in law. Mobley *v.* Letts, 61 Ind. 11; New Albany Ins. Co. *v.* Wilcoxson, 21 Ind. 355; Jordan *v.* Turner, 3 Blackf. (Ind.) 309; Robinson *v.* Elliott, 22 Wall. (U. S.) 513, 22 L. ed. 758; *In re* Burrows, 7 Biss. (U. S.) 526, 4 Fed. Cas. No. 2,204, 6 Am. L. Rec. 203, 5 Centr. L. J. 241, 23 Int. Rev. Rec. 362, 5 N. Y. Wkly. Dig. 137, 1 Tex. L. J. 41. *Compare* Davenport *v.* Foulke, 68 Ind. 382, 34 Am. Rep. 265, where a provision that the mortgagor might "use and enjoy" a silversmith's stock of trade and fixtures covered by a mortgage was held to make it void.

13. Fletcher *v.* Martin, 126 Ind. 55, 25 N. E. 866; Mayer *v.* Feig, 114 Ind. 577, 17 N. E. 159; Muncie Nat. Bank *v.* Brown, 112 Ind. 474, 14 N. E. 358; McFadden *v.* Fritz, 90 Ind. 590; Morris *v.* Stern, 80 Ind. 227; Rindsdopf *v.* Vaughan, 40 Fed. 394.

The mortgagor is an agent of the mortgagee, in effect, to make the sales. Overman *v.* Quick, 8 Biss. (U. S.) 134, 18 Fed. Cas. No. 10,624, 10 Chic. Leg. N. 210, 17 Nat. Bankr. Reg. 235.

14. New *v.* Sailors, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632; Stout *v.* Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

The absence of an express requirement that the proceeds should be applied to the extinguishment of the mortgage debt does not render a mortgage void, although the mortgagor continues to sell them and replenishes stock with after-acquired goods which come with the mortgage. Fisher *v.* Syfers, 109 Ind. 514, 10 N. E. 306.

Permitting the support of the mortgagor's family with part of the proceeds of sales will not make the mortgage void. Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488.

15. Meyer *v.* Evans, 66 Iowa 179, 23 N. W. 386; Meyer *v.* Gage, 65 Iowa 606, 22 N. W. 892; Jaffray *v.* Greenbaum, 64 Iowa 492, 20 N. W. 775; Sperry *v.* Etheridge, 63 Iowa 543, 19 N. W. 657; Clark *v.* Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; Smith *v.* McLean, 24 Iowa 322; Hughes *v.* Cory, 20 Iowa 399; Adler *v.* Claflin, 17 Iowa 89; Fromme *v.* Jones, 13 Iowa 474; Wilhelmi *v.* Leonard, 13 Iowa 330; Torbert *v.* Hayden, 11 Iowa 435; Argall *v.* Seymour, 48 Fed. 548; Maish *v.* Bird, 22 Fed. 576. *Contra*, Wells *v.* Langbein, 20 Fed. 183.

16. Meyer *v.* Evans, 66 Iowa 179, 23 N. W. 386; Jaffray *v.* Greenbaum, 64 Iowa 492, 20 N. W. 775; Sperry *v.* Etheridge, 63 Iowa 543, 19 N. W. 657; Clark *v.* Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160 (holding that it is more favorable to the creditors of the mortgagor when there is no agreement as to the application of the proceeds).

Actual fraud may be shown from the circumstances attendant upon the giving of the mortgage with power of sale. Jaffray *v.* Greenbaum, 64 Iowa 492, 20 N. W. 775.

In Kansas, where a mortgagor is allowed to remain in possession of a mortgaged stock of goods and make sales therefrom without accounting for the proceeds, the mortgage is void.[17] It is not necessary that there be an agreement permitting the mortgagor to sell, and it is sufficient that sales are made with the knowledge and consent of the mortgagee;[18] but an arrangement for accounting for the proceeds of sales to the mortgagee will prevent the inference of fraud as a matter of law and justify the court in submitting to the jury the question of actual bad faith.[19]

In Kentucky allowing a mortgagor to retain possession of a stock of goods and continue to sell and replenish the stock in the ordinary course of business is a badge of fraud,[20] but no presumption of fraud arises where the proceeds of a

Compare Lyon *v.* Council Bluffs Sav. Bank, 29 Fed. 566, where there was no valid debt secured and the amount of the indebtedness was wilfully overstated, and it was held proper for the court to give peremptory instruction that the mortgage was fraudulent.

The burden of proof is on the person attacking the mortgage on the ground that it is fraudulent. Maish *v.* Bird, 22 Fed. 576.

No lien on proceeds in the form of notes payable to the mortgagor arises in favor of the mortgagee against a judgment creditor who levies on the notes while they are in the possession of the mortgagor (Smith *v.* Clark, 100 Iowa 605, 69 N. W. 269); but a sale by the mortgagor with the consent of the mortgagee of goods covered by an unrecorded mortgage and payment of the proceeds to the mortgagee is valid against creditors of the mortgagor who have acquired no lien on the property prior to such sale (S. Hammill Co. *v.* Van Loon, 103 Iowa 249, 72 N. W. 520).

17. Humphrey *v.* Mayfield, 63 Kan. 208, 65 Pac. 234; Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084 (where the mortgage was unrecorded). *Compare* Leser *v.* Glaser, 32 Kan. 546, 4 Pac. 1026, where the mortgagor was allowed to remain in possession and to sell without accounting for the proceeds and the mortgage was held to be actually fraudulent so as to furnish a ground for attachment. See also ATTACHMENT, 4 Cyc. 422.

A subsequent mortgagee with notice of a prior mortgage can raise the objection thereto that the mortgagee permitted sales to be made from the stock by the mortgagor without requiring that the proceeds be applied to the debt. Smith *v.* Epley, 55 Kan. 71, 39 Pac. 1016.

Construing terms of mortgage.— Allowing a mortgagor to remain in possession of a stock of mortgaged merchandise has been held not to imply an authority to sell where the mortgagee was entitled to take possession in case any of the property was sold or offered for sale. Symns Grocery Co. *v.* Smith, 6 Kan. App. 258, 51 Pac. 803.

18. Brown *v.* Barber, 47 Kan. 527, 28 Pac. 184; Standard Implement Co. *v.* Schultz, 45 Kan. 52, 25 Pac. 625.

Ignorance of the mortgagee regarding the sales of stock made by the mortgagor prevents the inference of fraud as a matter of law from arising. Bell *v.* Fisher, 1 Kan. App. 284, 40 Pac. 674.

Where there is a conflict on the evidence as to whether the mortgagor was permitted to retain possession and sell, the doctrine of fraud in law has no application and the question of actual fraud should be submitted to a jury. Lorie *v.* Adams, 51 Kan. 692, 33 Pac. 599.

19. Atchison Saddlery Co. *v.* Gray, 63 Kan. 79, 64 Pac. 987; Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 632, 33 Pac. 362; Sedgwick City Bank *v.* Wichita Mercantile Co., 45 Kan. 346, 25 Pac. 888; Isenberg *v.* Fansler, 36 Kan. 402, 13 Pac. 573. *Compare* Richardson *v.* Jones, 56 Kan. 501, 43 Pac. 1127, 54 Am. St. Rep. 594, where a mortgage of three stallions allowing the mortgagor to sell one and apply the proceeds on the mortgage debt was held void and the court distinguished between a sale of such property and a stock of merchandise.

Sufficiency of accounting.— It seems that there can be a sufficient agreement for an accounting to prevent a mortgage from being void as a matter of law, although the mortgagor is permitted to use part of the proceeds of sales for the support of his family. Whitson *v.* Griffis, 39 Kan. 211, 17 Pac. 801, 7 Am. St. Rep. 546; Frankhouser *v.* Ellett, 22 Kan. 127, 31 Am. Rep. 171; Williams *v.* Mitchell, 9 Kan. App. 627, 58 Pac. 1025.

As a substitute for accounting, it has been held that there might be an actual application of proceeds toward the extinguishment of the mortgage debt. Howard *v.* Rohlfing, 36 Kan. 357, 13 Pac. 566; Frankhouser *v.* Ellett, 22 Kan. 127, 31 Am. Rep. 171.

Failure to account was not fraudulent where the mortgage covered a stock of dairy cows kept for permanent use and the mortgagee consented to a sale of two cows because it was necessary on account of their condition. Starr *v.* Cox, 9 Kan. App. 882, 57 Pac. 247.

Mortgagor selling as agent.— A mortgagee may place the mortgagor in possession of the property as his agent to make sales thereof for his benefit. Gleason *v.* Wilson, 48 Kan. 500, 29 Pac. 698. *Compare* Frick Co. *v.* Western Star Milling Co., 51 Kan. 370, 32 Pac. 1103, where an oral permission for the mortgagor to make sales was held not to contradict or vary the terms of a mortgage, but simply to show that the mortgagor had authority to act as agent for this purpose.

20. Ross *v.* Wilson, 7 Bush (Ky.) 29, holding furthermore that such a mortgage did

sale of the stock are to be applied on the indebtedness due the mortgagee by the mortgagor.[21]

In Maine, although a mortgage allows the mortgagor to remain in possession of the property, make sales therefrom, and replenish the stock with the proceeds, it may be valid and will cover additions thus acquired.[22] *A fortiori* a power of sale in the mortgagor for the purpose of paying the mortgage debt does not render the mortgage fraudulent.[23] Nor does it where there is a provision for an accounting.[24]

In Maryland a mortgage has been held not to be invalid, although accompanied by a collateral agreement which allows the mortgagor to make sales from the mortgaged goods but requires him to turn the proceeds over to the mortgagee to be applied on the mortgage debt;[25] but such a mortgage does not cover future additions to stock, and the mortgagee asserting his lien has the burden of showing that the goods claimed were on the premises at the date of the mortgage.[26]

In Massachusetts a chattel mortgage of a stock in trade is not fraudulent *per se*, although the mortgagor is allowed to make sales therefrom and use the proceeds to replenish the stock.[27]

In Michigan a mortgage allowing the mortgagor to make sales from the mortgaged stock and apply the proceeds to his own use or to keep up the stock is not void in law, but the question of actual fraud must be submitted to the jury,[28]

not constitute such a fraudulent transfer of property as would afford a ground for attachment. See also ATTACHMENT, 4 Cyc. 422.

21. New Albany Woolen Mills *v.* Lewis, 99 Ky. 398, 18 Ky. L. Rep. 321, 36 S. W. 12, where the mortgagee took possession, sold the goods, and shipped them to the purchaser in the mortgagor's name and it was held that the rights of the mortgagee were superior to those of a creditor of the mortgagor who garnisheed the purchase-money in the hands of the vendee.

22. Deering *v.* Cobb, 74 Me. 332, 43 Am. Rep. 596; Allen *v.* Goodnow, 71 Me. 420; Brown *v.* Thompson, 59 Me. 372. *Compare* Stedman *v.* Vickery, 42 Me. 132. See also Brinley *v.* Spring, 7 Me. 241, where an assignment by way of mortgage, with a stipulation that the mortgagor should retain possession of the property, changing that which is personal by manufacturing and selling, and that such possession should continue for a length of time beyond the day when the money becomes due, provided that such possession was not inconsistent with the security of the mortgage, was held to be valid.

Only the property purchased with proceeds of the stock originally covered by the mortgage and substituted therefor can be claimed by the mortgagee from a *bona fide* purchaser from the mortgagor. Sawyer *v.* Long, 86 Me. 541, 30 Atl. 111.

Lien does not attach to proceeds but mortgagee must look to personal responsibility of mortgagor. White Mountain Bank *v.* West, 46 Me. 15.

23. Melody *v.* Chandler, 12 Me. 282.

24. Abbott *v.* Goodwin, 20 Me. 408, holding that a power of sale could be inferred from an agreement to account.

25. Edelhoff *v.* Horner-Miller Mfg. Co., 86 Md. 595, 39 Atl. 314.

26. Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170; Hamilton *v.* Rogers, 8 Md. 301; Preston *v.* Leighton, 6 Md. 88.

27. Fletcher *v.* Powers, 131 Mass. 333; Cobb *v.* Farr, 16 Gray (Mass.) 597; Jones *v.* Huggeford, 3 Metc. (Mass.) 515. See also Briggs *v.* Parkman, 2 Metc. (Mass.) 258, 37 Am. Dec. 89, where a mortgage of a stock in trade was held not to be fraudulent *per se*, although it provided that the mortgagor was to retain possession till condition broken, and although it was orally agreed that he might dispose of the property and apply the proceeds to his own use, he promising to add to the mortgagee's security if any large sales were made.

All the facts surrounding a transaction are to be taken into account collectively in determining whether a power of sale in the mortgagor is fraudulent. Sleeper *v.* Chapman, 121 Mass. 404; Rowley *v.* Rice, 11 Metc. (Mass.) 333. *Compare* Robbins *v.* Parker, 3 Metc. (Mass.) 117, where a mortgage covered all the hay and grain grown on a farm and the mortgagor consumed the property covered by the mortgage for his own benefit, and it was held that the jury must necessarily infer fraud in fact from these circumstances.

28. Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222; People *v.* Bristol, 35 Mich. 8; Gay *v.* Bidwell, 7 Mich. 519; Bagg *v.* Jerome, 7 Mich. 145; Oliver *v.* Eaton, 7 Mich. 108; People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754; Hills *v.* Stockwell, etc., Furniture Co., 23 Fed. 432; Morse *v.* Riblet, 22 Fed. 501.

"Allowing sales to continue as though the instrument were not made" is not a provision which, when contained in a mortgage of a stock of goods, will make the transaction fraudulent in law. Wingler *v.* Sibley, 35 Mich. 231.

Application of proceeds.— The omission of a stipulation that the proceeds of sales shall be applied toward payment of the secured

and this is true even though the mortgage attempts to cover future additions to the stock.[29]

In Minnesota, where a mortgage of a stock of goods contains a provision authorizing the mortgagor to sell in the ordinary course of trade, or there is a collateral understanding between the parties to the same effect, the instrument is fraudulent as a matter of law.[30] The existence of a collateral agreement allowing sales is one of fact to be submitted to a jury,[31] and it has been held that a stipulation that proceeds be paid directly on the mortgage debt will prevent the inference of fraud as a matter of law.[32]

In Mississippi, where permission for a mortgagor to sell portions of the mortgaged property is given by the terms of a mortgage or by a collateral agreement, the mortgage is void as matter of law.[33]

debt has been held not to make a mortgage fraudulent in law. Hills *v.* Stockwell, etc., Furniture Co., 23 Fed. 432.

29. Leland *v.* Collyer, 34 Mich. 418 (holding that the mortgage would be valid as to the future-acquired property in the absence of intervening paramount rights); Morse *v.* Riblet, 22 Fed. 501.

Right to proceeds of sales.— It has been held that a mortgage of stock in trade, future additions thereto, and book-accounts and moneys due the mortgagor from sales thereof gave a mortgagee a lien on purchase-money due for such goods, which was superior to the rights of a creditor of the mortgagor who had garnisheed the purchaser. Fuller *v.* Rhodes, 78 Mich. 36, 43 N. W. 1085. See also Curtis *v.* Wilcox, 91 Mich. 229, 51 N. W. 992, where the mortgagor was authorized to sell a small amount on credit to a certain person and sold a much larger amount which was never paid for, and it was held that creditors of the mortgagor were not entitled to have the purchase-price of goods thus sold credited on the mortgage debt.

30. Joseph M. Hayes Woolen Co. *v.* Gallagher, 58 Minn. 502, 60 N. W. 343; Gallagher *v.* Rosenfield, 47 Minn. 507, 50 N. W. 696; Fergus Falls First Nat. Bank *v.* Anderson, 24 Minn. 435; Stein *v.* Munch, 24 Minn. 390; Horton *v.* Williams, 21 Minn. 187; Gere *v.* Murray, 6 Minn. 305; Chophard *v.* Bayard, 4 Minn. 533.

A voluntary assignee, it has been held, cannot avoid a mortgage as fraudulent because it contains a power of sale, the mortgage being valid between the parties. Mann *v.* Flower, 25 Minn. 500.

31. Stein *v.* Munch, 24 Minn. 390; Horton *v.* Williams, 21 Minn. 187.

Agreements authorizing sale.— Proof of sales by the mortgagor after the giving of the mortgage is not sufficient to show the existence of an agreement allowing mortgagor to sell (Filebeck *v.* Bean, 45 Minn. 307, 47 N. W. 969; Horton *v.* Williams, 21 Minn. 187), but it is strong evidence of fraud in making the mortgage (Horton *v.* Williams, 21 Minn. 187). *Compare* Donohue *v.* Campbell, 81 Minn. 107, 83 N. W. 469, where a mortgage stipulated that it should cover all future additions to stock, that the mortgagor should keep up the stock at all times to its present value, that until default he might use and enjoy the same, but that if he made any attempt to sell any part of it without the written consent of the mortgagee, the latter could take possession, and it was held that it did not expressly or by implication provide that the mortgagor could sell the mortgaged stock as his own.

32. Bannon *v.* Bowler, 34 Minn. 416, 26 N. W. 237. But see Pierce *v.* Wagner, 64 Minn. 265, 66 N. W. 977, 67 N. W. 537, where a stipulation that the mortgagor should account for proceeds was held not to prevent the inference of fraud in law.

A clause constituting the mortgagor the agent of the mortgagee to make sales and account for the proceeds has been held not to render a mortgage fraudulent on its face. Hawkins *v.* Hastings Bank, 1 Dill. (U. S.) 462, 11 Fed. Cas. No. 6,244, 2 Nat. Bankr. Reg. 337. See also Blakely *v.* Hammerel, 62 Minn. 307, 64 N. W. 821, where a mortgage provided that the mortgagor should act as the mortgagee's agent, dispose of the goods in the usual course of trade, deduct from the proceeds the expenses, and pay the balance to the mortgagee, and the question of good faith was held to be for the jury, although there was no accounting in fact and only insignificant amounts were paid.

Requiring mortgagor to replenish stock is not sufficient to render valid a mortgage reserving possession and power of sale to the mortgagor. Gallagher *v.* Rosenfield, 47 Minn. 507, 50 N. W. 696.

33. Hazlehurst Bank *v.* Goodbar, 73 Miss. 566, 19 So. 204; Johnston *v.* Tuttle, 65 Miss. 492, 4 So. 553; Britton *v.* Criswell, 63 Miss. 394; Joseph *v.* Levi, 58 Miss. 843.

A fortiori a mortgage is void where the mortgagor is allowed to remain in possession and make sales of the mortgaged stock after default in payment of the mortgage debt. Smith *v.* McLean, 22 Fed. Cas. No. 13,074, 10 Nat. Bankr. Reg. 260.

Interpretation of mortgage.— The reservation of the right to make sales must appear so clearly from the face of the mortgage that all contrary evidence would be excluded as contradicting its terms, in order to justify a court in declaring it void on its face. Britton *v.* Criswell, 63 Miss. 394. *Compare* Baldwin *v.* Little, 64 Miss. 126, 8 So. 168, where a mortgage conveying a stock of merchandise and all future additions thereto was held not to be fraudulent on its face because it did not expressly authorize the mortgagor to continue

In Missouri, where a mortgage contains a stipulation whereby the mortgagor is allowed to make sales from the stock covered by the mortgage without accounting for the proceeds to the mortgagee, it is fraudulent as a matter of law and void as to creditors,[34] and an agreement for sale not contained in the mortgage itself is equally effectual to invalidate the mortgage it accompanies,[35] provided the two are contemporaneous,[36] but the question whether such an agreement exists is for

to sell and replenish stock in the ordinary course of business. But see Chicago First Nat. Bank *v.* Caperton, 74 Miss. 857, 22 So. 60, 60 Am. St. Rep. 540, where a mortgage by a cooperage company of all its cooperage materials and other personal property was held to be void because it gave the mortgagor the right "to keep and use" the property until default in the payment of the debt secured.

A provision for monthly accounting to the trustee in a mortgage deed of trust and for payment to him of all the proceeds to be applied, under his direction, to the payment of current expenses and in making purchases to replenish stock has been held not to prevent an inference of fraud in law. Joseph *v.* Levi, 58 Miss. 843. But see Smith *v.* McLean, 22 Fed. Cas. No. 13,074, 10 Nat. Bankr. Reg. 260, where it was said that a mortgage with power of sale in the mortgagor would be void in the absence of a provision requiring the application of the proceeds toward payment of the debt secured.

Conduct of the beneficiary of a deed of trust of "all the property used or acquired in carrying on" a tannery, in permitting the grantor to buy, sell, and ship the leather covered thereby in his own name, vitiates the deed, as against creditors of the grantor. Iuka Bank *v.* Dean, (Miss. 1894) 16 So. 305.

Mortgage for purchase-money.— A deed of trust of a stock of goods which secures payment of the purchase-money out of proceeds of the goods to be sold by the purchaser at retail in his own name has been held to be valid against creditors of the purchaser. Dodds *v.* Pratt, 64 Miss. 123, 8 So. 167.

34. Bullene *v.* Barrett, 87 Mo. 185; White *v.* Graves, 68 Mo. 218; State *v.* D'Oench, 31 Mo. 453; State *v.* Tasker, 31 Mo. 445; Reed *v.* Pelletier, 28 Mo. 173; Walter *v.* Wimer, 24 Mo. 63; Brooks *v.* Wimer, 20 Mo. 503; Atchison County Bank *v.* Shackelford, 67 Mo. App. 475; Smith-Wallace Shoe Co. *v.* Wilson, 63 Mo. App. 326, 1 Mo. App. Rep. 749; Martin-Perrin Mercantile Co. *v.* Perkins, 63 Mo. App. 310, 1 Mo. App. Rep. 762; Russell *v.* Rutherford, 58 Mo. App. 550; American Oak Leather Co. *v.* Wyeth Hardware, etc., Co., 57 Mo. App. 297; Smith *v.* Ham, 51 Mo. App. 433; State *v.* Jacob, 2 Mo. App. 183; Cator *v.* Collins, 1 Mo. App. 225.

Between the parties the mortgage is good, although the mortgagor is allowed to remain in possession of the property and make sales therefrom. Barton *v.* Sitlington, 128 Mo. 164, 30 S. W. 514; Meyer Bros. Drug Co. *v.* Self, 77 Mo. App. 284; Wood *v.* Hall, 23 Mo. App. 110.

A mortgage was fraudulent as to a second mortgagee, where, prior to the giving of the second mortgage, the first mortgagee permitted sales to be made from the mortgaged goods without requiring that the mortgagor account for the proceeds. Sparks *v.* Brown, 46 Mo. App. 529.

Provisions in mortgage constituting a power of sale.— It has been held that to constitute a mortgage fraudulent upon its face the right of the mortgagor to remain in possession and dispose of the property must be a necessary inference from the wording of the instrument (Voorhis *v.* Langsdorf, 31 Mo. 451; State *v.* Nelson Distilling Co., 60 Mo. App. 437, 1 Mo. App. Rep. 169); and such an inference did not arise from the circumstance that the mortgage purported to cover after-acquired property (St. Louis Drug Co. *v.* Robinson, 81 Mo. 18; Thompson *v.* Foerstel, 10 Mo. App. 290), even though the goods were described as "now kept and offered for sale at my wareroom" (Hewson *v.* Tootle, 72 Mo. 632. But see State *v.* Busch, 38 Mo. App. 440, where it was held that a power in the mortgagor to substitute other goods for those originally covered made the mortgage void), that the mortgagor was allowed to supply any breakage, loss, or waste in the mortgaged sawmill (Jennings *v.* Sparkman, 48 Mo. App. 246), or that machinery, tools, and fixtures were to remain in the possession of the mortgagor for the purposes of his trade (State *v.* Tasker, 31 Mo. 445). But see Lodge *v.* Samuels, 50 Mo. 204, holding that a mortgage of the stock in trade of a manufacturer, whereby the mortgagor was to remain in possession and continue the business, was void as to creditors and purchasers.

35. Scott Hardware Co. *v.* Riddle, 84 Mo. App. 275; Tennant-Stribling Shoe Co. *v.* Gallant, 53 Mo. App. 423; Helm *v.* Helm, 52 Mo. App. 615.

In the absence of agreement a sale of the mortgaged goods by the mortgagor and a conversion of the proceeds to his own use does not invalidate the mortgage and render it fraudulent so that it will support an attachment. Hopkins *v.* Hastings, 21 Mo. App. 263.

Proof of agreement.— Where a mortgage included all the property used, bought, or belonging to the mortgagor "in the course of his usual trade or business," the same to be kept in his store, and there was evidence that the store was open and that the mortgagor employed a clerk, it was held that this would support a finding that he was selling the property for his own use. Eby *v.* Watkins, 39 Mo. App. 27.

36. State *v.* Roever, 55 Mo. App. 448; Smith *v.* Ham, 51 Mo. App. 433.

the jury.[37] A requirement that the mortgagor shall account to the mortgagee for the proceeds of all sales prevents the inference of fraud as a matter of law and renders the mortgage *prima facie* valid.[38]

In Montana a mortgage authorizing the mortgagor to remain in possession of the mortgaged property and to sell it at retail is not void unless the proceeds are applied to the mortgagor's own use.[39]

In Nebraska, in the absence of a provision that the proceeds of sales shall be applied on the mortgage debt, a mortgage authorizing the mortgagor to remain in possession of the mortgaged chattels and sell them is conclusively fraudulent.[40] Where the proceeds of sales are to be accounted for by the mortgagor, the mortgage is only presumptively fraudulent,[41] but the burden of proving good faith is on the mortgagee or those claiming under him.[42]

37. Weber *v.* Armstrong, 70 Mo. 217; State *v.* Tasker, 31 Mo. 445.

38. Rock Island Nat. Bank *v.* Powers, 134 Mo. 432, 34 S. W. 869, 35 S. W. 1132; Hubbell *v.* Allen, 90 Mo. 574, 3 S. W. 22; Scudder *v.* Bailey, 66 Mo. App. 40; Smith-Wallace Shoe Co. *v.* Wilson, 63 Mo. App. 326, 1 Mo. App. Rep. 749.

Sufficiency of accounting.—Where the mortgagor accounted for proceeds to the mortgagee but did not pay over the proceeds, it was held that the mortgage was not fraudulent as to creditors (Dunham *v.* Stevens, 160 Mo. 95, 60 S. W. 1064), and where a mortgagee received monthly payments without demanding an account, he was held not to have waived his right to such an accounting (Kerbs *v.* Zumwalt, 86 Mo. App. 128). *Compare* Vermont Marble Co. *v.* Achuff, 83 Mo. App. 42 (where it was held that a mortgagee could not allow a mortgagor to retain possession of the mortgaged chattels, bestow labor and skill upon them, and then sell them in the ordinary course of business, and only require him to account for the first cost of articles sold, without making the mortgage fraudulent); Smith-Wallace Shoe Co. *v.* Wilson, 63 Mo. App. 326, 1 Mo. App. Rep. 749 (where an agreement for an accounting was held to be sufficient, although there was a further stipulation that the mortgagee should make future advances for replenishing stock).

Keeping stock up.—An agreement to replace the property sold with other property of the same kind does not render valid a mortgage which would otherwise be void (McCarthy *v.* Miller, 41 Mo. App. 200); but an oral permission to sell on condition of keeping the stock up would only authorize sales in accordance with the condition (St. Louis Drug Co. *v.* Robinson, 81 Mo. 18). *Compare* Janssen *v.* Stone, 60 Mo. App. 402, 1 Mo. App. Rep. 101, where it was held that there was no presumption against a mortgagee that all the original stock was sold after three months.

Actual fraud was established where it was shown that the mortgagor continued to run the business as his own for eight months after the mortgage was given, without changing the name over the store and without rendering any account of proceeds of sales to the mortgagee. Hisey *v.* Goodwin, 90 Mo. 366, 2 S. W. 566.

39. Rocheleau *v.* Boyle, 11 Mont. 451, 28 Pac. 872 [*discrediting* the earlier case of Leopold *v.* Silverman, 7 Mont. 266, 16 Pac. 580, where it was held sufficient to render a mortgage fraudulent to show that the mortgagor by consent received a portion of the proceeds from sales]. *Compare* Heilbronner *v.* Lloyd, 17 Mont. 299, 42 Pac. 853, where a mortgage with power of sale was held not to be void when the proceeds of sales were applied on the mortgage debt.

Where a mortgage expressly forbids sales, it is not fraudulent by reason of a permission for the mortgagor to remain in possession and carefully use the mortgaged goods which consisted of "wines, liquors, and cigars" on the premises, whether for consumption or otherwise. Schwab *v.* Owens, 10 Mont. 381, 25 Pac. 1049.

40. Buckstaff Bros. Mfg. Co. *v.* Snyder, 54 Nebr. 538, 74 N. W. 863; Gregory *v.* Whedon, 8 Nebr. 373; Hedman *v.* Anderson, 6 Nebr. 392; Tallon *v.* Ellison, 3 Nebr. 63.

What constitutes a power of sale.—A power for the mortgagor to retain and use the mortgaged property does not necessarily imply that he is given a power of sale. Hedman *v.* Anderson, 6 Nebr. 392; Williams *v.* Evans, 6 Nebr. 216.

In the absence of any agreement allowing sales, it has been held that the mortgagee's consent that a small portion of the mortgaged property be turned over to a third person in payment of a debt would not of itself render the mortgage fraudulent and void as to creditors. Chicago Lumber Co. *v.* Fisher, 18 Nebr. 334, 25 N. W. 340.

41. Davis *v.* Scott, 22 Nebr. 154, 34 N. W. 353; Turner *v.* Killiam, 12 Nebr. 580, 12 N. W. 101.

42. Paxton *v.* Smith, 41 Nebr. 56, 59 N. W. 690.

Sales without consent of mortgagee.—Where a few articles of small value were sold by the servant of the mortgagor without the knowledge or consent of the mortgagee, there was no ground for a conclusive presumption of fraud (Whitney *v.* Levon, 34 Nebr. 443, 51 N. W. 972), and it has been held that the mortgagee may either disavow such sale and retake the property, or ratify it and recover the proceeds of the sale (Burke *v.* Pender First Nat. Bank, 61 Nebr. 20, 84 N. W. 408, 87 Am. St. Rep. 447). *Compare* Houck *v.* Heinzman, 37 Nebr. 463, 55 N. W.

In Nevada, where there is a necessary inference from the face of a mortgage that the mortgagor may remain in possession and make sales for his own benefit, it is fraudulent *per se* and void,[43] and the same is true where the mortgagor is left in possession under a collateral agreement that he may make sales.[44]

In New Hampshire, where a mortgage of a stock of goods is accompanied by an agreement between the parties that the mortgagor may continue in possession and sell for his own benefit and sales are actually made, it is void as to creditors,[45] but the question as to the existence of such an agreement is one of fact.[46] Under the statute requiring written permission from the mortgagee to authorize sales,[47] it has been held that the written permission is subject to explanation by parol evidence,[48] and it is consistent with good faith for the mortgagor to sell and receive the proceeds as agent for the mortgagee.[49]

In New Jersey a mortgage of merchandise authorizing the mortgagor to sell in the regular course of business is not fraudulent *per se*,[50] for the mortgagor will be considered as acting as agent for the mortgagee.[51]

In New Mexico, where a mortgagor is allowed to retain possession of the mortgaged property and dispose of it in his own name in the usual course of business, the mortgage is void as to creditors.[52]

1062, where it was held that a mortgage of a butcher's stock in trade could not be conclusively deemed fraudulent, there being no proof of the quantity of such perishables, of sales, or of the mortgagee's knowledge of them.

Subsequent consent to a sale for the purpose of paying the mortgage debt has been held not to render the mortgage fraudulent where the sale was never consummated. Houck *v.* Linn, 48 Nebr. 227, 66 S. W. 1103.

43. Lutz *v.* Kinney, 24 Nev. 38, 49 Pac. 453, 50 Pac. 1031, holding that where the mortgage allowed the mortgagor to remain in possession of a mortgaged stock of goods "with full use and enjoyment" of the same until default, there was a necessary inference of a power of sale.

44. *In re* Morrill, 2 Sawy. (U. S.) 356, 17 Fed. Cas. No. 9,821, 8 Nat. Bankr. Reg. 117.

45. Putnam *v.* Osgood, 51 N. H. 192; Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603; Coburn *v.* Pickering, 3 N. H. 415, 14 Am. Dec. 375.

After-acquired property cannot be subjected to the mortgage lien by substitution for the original stock. Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603. *Compare* Perry *v.* Pettingill, 33 N. H. 433, where the mortgagor greatly increased the value of the mortgaged property by manufacturing it into pruning shears, and it was held that this increase in value did not invalidate the mortgage.

46. Coburn *v.* Pickering, 3 N. H. 415, 14 Am. Dec. 375.

Sufficiency of agreement.— Actual sales by a mortgagor of the mortgaged merchandise with the mortgagee's knowledge and without his objection, is evidence of an assent thereto (Putnam *v.* Osgood, 52 N. H. 148); and an intention that proceeds of sales shall not be applied to the mortgage debt and that the mortgage is to protect the property from creditors is equivalent to an understanding that the mortgagor may dispose of it for his own benefit (Gerrish *v.* Gerrish, 63 N. H. 128).

A subsequent agreement allowing the mortgagor to sell and followed by sales in fact will render the mortgage void. Putnam *v.* Osgood, 52 N. H. 148.

47. N. H. Gen. Laws (1878), c. 137, § 13.

While the law imposing a penalty for selling mortgaged chattels without the mortgagee's consent permits selling with his consent, it does not by that fact validate a mortgage as against creditors, under which the mortgagor retained possession for his own benefit. Putnam *v.* Osgood, 52 N. H. 148.

48. Wilson *v.* Sullivan, 58 N. H. 260, holding that fraud is not to be inferred from the omission of the mortgagee to declare, in a written permission of sale of the property, that the proceeds of the sale are to be applied to the extinguishment of the mortgage debt.

49. Gibbs *v.* Parsons, 64 N. H. 66, 6 Atl. 93; Wilson *v.* Sullivan, 58 N. H. 260, in both of which cases it was held that the proceeds of sales would be applied toward the extinguishment of the mortgage debt, although the mortgagor misappropriated them.

50. Lister *v.* Simpson, 38 N. J. Eq. 438, holding that the question whether such a mortgage is fraudulent is a question of fact to be determined by proof in the same manner as other questions of fact are to be determined.

51. Shreve *v.* Miller, 29 N. J. L. 250 (holding that it would be otherwise if the stock were sold otherwise than in the regular course of business); Hagaman *v.* Hunterdon, 1 N. J. L. J. 23 (holding that the proceeds of sales would be credited on the mortgage debt). See also *In re* Bloom, 17 Nat. Bankr. Reg. 425; Miller *v.* Jones, 15 Nat. Bankr. Reg. 150.

52. Speigelberg *v.* Hersch, 3 N. M. 185, 4 Pac. 705 [*following* Robinson *v.* Elliot, 22 Wall. (U. S.) 513, 22 L. ed. 758].

In New York, when a mortgagor is left in possession of the property[53] under an agreement that he may sell it and apply the proceeds to his own purposes, the mortgage is void in law and the question of actual fraud is immaterial.[54] Actual sales by the mortgagor need not be proved,[55] but there must be an agreement authorizing the sale,[56] and when there is none in the mortgage the existence of a collateral understanding between the parties is a question of fact and may be submitted to a jury.[57] When the stipulation regarding the power of sale further

53. Retaining possession of itself makes a mortgage presumptively fraudulent by force of statutory provisions. Dutcher *v.* Swartwood, 15 Hun (N. Y.) 31; Groat *v.* Rees, 20 Barb. (N. Y.) 26; Otis *v.* Sill, 8 Barb. (N. Y.) 102; Smith *v.* Acker, 23 Wend. (N. Y.) 653. See also *supra*, XI, B.

54. Potts *v.* Hart, 99 N. Y. 168, 1 N. E. 605; Gardner *v.* McEwen, 19 N. Y. 123; Edgell *v.* Hart, 9 N. Y. 213, 59 Am. Dec. 532; Cook *v.* Bennett, 60 Hun (N. Y.) 8, 14 N. Y. Suppl. 683, 38 N. Y. St. 632; Smith *v.* Cooper, 27 Hun (N. Y.) 565; Wagner *v.* Jones, 7 Daly (N. Y.) 375; Spies *v.* Boyd, 1 E. D. Smith (N. Y.) 445; Hardt *v.* Deutsch, 22 Misc. (N. Y.) 66, 48 N. Y. Suppl. 564; *In re* Cantrell, 6 Ben. (U. S.) 482, 5 Fed. Cas. No. 2,389. *Compare* Boshart *v.* Kirley, 34 Misc. (N. Y.) 241, 69 N. Y. Suppl. 623, where a mortgagor was allowed to remain in possession of a stock of goods covered by an unrecorded mortgage for fifteen months and make sales therefrom without accounting for the proceeds, and it was held that a creditor could bring an action against the executor of the mortgagor's insolvent estate under the statute allowing a creditor to maintain an action to set aside any act of the debtor in fraud of creditors. But see New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 88 Hun (N. Y.) 569, 34 N. Y. Suppl. 890, 69 N. Y. St. 55, where the personal and real estate of an electric light company were covered by a mortgage and it was held that the mortgage was not fraudulent merely because the mortgagor was permitted to use and sell the property and apply proceeds for supplies, repairs, and general expenses.

An actual good motive will not serve to redeem the mortgage. Marston *v.* Vultee, 8 Bosw. (N. Y.) 129.

Action to set aside mortgage by creditor without judgment.— Where a chattel mortgage allowed the mortgagor to remain in possession of the mortgaged stock and apply the proceeds in the course of business and the mortgage had not been recorded, it was held that a creditor without a judgment could bring an action under N. Y. Laws (1897), c. 417, § 87, to have the mortgage set aside as an act in fraud of creditors. Boshart *v.* Easton, 34 Misc. (N. Y.) 241, 69 N. Y. Suppl. 623 [*affirmed* in 67 N. Y. App. Div. 624, 74 N. Y. Suppl. 1121].

55. Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 24 N. Y. St. 526, 11 Am. St. Rep. 691, 5 L. R. A. 137.

56. Yates *v.* Olmsted, 56 N. Y. 632 [*reversing* 65 Barb. (N. Y.) 43]; Chatham Nat. Bank *v.* O'Brien, 6 Hun (N. Y.) 231; Wise *v.* Rider, 34 N. Y. Suppl. 782, 68 N. Y. St. 716; Thompson *v.* Fuller, 8 N. Y. Suppl. 62, 28 N. Y. St. 4; Hanrahan *v.* Roche, 22 Alb. L. J. 134.

Collateral agreement.— An agreement allowing the mortgagor to sell the mortgaged stock need not be contained in the mortgage to make it fraudulent in law as against creditors of the mortgagor. Southard *v.* Benner, 72 N. Y. 424.

57. Manufacturers', etc., Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9; Gardner *v.* McEwen, 19 N. Y. 123; Williston *v.* Jones, 6 Duer (N. Y.) 504; Vreeland *v.* Pratt, 17 N. Y. Suppl. 307, 42 N. Y. St. 582; Gorman *v.* Park, 100 Fed. 553, 40 C. C. A. 537.

Proof of agreement.— It has been held that an agreement to allow the mortgagor of chattels to retain possession and sell may be shown by parol evidence or may be inferred from the acts of the parties. Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046, 24 N. Y. St. 526, 11 Am. St. Rep. 691, 5 L. R. A. 137. Such an agreement may be inferred from the circumstance that the mortgagee permitted such sales to be made (Southard *v.* Benner, 72 N. Y. 424; Divver *v.* McLaughlin, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655), or where the mortgage was given to secure a preëxisting debt and the mortgagors were to remain in possession and carry on the business and apply the proceeds first to the expenses of the business which required a substantial part of the resulting product (Wait *v.* Bull's Head Bank, 28 Fed. Cas. No. 17,043, 19 Nat. Bankr. Reg. 500), but is not necessarily established by proof that sales of stock were made by the mortgagor with the mortgagee's knowledge (Frost *v.* Warren, 42 N. Y. 204; Wise *v.* Rider, 34 N. Y. Suppl. 782, 69 N. Y. St. 716; Hanrahan *v.* Roche, 22 Alb. L. L. 134) of a clause in the mortgage that the mortgagor was "to keep about the same stock on hand" (Stedman *v.* Batchelor, 4 Silv. Supreme (N. Y.) 544, 8 N. Y. Suppl. 37, 28 N. Y. St. 436), or by showing merely that the mortgagor is to be allowed to remain in possession till default (Simis *v.* Hodge, 50 Hun (N. Y.) 410, 3 N. Y. Suppl. 228, 21 N. Y. St. 955), and it is not sufficient that the creditor expected that part of the proceeds would be applied by the mortgagor for his own benefit (Brackett *v.* Harvey, 91 N. Y. 214). *Compare* Hincks *v.* Field, 14 N. Y. Suppl. 247, 37 N. Y. St. 724, where the business was to be sold in bulk and if any sales should be made at retail they would be simply for the purpose of placing the stock in a better condition for a sale in bulk, and it was held that there was no agreement for sale which would make the mortgage fraudulent in law.

requires that the proceeds shall be turned over to the mortgagee, this prevents the inference of fraud as a matter of law and the validity of the transaction depends on the actual intent of the parties,[58] but a collateral agreement to pay the receipts to the mortgagee is of no avail.[59]

In North Carolina, where a mortgagor is allowed to remain in possession with a power of sale, the mortgage is presumptively fraudulent,[60] and unless this presumption is rebutted by evidence the mortgage is fraudulent in law.[61]

58. Spaulding *v.* Keyes, 125 N. Y. 113, 26 N. E. 15, 34 N. Y. St. 588; Brackett *v.* Harvey, 91 N. Y. 214; Miller *v.* Lockwood, 32 N. Y. 293; Conkling *v.* Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Ford *v.* Williams, 24 N. Y. 359; Ostrander *v.* Fay, 3 Abb. Dec. (N. Y.) 431, 2 Keyes (N. Y.) 586; Farmers' Bank *v.* Cowan, 2 Abb. Dec. (N. Y.) 88, 2 Keyes (N. Y.) 217; Caring *v.* Richmond, 22 Hun (N. Y.) 369; Dolson *v.* Saxton, 11 Hun (N. Y.) 565. *Compare* Johnson *v.* Curtis, 42 Barb. (N. Y.) 588, where it was agreed that mortgaged logs should be sawed into lumber and delivered to the mortgagee at a stated price which should be credited on the mortgage debt and the transaction was held not to be fraudulent in law.

An actual application of the proceeds of sales toward the extinguishment of the mortgage debt in accordance with the terms of an agreement is not necessary (Conkling *v.* Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Sperry *v.* Baldwin, 46 Hun (N. Y.) 120), and it has been held sufficient that the mortgagee supposed the proceeds were to be applied in payment of the mortgage debt (Southard *v.* Pinckney, 5 Abb. N. Cas. (N. Y.) 184), for the proceeds are nevertheless to be credited on the sum secured by the mortgage Sperry *v.* Baldwin, 46 Hun (N. Y.) 120); Smith *v.* Ely, 22 Fed. Cas. No. 13,044, 10 Nat. Bankr. Reg. 553), and a subsequent judgment creditor may have an account taken of the sales made (Ellsworth *v.* Phelps, 30 Hun (N. Y.) 646); but failure to turn over proceeds of sales to the mortgagee according to agreement may be evidence of actual fraud (Rochester City Bank *v.* Westbury, 16 Hun (N. Y.) 458). In Sperry *v.* Baldwin, 46 Hun (N. Y.) 120, a second mortgagee of a stock of goods allowed sales to be made therefrom, and the first mortgagee knew of the sales, but it was held that the creditors of the mortgagor could not insist on having the proceeds credited on the first mortgage because the first mortgagee was not a party to the arrangement by which the sales were authorized. *Compare* Brackett *v.* Harvey, 25 Hun (N. Y.) 502, where the proceeds of sales were to be turned over to the mortgagee except such part as was necessary to replenish stock and support the mortgagor's family and it was held to be actually fraudulent, since one third of the mortgage debt remained unpaid at the end of two years.

Putting an agent of the mortgagee in the store to look after the mortgagee's interests has been held sufficient to rebut the inference of fraud in law arising from a power of sale in a mortgage on merchandise and to justify the court in submitting the question of fraud to the jury. Manufacturers', etc., Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9.

59. Ball *v.* Slafter, 26 Hun (N. Y.) 353.

Sufficiency of agreement to pay over proceeds.— A mortgage was held not to be fraudulent as an inference of law where the proceeds were to be paid to the mortgagor or used to replenish stock and new mortgages were to be executed on the additions thus acquired every sixty days (Brackett *v.* Harvey, 91 N. Y. 214; Kerr *v.* Dildine, 6 N. Y. St. 163); where the mortgagor was authorized to take good business paper and turn it over to the mortgagee, even though there was an understanding that he might use a portion of proceeds of sales for his own benefit (Brackett *v.* Harvey, 91 N. Y. 214); but where the accounts obtained from sales made on credit were to be turned over to the mortgagee at once, but not applied on the mortgage debt till collected, the transaction was fraudulent *per se* (Rochester City Bank *v.* Westbury, 16 Hun (N. Y.) 458); and it is not sufficient to prevent the mortgage from being fraudulent in law for the mortgagor to agree to pay over a certain sum monthly or more or less according to the profits (Randall *v.* Carman, 89 Hun (N. Y.) 84, 35 N. Y. Suppl. 53, 69 N. Y. St. 466).

60. Kreth *v.* Rogers, 101 N. C. 263, 7 S. E. 682; Holmes *v.* Marshall, 78 N. C. 262; Cheatham *v.* Hawkins, 76 N. C. 335; Young *v.* Booe, 33 N. C. 347. *Compare* Cheatham *v.* Hawkins, 76 N. C. 335 (where it was held that such a mortgage approached the verge of being on its face fraudulent in law); Cheatham *v.* Hawkins, 80 N. C. 161 (where the wording of the instrument in not allowing the mortgagees to take possession unless there was an "unreasonable" depreciation in value was held to be most cogent intrinsic evidence of fraud).

61. Boone *v.* Hardie, 87 N. C. 72.

The inference of fraud was not rebutted by proof that the debt secured was *bona fide* and that the insolvency of the mortgagor was unknown to the mortgagee. Holmes *v.* Marshall, 78 N. C. 262.

The presumption of fraud was rebutted by testimony of the mortgagor that at the time of making the mortgage he expected other money with which to discharge the debt and had no intention to defraud his creditors (Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672); and by evidence that the mortgage was executed to secure the purchase-price of new goods and that large amounts had been paid on the mortgage debt in a short time (Kreth *v.* Rogers, 101 N. C. 263, 7 S. E. 682).

A right to replenish stock necessarily im-

In North Dakota, although it has been held that a mortgage authorizing the mortgagor to make sales from the mortgaged stock is not fraudulent *per se*, when the mortgagor is required to keep an accurate account and turn over proceeds daily,[62] a subsequent decision inclines strongly to the view that a doctrine of constructive fraud exists which will be applied on a proper occasion.[63]

In Ohio a mortgage is void without regard to the actual intent of the parties when it allows the mortgagor to remain in possession and sell, either by a stipulation upon the face of the mortgage[64] or by a collateral understanding between the parties;[65] but it has subsequently been held that a requirement that the proceeds of sales be turned over to the mortgagee prevents the inference of fraud as a matter of law.[66]

In Oklahoma, where the mortgagor was authorized to sell a mortgaged stock of goods in the ordinary course of business, pay necessary expenses, and replenish stock, the mortgage was void as a matter of law as to creditors, without regard to the actual intent of the parties.[67]

In Oregon, when a stipulation in a mortgage or an agreement collateral to it permits the mortgagor to have full power to dispose of the property, the mortgage is *per se* fraudulent and void,[68] but in order that a disposition by the mort-

plies a right for the mortgagor to sell. Bynum *v.* Miller, 89 N. C. 393.

Application of proceeds.— Where one of a firm of mortgagors was authorized to sell goods and receive proceeds as agent for the mortgagee, the proceeds coming into such agent's hands extinguished the mortgage debt *pro tanto* and further use of such proceeds by the agent created a new debt which was not secured by the original mortgage. Weill *v.* Wilmington First Nat. Bank, 106 N. C. 1, 11 S. E. 277.

62. Red River Valley Nat. Bank *v.* Barnes, 8 N. D. 432, 79 N. W. 880, holding that a collateral agreement that the mortgagor might retain a reasonable amount of the proceeds as a salary did not render the mortgage fraudulent. *Compare* New England Mortg. Security Co. *v.* Great Western Elevator Co., 6 N. D. 407, 71 N. W. 130, where it was held that the mortgagee lost his lien on property sold with his consent, although the mortgagor converted the proceeds.

63. Bergman *v.* Jones, 10 N. D. 520, 88 N. W. 284, where a chattel mortgage of firm property, executed to secure preëxisting individual debts of partners, which allowed the mortgagors to continue the business, reserved the right to sell the mortgaged goods for cash and out of the proceeds to replenish the stock and pay the expenses of the business, and which provided for the payment of the net proceeds of the business to the mortgagees, was held to be void, as its effect was to delay partnership creditors and it was primarily for the benefit of the mortgagors.

64. Freeman *v.* Rawson, 5 Ohio St. 1; Collins *v.* Myers, 16 Ohio 547; Morris *v.* Devou, 2 Disn. (Ohio) 218; Griefenkamp *v.* Beal, 21 Ohio Cir. Ct. 788, 11 Ohio Cir. Dec. 377; Droege *v.* Ipsharding, 5 Ohio Dec. (Reprint) 543, 6 Am. L. Rec. 478; *In re* Brammer, 4 Ohio S. & C. Pl. Dec. 107, 2 Ohio N. P. 169; Hart *v.* Heard, 4 Ohio Dec. (Reprint) 140, 1 Clev. L. Rep. 67; Matter of White, Ohio Prob. 153. *Compare* Harman *v.* Abbey, 7 Ohio St. 218, where the mortgage was held to be fraudulent in law, although it was stipulated that the mortgagee should at all times hold absolute and conclusive possession of the goods as against all persons other than the mortgagor, and should release all claims to the property as soon as the debt should be fully paid.

Recording a mortgage which allows the mortgagor to sell does not render it valid. Freeman *v.* Rawson, 5 Ohio St. 1.

65. Freeman *v.* Rawson, 5 Ohio St. 1; Goodenough *v.* Harris, 1 Disn. (Ohio) 53, 12 Ohio Dec. (Reprint) 482; Clark *v.* Morris, 5 Ohio Dec. (Reprint) 66, 2 Am. L. Rec. 364; Canfield *v.* Lathrop, 4 Ohio Dec. (Reprint) 51, 1 Clev. L. Rec. 67; *In re* Manly, 2 Bond (U. S.) 261, 16 Fed. Cas. No. 9,031, 2 Am. L. T. Bankr. Rep. 89, 3 Nat. Bankr. Reg. 291 (where the sales by the mortgagor were allowed to continue after the maturity of the mortgage debt); McLean *v.* Lafayette Bank, 3 McLean (U. S.) 587, 16 Fed. Cas. No. 8,888.

Necessity and effect of actual sales.— In the absence of an agreement actual sales by the mortgagor of the mortgaged property will not make the mortgage fraudulent in law (Ford *v.* Miller, 5 Ohio S. & C. Pl. Dec. 603, 5 Ohio N. P. 512); but where the mortgagor has authority to sell, his failure to take advantage of such an agreement will not render the mortgage valid (Griefenkamp *v.* Beal, 21 Ohio Cir. Ct. 788, 11 Ohio Cir. Dec. 377).

66. Kleine *v.* Katzenberger, 20 Ohio St. 110, 5 Am. Rep. 630. *Compare* Ford *v.* Miller, 5 Ohio S. & C. Pl. Dec. 603, 5 Ohio N. P. 512.

67. Will T. Little Co. *v.* Burnham, 5 Okla. 283, 49 Pac. 66; Perry Bank *v.* Cooke, 3 Okla. 534, 41 Pac. 628. But see Hixon *v.* Hubbell, 4 Okla. 224, 44 Pac. 222, where a sale of mortgaged chattels in the ordinary course of business for the sole purpose of applying the proceeds toward payment of the mortgage debt was held not to avoid the instrument.

68. Marks *v.* Miller, 21 Oreg. 317, 28 Pac. 14, 14 L. R. A. 190; Aiken *v.* Pascall, 19 Oreg.

gagor shall have this effect it must be done in pursuance of an agreement with the mortgagee.[69]

In Rhode Island whether a mortgage containing a power to the mortgagor to sell is fraudulent is a question of fact for the jury,[70] but legal title to future-acquired property will not vest in the mortgagee[71] until he obtains possession of the property.[72]

In South Carolina whether a mortgage which gives the mortgagor a power to make sales from the mortgaged stock, replenish it, and carry on business is fraudulent or not is a question of fact.[73]

In South Dakota, where a mortgage allows the mortgagor to make sales from the mortgaged stock and appropriate the proceeds for his own use, it is presumptively fraudulent only,[74] and where the mortgagor is to account for proceeds the mortgage is not even presumptively fraudulent.[75] In either case the question of good faith is one of fact.[76]

In Tennessee a mortgage of a stock in trade is void in law when the mortgagor is allowed to remain in possession and make sales at retail.[77]

In Texas a mortgage which allows the mortgagor to remain in possession of the mortgaged property and dispose of it is fraudulent *per se* by force of legislative enactment.[78]

493, 24 Pac. 1039; Jacobs *v.* Ervin, 9 Oreg. 52; Orton *v.* Orton, 7 Oreg. 478, 33 Am. Rep. 717; Catlin *v.* Currier, 1 Sawy. (U. S.) 7, 5 Fed. Cas. No. 2,518.

69. Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146, where, however, actual fraud was found to exist.

70. Williams *v.* Winsor, 12 R. I. 9.

Authority to sell depends on the intention of the parties, which may be inferred by the jury from the facts of the case. Jenckes *v.* Goffe, 1 R. I. 511. *Compare* Barrett *v.* Franklin, 14 R. I. 241, where a mortgagee appointed the mortgagor his agent to sell by a memorandum at the foot of the mortgage and it was held that this merely gave the mortgagor a power of sale.

71. Williams *v.* Briggs, 11 R. I. 476, 23 Am. Rep. 518.

72. Cook *v.* Corthell, 11 R. I. 482, 23 Am. Rep. 518.

73. Marshall *v.* Crawford, 45 S. C. 189, 22 S. E. 792; Hirshkind *v.* Israel, 18 S. C. 157 (where the objection that the mortgage was fraudulent was raised by a second mortgagee). See also Porter *v.* Stricker, 44 S. C. 183, 21 S. E. 635.

The burden of proving fraud by reason of a stipulation allowing the mortgagor to remain in possession and sell is on the person attacking the mortgage. Marshall *v.* Crawford, 45 S. C. 189, 22 S. E. 792.

74. Black Hills Mercantile Co. *v.* Gardiner, 5 S. D. 246, 58 N. W. 557; Greeley *v.* Winsor, 1 S. D. 117, 45 N. W. 325, 36 Am. St. Rep. 720, 1 S. D. 618, 48 N. W. 214.

75. Ayers, etc., Co. *v.* Sundback, 5 S. D. 31, 58 N. W. 4; Lane *v.* Starr, 1 S. D. 107, 45 N. W. 212.

76. Custer City First Nat. Bank *v.* Calkins, 12 S. D. 411, 81 N. W. 732.

77. Rome Bank *v.* Haseltine, 15 Lea (Tenn.) 216; McCrasly *v.* Hasslock, 4 Baxt. (Tenn.) 1; Tennessee Nat. Bank *v.* Ebbert, 9 Heisk. (Tenn.) 153; Moore *v.* Wood, (Tenn. Ch. 1901) 61 S. W. 1063; Phelps *v.* Murray, 2 Tenn. Ch. 746.

In the absence of a power of sale, a mere stipulation that a trust deed is to include future-acquired property is not sufficient to render the deed void as reserving a right to sell by necessary implication. Reeves *v.* John, 95 Tenn. 434, 32 S. W. 312.

Sales by mortgagor as agent.— The former doctrine that the mortgagor might sell as agent for the mortgagee and account for the proceeds without rendering the mortgage fraudulent (Hickman *v.* Perrin, 6 Coldw. (Tenn.) 135) must be regarded as overruled (Tennessee Nat. Bank *v.* Ebbert, 9 Heisk. (Tenn.) 153). *Compare* Saunders *v.* Turbeville, 2 Humphr. (Tenn.) 271, where the mortgagor had the right to continue selling, but was required to account for proceeds, and it was held not to be evidence of fraud that he applied a portion of the proceeds to pay a debt not secured by the conveyance, where the mortgagees were ignorant of such application.

78. Wilber *v.* Kray, 73 Tex. 533, 11 S. W. 540; Duncan *v.* Taylor, 63 Tex. 645; National Bank *v.* Lovenberg, 63 Tex. 506.

A mortgage on part only of the stock of goods offered for sale by the mortgagor is within the prohibition of the statute. Avery *v.* Waples, 19 Tex. Civ. App. 672, 49 S. W. 151.

Prior to the statute it had been held that a mortgage of the kind under consideration was not fraudulent in law and that it was a usurpation of the province of the jury for the court to hold it so. Scott *v.* Alford, 53 Tex. 82, where the case of Peiser *v.* Peticolas, 50 Tex. 638, 32 Am. Rep. 621, in which the court incline to the doctrine of fraud in law, is explained on the ground that the court were sitting in the joint capacity of judge and jury and that there was actual fraud. *Compare* Bettes *v.* Weir Plow Co., 84 Tex. 543, 19 S. W. 705, holding that the statute was but a declaration of the common law.

In Utah a mortgage on a stock of goods is void if it permits the mortgagor to remain in possession and sell in the usual course of trade,[79] and it is immaterial whether the permission is contained in the mortgage or in a collateral agreement.[80]

In Vermont a mortgage which allows the mortgagor to sell portions of the mortgaged property and replace it with other property of similar kind and value is not fraudulent *per se*.[81]

In Virginia a mortgage deed of trust which allows the mortgagor to deal with the property as his own and make sales therefrom is inconsistent with the idea of a *bona fide* security and is fraudulent *per se*.[82]

In Washington a mortgage upon a stock of merchandise is not rendered fraudulent *per se* by an accompanying parol agreement that the mortgagor may remain in possession, make sales at retail, and use part of the proceeds to replenish stock, but the question of fraud depends on the actual intent of the parties.[83]

As between the parties, it has been held that the statute declaring a mortgage with power of sale in the mortgagor to be fraudulent *per se* has no application. Parker *v.* American Exch. Nat. Bank, (Tex. Civ. App. 1891) 27 S. W. 1071.

A conditional sale of goods to a merchant under an agreement by which title is not to pass till the purchase-price is paid is not within the provisions of the statute making invalid mortgages of goods exposed for sale. Bowen *v.* Lansing Wagon Works, 91 Tex. 385, 43 S. W. 872.

Agreements allowing sale.— Where the maker of a deed of trust in the nature of a mortgage disposed of a few articles of merchandise after the deed was delivered, but without the knowledge of the trustee, and it did not appear that the maker knew the exact time when the deed was delivered, an agreement allowing the grantor to remain in possession was not established sufficiently to invalidate the deed. Byrd *v.* Perry, 7 Tex. Civ. App. 378, 26 S. W. 749.

Sales by the mortgagor as agent.— It has been held, both before (Crow *v.* Red River County Bank, 52 Tex. 362) and after (Bettes *v.* Weir Plow Co., 84 Tex. 543, 19 S. W. 705) the passing of the statute on this subject, that sales by the mortgagor as agent do not render a mortgage fraudulent in law. *Compare* Smith *v.* Moore, (Tex. App. 1891) 15 S. W. 910, where there was a simulated change of possession and a pretense that the mortgagor sold as agent for the mortgagee and the good faith of such arrangements was held to be for the jury.

79. McKibbon *v.* Brigham, 18 Utah 78, 55 Pac. 66, holding that a compliance with the recording statute which required that a mortgage must be accompanied by an affidavit of good faith and recorded when the mortgagor remained in possession did not render such a mortgage valid.

80. McKibbon *v.* Brigham, 18 Utah 78, 55 Pac. 66, holding that it was immaterial whether the agreement was contemporaneous with the execution of the mortgage or subsequent thereto.

81. Bartlett *v.* Walker, 65 Vt. 594, 27 Atl. 496; Peabody *v.* Landon, 61 Vt. 318, 17 Atl. 781, 15 Am. St. Rep. 903 (holding that after-acquired property passed as of the date of the mortgage when the mortgagee took possession). But see Wilson *v.* Wallace, 67 Vt. 646, 32 Atl. 501, where, subsequently to the execution of a mortgage, the parties entered into an agreement whereby the mortgagor was authorized to dispose of the entire mortgaged property by a single transaction and for his own benefit and it was held that this agreement rendered the mortgage invalid as to creditors of the mortgagor.

82. Hughes *v.* Epling, 93 Va. 424, 25 S. E. 105; Brockenbrough *v.* Brockenbrough, 31 Gratt. (Va.) 580; Quarles *v.* Kerr, 14 Gratt. (Va.) 48; Addington *v.* Etheridge, 12 Gratt. (Va.) 436; Spence *v.* Bagwell, 6 Gratt. (Va.) 444; Sheppards *v.* Turpin, 3 Gratt. (Va.) 357; Lang *v.* Lee, 3 Rand. (Va.) 410 (where the court reason that, since the mortgagor could sell the mortgaged property free from the lien of the mortgage, there could be no inducement to take the mortgage as security and it must have been accepted for the purpose of defrauding other creditors).

An implied power for the mortgagor to remain in possession and make sales is equally effective in making a mortgage void. Perry *v.* Shenandoah Nat. Bank, 27 Gratt. (Va.) 755. But see Williams *v.* Lord, 75 Va. 390, where it was held that the court would not presume fraud unless the terms of the instrument precluded any other inference.

The mortgage was not fraudulent where one of the mortgagors was authorized to attend to the business of selling the stock at retail under the control of the mortgagee, who could require a sale at auction at any time (Marks *v.* Hill, 15 Gratt. (Va.) 400), or where a deed of trust conveying land, farming implements, horses, cattle, etc., and allowing the grantor to remain in possession for three years, provided that the property might be sold within the three years at the instance of the grantor (Sipe *v.* Earman, 26 Gratt. (Va.) 563).

83. Ephraim *v.* Kelleher, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604. See also Dillon *v.* Dillon, 13 Wash. 594, 43 Pac. 894, where it was held that a chattel mortgage of a stock of goods was not invalid because making no

In West Virginia a mortgage of merchandise which authorizes the mortgagor to remain in possession and sell is fraudulent in law and void as to creditors,[84] but a mortgage to secure purchase-money, accompanied by a parol authority to make sales and use the proceeds to replenish stock, has been held to be valid as to subsequent creditors of the purchaser.[85]

In Wisconsin a mortgage was formerly[86] fraudulent on its face when it allowed the mortgagor to continue in possession of the mortgaged stock of goods, make sales therefrom, and appropriate the proceeds to his own use,[87] and it was also fraud *per se* to allow the mortgagor to dispose of the property by an agreement collateral to the mortgage;[88] but there must be an agreement or understanding between the parties[89] and the existence of one was a question of fact.[90]

provision for application of proceeds, where it appeared that they were applied in payment of the ordinary expenses of the business and in reduction of claims against the mortgagor for which the mortgagee was liable as surety, and it further appeared that no goods were added to the stock after the giving of the mortgage.

The former doctrine was that a mortgage permitting the mortgagor to make sales from the mortgaged stock was fraudulent on its face (Byrd *v.* Forbes, 3 Wash. Terr. 318, 13 Pac. 715), unless the proceeds of sales were to be accounted for to the mortgagee (Langert *v.* Brown, 3 Wash. Terr. 102, 13 Pac. 704), for then the amounts received would be credited on the mortgage debt, whether they were received by the mortgagee or not (Warren *v.* His Creditors, 3 Wash. 48, 28 Pac. 257).

84. Garden *v.* Bodwing, 9 W. Va. 121; Kuhn *v.* Mack, 4 W. Va. 186.

85. Conaway *v.* Stealey, 44 W. Va. 163, 28 S. E. 793.

What constitutes a power of sale.— It was held that an absolute power of sale could be inferred from a provision in a deed that the mortgagor bound himself to keep always on hand a stock of goods equal in quality, description, and value to the property therein mentioned (Garden *v.* Bodwing, 9 W. Va. 121); but merely extending a trust deed to future-acquired property does not make it fraudulent as allowing the mortgagor to replenish stock when there is no power of sale (Baer Sons Grocer Co. *v.* Williams, 43 W. Va. 323, 27 S. E. 345).

86. The present doctrine, in force by virtue of 1 Wis. Annot. Stat. (1889), § 2316b, allows the mortgagor to make sales and apply the proceeds on the mortgage debt without rendering the mortgage fraudulent.

87. Blakeslee *v.* Rossman, 43 Wis. 116; Place *v.* Langworthy, 13 Wis. 629, 80 Am. Dec. 758; Cotton *v.* Marsh, 3 Wis. 221; *In re* Kahley, 2 Biss. (U. S.) 383, 14 Fed. Cas. No. 7,593, 3 Chic. Leg. N. 85, 2 Leg. Gaz. (Pa.) 405, 4 Nat. Bankr. Reg. 378. But see Roundy *v.* Converse, 71 Wis. 524, 37 N. W. 811, 5 Am. St. Rep. 240, where it was held that an implied permission for the mortgagor to sell would not make the mortgage fraudulent, in the absence of proof of an understanding that the proceeds might be applied to the mortgagor's own use.

An application of any part of the proceeds of sales to the mortgagor's own use made the mortgage fraudulent, although the balance was to be applied on the mortgage debt. Blakeslee *v.* Rossman, 43 Wis. 116.

Application of proceeds.— Where a portion of the proceeds from sales of the mortgaged stock were paid into the mortgagee's bank and checked out and the bank officials were familiar with these transactions, this was held to show an agreement that the proceeds might be applied to the mortgagor's use in the absence of evidence to the contrary. Durr *v.* Wildish, 108 Wis. 401, 84 N. W. 437. *Compare* Chas. Baumbach Co. *v.* Hobkirk, 104 Wis. 488, 80 N. W. 740, where one mortgagee testified that he supposed the mortgagor would use the proceeds to pay debts and for the support of his family, and the other mortgagee denied that there was any such agreement but admitted that he knew the manner of conducting the business, and this was held to show an implied agreement that the mortgagor might apply the proceeds of sales to his own use.

88. Durr *v.* Wildish, 108 Wis. 401, 84 N. W. 437; Kaukauna Bank *v.* Joannes, 98 Wis. 321, 73 N. W. 997; Blakeslee *v.* Rossmann, 43 Wis. 116; Steinart *v.* Deuster, 23 Wis. 136; Bowen *v.* Clark, 1 Biss. (U. S.) 128, 3 Fed. Cas. No. 1,721, 5 Am. L. Reg. 203.

89. Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16; Fisk *v.* Harshaw, 45 Wis. 665.

90. Rosenthal *v.* Vernon, 79 Wis. 245, 48 N. W. 485.

Proof of agreement.— Where a mortgage included a drug stock and other articles not intended for sale, and there was a stipulation that the mortgagor might remain in possession and should keep the property in as good condition as it then was, it was held that sales by the mortgagor were not authorized. Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296.

Where property was included by mistake it was held that the parties could release it from the lien of the mortgage without rendering the transaction fraudulent. Allen *v.* Kennedy, 49 Wis. 549, 5 N. W. 906.

Holding possession for benefit of mortgagee, as where materials were manufactured by the mortgagor on a contract with the mortgagee, does not render a mortgage void as to creditors of the mortgagor. Knapp *v.* Deitz, 64 Wis. 31, 24 N. W. 471.

In Wyoming, under the statute[91] declaring that mortgages giving the mortgagor a right to sell at retail shall be valid, it has been held that application of the proceeds of sales toward payment of the mortgage debt is not necessary.[92]

3. Doctrine of Federal Courts. In deciding whether a mortgage containing a power for the mortgagee to sell is fraudulent *per se* or whether its validity depends on the actual intent of the parties, the federal courts follow the doctrine of the state court in which the controversy arose,[93] for this is regarded as a rule of the law of property;[94] but in the absence of binding adjudications, it would be held that the question of fraud in a mortgage of the kind under discussion would be one of fact for the jury.[95]

4. Doctrine of English Courts. The question of fraud is to be determined as one of fact, although the mortgagor remains in possession of the mortgaged property with a power of disposal,[96] and the same doctrine is law in Canada.[97]

5. Effect on Property Not Included in Power of Sale. Where a power of sale contained in a mortgage covers only a part of the property subject thereto, it has been generally held that, although the mortgage is void in part, it is valid as to the property not included in the power of sale;[98] while the more

The mortgagee's power of sale, where it was agreed that either party might sell the property at a certain price or better and apply proceeds on the mortgage debt, has been held to authorize him to sell for cash only, and hence the purchaser could not set off a balance due him from the mortgagor against the latter's share of the purchase-money. Halpin *v.* Stone, 78 Wis. 183, 47 N. W. 177.

91. Wyo. Laws (1891), c. 7, § 2.

92. McCord *v.* Albany County Nat. Bank, 7 Wyo. 9, 48 Pac. 1058, holding that a mortgage of a stock of merchandise and outstanding accounts would cover a new series of accounts after the proceeds of the first accounts had been used in carrying on the business. *Compare* McCord *v.* Albany County Nat. Bank, 6 Wyo. 507, 46 Pac. 1093, holding that a mortgage containing a power of sale and covering after-acquired property would be a prior lien on after-acquired property as against a subsequent mortgage, although the second mortgage specified the goods on hand and those that might be acquired and the earlier one did not.

93. Etheridge *v.* Sperry, 139 U. S. 266, 11 S. Ct. 565, 35 L. ed. 171 [*affirming* 63 Iowa 543, 19 N. W. 657]; Means *v.* Dowd, 128 U. S. 273, 9 S. Ct. 65, 32 L. ed. 429; People's Sav. Bank *v.* Bates, 120 U. S. 556, 7 S. Ct. 679, 30 L. ed. 754; *In re* Cantrell, 6 Ben. (U. S.) 482, 5 Fed. Cas. No. 2,389.

94. Morse *v.* Riblet, 22 Fed. 501.

95. Etheridge *v.* Sperry, 139 U. S. 266, 11 S. Ct. 555, 35 L. ed. 171; Brett *v.* Carter, 2 Lowell (U. S.) 458, 4 Fed. Cas. No. 1,844, 13 Alb. L. J. 361, 10 Am. L. Rev. 600, 3 Centr. L. J. 286, 22 Int. Rev. Rec. 152, 14 Nat. Bankr. Reg. 301, 2 N. Y. Wkly. Dig. 331. *Contra,* Robinson *v.* Elliot, 22 Wall. (U. S.) 513, 22 L. ed. 758, where the court also said that their conclusions agreed with the then law of Indiana.

96. Brett *v.* Carter, 2 Lowell (U. S.) 458, 4 Fed. Cas. No. 1,844, 13 Alb. L. J. 361, 10 Am. L. Rev. 600, 3 Centr. L. J. 286, 22 Int. Rev. Rec. 152, 14 Nat. Bankr. Reg. 301, 2 N. Y. Wkly. Dig. 331; *Ex p.* Games, 12 Ch. D. 314, 40 L. T. Rep. N. S. 789, 27 Wkly. Rep. 744; Twyne's Case, 1 Smith Lead. Cas. 1 *et seq.*; May Vol. & Fraud. Convey. 106. See also Holroyd *v.* Marshall, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. 193, 7 L. T. Rep. N. S. 172, 11 Wkly. Rep. 171.

97. Hunter *v.* Corbett, 7 U. C. Q. B. 75.

Authority to sell live stock and crops raised on a farm was inferred from a stipulation that the mortgagor might remain in possession and use the property in the ordinary way while in possession. McPherson *v.* Moody, 35 N. Brunsw. 51.

What constitutes ordinary course of business.— A purchase of whisky by a syndicate under an agreement that the proceeds should be applied to pressing needs of the mortgagor was held to be a purchase in the ordinary course of business, although none of the members of the syndicate were engaged in the whisky trade. *In re* Old Bushmills Distillery Co., [1897] 1 Ir. R. 488.

98. *Alabama.*— Hayes *v.* Westcott, 91 Ala. 143, 8 So. 337, 24 Am. St. Rep. 875, 11 L. R. A. 488.

Arkansas.— Lund *v.* Fletcher, 39 Ark. 325, 43 Am. Rep. 270.

Florida.— Rogers *v.* Munnerlyn, 36 Fla. 591, 18 So. 669.

Illinois.— Goodheart *v.* Johnson, 88 Ill. 58; Barnet *v.* Fergus, 51 Ill. 352, 99 Am. Dec. 547; Huschle *v.* Morris, 29 Ill. App. 434; Schemerhorn *v.* Mitchell, 15 Ill. App. 418.

Mississippi.— Baldwin *v.* Little, 64 Miss. 126, 8 So. 168.

Missouri.— Bullene *v.* Barrett, 87 Mo. 185; Donnell *v.* Byern, 69 Mo. 468; Mallmann *v.* Harris, 65 Mo. App. 127, 2 Mo. App. Rep. 1163; Kennedy *v.* Dodson, 44 Mo. App. 550.

Montana.— Rocheleau *v.* Boyle, 11 Mont. 451, 28 Pac. 872.

Ohio.— Hart *v.* Heard, 4 Ohio Dec. (Reprint) 140, 1 Clev. L. Rep. 67; *In re* Brammer, 4 Ohio S. & C. Pl. Dec. 107, 2 Ohio N. P. 169.

Texas.— Cook *v.* Halsell, 65 Tex. 1.

consistent doctrine that the mortgage is void *in toto* has less authority to support it.[99]

6. Effect of Mortgagee's Possession. Where the mortgage contains a stipulation regarding the use of the property which would render it invalid against creditors, it has been held that such invalidity will be cured by a transfer of possession to the mortgagee before adverse rights attach to the property,[1] but

United States.—*In re* Kahley, 2 Biss. (U. S.) 383, 14 Fed. Cas. No. 7,593, 3 Chic. Leg. N. 85, 2 Leg. Gaz. (Pa.) 405, 4 Nat. Bankr. Reg. 378 (construing Wisconsin law); *In re* Kirkbride, 5 Dill. (U. S.) 116, 14 Fed. Cas. No. 7,839 (construing Missouri law).

See 9 Cent. Dig. tit. "Chattel Mortgages," § 399.

99. *Colorado.*— Wilson *v.* Voight, 9 Colo. 614, 13 Pac. 726.

Minnesota.— Gallagher *v.* Rosenfield, 47 Minn. 507, 50 N. W. 696; Horton *v.* Williams, 21 Minn. 187.

New York.— Russell *v.* Winne, 37 N. Y. 591, 5 Transcr. App. (N. Y.) 52, 4 Abb. Pr. N. S. (N. Y.) 384, 97 Am. Dec. 755.

South Dakota.— Greeley *v.* Winsor, 1 S. D. 618, 48 N. W. 214, holding that the mortgage was presumptively fraudulent as to the property not included in the power of sale as well as in regard to the property thus included.

United States.— *In re* Burrows, 7 Biss. (U. S.) 526, 4 Fed. Cas. No. 2,204, 6 Am. L. Rec. 203, 5 Centr. L. J. 241, 23 Int. Rev. Rec. 362, 5 N. Y. Wkly. Dig. 137, 1 Tex. L. J. 41, construing Indiana law.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 399.

1. *Dakota.*— McKay *v.* Shotwell, 6 Dak. 124, 50 N. W. 622, where the jury found expressly that there was no actual fraud.

Illinois.— Read *v.* Wilson, 22 Ill. 376, 74 Am. Dec. 159; O'Neil *v.* Patterson, 52 Ill. App. 26.

Kansas.— Cameron *v.* Marvin, 26 Kan. 612; Leech *v.* Arkansas City Mfg. Co., 8 Kan. App. 621, 56 Pac. 134; Williams *v.* Miller, 6 Kan. App. 626, 49 Pac. 703.

Kentucky.— New Albany Woolen Mills *v.* Lewis, 99 Ky. 398, 18 Ky. L. Rep. 321, 36 S. W. 12.

Massachusetts.— Adams *v.* Wheeler, 10 Pick. (Mass.) 199.

Mississippi.— Summers *v.* Roos, 42 Miss. 749, 2 Am. Rep. 653.

Missouri.— State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; Barton *v.* Sitlington, 128 Mo. 164, 30 S. W. 514; Dobyns *v.* Meyer, 95 Mo. 132, 8 S. W. 251, 6 Am. St. Rep. 32; State *v.* Nelson Distilling Co., 60 Mo. App. 437, 1 Mo. App. Rep. 169; Joseph *v.* Boldridge, 43 Mo. App. 333; Koppelman Furniture Co. *v.* Fricke, 39 Mo. App. 146 (unless actual or intentional fraud is shown); Manhattan Brass Co. *v.* Webster Glass, etc., Co., 37 Mo. App. 145; Wood *v.* Hall, 23 Mo. App. 110; Dobyns *v.* Meyer, 20 Mo. App. 66.

Nebraska.— Kay *v.* Noll, 20 Nebr. 380, 30 N. W. 269; Ahlman *v.* Meyer, 19 Nebr. 63, 26 N. W. 584.

New York.—Brown *v.* Platt, 8 Bosw. (N. Y.) 324; Hardt *v.* Deutsch, 22 Misc. (N. Y.) 66, 48 N. Y. Suppl. 564.

Ohio.— Francisco *v.* Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711; Brown *v.* Webb, 20 Ohio 389.

Oklahoma.—Will T. Little Co. *v.* Burnham, 5 Okla. 283, 49 Pac. 66.

See 9 Cent. Dig. tit. "Chattel Mortgages," § 448.

Constructive fraud in a chattel mortgage is cured when the mortgagee rightfully takes possession before levy on the property under process against the mortgagor. State *v.* Roever, 55 Mo. App. 448. *Compare* Fergus Falls First Nat. Bank *v.* Anderson, 24 Minn. 435, where the chattel mortgage was fraudulent as to creditors, but the mortgagor surrendered possession of the property before the mortgage was attacked and it was held that such surrender rendered the mortgage valid.

Actual fraud in a mortgage will not he cured by the circumstance that the mortgagee takes possession of the property. Antram *v.* Burch, 84 Mo. App. 256; Wells *v.* Langbein, 20 Fed. 183. But see Spegal *v.* Krag-Reynolds Co., 21 Ind. App. 205, 51 N. E. 959, where an insolvent debtor gave a chattel mortgage to certain creditors, which was recorded, and then made an assignment for the benefit of creditors and put his assignee in possession, and the assignee of the mortgage replevied the mortgaged property, bid it in at the mortgage sale, and took possession, and it was held that the mortgagee was entitled to the chattels, as against a subsequent execution creditor, even though the mortgage and assignment were void, because the insolvent, if he chose, might have preferred such creditors by turning over his property.

Delivery to the mortgagee after levy will not render valid a mortgage which is void because of an agreement that the mortgagee may retain possession and sell the mortgaged property. Quinn, etc., Brewing Co. *v.* Hart, 48 Hun (N. Y.) 393, 1 N. Y. Suppl. 388, 16 N. Y. St. 321.

An actual transfer and continued change of possession is necessary to cure the fraud in a mortgage on a stock in trade which permits the mortgagor to remain in possession and make sales therefrom. Moser *v.* Claes, 23 Mo. App. 420.

The mortgagor must consent to the transfer of possession to the mortgagee, and it is not sufficient for the latter to take possession under a clause in the mortgage authorizing him to do so whenever he felt insecure. Rathbun *v.* Berry, 49 Kan. 735, 31 Pac. 679, 33 Am. St. Rep. 389.

there is authority for the doctrine that possession by the mortgagee will not render the mortgage valid.[2]

2. *Colorado.*— Wilson *v.* Voight, 9 Colo. 614, 13 Pac. 726.

Minnesota.— Gallagher *v.* Rosenfield, 47 Minn. 507, 50 N. W. 696; Stein *v.* Munch, 24 Minn. 390.

New York.— Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 36 N. Y. St. 338, 21 Am. St. Rep. 678 [*reversing* 57 Hun (N. Y.) 78, 10 N. Y. Suppl. 323, 32 N. Y. St. 267].

Wisconsin.— Durr *v.* Wildish, 108 Wis. 401, 84 N. W. 437; Blakeslee *v.* Rossman, 43 Wis. 116.

United States.— Wells *v.* Langbein, 20 Fed. 183, construing Iowa law.